UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40193 (reh)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF DOCKETING**
Colin R. COVITZ	)	
Captain (0-3)	)	
U.S. Air Force	)	
Appellant	)	

The record of trial in the above-styled case was returned to this court on 5 December 2023 by the Military Appellate Records Branch (JAJM) for re-docketing with the court.

Accordingly, it is by the court on this 14th day of December, 2023,

ORDERED:

The above-styled case is refe1Ted to Panel 1 for appellate review.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Captain (0-3) **COLIN R. COVITZ,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel **1** No. ACM 40193 (reh) 2 February 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 an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 60 days, which will end on **12 April 2024.** The record of trial was docketed with this Court on 14 December 2023. From the date of docketing 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]

MATTHEvV **L. BLYTH,** Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 vVest 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 2 February 2024.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

5 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Captain (O-3) COLIN R. COVITZ, USAF, *Appellant.*	)	ACM 40193 (reh) Panel No. 1

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]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
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 to the Air Force Appellate Defense Division on 5 February 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations 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. Captain (O-3) **COLIN R. COVITZ,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel 1 No. ACM 40193 (reh) 4 April 2024

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **12 May 2024.** The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

From 14-18 June, 2021, at Creech Air Force Base (AFB), Nevada, a general court-martial composed of officer members found Appellant, Capt Colin R. Covitz, guilty, contrary to his pleas, of one charge with four specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928b.[1] (R. at 1115; EOJ, ROT Vol. 1, 8 Sep. 2021.) A military judge sentenced Capt

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

Covitz to forfeiture of all pay and allowances, eight months' confinement, and dismissal from the service. (R. at 1157.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 23 Aug. 2021.) On 30 September 2022, this Court set aside the findings and sentence and authorized a rehearing because the military judge abused his discretion in denying challenges for cause against panel members. *United States v. Covitz*, No. ACM 40193, 2022 CCA LEXIS 563, at *32, 40 (A.F. Ct. Crim. App. 30 Sep. 2022).

At a rehearing at Creech Air Force AFB on 26 June and 10-12 July, 2023, a general court-martial composed of a military judge alone convicted Capt Covitz, contrary to his pleas, of two specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b (2018). (Rehearing Record (RR) at 22, 37, 386.) The military judge sentenced Capt Covitz to five months' confinement, forfeiture of $6,127.00 per month for five months, and a reprimand. (RR. at 462.) The convening authority disapproved the reprimand and reduced adjudged forfeitures to $925.00 per month for five months. (Convening Authority Decision on Action, 28 Aug. 2023.)

The record of trial contains 8 prosecution exhibits, 11 defense exhibits, 31 appellate exhibits, and 1 court exhibit. The transcript is 463 pages. Capt Covitz is not currently confined.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
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 Government Trial and Appellate Operations Division on 4 April 2024.

[redacted]TH, Maj, USAFR

Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

4 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) COLIN R. COVITZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40193 (reh) Panel No. 1

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]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
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 to the Air Force Appellate Defense Division on 4 April 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
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 40193 (reh)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Colin R. COVITZ	)	
Captain (0-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 2 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Third) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 7th day of May, 2024,

ORDERED:

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

Each request for an enlargement of time will be considered on its merits. Appellant's counsel is advised that anysubsequent 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. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Captain (O-3) **COLIN R. COVITZ,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel 1 No. ACM 40193 (reh) 2 May 2024

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **11 June 2024.** The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

From 14-18 June, 2021, at Creech Air Force Base (AFB), Nevada, a general court-martial composed of officer members found Appellant, Capt Colin R. Covitz, guilty, contrary to his pleas, of one charge with four specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928b.[1] (R. at 1115; EOJ, ROT Vol. 1, 8 Sep. 2021.) A military judge sentenced Capt

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

Covitz to forfeiture of all pay and allowances, eight months' confinement, and dismissal from the service. (R. at 1157.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 23 Aug. 2021.) On 30 September 2022, this Court set aside the findings and sentence and authorized a rehearing because the military judge abused his discretion in denying challenges for cause against panel members. *United States v. Covitz*, No. ACM 40193, 2022 CCA LEXIS 563, at *32, 40 (A.F. Ct. Crim. App. 30 Sep. 2022).

At a rehearing at Creech Air Force AFB on 26 June and 10-12 July, 2023, a general court-martial composed of a military judge alone convicted Capt Covitz, contrary to his pleas, of two specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b (2018). (Rehearing Record (RR) at 22, 37, 386.) The military judge sentenced Capt Covitz to five months' confinement, forfeiture of $6,127.00 per month for five months, and a reprimand. (RR. at 462.) The convening authority disapproved the reprimand and reduced adjudged forfeitures to $925.00 per month for five months. (Convening Authority Decision on Action, 28 Aug. 2023.)

The record of trial contains 8 prosecution exhibits, 11 defense exhibits, 31 appellate exhibits, and 1 court exhibit. The transcript is 463 pages. Capt Covitz is not currently confined.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
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 Government Trial and Appellate Operations Division on 2 May 2024.

[redacted]H, Maj, USAFR

Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

3 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) COLIN R. COVITZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40193 (reh) Panel No. 1

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 3 May 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 40193 (reh)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Colin R. COVITZ	)	
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 30 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Fourth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

This court held a status conference on 5 June 2024 to discuss the progress of Appellant's case. Major Brittany M. Speirs represented the Government, and Major Matthew L. Blyth represented Appellant. Ms. Megan P. Marinos also attended as the Senior Counsel of the Appellate Defense Division. Appellant's counsel explained well his priorities before this court and confirmed Appellant was provided an update of the status of counsel's progress on his case.

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 5th day of June, 2024,

ORDERED:

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

Each request for an enlargement of time will be considered on its merits. 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.

FOR THE COURT

[redacted]

Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	
	)	Before Panel 1
Captain (O-3) **COLIN R. COVITZ,** United States Air Force	)	No. ACM 40193 (reh)
Appellant	)	30 May 2024

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **11 July 2024.** The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 168 days have elapsed. On the date requested, 210 days will have elapsed.

From 14-18 June, 2021, at Creech Air Force Base (AFB), Nevada, a general court-martial composed of officer members found Appellant, Capt Colin R. Covitz, guilty, contrary to his pleas, of one charge with four specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928b.[1] (R. at 1115; EOJ, ROT Vol. 1, 8 Sep. 2021.) A military judge sentenced Capt Covitz to forfeiture of all pay and allowances, eight months' confinement, and dismissal

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

from the service. (R. at 1157.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 23 Aug. 2021.) On 30 September 2022, this Court set aside the findings and sentence and authorized a rehearing because the military judge abused his discretion in denying challenges for cause against panel members. *United States v. Covitz*, No. ACM 40193, 2022 CCA LEXIS 563, at *32, 40 (A.F. Ct. Crim. App. 30 Sep. 2022).

At a rehearing at Creech Air Force AFB on 26 June and 10-12 July, 2023, a general court-martial composed of a military judge alone convicted Capt Covitz, contrary to his pleas, of two specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b (2018). (Rehearing Record (RR) at 22, 37, 386.) The military judge sentenced Capt Covitz to five months' confinement, forfeiture of $6,127.00 per month for five months, and a reprimand. (RR. at 462.) The convening authority disapproved the reprimand and reduced adjudged forfeitures to $925.00 per month for five months. (Convening Authority Decision on Action, 28 Aug. 2023.)

The record of trial contains 8 prosecution exhibits, 11 defense exhibits, 31 appellate exhibits, and 1 court exhibit. The transcript is 463 pages. Capt Covitz is not currently confined. Counsel is currently assigned 17 cases, with 4 pending initial briefs before this Court. Counsel has almost completed review of the record in this case.

There is one pending case before this Court with higher priority: *United States v. Boren*, ACM 40296. The record of trial consists of 10 prosecution exhibits, 28 defense exhibits, 46 appellate exhibits, and 1 court exhibit. The transcript is 1,034 pages.

Boren is on the fifth enlargement of time. Counsel and civilian co-counsel have drafted the majority of the brief in *Boren*.

Through no fault of Capt Covitz, undersigned counsel has been working on other assigned matters and has yet to complete the assignments of error. Capt Covitz was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Capt Covitz's case and advise him regarding potential errors.

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

Respectfully submitted,

[redacted]

MATIHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 vVest 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 Government Trial and Appellate Operations Division on 30 May 2024.

MATTHEvV L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

31 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) COLIN R. COVITZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40193 (reh) Panel No. 1

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 31 May 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	
	)	Before Panel 1
Captain (O-3) **COLIN R. COVITZ,** United States Air Force, *Appellant.*	)	No. ACM 40193 (reh)
	)	5 June 2024

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel for Captain (Capt) Colin R. Covitz, Appellant, in the above-captioned case. Appellant has been advised of this motion to withdraw and consents to this request. Undersigned counsel was hired for the first appeal, but was not hired for the appeal of the rehearing.

Maj Matthew Blyth, who was military on the initial appeal, remains Capt Covitz's counsel for this rehearing. A turnover of the record is not required because Maj Blyth has always remained counsel and neither Mr. Scott Hockenberry (nor Mr. Dan Conway, who was also included on emails) have taken any part in the rehearing. A copy of this motion will be delivered to Capt Covitz following its filing.

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

Respectfully submitted,

[redacted]
SCOTT HOCKENBERRY
Civilian Appellate Defense Counsel
Daniel Conway and Associates
12235 Arabian Place,
Woodbridge, VA 22192
586-930-8359
hockenberry@militaryattorney.com
www.militaryattorney.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 Government Trial and Appellate Operations Division on 5 June 2024.

Respectfully submitted,

[redacted]LYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 vVest Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	
	)	Before Panel 1
Captain (O-3) **COLIN R. COVITZ,** United States Air Force, *Appellant.*	)	No. ACM 40193 (reh)
	)	6 June 2024

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel for Captain (Capt) Colin R. Covitz, Appellant, in the above-captioned case. Appellant has been advised of this motion to withdraw and consents to this request. Undersigned counsel was hired for the first appeal, but was not hired for the appeal of the rehearing.

Maj Matthew Blyth, who was military counsel on the initial appeal, remains Capt Covitz's appellate counsel for this rehearing. A turnover of the record is not required because Maj Blyth has always remained counsel and undersigned counsel has not taken any part in the rehearing. A copy of this motion will be delivered to Capt Covitz following its filing.

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

Respectfully submitted,

[redacted]

Civilian Appellate Defense Counsel
Daniel Conway and Associates
20079 Stone Oak Parkway,
Suite 1005-506
San Antonio, TX 78258
(210) 934-8265 (UCMJ)
conway@militaryattorney.com
www.militaryattorney.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 Government Trial and Appellate Operations Division on 6 June 2024.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 vVest Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Captain (O-3) **COLIN R. COVITZ,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Panel 1 No. ACM 40193 (reh) 2 July 2024

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of seven days, which will end on **18 July 2024.** The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 201 days have elapsed. On the date requested, 217 days will have elapsed.

From 14-18 June, 2021, at Creech Air Force Base (AFB), Nevada, a general court-martial composed of officer members found Appellant, Capt Colin R. Covitz, guilty, contrary to his pleas, of one charge with four specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928b.[1] (R. at 1115; EOJ, ROT Vol. 1, 8 Sep. 2021.) A military judge sentenced Capt Covitz to forfeiture of all pay and allowances, eight months' confinement, and dismissal

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

from the service. (R. at 1157.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 23 Aug. 2021.) On 30 September 2022, this Court set aside the findings and sentence and authorized a rehearing because the military judge abused his discretion in denying challenges for cause against panel members. *United States v. Covitz*, No. ACM 40193, 2022 CCA LEXIS 563, at *32, 40 (A.F. Ct. Crim. App. 30 Sep. 2022).

At a rehearing at Creech Air Force AFB on 26 June and 10-12 July, 2023, a general court-martial composed of a military judge alone convicted Capt Covitz, contrary to his pleas, of two specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b (2018). (Rehearing Record (RR) at 22, 37, 386.) The military judge sentenced Capt Covitz to five months' confinement, forfeiture of $6,127.00 per month for five months, and a reprimand. (RR. at 462.) The convening authority disapproved the reprimand and reduced adjudged forfeitures to $925.00 per month for five months. (Convening Authority Decision on Action, 28 Aug. 2023.)

The record of trial contains 8 prosecution exhibits, 11 defense exhibits, 31 appellate exhibits, and 1 court exhibit. The transcript is 463 pages. Capt Covitz is not currently confined. Counsel is currently assigned 18 cases, with 3 pending initial briefs before this Court. Counsel has reviewed the record and drafted the brief in this case. It is ready to file pending client approval. However, counsel asks for a one-week EOT because counsel is on previously scheduled leave from 6-13 July 2024, which includes the due date of 11 July 2024. Counsel would like to allow adequate time for client to review the brief and will be unable to make any late changes in response to client input.

Additionally, counsel will be filing a motion to attach that will include hand-delivered digital media, which is easier to execute when back from leave.

Through no fault of Capt Covitz, undersigned counsel has previously scheduled leave that inhibits the final filing of the brief. Capt Covitz was specifically informed of the case status and counsel's progress on the case, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review finalize the brief and file it contemporaneously with associated motions.

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

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 vVest 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 Government Trial and Appellate Operations Division on 2 July 2024.

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3 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Captain (O-3) COLIN R. COVITZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40193 (reh) Panel No. 1

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
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 July 2024.

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18 July 2024

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee,

v.

COLIN R. COVITZ,
Captain, USAF
Appellant

Before Panel No. 1

No. ACM 40193 (reh)

BRIEF ON BEHALF OF APPELLANT

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I.

WHETHER CAPTAIN COVITZ'S DOMESTIC VIOLENCE CONVICTIONS ARE FACTUALLY SUFFICIENT.

II.

WHETHER THE RECORD OF TRIAL'S OMISSION OF THE ARRAIGNMENT AUDIO REQUIRES RELIEF OR, AT A MINIMUM, REMAND FOR CORRECTION.

III.

WHETHER CAPTAIN COVITZ IS ENTITLED TO SENTENCE RELIEF BECAUSE OF THE 155-DAY DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT.

IV.

WHETHER, AS APPLIED TO CAPTAIN COVITZ, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."

V.[1]

WHETHER THE ORIGINAL PREFERRAL OF CHARGES IN CAPTAIN COVITZ'S CASE SUFFERED FROM UNLAWFUL COMMAND INFLUENCE BECAUSE THE PREFERRING COMMANDER DID WHAT HE THOUGHT HE WAS REQUIRED TO DO IN DOMESTIC VIOLENCE CASES: PREFER CHARGES.

VI.

WHETHER CAPTAIN COVITZ'S DOMESTIC VIOLENCE CONVICTIONS ARE LEGALLY SUFFICIENT.

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[1] Assignments of error (AOE) V and VI are raised in the appendix pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Statement of the Case

From 14-18 June, 2021, at Creech Air Force Base (AFB), Nevada, a general court-martial composed of officer members found Appellant, Captain (Capt) Colin R. Covitz, guilty, contrary to his pleas, of one charge with four specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928b (2018).[2] (Original Record (OR.) at 1115; Original Entry of Judgement (EOJ), 8 Sep. 2021.) A military judge sentenced Capt Covitz to forfeiture of all pay and allowances, eight months' confinement, and dismissal from the service. (OR. at 1157.) The convening authority took no action on the findings or sentence. (Original Convening Authority Decision on Action, 23 Aug. 2021.) On 30 September 2022, this Court set aside the findings and sentence and authorized a rehearing because the military judge abused his discretion in denying challenges for cause against panel members. *United States v. Covitz*, No. ACM 40193, 2022 CCA LEXIS 563, at *32, 40 (A.F. Ct. Crim. App. 30 Sep. 2022) (unpublished).

At a rehearing at Creech AFB on 26 June and 10-12 July 2023, a general court-martial composed of a military judge alone convicted Capt Covitz, contrary to his pleas, of two specifications of domestic violence in violation of Article 128b, UCMJ.[3] (RR at 22, 37, 386.) The military judge sentenced Capt Covitz to five months' confinement, forfeiture of $6,127.00 per month for five months, and a reprimand.

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[2] Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Mil. R. Evid. are to the version in the *Manual for Courts-Martial, United States* (2019 ed.) [2019 *MCM*].

[3] The military judge merged both specifications for findings and sentence. (Rehearing Record (RR.) at 403–04.)

(RR. at 462.) The convening authority disapproved the reprimand and reduced adjudged forfeitures to $925.00 per month for five months. (Convening Authority Decision on Action, 28 Aug. 2023.)

Statement of Facts

Background

Capt Covitz and CC met in Las Vegas in 2016. (RR. at 57.) CC, along with her two children, moved into Capt Covitz's home in 2017. (RR. at 58–59.) They dated until 2018 when Capt Covitz broke up with CC, although they continued living together in the home (hereafter "Trimming Court" based on the address) and even shared a bed. (RR. at 60–62.) They were sometimes intimate. (RR. at 61.) This continued until 2019 when Capt Covitz deployed, after which he moved into an apartment closer to base. (RR. at 62–63.) CC took care of Capt Covitz's three cats while he was deployed, and the cats remained in the home when Capt Covitz moved to the smaller apartment. (RR. at 63.) To keep the cats from entering the kitchen and potentially leaving the home, an extendable barrier was screwed into the wall to control access. (Pros. Ex. 1; RR. at 66–67.) In early February 2020, one of the cats, Mittens, escaped the home and was never found. (RR. at 67.)

The Incident

Days after Mittens was lost, Capt Covitz invited CC to lunch. (RR. at 70.) He bought CC flowers, and CC made a joke that Mittens, who always ate flowers, was not there to eat them. (RR. at 169.) Capt Covitz became upset at the joke about his lost cat, and they began an argument over Mittens' loss and CC's responsibility for the loss; this conversation continued while they drove from lunch to Trimming Court

and was captured on CC's dashcam. (Pros. Ex. 2; RR. at 72–83, 169.) The dashcam stopped recording when they exited the vehicle at Trimming Court. (Pros. Ex. 2 at 14:25.) The home had an interior surveillance system that was turned off and would have recorded the living room and kitchen areas. (RR. at 170.) CC denied turning the system off, stating that it was "randomly on and randomly off." (RR. at 170–71.) The Defense confronted CC with testimony from the first court-martial, where she acknowledged she turned off the system because she did not want notifications on her phone. (RR. at 172–74.)

The evidence on what happened next is a mix of CC's testimony and Prosecution Exhibit 3, which is an audio recording of the incident from her phone. CC claimed Capt Covitz was angry and scaring her, that she had nowhere to go, and that he pushed her against the refrigerator. (RR. at 85.) She stated he grabbed her arms and wrists and twisted. (RR. at 85.) She testified that Capt Covitz was the first one to make the argument physical. (RR. at 86.) On cross-examination, she acknowledged that she later told a judge in family court (explained in more detail below) that "it started when [Capt Covitz] was grabbing my wrist because he thought I was going to attack him." (RR. at 178.) She denied pushing him, stating that she "probably touched him." (RR. at 180.) She was then confronted again with her family court testimony, where she said she needed to "push him away because I am not safe." (RR. at 181.) She acknowledged that she believed she scratched him that day. (RR. at 183.) She claimed that after he pushed and grabbed her, she took out her phone and began recording without Capt Covitz noticing. (RR. at 185.) The military judge

acquitted Capt Covitz of two specifications involving pushing and grabbing of CC during this portion of the incident. (RR. at 386.)

CC's surreptitious audio recording is about 32 minutes long and was played in full at the court-martial. CC testified alongside portions of the clips to present her story on what the audio reflected. (RR. at 91–138.) In the audio of the encounter there is a crash at approximately six minutes and thirty seconds in, which CC thought was the falling barrier that separated the kitchen and living room. (R. at 98–100.) She was struggling to pick up the barrier, which had fallen into the living room, and Capt Covitz came to pick it up. (RR. at 103.) They began arguing over the barrier, and CC claimed she ended up on her back and tried to kick Capt Covitz off of her. (*Id.*) She testified that he grabbed her foot, pulled her boot off, and then placed his knee on her stomach. (*Id.*) She alleged he then put a single hand on her neck for a few seconds. (RR. at 104, 196.)

CC claimed this was the end of the physical encounter, and that she then went to the master bedroom to change because she had urinated on herself. (RR. at 115.) At the court-martial she claimed to have urinated once in the kitchen and once when Capt Covitz was on top of her, although during her Air Force Office of Special Investigations (OSI) interview she did not state that she urinated when Capt Covitz was on top of her, but rather when she fell to the ground. (RR. at 115, 198, 200, 281.)

Capt Covitz was unaware of this recording until the later family court hearing. (RR. at 186.) Despite his lack of awareness, in the recording Capt Covitz repeatedly told CC to stop shoving and punching him, even though, according to CC's testimony,

she had not shoved or punched him. (*Id.*) Her explanation was that he was gaslighting her. (*Id.*)

Of note, the Defense confronted CC about a moment approximately three minutes into Prosecution Exhibit 3, where CC stated, "Did you just not push me and choke me, and pull my hair[?]" (RR. at 201–02; Pros. Ex. 3 at 2:49.) After the Defense pointed out that she claimed Capt Covitz put his hand on her throat at about the eighth minute of the audio (meaning she accused him of choking her in the audio five minutes before she testified that he actually choked her), CC testified that she does not remember why she made the comment about an earlier choking. (RR. at 202.) The Defense later called the lead agent from the OSI, who confirmed that CC claimed there was only one instance of choking. (RR. at 281.)

As a result of the encounter, CC claimed there were bruises everywhere, including up and down her arms, between her fingers, and across her chest; that her abdomen was tender; that she could barely wear a seat belt; and that she could not sleep on her stomach or side for a week. (RR. at 140, 142, 206.) At the time of the incident, and at the time of the second court-martial years later, CC was in a sexual relationship with RW. (R. at 205, 211.) On the night of the incident, CC picked up RW and another friend, ES, from the airport. (RR. at 205.) CC did not mention her allegation to them, and they did not notice any bruises or discomfort.[4] (RR. at 205,

[4] ES provided somewhat conflicting testimony on what he observed. He testified that he did not notice any bruises on her, but believed he saw pictures on CC's phone. (RR. at 255.) After being confronted with his first court-martial testimony that he saw a bruise on her, ES seemed confused and testified that he did not, at the time of the second court-martial, recall seeing bruises on her wrists. (RR. at 258–60.)

230–31, 250.) RW took photographs of CC's arms while at brunch approximately two weeks later after the incident, which show minor bruising on her arms. (RR. at 220–21; Pros. Ex. 6.) RW explained that, in part, he took the pictures after his Director of Operations asked RW if he was "going after [Capt Covitz]", which led RW to think something had happened and there might be an investigation. (RR. at 223.) RW and CC were regularly having sex at the time, and they spent the night with each other on 18 February 2020, eight days after the allegation. (RR. at 233.) He did not notice any bruises at the time, never heard her complain about sleep problems, and never noticed any physical soreness. (RR. at 236.) CC interviewed with OSI on 6 March 2020. (R. at 282.) OSI took a single photograph of CC's face, and the lead agent did not notice any bruising on her neck, wrists, fingers, chest, or stomach. (R. at 282–83.)

A week after the incident CC arrived late at night at Capt Covitz's apartment to pick up her belongings. (RR. at 207.) She repeatedly called and contacted him on social media, leading to the police's arrival. (RR. at 208.) They asked her to leave the area. (RR. at 208.) She later received notice that Capt Covitz secured a temporary protective order (TPO); she also received an eviction notice. (RR. at 209.) She responded by contesting the TPO and seeking one herself, which led to the aforementioned family court hearing on 5 March 2020. (RR. at 210.) During the hearing, Capt Covitz provided a description of what occurred on the audio. (Pros. Ex. 5; RR. at 159.) He explained that when CC was on the ground after they struggled

with the barrier in the living room, she kicked him and threw her boot "along with a couple other things" at the back of his head. (RR. at 159.) He explained that he then:

> [C]limbed on top of her, put one knee in her gut, and my left knee against her throat. Pushing it up against her jugular on the right side of her neck and rolled -- rolled it pretty much across her neck to cut off the flow of blood so, I can restrain her and keep her from attacking me any further.
>
> Like I said, I did not put my hands on her neck, I did not strike her at all, and I wanted her out of my house.

(*Id.*) Seven witnesses testified to Capt Covitz's character for peacefulness, truthfulness, and his excellent military character. (RR. at 289, 291, 300–01, 313, 323, 331, 340, 349.) At trial, CC denied there was a knee at her neck. (RR. at 197.) CC's friend, ES, and longtime intimate partner, RW, testified that CC had a character for peacefulness and truthfulness. (RR. at 224–225, 246.) The military judge convicted Capt Covitz of strangling CC with his hand and putting his knee on her stomach, but acquitted Capt Covitz of grabbing her wrists and shoving her. (RR. at 386.)

Additional facts necessary to resolve the issues raised are provided below.

Argument

I.

CAPTAIN COVITZ'S DOMESTIC VIOLENCE CONVICTIONS ARE FACTUALLY INSUFFICIENT.

Standard of Review

This Court reviews factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law

The test for factual sufficiency is "whether, after weighing the evidence in the

record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [this Court takes] a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (internal punctuation omitted) (quoting *Washington*, 57 M.J. at 399). This Court exercises an "awesome, plenary, *de novo* power of review" under Article 66(d), UCMJ, 10 U.S.C. § 866(d). *See United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993) (citation omitted).

The elements of domestic violence for Specification 1 are as follows: (i) that Capt Covitz assaulted CC; (ii) that he did so by strangulation with his hand; and (iii) that the strangulation was done with unlawful force or violence. *See* 2024 *MCM*, pt. IV, ¶ 78.b.(6).[5] "Strangulation" means "[i]ntentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim." *Id.* ¶ 77.c.(5)(c)(iii).

[5] While the offense of domestic violence was in place in 2020, the President did not set forth the elements of the offense until years later. *See* Exec. Order 14,062, 87 Fed. Reg. 4763 (26 Jan. 2022). Capt Covitz does not challenge the later-stated elements of the offense.

The elements of Specification 4, as alleged, are that: (i) Capt Covitz committed a violent offense against CC by putting his knee on her stomach; and (ii) the violent offense was committed against an intimate partner. *Id.* ¶ 78a.b.(1). A violent offense includes any offense under Article 128, UCMJ, 10 U.S.C. § 928. *Id.* ¶ 78a.c.(1).

Self-defense is a complete defense to each of the convicted specifications. *See Military Judge's Benchbook* [*Benchbook*], Dept. of the Army Pamphlet 27-9 at 1658 (29 Feb. 2020). The defense for using non-deadly force has two parts. First, the accused must "[a]pprehend[], upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on [himself]." R.C.M. 916(e)(3). This is an objective test which asks whether the accused's apprehension is "one which a reasonable, prudent person would have held under the circumstances." R.C.M. 916(e)(1), Discussion. The second part requires that the accused must "[b]elieve[] that the force the accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm." R.C.M. 916(e)(3)(B). This part of the test is entirely subjective. R.C.M. 916(e)(1), Discussion. The Government bears the burden of disproving self-defense. R.C.M. 916(b)(1).

Analysis

The audio of the encounter sounds terrible. But the audio alone cannot convict Capt Covitz. Because the conviction rests heavily upon CC's fatally flawed testimony, this Honorable Court should find the evidence factually insufficient.

1. The audio cannot solve fundamental questions about how the incident occurred.

The audio establishes there was a verbal altercation that became physical. Drawing more from the chaotic recording is dubious; as even the Senior Trial Counsel (STC) stated in argument, "You can't entirely tell what's going on in that audio, but there's some scuffling." (RR. at 364.) In fact, the audio injects further uncertainty into what happened.[6] At various times in the audio, Capt Covitz makes comments that shed further doubt on what happens: he talks about how CC "thr[e]w a punch," (RR. at 94), and says "touch me again and I swear" (RR. at 102), "You keep lunging at me" (RR. at 105), "Let go of me" (RR. at 111 (repeatedly)), "Are you done attacking me?" (RR. at 112), "you think I'm not gonna shove you after you throw a punch" (RR. at 130), and "Are you really attacking me again?" (RR. at 133.). And consider this exchange:

ACC: You are the one who attacked me.

VIC: I didn't.

ACC: [CC].

VIC: You know what, you tell yourself that.

ACC: [CC] if I had attacked you----

VIC: Tell yourself that.

ACC: You wouldn't be standing.

---

[6] The Report of Investigation (ROI) identified a different time in the audio, 14:28-14:30, when CC "gasped for air." (ROI at 6, Original Record Vol. 3, 21 May 2020.) At the first court-martial, CC was not specific about when the strangulation was supposed to have occurred. (App. Ex. XXVII at 57–58.)

(RR. at 131–32.) Certainly it is not flattering conduct, but it raises the legitimate prospect that Capt Covitz's response was an objectively reasonable expression of self-defense. Presumably the military judge thought so as well when he acquitted Capt Covitz of Specifications 2 and 3. But the same uncertainty about what happened, and the same mutual affray that supports self-defense, should have applied with equal force to Specifications 1 and 4. While the military judge erred on this point, this Court need not. After recognizing the audio for its probative value—very little—this Court should see the remaining evidence cannot support a finding of guilty beyond a reasonable doubt.

2. CC's credibility problems mean she cannot be the foundation for a factually sufficient conviction.

For the convicted specifications, the evidence at issue consists of CC's testimony and the statements from the family court hearing. The audio and the remaining testimony offer little dependable evidence. Addressing CC's testimony first, this Court has ample reason to question whether the version of events she told at trial is accurate. And to be clear, the Government had the burden to prove the convictions according to the charge sheet. *See United States v. Rodriguez-Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006).

First, CC lacked memory of what happened and downplayed her own role. Her direct testimony involved as much media—the dashcam, the audio of the incident, and the family court hearing—as actual testimony. (*See* RR. at 57–160.) In this initial telling, Capt Covitz was the "first to get physical" and contacted her over and over. (RR. at 86, 89.) On cross-examination, she doubled down. She either could not

remember what happened or denied her affirmative role. Even when confronted with her previous statements she maintained the line. For instance, she would not confirm what she said previously at the family court hearing more than three years earlier: that Capt Covitz first grabbed her because he thought she was attacking him. (RR. at 176, 179.) Or she only reluctantly and partially admitted to pushing Capt Covitz, initially only saying she "probably touched him because he was right there." (RR. at 180.) The list of what she did not recall, or asserts she did not do, goes on: she does not remember pushing him in the kitchen (RR. at 188), or throwing items at him (RR. at 189), or that she actually turned the surveillance system off herself despite denying at the second court-martial that she had. (RR. at 170–74.) Perhaps alone these inconsistencies are minor, but read together, and taken with the other evidence, they serve to fatally undermine her testimony.

Second, the manner of CC's recording the incident and her behavior during the recording raise questions about her conduct and trial testimony. As noted, she minimized her role in the conflict. But she had to explain why, in the audio recording, Capt Covitz says that she pushed him and hit him and attacked him. Her solution? Capt Covitz was gaslighting her. But this makes little sense. It is just the two of them and *Capt Covitz does not know there is a recording*. Since he does not think anyone would hear the conversation except the two of them, why would he continually accuse her of taking actions she did not take?

By contrast, CC obviously knows about the recording and has every incentive to make it as damning as possible. An egregious example that should make this Court

pause occurred less than three minutes into the audio—five minutes *before* CC testified that the strangulation occurred—when they were arguing over what had already happened and CC said: "Did you just not push me and choke me, and pull my hair[?]" (RR. at 202.) Why would CC accuse him of choking her before—according to her trial testimony—the strangulation actually occurred? (She also accused him of pulling her hair at that point in the recording, but this was never charged and she never testified that this actually happened.) CC certainly could not explain why she did this. (*Id.*) If she cannot, this calls into question the credibility of her account more broadly speaking. This Court cannot differentiate what is a real allegation compared with whatever her performative statements were at the three-minute mark in the audio.

Third, the audio reveals one of several motives for CC to fabricate or, at a minimum, to embellish what actually occurred. From the beginning of the audio, Capt Covitz is telling her that she needs to leave the house. (RR. at 90–93.) CC is living in his home with no written agreement and only whatever protection Nevada landlord-tenant law might offer. (RR. at 166.) The best way to combat the eviction threat is to turn things around on Capt Covitz in the form of the allegation here. Similarly, the TPO that Capt Covitz filed provided another prompt for CC to maximize the gravity of the situation and Capt Covitz's alleged actions.

All of the flaws in her testimony add up to the point that she cannot serve as the basis for conviction. This is not to deny that something serious happened in the home that day; rather, this all underscores that the Government had to prove that

Capt Covitz acted as charged and had to disprove his defense of self-defense. On these facts, and with CC as its lead witness, it cannot.

3. Capt Covitz's family court statements are potential proof of a different offense and fail to disprove self-defense.

It is worth reiterating that only two offenses remain: strangulation *with the hand* and Capt Covitz putting his knee on CC's stomach. Regarding the first, Capt Covitz spoke with clarity at the family court hearing when he admitted to putting his knee on CC's neck to cut off the blood supply and keep her from attacking him. (RR. at 159.) While Capt Covitz maintains self-defense for this specification as well, it is critical that the Government chose to go with CC's story about strangulation with the hand. The act that Capt Covitz admitted was not pursued at trial. The Government presented and argued CC's version: it wanted to use Capt Covitz's statement for his *intent* but not his specific words on placing his knee on her neck. (RR. at 364.) The Government is bound by its decision not to present this theory to the factfinder, and this Court is not at liberty to make substitutions to support that finding now. *See United States v. English*, 79 M.J. 116, 120–21 (C.A.A.F. 2019) (holding the court of criminal appeals exceeded its authority when it affirmed a conviction by making exceptions that rendered the offense different from the one charged and tried). While Capt Covitz's statements about placing his knee on CC's neck could have supported a differently charged case, the Government is bound by its charging decisions. *Id.*

With regard to Specification 4—placing his knee on her stomach—at least the facts align between Capt Covitz's statement and the Government's theory. But self-

defense is still intact. Capt Covitz put his knee on her stomach when CC was throwing a boot and other things at his head. (RR. at 159.) The law requires an objectively reasonable analysis of whether bodily harm was "about to be inflicted wrongfully" on himself. R.C.M. 916(e)(3). His apprehension was objectively reasonable because she had *already* inflicted bodily harm by throwing things at him, pushing him, hitting him, and scratching him. The second part of the test asks whether he subjectively believed that his action—placing the knee on her stomach—"was necessary for protection against bodily harm." R.C.M. 916(e)(3)(B). And he said as much in the family court hearing. He took the steps to "keep her from attacking me any further," and disclaimed that he put his hands on her neck or struck her at all. (RR. at 159.) This was the response that he felt was necessary, and such a belief was reasonable under the circumstances. The question of whether the knee to the neck would have passed muster in the self-defense analysis is irrelevant because that was not the theory the Government chose to pursue.

4. Conclusion

The Government presented ostensibly inculpatory evidence from the recording, yet the probative value crumbles on further inspection. And the Defense thoroughly impeached the remainder of the Government's case through cross-examination of CC, RW, and ES. This Court should see that the digital evidence cannot make the Government's case, that it must rely on CC's questionable testimony, and that the Government charging decisions have closed the door to certain evidence. This Court should find the Government failed to meet its burden to prove the offense beyond a reasonable doubt and should set aside the convictions.

WHEREFORE, Capt Covitz respectfully requests this Honorable Court set aside the finding.

II.

THE RECORD OF TRIAL'S OMISSION OF THE ARRAIGNMENT AUDIO REQUIRES RELIEF OR, AT A MINIMUM, REMAND FOR CORRECTION.

Additional Facts

The audio is missing for the arraignment on 26 June 2023. This session included a discussion of forum rights, rights to counsel, arraignment, and the admission of certain appellate exhibits. (RR. at 1–31.)

Standard of Review

Whether a record of trial is incomplete or not substantially verbatim is reviewed de novo. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law and Analysis

The record of trial is "the very heart of the criminal proceedings and the single essential element to meaningful appellate review." *United States v. Credit*, 4 M.J. 118, 119 (C.M.A. 1977). A complete record of proceedings is required for every court-martial in which the sentence adjudged includes "a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months." Article 54(c)(2), 10 U.S.C. § 854(c)(2). A complete record shall include "[a] substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting." R.C.M. 1112(b)(1). A substantial omission in a record of trial raises a presumption of prejudice to an appellant, which the

Government must rebut. *Henry*, 53 M.J. at 111 (citations omitted). "Moreover, since in military criminal law administration the Government bears responsibility for preparing the record of trial, it is fitting that every inference be drawn against the Government with respect to the existence of prejudice because of an omission." *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981) (citation omitted).

The missing arraignment audio is a substantial omission. *See United States v. Matthew*, No. ACM 39796 (f rev), 2022 CCA LEXIS 425, at *11–12 (A.F. Ct. Crim. App. 21 Jul. 2022) (unpublished). In *Matthew*, this Court held the omission of audio of the arraignment was quantitatively substantial. *Id.* Interpreting the 2016 *MCM*, this Court followed the procedures in R.C.M. 1103 and remanded to the Judge Advocate General. *Id*. at *15–16. Here, like *Matthew*, omitting the arraignment audio is substantial. While the transcript does exist here (and did not in *Matthew*), the transcript is not part of the record of trial; instead, it is one of the attachments for appellate review under R.C.M. 1112(f). The record of trial is incomplete. *See Matthew*, 2022 CCA LEXIS 425, at * 11; *United States v. Valentin-Andino*, 83 M.J. 537, 540–41 (A.F. Ct. Crim. App. 2023) (remanding for correction because of missing substantially verbatim recordings).

This Court should use its broad remit under Article 66, UCMJ, to provide any sentence relief appropriate for the Government's failure to provide a record of trial within the meaning of R.C.M. 1112. The Government's chronic failure to docket

complete records of trial shows no signs of abating.[7] As this Court has recognized, this is institutional neglect. *United States v. Valentin-Andino*, No. ACM 40185 (f rev),

[7] *See United States v. Boren*, No. ACM 40296, 2024 CCA LEXIS 246 (24 Jun. 2024) (remand order); *United States v. Howard*, No. ACM 40478, 2024 CCA LEXIS 137 (A.F. Ct. Crim. App. 9 Apr. 2024) (remand order); *United States v. Moore*, No. ACM 40442, 2024 CCA LEXIS 118 (A.F. Ct. Crim. App. 21 Mar. 2024) (remand order); *United States v. Donley*, No. ACM 40350, 2024 CCA LEXIS 115 (A.F. Ct. Crim. App. 19 Mar. 2024) (unpublished) (remanding due to record of trial issues); *United States v. Smith*, No. ACM 40437, 2024 CCA LEXIS 109 (A.F Ct. Crim. App. 11 Mar. 2024) (remand order); *United States v. Harnar*, No. ACM 40559, 2024 CCA LEXIS 39 (A.F. Ct. Crim. App. 31 Jan. 2024) (remand order); *United States v. Wells*, No. ACM S32762, 2024 CCA LEXIS 15 (A.F. Ct. Crim. App. 18 Jan. 2024) (remand order); *United States v. Conway*, No. ACM 40372, 2023 CCA LEXIS 501 (A.F. Ct. Crim. App. 5 Dec. 2023) (unpublished); *United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. 11 Sep. 2023) (remand order); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. 1 Aug. 2023) (remand order); *United States v. Manzano Tarin*, No. ACM S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. 27 Jun. 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. 15 Jun. 2023) (remand order); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Gammage*, No. ACM S32731, 2023 CCA LEXIS 240 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Goodwater*, No. ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. 31 May 2023) (remand order); *United States v. Irvin*, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim. App. 12 May 2023) (remand order); *United States v. Valentin-Andino*, 83 M.J. 537, 544 (A.F. Ct. Crim. App. 2023) (remanding because of audio issue); *United States v. Lake*, No. ACM 40168, 2022 CCA LEXIS 706 (A.F. Ct. Crim. App. 7 Dec. 2022) (remand order); *United States v. Fernandez*, No. ACM 40290, 2022 CCA LEXIS 668 (A.F. Ct. Crim. App. 17 Nov. 2022) (remand order); *United States v. Stafford*, No. ACM 40131, 2022 CCA LEXIS 654 (A.F. Ct. Crim. App. 8 Nov. 2022) (remand order); *United States v. Lampkins*, No. ACM 40135, 2020 CCA LEXIS 500 (A.F. Ct. Crim. App. 25 Oct. 2022) (remand order); *United States v. Romero-Alegria*, No. ACM 40199, 2022 CCA LEXIS 558 (A.F. Ct. Crim. App. 22 Sep. 2022) (remand order); *United States v. Payan*, No. ACM 40132, 2022 CCA LEXIS 242 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Cooper*, No. ACM 40092, 2022 CCA LEXIS 243 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. 17 Mar. 2022) (unpublished); *United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43 (A.F. Ct. Crim. App. 20 Jan. 2022) (unpublished) (requiring second remand for noncompliance with initial remand order), *United States v. Goldman*, No. ACM 39939 (f rev), 2022 CCA LEXIS 511 (A.F. Ct. Crim. App. 30 Aug. 2022) (remand order); *United States v. Mardis*, No.

2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. 7 Jun. 2024) (unpublished) (finding institutional neglect in Air Force post-trial processing). Perhaps real consequences for this continued behavior will correct the issue.

If this Court disagrees that sentencing relief is warranted, a remand is required to determine whether the audio exists. The absence of the audio impedes appellate review for Capt Covitz and this Court.

WHEREFORE, Capt Covitz respectfully requests this Honorable Court provide sentencing relief or remand to correct the record. Capt Covitz also demands speedy appellate review.

III.

CAPTAIN COVITZ IS ENTITLED TO SENTENCE RELIEF BECAUSE OF THE 155-DAY DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT.

Additional Facts

Capt Covitz's court-martial concluded on 12 July 2023. (RR. at 463.) The court reporter did not begin transcription until 26 September 2023, 76 days after the sentence. (Court Reporter's Chronology, ROT Vol. 3, 6 Nov. 2023). The Court reporter certified the record of trial on 6 November 2023. (*Id.*) This Court docketed this case on 14 December 2023, 155 days after announcement of sentence. Because the record contains no legal office chronology, there is no explanation for what

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ACM 39980, 2022 CCA LEXIS 10 (A.F. Ct. Crim. App. 6 Jan. 2022) (unpublished); *United States v. Daley*, No. ACM 40012, 2022 CCA LEXIS 7 (A.F. Ct. Crim. App. 5 Jan. 2022) (unpublished).

happened after 6 November 2023.

Standard of Review

Whether an appellant has been deprived of his due process right to speedy appellate review is a question of law reviewed de novo. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law and Analysis

Capt Covitz is entitled to sentence relief from this Court because the Government's dilatory processing violated *Moreno*. Even if this Court were to find no prejudice from the due process violation, he is nevertheless entitled to relief under *Gay*, *Toohey*, and *Tardif*.[8]

Convicted servicemembers have a due process right to timely review of courts-martial convictions. *Moreno*, 63 M.J. at 135. Presumptive prejudicial delay occurs in three scenarios: (1) the action of the convening authority is not taken within 120 days of the completion of trial; (2) the record of trial is not docketed by the service Court of Criminal Appeals (CCAs) within 30 days of the convening authority's action; or (3) appellate review is not completed and a decision is not rendered by a CCA 18 months after docketing. 63 M.J. at 142. This Court also adapted *Moreno*'s benchmark standards for the new post-trial processing scheme. *See United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (applying the aggregate *Moreno* standard of

[8] *United States v. Gay*, 74 M.J. 736 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016); *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

150 days from the day an appellant was sentenced to the docketing of the case with the CCA to determine presumptively unreasonable delay).

The initial inquiry starts with the presumption of unreasonable post-trial delay. The 155-day delay between the 12 July 2023 announcement of sentence and the 14 December 2023 docketing with this Court exceeds the 150-day standard from *Livak*.[9]

A presumption of unreasonable post-trial delay triggers a four-part analysis. *Moreno*, 63 M.J. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). It includes: (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. *Id.* Prejudice considers "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Id.* at 138–39 (citations omitted). The Court of Appeals for the Armed Forces (CAAF) "expect[s]" the CCAs to "document the reasons for delay" and "exercise [] institutional vigilance." *Id.* at 143. Once a presumptive delay or facially unreasonable delay triggers the

[9] Capt Covitz maintains that the docketing of an incomplete record of trial, *see* AOE II, *supra*, does not serve to toll the clock for the purpose of the *Moreno* and *Livak* analysis. Thus, the true count should continue to run until the Government dockets a complete record. Capt Covitz recognizes this Court has repeatedly ruled against this position. *See*, *e.g.*, *United States v. Donley*, No. ACM 40350 (f rev), 2024 CCA LEXIS 228, at *37–38 (A.F. Ct. Crim. App. 11 Jun. 2024 (unpublished). Capt Covitz preserves his position but nonetheless provides the argument based on the 155-day docketing of *a* record.

analysis, the factors are balanced with no single factor being required and none being dispositive. *Id*. at 136 (citations omitted).

The total length of delay and the reasons for the delay weigh in favor of Capt Covitz. This was a relatively straightforward judge-alone litigated case with a 463-page transcript that took 155 days to docket. While not an egregious delay, it breaks the standard. The reasons are more problematic chiefly because we do not know them. From what the record shows, all we know is that the court reporter started work 76 days after the sentence, and completed work 117 days after the sentence. The other 114 days when the court reporter was not working are unaccounted for.

While Capt Covitz has not yet demanded speedy appellate review, he does so in this brief. As to prejudice, Capt Covitz had to postpone work on his appellate case until the delayed docketing. (Declaration of Capt Colin R. Covitz ("Declaration"), 9 Jul. 2024.) He has shown sufficient prejudice to warrant relief under *Moreno*.

Even if this Court finds no prejudice, Capt Covitz is still entitled to post-trial relief. *See Tardif*, 57 M.J. at 225; *Gay*, 74 M.J. at 744. The factors for *Tardif* relief include:

> (1) How long did the delay exceed the standards set forth in [*Moreno*]? (2) What reasons, if any, has the [G]overnment set forth for the delay? Is there any evidence of bad faith or gross indifference to the overall post-trial processing of this case? (3) Keeping in mind that our goal under *Tardif* is not to analyze for prejudice, is there nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay? (4) Has the delay lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline? (5) Is there any evidence of institutional neglect concerning timely post-trial processing, either

> across the service or at a particular installation? (6) Given the passage of time, can this court provide meaningful relief in this particular situation?

Gay, 74 M.J. at 744. These factors also favor Capt Covitz. First, the 155 days exceeded the 150 days authorized from the announcement of sentence to docketing a complete record of trial. Second, there is no discernable reason why the Government could not make the deadline here. As articulated above, the reasons for delay also weigh in Capt Covitz's favor. To the extent the prejudice analysis above did not persuade the Court, at the very least, there is still "some evidence of harm." Capt Covitz has endured two courts-martial and has watched as Government inaction and blundering have infringed on his rights to due process. (Declaration.) While his appellate rights are subject to waiver, the Government suffers no consequence for its missteps. Next, providing sentencing relief will have no impact on good order and discipline and will not lessen the disciplinary effect of the sentence. He has already served eight months' confinement from the first court-martial, even though his eventual sentence was only five months' confinement. (RR. at 391, 462.)

On the issue of institutional neglect, this Court is well aware of the trend of untimely docketing and incomplete records of trial. Indeed, the frequency of such incomplete records is disturbing and disconcerting—28 cases in two and a half years. *See Supra* 18–19 & n.7. Even if the record here is mostly complete, this untimely docketing still fits within the broader pattern of institutional neglect. At a certain point, which has now been surpassed, an appellant should get relief—in part—to motivate the Government to do its job correctly in preparing and docketing a correct record of trial within 150 days of announcement of sentence.

WHEREFORE, Capt Covitz respectfully requests this Court dismiss the case with prejudice. In the alternative, he requests this Court grant sentence relief in the form of reduced confinement.

IV.

AS APPLIED TO CAPTAIN COVITZ, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."[10]

Additional Facts

After his conviction, the Government determined that Capt Covitz's conviction qualified for a firearms prohibition both under 18 U.S.C. § 922(g)(9) and, generally, 18 U.S.C. § 922. (EOJ; Statement of Trial Results (STR), 28 Aug. 2023.)

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021).

Law and Analysis

1. Section 922 is unconstitutional as applied to Capt Covitz.

The test for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

[10] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022).

Bruen, 597 U.S. at 24 (citation omitted).

This brief will address both the stated firearms prohibition—Section 922(g)(9) for domestic violence convictions—and the stated but vague annotation that Section 922 applies to the case. Presumably the Government intended to apply Section 922(g)(1), which bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, subsection (g)(1) cannot constitutionally apply to Capt Covitz, who stands convicted of offenses that have historically not merited firearms restrictions. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter what the convicted offense, as long as the punishment could exceed one year of confinement. Murder or mail fraud, rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show.

The historical tradition took a narrow view of firearms regulation for criminal acts than that reflected in Section 922:

> [A]ctual "longstanding" precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates *a present danger that one will misuse arms against others and the disability redresses that danger*.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930

stated that "a person convicted of a 'crime of violence' could not own or have in his possession or under his control, a pistol or revolver." *Id.* at 701, 704 (quotations omitted). A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking." *Id.* at 701 (quotations omitted). Capt Covitz's offense falls short of these. It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit recently adopted this logic to conclude that § 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years' confinement. *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. 2023), *vacated* (U.S. 2. Jul. 2024) (remanding for further consideration in light of *United States v. Rahimi*, 602 U.S. ___, 2024 U.S. LEXIS 2714 (21 Jun. 2024). Evaluating § 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to violent criminals." *Id.* at 104 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05. While Capt Covitz's convictions may colloquially qualify as "violent," the real question is whether they meet the historical tradition of

regulating firearms based on a more limited framing of "violent."

In addition to the distinction on violence, a felony conviction today is vastly different from what constituted a felony prior to the 20th century, let alone at the time of this country's founding. This is problematic because categorizing crimes as felonies has not only increased, but done so in a manner inconsistent with the traditional understanding of a felony:

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

Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y at 697. Notably, the "federal 'felon' disability--barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm--is less than [64] years old." *Id.* at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with this country's history and tradition.

Not only does the conviction fail the historical analysis for Subsection (g)(1), it also cannot pass muster for Subsection (g)(9). All the above arguments apply to the fact that an offense of this nature does not qualify for a lifetime ban on firearms. The recent case of *United States v. Rahimi* does not change the analysis. In *Rahimi*, the Supreme Court addressed the validity of Section 922(g)(8)(C)(i), which applies once a

court has found that a defendant "represents a credible threat to the physical safety of another" and issued a restraining order. 2024 U.S. LEXIS 2714, at *26. The Court concluded that the historical analysis supported the proposition that when "an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at *25.

But the historical analogue breaks down when applied here. In *Rahimi*, the Court noted that the "surety" and "going armed laws" which supported a restriction involved "whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* at *26. The Court also noted that surety bonds were of limited duration, and that Section 922(g)(8) only applied while a restraining order was in place. *Id.* By contrast, this case never involved a weapon threat and the firearms ban will last forever. Ultimately, the Court itself noted the limited nature of its holding: "we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be *temporarily* disarmed consistent with the Second Amendment." *Id.* at 30 (emphasis added). Such a narrow holding cannot support the broad restriction encompassed here.

2. This Court may order correction of the EOJ.

In *United States v. Lepore*, citing to the 2016 Rules for Courts-Martial (R.C.M.), this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. at 763. Despite the court-martial order

erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760.

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*. The CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals' (ACCA) decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." 82 M.J. 263, 2022 CAAF LEXIS 182, at *1 n.* (C.A.A.F. 2022) (decision without published opinion). This disposition stands in tension with *Lepore*.

The CAAF's decision in *Lemire* reveals three things. First, the CAAF has the power to correct administrative errors in promulgating orders.[11] Second, the CAAF believes that CCAs have the power to address collateral consequences under Article 66 as well since it "directed" the ACCA to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders, even if the Court deems them to be a collateral consequence.

Moreover, *Lepore* relates to a prior version of the Rules for Courts-Martial—

[11] While a promulgating order was at issue in *Lemire*, the same should apply to the EOJ, which replaced the promulgating order as the "document that reflects the outcome of the court-martial." *Manual for Courts-Martial, United States* (2019 ed.), App. 15 at A15-22.

"[a]ll references in this opinion to the UCMJ and [R.C.M.] are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at 760 n.1. In the 2019 *MCM*, both the STR and EOJ contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6), 1111(b)(3)(F). Under DAFI 51-201, *Administration of Military Justice*, dated 14 April 2022, ¶ 29.32, the STR and EOJ must include whether the offenses trigger a prohibition under Section 922. As such, this Court's analysis in *Lepore* is no longer controlling since the Rules for Courts-Martial now require—by incorporation—a determination on whether the firearm prohibition is triggered.[12] Thus, this Court can rule in Capt Covitz's favor without taking the case en banc.[13] If this Court disagrees, Capt Covitz offers the above argument to overrule *Lepore* under Joint Rule of Appellate Procedure 27(d).

WHEREFORE, Capt Covitz respectfully requests this Court hold Section 922(g)'s firearm prohibition unconstitutional as applied to him and order correction of the STR and EOJ to indicate that no firearm prohibition applies in his case.

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[12] *See also United States v. Robertson*, No. 202000281, 2021 CCA LEXIS 531 (N.M. Ct. Crim. App. 18 Oct. 2021) (unpublished) (ordering correction of an STR because it incorrectly stated Section 922 did not apply); *United States v. Moreldelossantos*, ARMY 20210167, 2022 CCA LEXIS 164 (17 Mar. 2022) (unpublished) (ordering correction of the STR to change the Subsection 922(g)(1) designator to "No").

[13] Capt Covitz recognizes this Court has repeatedly ruled against this argument. *See, e.g.*, *United States v. Vanzant*, No. ACM 22004, 2024 CCA LEXIS 215, at *23–26 (A.F. Ct. Crim. App. 28 May 2024). However, this Court has not yet addressed the question of whether the Rules change provides a basis for this Court to reach a different result.

Respectfully submitted,

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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:

V.

UNLAWFUL COMMAND INFLUENCE TAINTED PREFERRAL IN CAPTAIN COVITZ'S CASE BECAUSE THE PREFERRING COMMANDER DID WHAT HE THOUGHT HE WAS REQUIRED TO DO IN DOMESTIC VIOLENCE CASES: PREFER CHARGES.

Additional Facts

Capt Covitz underwent a Board of Inquiry (BOI) from 24-26 April 2024. (Declaration.) On the second day of his BOI, his defense counsel had the following conversation with the preferring commander in this case, Lt Col MC:

> Q. Did you have other options that you could have chose to -- to take? For instance, could have you gone with an Article 15 or an LOR?
>
> A. I'd actually have to answer yes, because I thought like charges like domestic violence and that, and that was above my commander level and that the wing commander is not --
>
> Q. So, sir, are you saying that you were receiving pressure from higher commanders to prefer -- to prefer charges?
>
> A. No.

(BOI Transcript at 420–21.) However, the audio corresponding to the transcribed words "I'd actually have to answer yes," seems to say something different. (BOI Audio at 1:55:41.)

Lt Col MC preferred the original charges and signed the first indorsement on 16 September 2020. (App. Ex. I; First Indorsement, Original Record of Trial Volume 3, 16 Sep. 2020.)

Standard of Review

Allegations of unlawful command influence are reviewed *de novo*. *See United States v. Bergdahl*, 80 M.J. 230, 234 (C.A.A.F. 2020) (internal citations omitted).

Law and Analysis

"No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts." Article 37(a), UCMJ, 10 U.S.C. § 837(a).

"A party alleging actual unlawful command influence 'must (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness.'" *United States v. Washington*, 80 M.J. 106, 112 (C.A.A.F. 2020) (internal citations omitted).

"To make a *prima facie* case of apparent unlawful command influence, an accused bears the initial burden of presenting 'some evidence" that unlawful command influence occurred." *Bergdahl*, 80 M.J. at 234. (internal citations omitted). "This burden on the defense is low, but the evidence presented must consist of more than 'mere allegation or speculation.'" *Id.* (internal citations omitted). "Once the accused meets the 'some evidence' threshold, the burden shifts to the government to

prove beyond a reasonable doubt that either: (a) the 'predicate facts proffered by the appellant do not exist,' or (b) 'the facts as presented do not constitute unlawful command influence.' *Id*. (internal citations omitted). "If the government cannot succeed at this step, it must prove beyond a reasonable doubt that the unlawful command influence 'did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.'" *Id*. (internal citations omitted).

It appears the preferring commander believed that a higher-level commander had authority over offenses of this gravity, and thus his hands were tied on the question of whether a lower-level punishment was permissible. The erroneous transcription does not suggest otherwise; indeed, if his answer was actually "yes" on whether he could consider nonjudicial punishment or a letter of reprimand, the rest of his explanation would be unnecessary. He would have no reason to talk about what higher-level commanders thought because the preferral decision should have been his and his alone. But it was not.

This is sufficient to raise a prima facie case of apparent and actual unlawful command influence under existing precedents. If this Court disagrees and believes it needs more information, a *DuBay* hearing is appropriate to gather facts and determine whether Lt Col MC understood his options and did not prefer charges simply because he believed that was the expectation for a case involving domestic violence.

WHEREFORE, Capt Covitz respectfully requests this Honorable Court set aside the findings and sentence or, alternatively, order a *DuBay* hearing for further factfinding.

VI.

CAPTAIN COVITZ'S CONVICTIONS ARE LEGALLY INSUFFICIENT.

Standard of Review

Legal sufficiency is reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)).

For the reasons discussed in the main brief in Assignment of Error I, Capt Covitz's convictions for domestic violence are legally insufficient. No reasonable factfinder could conclude that the Government met its burden to prove beyond a reasonable doubt.

WHEREFORE, Capt Covitz respectfully requests this Honorable Court set aside the finding and the sentence.

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 18 July 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION TO ATTACH**
v.	)	Before Panel 1
Captain (O-3) **COLIN R. COVITZ,** United States Air Force, *Appellant.*	)	No. ACM 40193 (reh) 18 July 2024

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

Pursuant to Rules 23(b) and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to attach the following materials to the record:

- Declaration of Colin R. Covitz, dated 9 July 2024, 1 page
- Transcript of Board of Inquiry (BOI) Day 2, 25 April 2024, 221 pages
- Audio of BOI Day 2, 25 April 2024, DVD

The declaration is relevant to the third Assignment of Error (AOE), which raises post-trial processing delays. It is necessary to illuminate the prejudice Capt Covitz experienced by virtue of the delays. It is also relevant to the authentication of attachments 2 and 3.

The transcript and audio from the BOI are relevant to AOE V, which raises unlawful influence.[1] The genesis of the claim is an interaction between the preferring

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

commander in this case and the defense counsel at the BOI. Providing the transcription and the audio is necessary to establish the underlying factual basis for the issue. Additionally, Capt Covitz's declaration addresses the authenticity of the transcript and audio. Counsel will hand serve the DVD for attachment 3 upon all recipients.

In *United States v. Jessie,* 79 M.J. 437 (C.A.A.F. 2020), the Court of Appeals for the Armed Forces did not bar the consideration of declarations, such as this one, that explain the timing and impact of post-trial actions, or inaction. Moreover, the information contained within addresses key matters this Court must consider when assessing prejudice. As for the transcript and audio raised in support of the UCI claim, *Jessie* does not bar consideration of matters outside the record that "implicate the fairness, integrity, and public reputation of the proceedings themselves." *United States v. Tucker*, 82 M.J. 553, 565 (C.G. Ct. Crim. App. 2022).

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the motion and attach the documents to the record.

Respectfully submitted,

[redacted]

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No.ACM 40193 (reh)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Colin R. COVITZ	)	
Captain (0-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 18 July 2024, counsel for Appellant submitted a Motion to Attach, specifically requesting to attach the following to the record of trial: (1) a declaration from Appellant dated 9 July 2024; (2) a transcript of a Board of Inquiry, dated 25 April 2024; and (3) an audio recording of the Board of Inquiry, dated 25 April 2024. The Government did not submit any opposition.

The court has considered Appellant's motion, case law, and this court's Rules of Practice and Procedure. The court grants Appellant's motion; however, it specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law to the attachments until it completes its Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's entire case.

Accordingly, it is by the court on this 26th day of July, 2024,

ORDERED:

Appellant's Motion to Attach, dated 18 July 2024, is **GRANTED.**

FOR THE COURT

[redacted]

0 AST O D, pt, USAF
C · missioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Captain (O-3) **COLIN R. COVITZ,** United States Air Force *Appellant*	)))))))))	**CONSENT MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF** Before Panel 1 No. ACM 40193 (reh) 9 August 2024

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file a reply to the Government Answer. Appellant files this motion for enlargement of time in advance because undersigned counsel will be out of the country when the answer is filed, presumably on 19 August 2024. Appellant requests an enlargement for a period of seven days (in addition to the seven-day reply window), with a new due date **2 September 2024.** The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 239 days have elapsed. On the date requested, 263 days will have elapsed.

From 14-18 June, 2021, at Creech Air Force Base (AFB), Nevada, a general court-martial composed of officer members found Appellant, Capt Colin R. Covitz, guilty, contrary to his pleas, of one charge with four specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C.

§ 928b.[1] (R. at 1115; EOJ, ROT Vol. 1, 8 Sep. 2021.) A military judge sentenced Capt Covitz to forfeiture of all pay and allowances, eight months' confinement, and dismissal from the service. (R. at 1157.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 23 Aug. 2021.) On 30 September 2022, this Court set aside the findings and sentence and authorized a rehearing because the military judge abused his discretion in denying challenges for cause against panel members. *United States v. Covitz*, No. ACM 40193, 2022 CCA LEXIS 563, at *32, 40 (A.F. Ct. Crim. App. 30 Sep. 2022).

At a rehearing at Creech Air Force AFB on 26 June and 10-12 July, 2023, a general court-martial composed of a military judge alone convicted Capt Covitz, contrary to his pleas, of two specifications of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b (2018). (Rehearing Record (RR) at 22, 37, 386.) The military judge sentenced Capt Covitz to five months' confinement, forfeiture of $6,127.00 per month for five months, and a reprimand. (RR. at 462.) The convening authority disapproved the reprimand and reduced adjudged forfeitures to $925.00 per month for five months. (Convening Authority Decision on Action, 28 Aug. 2023.)

The record of trial contains 8 prosecution exhibits, 11 defense exhibits, 31 appellate exhibits, and 1 court exhibit. The transcript is 463 pages. Capt Covitz is not currently confined. Counsel is currently assigned 18 cases, with 1 pending initial brief before this Court. When the Answer is filed, the reply will be counsel's highest priority.

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

The Government's answer is currently due 17 August 2024, a Saturday, which will become 19 August 2024. Counsel will be out of the country from 16-24 August 2024 and will be unavailable to work on the reply or to file a timely enlargement of time. For this reason, Appellant's files this motion for enlargement of time in advance. Appellant requests seven additional days to work on the reply, or fourteen days overall from the date of the Answer. This will allow adequate time to review the answer and coordinate with Appellant on the reply. The Government consents to this enlargement of time.

Through no fault of Capt Covitz, undersigned counsel has previously scheduled travel that falls during the normal reply window. Capt Covitz was specifically informed of the case status and counsel's progress on the case, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review the answer and complete a thorough reply.

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

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 9 August 2024.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee,	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	No. ACM 40193 (reh)
Captain (O-3) **COLIN R. COVITZ**, USAF, *Appellant.*	)	Before Panel No. 1
	)	19 August 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 ASSIGNMENT OF ERRORS**
v.	)	Before Panel No. 1
Captain (O-3) **COLIN R. COVITZ**, USAF *Appellant.*	)	No. ACM 40193 (reh)
	)	19 August 2024

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

ISSUES PRESENTED

I.

WHETHER APPELLANT'S CONVICTIONS FOR DOMESTIC VIOLENCE ARE FACTUALLY SUFFICIENT.

II.

WHETHER THE RECORD OF TRIAL'S OMISSION OF THE ARRAIGNMENT AUDIO REQUIRES RELEIF OR, AT A MINIMUM, REMAND FOR CORRECTION.

III.

WHETHER APPELLANT IS ENTITLED TO SENTENCE RELIEF BECAUSE OF THE 155-DAY DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT.

IV.

WHETHER, AS APPLIED TO APPELLANT, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."

V.[1]

WHETHER THE ORIGINAL PREFERRAL OF CHARGES IN APPELLANT'S CASE SUFFERED FROM UNLAWFUL COMMAND INFLUENCE BECAUSE THE PREFERRING COMMANDER DID WHAT HE THOUGHT HE WAS REQUIRED TO DO IN DOMESTIC VIOLENCE CASES: PREFER CHARGES.

VI.

WHETHER APPELLANT'S DOMESTIC VIOLENCE CONVICTIONS ARE LEGALLY SUFFICIENT.

STATEMENT OF THE CASE

The United States generally agrees with the Appellant's Statement of the Case. [2]

STATEMENT OF FACTS

Appellant and CC were former romantic partners who dated in Las Vegas, Nevada from September 2016 to January 2018. (RR at 57.) During their relationship, CC and her two children moved into a home with Appellant on Trimming Court in Las Vegas. (R. at 58-59.) Appellant and CC broke up in early 2018, but Appellant remained living in the same home with CC until sometime at the end of 2019. (R. at 60-62.) When Appellant moved out, he did not take his three cats with him, and CC cared for the cats at the Trimming Court home. (R. at 63.)

Sometime in February 2020, Appellant's cat Mittens got out of the house and went missing. (R. at 67.) About a week after Mittens got out, Appellant and CC went to lunch. (R. at 70.) Appellant and CC traveled together in CC's car, with CC driving. (Id.) After lunch, Appellant

[1] Appellant raised Issues V and VI under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

[2] All references to the Military Rules of Evidence (Mil. R. Evid.), Rules for Courts-Martial (R.C.M.), and Uniform Code of Military Justice (UCMJ) are to the version in the 2019 version of the Manual for Courts-Martial, United States. (MCM).

and CC went to a grocery store where Appellant purchased flowers for CC. (R. at 71.) Appellant gave CC the flowers once they got back to the car and CC made a joke about Mittens not being there to eat the flowers because the cat had historically eaten them. (R. at 72.) The joke upset Appellant, which led to an argument in the car on the way from the grocery store back to the Trimming Court house, which was captured on CC's in-car dash camera. (Pros. Ex. 2; R. at 73-84.)

The argument continued from the car into the home. (R. at 84.) The argument escalated inside the home, becoming physical. (R. at 85.) CC recalled the argument became physical when Appellant shoved her, pushing her against the fridge and grabbed her wrists and twisted. (R. at 85.) Appellant was the first person to take the argument from verbal to physical. (R. at 86.) After the altercation became physical, CC used her phone to record 32 minutes of audio of their interaction. (Pros. Ex. 3.) At trial, CC testified to what was captured on the audio recording. (R. at 91-138.) CC can be heard on the recording telling Appellant, "You just assaulted me." (R. at 91.) Appellant responded, "You're lucky I didn't snap your fucking neck. You killed my baby." (Id.) Throughout the argument and altercation, CC repeatedly asked Appellant to leave. (Pros. Ex. 3.) Appellant refused to leave and demanded CC leave the home. (Id.)

During the altercation, CC testified that at some point the barrier she had constructed to keep the cats out of the kitchen fell, and as she attempted to pick it up, she and Appellant got into a physical altercation with CC ending up on her back on the ground. (Pros. Ex. 3; R. at 100-103.) With CC on the ground, Appellant put a knee in her stomach and put one of his hands on her neck. (R. at 103-104.) CC could not breathe. (R. at 104.)

After Appellant released CC, she went to the master bedroom to change her clothes having urinated on herself twice during the altercation. (R. at 115.) Appellant was aware CC urinated on

herself saying, "Oh right, you mean like I made you pee yourself. … Maybe that will teach you a lesson, so you don't attack me again." (R. at 130.)

Appellant was unaware CC was recording the altercation inside the home. (R. at 186.) Notably, Appellant never denied any of the claims of assault CC accused Appellant of during the recording. (Pros. Ex. 3; R. at 91-138.) Appellant accused CC of punching him during the altercation. (R. at 94, 130.) CC, however, denied punching Appellant. (R. at 94, 131.) CC said she pushed Appellant and did not punch him, stating, "I don't even know how. … I didn't even try to slap you and that I know how to do." (R. at 94, 131.)

At a later hearing on a temporary protective order (TPO), both Appellant and CC testified about what happened that day in the kitchen at the Trimming Court home. (Pros. Ex. 5; R. at 145-159.) Appellant admitted most of what occurred that day from CC's testimony "line[d] up almost perfectly with my narrative." (R. at 159.) Appellant admitted to grabbing and squeezing CC's wrists and shoving CC. (Id.) Appellant testified,

> [w]hen you hear her choking, that was when she had fallen over. She started kicking me. I grabbed her by the back of the ankle to stop her from being able to kick. She yanked her foot back, that's how her foot came out of the boot. I threw it on the ground, and she picked it up and threw it at the back of my head along with a couple of other things. At which point, I turned around, climbed on top of her, put one knee in her gut, and my left knee against her throat. Pushing it up against her jugular on the right side of her neck and rolled – rolled it pretty much across her neck to cut off the flow of blood so, I can restrain her and keep her from attacking me any further.

(Id.) The most significant difference in Appellant's recounting of what happened and CC's was that CC said it was Appellant's hand that was on her neck and not Appellant's knee. (R. at 103-104.)

The military judge found Appellant not guilty of unlawfully grabbing CC's wrists and unlawfully shoving CC. (R. at 386.) Appellant was found guilty of strangling CC with his hand and putting his knee in CC's stomach. (Id.)

ARGUMENT

I.

APPELLANT'S CONVICTIONS FOR DOMESTIC VIOLENCE ARE FACTUALLY AND LEGALLY[3] SUFFICIENT.

Additional Facts

CC testified about the altercation with Appellant along with the explaining various portions of the audio recording of the incident. (Pros. Ex. 3; R. at 85-138.) CC described Appellant pushing her against the fridge and grabbing her wrists (R. at 85) to spitting on her. (R. at 89, 94, 97.) CC can be heard on the recording saying, "Did you just not push me and choke me, and pull my hair, and grip on my wrists?" (R. at 94.) Appellant did not deny any of those accusations and responded, "How many times did you throw a punch?" (Id.) CC replied, "I was trying to push you off." (Id.)

CC described what happened when the barrier fell, recounting:

> At one point he pushed me. This was already in the living room. I ended up on my back. And it's something between – when he pushed me down. It's a point between when he pushed me down – or after he pushed me down. He came towards me. I don't know why. And I started trying to kick him off because he was coming towards me. And that's when he got ahold of my foot and pulled my boot off. And I can't tell you how it happened, but at some point, he ended up with – One of his knees in my stomach. And then he put one of his hands on my neck.

[3] Appellant raised legal sufficiency as a separate issue pursuant to Grostefon. The United States is responding to both Assignments of Error in this section.

(R. at 103.) CC described not being able to breathe, testifying, "I think the scariest part besides the fact that I can't breathe. I just – the look in – the look in his eyes he was just – I've seen him very angry. But this was just – it was a different kind of rage." (R. at 104). CC also said she was not sure if Appellant was going to kill her, and she was afraid she would not see her kids again. (Id.)

During the altercation, CC urinated on herself, which Appellant was aware of. (R. at 115, 130.) CC also suffered from injuries including bruising on her chest, up and down her arm and between her fingers. (R. at 140.) Air Force Office of Special Investigations (AFOSI) took photos of CC's bruising approximately three to four weeks after the 10 February 2020 incident. (Pros. Ex. 4; R. at 141.) CC's boyfriend, RW, at the time also noticed bruising on CC's arms, which he photographed on 18 February 2020. (R. at 220.) RW did not notice bruising anywhere other than on CC's arms. (R. at 237.) RW's and CC's friend, ES, also testified about CC's demeanor on the night of 10 February 2020, when CC picked RW and ES up from the airport after they returned from a trip to Indonesia and Thailand. (R. at 240-243.) ES noted how CC's demeanor was extremely subdued, finding CC' lack of interest in how RW and ES were doing after returning from a trip like that to be notable. (R. at 243.)

Standard of Review

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

Law

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 rather, 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).

When assessing legal sufficiency, the evidence necessary to support a verdict "need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt." United States v. Parrish, 925 F.2d 1293, 1297 (10th Cir. 1991). A legally sufficient verdict may be based on circumstantial as well as direct evidence, and even "[i]f the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb the conviction." United States v. McArthur, 573 F.3d 608, 614 (8th Cir. 2009) (citations omitted).

Analysis

The military judge found Appellant guilty of strangulation by hand and putting a knee in CC's stomach, but acquitted Appellant of grabbing CC's wrist and shoving CC. (R. at 386.) The essential elements of Specification 1 are that (1) Appellant assaulted CC; (2) that he did so by strangulation with his hand; 3) and that the strangulation was done with unlawful force or violence. *See* MCM, pt. IV, para. 78.b.(6) (2024 ed.).[4] The essential elements for Specification 4 are that 1) Appellant committed a violent offense against CC by putting his knee on her stomach; and 2) the violent offense was committed against an intimate partner. MCM, pt. IV, para. 78.b.(1). Appellant's case was tried before a military judge sitting alone. "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007).

[4] See App. Br. at 9, footnote 5.

A. The Audio is Not the Only Source of Evidence in Support of the Convictions

Appellant argues that audio recording establishes there was a verbal altercation that became physical, but that drawing more from the chaotic recording is dubious. (App. Br. at 11.) The audio recording in Prosecution Exhibit 3 clearly supports CC's testimony that there was an altercation, and that Appellant was physical with her. Likewise, CC admitted that she was pushing Appellant to get him away from her. Appellant can be heard asking CC about some of her conduct, which she either vehemently denied (such as punching Appellant (R. at 131.)), or which she admitted to (such as kicking and scratching Appellant (R. at 131, 150.)). When CC told Appellant, "You just assaulted me," Appellant responded, "You're lucky I didn't snap your fucking neck." (R. at 91.) The audio recording is highly probative of the facts testified to by CC. There is nothing in the record, however, to support that the recording is the *only* evidence relied upon by the military judge. CC testified along with the audio to explain, to the best of her ability, what was taking place. CC testified that Appellant put his knee into her stomach and put one of his hands on her neck. (R. at 94, 103-04.) Thus, it was the combination of the statements in the audio recording and CC's sworn testimony at the court-martial that were consistent with, and corroborate, each other. The military judge should be presumed to have given the audio the appropriate weight he felt it deserved in light of the live testimony from the victim and other corroborating evidence presented by the Government.

B. CC's Credibility and Reasonable Doubt

Appellant attacks the legal and factual sufficiency of Appellant's convictions based on CC's credibility. (App. Br. at 12-15.) The fact finder was in the best position to weigh and evaluate the credibility of witnesses and testimony. United States v. Peterson, 48 M.J. 81, 83 (C.A.A.F. 1998); *see* Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The

fact finder may also "believe one part of a witness's testimony and disbelieve another." United States v. Harris, 8 M.J. 52, 59 (C.M.A. 1979). While Appellant can point to a few discrepant statements from CC's testimony, CC's testimony was clearly found to be credible by the fact finder in this case. The military judge observed CC's demeanor as she testified, and heard, in detail, about what transpired between Appellant and CC on 10 February 2020.

Appellant first attacks CC's lack of memory and her downplaying her role in the argument as a basis to find factual insufficiency for the convictions. (App. Br. at 12.) CC admitted she was not able to recall everything from that day precisely testifying, "But to tell you what's exact, like, what – exactly what happened, like, what was happening in each and every second, I can't." (R. at 103.) When confronted with an apparent discrepancy in the recording and her testimony regarding when the strangulation occurred, CC also explained, "… I get that it's important for me to remember, but I don't remember, and I've been trying really hard to forget any of this happened." (R. at 202-203.) What CC did remember, though, was Appellant's hand on her neck when she was on the ground stating, "When he [] cut airflow, yes, I would very much remember that." (R. at 203.) CC may not have been able to recall some specific sequence of events from that day, but there was ample evidence for the military judge to have found CC credible. Considering the evidence in the light most favorable to the prosecution and that the military judge personally observed the witnesses, there was factually and legally sufficient evidence to support Appellant's convictions.

Appellant next calls into question the manner of CC's recording and her behavior during the recording. (App. Br. at 13.) Appellant claims that, during the recording, CC was minimizing her own role in the conflict by denying pushing and hitting Appellant, while Appellant had no reason to fabricate such allegations against CC, because he did not know she was recording him.

(Id.) Appellant argues that CC's false "solution" to that discrepancy was to say Appellant was gaslighting her during the recording. (Id.) At trial, however, CC maintained consistent testimony on this point during cross-examination:

> Q: Okay, and despite not knowing that the recording was on. Captain Covitz throughout this whole recording says things, like, he asked you to stop shoving him, correct?
>
> A: Yes.
>
> Q: Because at some point, you did shove him, right?
>
> A: This was after – so, he said – he kept saying that I was shoving him. I think he even said that I punched him. And this was before I had even touched him.
>
> Q: Okay, so, despite not knowing that he's recording, he's saying things, like, you just punched me. When that did not actually happen, is that right?
>
> A: He's trying to gaslight me, yes.
>
> Q: Okay, he's trying to gaslight you even though he thinks it's just you two in the room and there's no recording, correct?
>
> A: Yes.
>
> Q: Okay, so, at some point during the recording, the whole recording, he says stop pushing me, right?
>
> A: Yes.
>
> Q: Okay, because at some point you did push him, correct?
>
> A: *Yes*.
>
> …
>
> Q: So, at some point during the recording, he asked you to let go of him repeatedly, right?
>
> A: Yes.
>
> Q: Okay. And that's because at one point you were holding on to him, right?
>
> A: *Yes.*
>
> …
>
> Q: Okay. And then at some point, he also says, you think I'm going, you know, after you throw a punch. He says he accuses you of punching him, correct?
>
> A: Yes.

Q: And that's because you punched him?

A: *No*.

…

Q: Okay. And so, at some point in the recording, he also says that you kicked him, correct?

A: Yes.

Q: Because you kicked him at some point during this fight?

A: When I was on the ground and he approached me, *yes*.

(R. at 186-189, emphasis added.) CC answered affirmatively about pushing Appellant, holding on to Appellant and kicking Appellant. She denied punching Appellant at trial, just as she denied it on the recording with the same explanation each time – that she does not know how to throw a punch (which Appellant acknowledged by saying, "I know that," on the recording). (R. at 131; 189.) Appellant's attempt to cast CC as uncredible because she minimized her role fails to capture the full picture of her testimony, which involved making admissions to her own actions during the fight.

Appellant also argues that CC had every incentive to make the recording as damning as possible, taking particular issue with the timing of her statement on the recording, "Did you just not push me and choke me, and pull my hair[?]" compared to her testimony of when Appellant placed his hand on CC's neck. (App. Br. at 13-14.) CC was not able to explain the timing at trial; but the military judge also heard the recording which captured CC telling Appellant, "You just assaulted me" to which Appellant responded, "You're lucky I didn't snap your fucking neck." (R. at 91.) After this, CC asked about being pushed, choked, having her hair pulled and wrists grabbed. (R. at 94.) On the recording, Appellant did not deny or challenge any of CC's accusations, but instead said, "How many times did you throw a punch?" (id.), attempting to justify his actions. It is clear that less than three minutes into the audio recording, Appellant had indeed assaulted CC, and CC was "lucky" Appellant had not done much more. It was not CC who was responsible for

making damning statements – it was the Appellant's own words when he did not know he was being recorded.

With respect to CC's credibility, Appellant lastly attacks her motives to fabricate or embellish what occurred to protect herself from being evicted from the home or to "turn things around on Capt Covitz" in the TPO hearing. (App. Br. at 14.) These arguments ignore key facts – (1) that the prospect of an "eviction" came up *after* CC began recording and after Appellant had already told CC she was lucky he had not snapped her neck; (2) that CC was not planning to tell anyone, including law enforcement what happened that day; and (3) the TPO was filed after this incident. CC would have had no motive to embellish what was transpiring because she was not concerned about being evicted (when Appellant told her she would get an eviction notice, CC responded, "Then do it." (R. at 98.)) and she had no reason to believe Appellant was going to seek a protection order in court.

CC made clear she was not going to disclose what happened to anyone. (R. at 215.) She was embarrassed by what transpired, and she did not want to get Appellant into trouble. (Id.) CC testified at Appellant's court-martial that she never reported Appellant to local police or the OSI and, to that day, she had no idea who reported Appellant's conduct to OSI. (R. at 206, 215.) To be persuaded by Appellant's motive to fabricate argument, there would have to be evidence that CC knew or believed her recording could be used by a court in an eviction proceeding. There is nothing in the record to support this. Appellant's argument regarding CC's motive to maximize the gravity of the situation in the recording to somehow help the TPO proceedings also fails because CC had absolutely no reason to believe there even would be such a hearing. Appellant's argument that the conviction is factually or legally flawed based on CC's purported motive to fabricate is simply not supported by the evidence.

C. Self-Defense is not an Available Defense for Appellant

Appellant argues he had a valid claim of self-defense based on his belief he needed to keep CC from attacking him and prevent bodily harm about to be inflicted wrongfully on himself. (App. Br. at 15-16.) Appellant believes he had an objectively reasonable apprehension of such bodily harm because CC had thrown a boot at him, pushed him, hit him and scratched him. Appellant believes that strangulation was a reasonable response to that apprehension. (Id.)

R.C.M. 916(e)(3) provides that self-defense is available for any assault punishable under Art. 128 if the accused apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused. The accused also must believe the force that accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm. R.C.M. 916(e)(3)(A)-(B). Further, an accused loses the right to self-defense if the accused was the aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension. R.C.M. 916(e)(4).

CC testified that Appellant initiated the argument becoming physical. (R. at 85, 148.) CC told the Family Court Judge that she was pointing for Appellant to get out and Appellant thought she was going to hit him, so he grabbed her wrist. (R. at 148.) Appellant then began shoving and pushing CC against the fridge and grabbed her wrists. (R. at 85, 148.) Appellant himself testified,

> With regards to how the altercation went down, she's pretty much on point with that except that when I first grabbed her wrist, it's because she lunged at me. She started by backing herself up into that corner… And when [CC] reaches a point in our verbal arguments, where she starts screaming. She will lunge forward with her hands up like this. And she got right up onto my face. And I grabbed her wrists and shoved her back against the fridge. That was the first – first instance of where I grabbed her and pushed her away.

(R. at 151.) Appellant admitted that he was the first to make the argument physical from his belief that CC was lunging at him. But there was no evidence as to what Appellant feared from CC.

Appellant also argued that his apprehension about bodily harm about to be inflicted wrongfully on himself was because CC had thrown a boot at his head. Appellant skips over how CC came to be on her back on the ground with her boot removed – which was due to Appellant having pushed her down and pulling off her boot when she attempted to kick him to protect *herself*. (R. at 103.) The trier of fact was free to reject Appellant's assertion that he was defending himself, and was free to believe CC's testimony. Ultimately, they believed CC.

Even assuming CC's initial lunge or throwing the boot at Appellant's head was enough to set in motion a claim to self-defense, Appellant had to use defense less than that likely to produce death or grievous bodily harm. Placing his knee in CC's stomach, pinning her to the ground while simultaneously applying external pressure to CC's neck such that her ability to breathe was impaired is an act likely to produce death or grievous bodily harm. Appellant, in other words, used more force than necessary to defend himself and self-defense is not an available defense for Appellant.

D. Conclusion

After analyzing Appellant's convictions for factual sufficiency, each member of this Court should be convinced of Appellant's guilt beyond a reasonable doubt. After analyzing Appellant's convictions for legal sufficiency, considering the evidence in the light most favorable to the prosecution, this Court should find a reasonable fact finder could have found all of the essential elements beyond a reasonable doubt. For all of the foregoing reasons, Appellant's convictions were both factually and legally sufficient, and this Court should deny Appellant's request for relief.

II.

THE RECORD OF TRIAL'S OMISSION OF THE ARRAIGNMENT AUDIO DOES NOT REQUIRE RELIEF OR REMAND.

Additional Facts

The audio of the Appellant's 26 June 2023 arraignment is missing. The full transcription of the arraignment, however, is included in the Record of Trial. (R. at 1-31.) The Government has obtained a copy of the audio recording and filed a motion to attach contemporaneous with this Answer to Assignments of Error.

Standard of Review

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

Law

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general or special court-martial where a sentence of "death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months" is adjudged. Article 54(c)(2), UCMJ; 10 U.S.C. § 854. Article 1, UCMJ, defines the term "record," when used in connection with the proceedings of a court-martial, as either: "(A) an official written transcript, written summary, or other writing relating to the proceedings; or (B) an official audiotape, videotape, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced." 10 U.S.C. § 801(13)(A), (B). The record of trial in every general and special court-martial shall include a substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting. R.C.M. 1112(b)(1). R.C.M. 1112(f) identifies items a court reporter must attach to the record of trial when it is sent to The

Judge Advocate General for appellate review. One of those items is "[a]ny transcription of the court-martial proceedings created pursuant to R.C.M. 1114." R.C.M. 1112(f)(8). R.C.M. 1114 states:

> A certified verbatim transcript of the record of trial shall be prepared –
>
> (1) When the judgment entered into the record includes a sentence of death, dismissal of a commissioned officer, cadet, or midshipman, a dishonorable or bad-conduct discharge, or confinement for more than six months; or
>
> (2) As otherwise required by court rule, court order or under regulations prescribed by the Secretary concerned.

Department of the Air Force Instruction 51-201, *Administration of Military Justice*, para. 15.12 (28 September 2023), states that transcription requirements for Article 30(a), UCMJ, 10 U.S.C. § 830(a), proceedings and courts-martial are set forth in Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial* (12 April 2021). DAFMAN 51-203 provides guidance on compiling the ROT. It states, "[a] completed ROT consists of two parts: the required contents of the certified ROT as listed in R.C.M. 1112(b) … and the required ROT attachments and allied papers required by this manual …" DAFMAN 51-203, para. 1.4.

Appellate courts understand that inevitably records will be imperfect, and therefore review for substantial omissions. *See* United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982). A substantial omission renders a record incomplete and raises a presumption of prejudice that the government must rebut. United States v. Henry, 53 M.J. 108, 111 (C.A.A.F. 2000) (*citing* United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as complete. Id. A substantial omission may not be prejudicial if the appellate courts are able to conduct an informed review. United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001); *see also* United States v. Morrill, ARMY 20140197, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App. 31 October 2016)(Unpub. op.)

(finding the record "adequate to permit informed review by this court and any other reviewing authorities") (citation omitted).

Analysis

The court reporter in this case created an audio recording of the arraignment. The audio recording is not included in the record of trial. Appellant argues the record is not complete and this Court should provide sentencing relief or remand to correct the record. (App. Br. at 20.) This Court should deny the request, however, because no omission exists in the record since the Government compiled a record of trial which included a certified transcription of the court-martial proceedings, to include the full arraignment.

This Court has found in a remarkably similar case that missing audio was either not an omission where there was a certified transcript or, even assuming the missing audio was an omission, such omission was insubstantial. United States v. Reedy, No. ACM 40358, 2024 CCA LEXIS 40 (A.F. Ct. Crim. App. 2 Feb. 2024) (unpub. op.). In Reedy, there was no recording of the court-martial included in the record of trial because, although it was recorded by the court reporter, the files on the disc later became inaccessible. Before they became inaccessible, the court reporter had used the audio recording to create a transcript, which was included in the record of trial. Id. at 6. In Reedy, the appellant argued that the absence of any court-martial audio rendered the record incomplete. Id. This Court disagreed, however, finding that for a court-martial like appellant's, Article 1, UCMJ, defined "record" as *either* the transcript *or* the audio recording. Id. citing 10 U.S.C. § 801 (emphasis in original). This Court noted that although it is often the case that both are included in Air Force records of trial, there are instances where both are required and instances where they are not. Id. The Court found that there was no omission in the record because of the certified transcription. Id. The Court further found that even assuming there was an

omission, the omission was insubstantial as the certified transcription was available for all to reference. Id. Finding that appellant failed to substantiate how the lack of audio recording materially prejudiced his rights or negatively impacted him in any particular way, the Court declined to provide relief. Id.

Appellant here has also failed to identify how the missing audio has impacted or prejudiced him. Instead, he lists several cases with issues of incomplete records and asserts there should be real consequences to the Government for this continued behavior. (App. Br. at 18-20.) Appellant also cites to United States v. Matthew, No. ACM 39796 (f rev), 2022 CCA LEXIS 425, at *11-12 (A.F. Ct. Crim. App. 21 Jul. 2022) (unpub. op.), to support his position that the missing audio is a substantial omission. (App. Br. at 18.) The key distinguishing fact between Matthew and Reedy, however, is that there was no transcript in Matthew. There was in Reedy, and there is in Appellant's case.

Although the audio was missing from the record of trial, the proceedings were audio recorded and used to make a certified transcript of the arraignment. With the audio now submitted to this Court, there is no reason for a remand.

Conclusion

Appellant's arraignment was fully captured in the verbatim transcript allowing for sufficient appellate review. Because the omission is insubstantial and because the missing audio has now been provided to this Court and to Appellant's counsel, this Court should deny Appellant's assignment of error.

III.

APPELLANT IS NOT ENTITLED TO SENTENCE RELIEF BECAUSE OF THE 155-DAY DELAY BETWEEN ANNOUCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT.

Additional Facts

Appellant was sentenced on 12 July 2023. (R. at 462.) The court reporter was transcribing another court-martial from 14 July 2023 – 28 July 2023. (*Court Reporter Chronology*, ROT, Vol. 5.) The court reporter was in a court-martial on 31 July 2023, which was continued the same day. (Id.) The court reporter continued to transcribe another two courts-martial from 1 – 4 August 2023. (Id.) The court reporter was at a Court Reporter Course 6 – 25 August 2023 and was also transcribing or incorporating edits to other transcriptions during that same time frame. (Id.) From 28 – 31 August 2023, the court reporter was transcribing another court-martial. (Id.) From 1 – 4 September 2023, she was on a pass. (Id.) At the beginning of September, the court reporter was transcribing other courts-martial and then was on leave 10 – 23 September 2023, but still transcribing. (Id.) On 25 September 2023, she began transcribing Appellant's case. (Id.) Transcription of Appellant's case continued until 17 October 2023, when she sent the transcript to Trial Counsel (TC) for review. (Id.) From the time she began Appellant's transcript to the time she sent to TC, the court reporter was also in another court-martial, traveling, and working edits on other cases. (Id.) On 23 October 2023, the court reporter incorporated TC and defense counsel edits on Appellant's case. (Id.) At the end of October and beginning of November, she was transcribing another court-martial and in court for a court-martial. (Id.) On 3 November 2023, the court reporter received documents on Appellant's case from the previous court reporter. (Id.) On 4 November 2023, the court reporter had a travel day and, on 6 November 2023, the court

reporter certified Appellant's record of trial and sent the court report documents to the base legal office. (Id.)

On 15 November 2023, Appellant receipted for his copy of the ROT. (Receipt for Copy of Record of Trial (Rehearing), ROT, Vol. 5.)

In the United States' motion to attach filed contemporaneous with this Answer to Assignments of Error, we attached a declaration from the non-commissioned officer in charge of the Creech Air Force Base legal office. In it, he states, among other facts, the following: On 16 November 2023, the ROT was sent to, and received by, Appellant. On 20 November 2023, Appellant signed receipt for the ROT. On 5 December 2023, AF/JAJM received the ROT.

On 14 December 2023, this Court docketed Appellant's case.

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 Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision more than 18 months after the case is docketed with the court. 63 M.J. 129, 142-143 (C.A.A.F. 2006). 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 the 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, 57 M.J. 219 (C.A.A.F. 2002), the Court of Appeals for the Armed Forces 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." Id. at 224. 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

Applying Livak, there is a facially unreasonable delay. From the conclusion of trial to the docketing of Appellant's case with this Court, 155 days passed, which is more than the 150-day threshold required to show a facially unreasonable delay. Since there is a facially unreasonable delay, this Court must assess whether there was a due process violation by considering the four Barker factors. Analyzing each of the Barker factors, Appellant is not entitled to relief for post-

trial delay because there are reasonable explanations for the delay, Appellant never asserted his right to speedy post-trial processing, and Appellant suffered no prejudice.

A. ***Length of the Delay***

This factor weighs only slightly in favor of Appellant. The length of time is not "egregious;" it is only five days more than the 150-day benchmark set out in Livak. In United States v. Lundby, No. ACM S32500, 2019 CCA LEXIS 181 (A.F. Ct. Crim. App. Apr. 23, 2019) (unpub. op.), a four day-delay was not considered egregious when the government "acted with reasonable diligence in the post-trial processing of Appellant's case." Id. at *13 (action took place well within the 120-day window, and "final modifications to the record took place over the course of an extended holiday period, and the record of trial spent 11 days in transit before being docketed with the court.") But even in cases where the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case, courts have not awarded sentence relief. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.") Even though the delay is presumptively unreasonable, it does not end the inquiry. The delay alone is not sufficient to justify relief—it merely triggers a due process analysis.

B. Reasons for the Delay

Even though the court reporter did not begin transcription of Appellant's case until 25 September 2023, there is no evidence of a "deliberate attempt to delay the trial in order to hamper the defense." Barker, 407 U.S. at 531. On the contrary, the court reporter was constantly working on transcribing other courts-martial, in other courts-martial, on leave, traveling, or in a course (and still working on court reporter duties). (*Court Reporter Chronology*, ROT Vol. 5; TSgt Zens

Declaration.) "A more neutral reason such as negligence … should be weighed less heavily." Barker, 407 U.S. at 531. The chronology from the court reporter and TSgt Zen's declaration shows that though there were small delays throughout the process, all parties attempted to move the case swiftly through post-trial processing. Any delays should be attributed to ordinary and reasonable timing based on the base legal office's workload rather than deliberate delay.

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

This factor favors the Government. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (quoting Barker, 407 U.S. at 528). In this case, Appellant did not assert his right to speedy post-trial processing to the convening authority and only asserted the right in his assignments of error (*Submission of Matters*, 22 July 2023, ROT, Vol. 6 ; App. Br. at 23.) Therefore, Appellant is not entitled to strong evidentiary weight for this factor, and it weighs in the government's favor.

D. 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. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.

Appellant alleges prejudice because he had to postpone work on his appellate case until the delayed docketing. (App. Br. at 23; Declaration of Capt Colin R. Covitz ("Declaration"), 9 Jul. 2024.) Appellant offers no other information with respect to the prejudice. In United States v. Dunbar, 31 M.J. 70 (C.M.A. 1990), a "general assertion" is insufficient to establish prejudice. Id. at 73 ("appellant made the general assertion that he has been denied two college scholarships because he had not received his DD Form 214, although he failed to support this claim in his affidavit by identifying the institutions or organizations sponsoring the scholarships.") If a generalized assertion is insufficient, then Appellant's merely stating there was prejudice because work on his appeal was delayed, is also insufficient. Here Appellant stated the law and then provided no indication of oppressive incarceration pending appeal, undue anxiety and concern, impairment of a retrial, or any other prejudice. Moreover, the delay is not "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." Toohey, 63 M.J. at 362.

Appellant also argues for post-trial relief when he cited Tardif in his brief. (App. Br. at 23-24.) 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.

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). The delay in this case does not meet any of the non-exhaustive Gay factors. Providing sentence relief without a showing of actual prejudice in this case would not be meaningful. It would amount to an appellate windfall which is not consistent with justice or good order and discipline, given the seriousness of the charge of which Appellant was convicted and the absence of governmental bad faith.

Conclusion

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." Id. at 225. In this case, Appellant did not experience any prejudice from the five-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 three-day delay is not an egregious and prejudicial delay requiring post-trial sentencing relief from this Court. This Court should deny this Assignment of Error.

IV.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF THIS COURT DID POSSESS JURISDICTION TO REVIEW THIS ISSUE, AIR FORCE INSTRUCTION REQUIRED THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT TO ANNOTATE APPELLANT'S CRIMINAL INDEXING. FINALLY, 18 U.S.C. § 922 IS CONSTITUIONAL AS APPLIED TO APPELLANT.

Additional Facts

The Staff Judge Advocate's first indorsement to the Statement of Trial Results (STR) and EOJ in Appellant's case contains the following statements: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes. Domestic Violence Conviction Under 18 U.S.C. § 922(g)(9): Yes." (*STR* and *EOJ*, ROT, Vol. 1.)

Standard of Review

The scope and meaning of Article 66, UCMJ, is a matter of statutory interpretation, which is reviewed de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law and Analysis

The Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he has been, *inter alia*, "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him. (App. Br. at 25-31.) Appellant asserts that any prohibitions on the possession of firearms imposed runs afoul of the Second Amendment, U.S. CONST. AMEND. II, the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). Appellant's

constitutional argument is without merit and is a collateral matter beyond this Honorable Court's authority to review.

A. This Court lacks jurisdiction to determine whether Appellant should be criminally indexed in accordance with 18 U.S.C. § 922.

This Court recently held in its published opinion in United States v. Vanzant, No. ACM 22004, 2024 CCA LEXIS 215, ___M.J. ___(A.F. Ct. Crim. App. 28 May 2024), that 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are beyond the scope of this Court's jurisdiction under Article 66, UCMJ. Id. at *24.

B. The Statement of Trial Results and Entry of Judgment were prepared correctly in accordance with the applicable Air Force Instruction.

Even if this Court has jurisdiction to review this issue, Appellant was found guilty of four specifications of Domestic Violence, in violation of Article 128b, UCMJ, which are crimes punishable by imprisonment for a term exceeding one year, that is, by 3 years of confinement. (MCM, pt. IV, para. 78a.d(1) (2023 ed.); R. at 19-20.) And the firearms possession prohibition from 18 U.S.C. § 922(g)(9) applicable to those convicted of misdemeanor crimes of violence applies, under Department of Defense policy to those convicted in a court-martial of "an offense that has as its factual basis, the use . . . of physical force . . . committed by a current or former spouse." DoD Instruction 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Peronnel*, E2.8, ¶ 6.1.4.3 (21 August 2007, incorporating Change 1, 20 September 2011). Thus, the Staff Judge Advocate followed the appropriate Air Force regulations in signing the first indorsement to the STR and EOJ. DAFI 51-201, dated 14 April 2022, paras. 29.30, 29.32.

C. The Firearm Prohibition in the Gun Control Act of 1968 is Constitutional as Applied to Appellant[and his Conviction for a Crime of Violence].

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST., amend. II. But as the Supreme Court has repeatedly emphasized, "the right secured by the Second Amendment is not unlimited." District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 20 (2022); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion). "[T]he right was *never* thought to sweep indiscriminately." United States v. Rahimi, 602 U.S. _, 144 S. Ct. 1889, 1897, Docket No. 22-915, 2024 U.S. LEXIS 2714 (21 June 2024) (slip op.). The history of firearms regulation reflects "a concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons," Barrett v. United States, 423 U.S. 212, 220 (1976), and "an intent to impose a firearms disability on *any* felon based on the fact of conviction." Lewis v. United States, 445 U.S. 55, 62 (1980) (emphasis added). Firearms prohibitions for felons are "presumptively lawful." Rahimi, 144 S. Ct. at 1902 (citing Heller, 554 U.S. at 626). Because Appellant has been convicted by a general court-martial of a serious crime, application of 18 U.S.C. 922(g) to him is constitutional.

Appellant's argument presumes, incorrectly, that his crime was not a violent offense or "crime of violence." (App. Br. at 27.) But federal law defines the term "crime of violence" as "an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §§ 924(c)(3)(A), 3156(a)(4)(A). The Manual for Courts-Martial (MCM) also considers violations of Article 128 to be "violent offenses." MCM, Part VI, para. 78a.c.(1).

Because Appellant's constitutional argument is without merit and is a collateral matter beyond this Honorable Court's authority to review, the Court should deny the assignment of error.

V.

THERE WAS NO UNLAWFUL COMMAND INFLUENCE IN THE ORIGINAL PREFERRAL OF CHARGES.[5]

Additional Facts

Appellant presents the following two questions and two answers in his "Additional Facts" section of his brief from the cross-examination of Lt Col MC during Appellant's board of inquiry (BOI):

> Q. Did you have other options that you could have chose to -- to take? For instance, could have you gone with an Article 15 or an LOR?
>
> A. I'd actually have to answer yes, because I thought like charges like domestic violence and that, and that was above my commander level and that the wing commander is not --
>
> Q. So, sir, are you saying that you were receiving pressure from higher commanders to prefer -- to prefer charges?
>
> A. No.

(App. Br., Appx. at 1 (quoting BOI transcript at 420-21).) Appellant then asserts the Transcript from the BOI says, "I'd actually have to answer yes," but claims the audio seems to say something different, without representing what he heard in the audio recording.

From a review of the audio, Lt Col MC appears to have said, "I'd actually have to answer yes, because I thought like charges like domestic violence and that, that was like above *squadron* commander level and at the wing commander level; *it's not*." [6] (BOI Audio at 1:55:41, emphasis added). The remainder of the exchange between Lt Col MC and Appellant's defense counsel at

[5] Appellant raised this Issue V pursuant to Grostefon.

[6] The transcript includes the word "my" instead of "squadron" and the words "that the wing commander is not --" instead of "at the wing commander level; it's not."

the BOI proves that Lt Col MC made his own independent decision to charge Appellant, without any unlawful command influence:

> Q: Okay. So ultimately you elected to prefer charges, correct?
>
> A: Correct; based on the results of the investigation from OSI.
>
> Q: Understood, sir. Generally speaking, as a commander you have options as to what course of options you can take, correct?
>
> A: Correct.
>
> Q: And those options range from, you know, left bound, right bound, depending on the specific situation?
>
> A: Yes.
>
> Q: Ultimately your decision to prefer charges is what led to this being a conviction? …
>
> A: Yes.

(Id.)

Standard of Review

An appellate court must review *de novo* the legal question whether there is unlawful command influence. United States v. Ayers, 54 M.J. 85, 95 (C.A.A.F. 2000).

Law

Article 37(a), UCMJ, 10 U.S.C. § 837(a) prohibits unlawful influence by all persons subject to the UCMJ. To this end, a recommendation for trial by court-martial must be reached independent of unlawful influence by a superior commander. Article 37(a)(5)(B); United States v. Davis, 37 M.J. 152, 155-56, (C.M.A. 1993). When "coercion influence[s] the preferral of charges," the United States Court of Appeals for the Armed Forces (CAAF) has regarded "such charges as 'unsigned and unsworn.'" United States v. Weasler, 43 M.J. 15, 18, (C.A.A.F. 1995) (quoting United States v. Hamilton, 41 M.J. 32, 36 (CMA 1994)). "No finding or sentence of a court-martial may be held incorrect on the ground of [UCI] unless the violation material prejudices the substantial rights of the accused." Article 37(c).

"The terms 'unlawful command influence' has been used broadly … to cover a multitude of situations in which superiors have unlawfully controlled the actions of subordinates in the exercise of their duties under the UCMJ." Hamilton, 41 M.J. at 36 (citing United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956)). Historically, there have been two types of unlawful command influence: actual unlawful command influence and the appearance of unlawful command influence. United States v. Boyce, 76 M.J. 242, 247 (C.A.A.F. 2017). Actual unlawful command influence "is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case. Id. (citations omitted). In order to demonstrate actual unlawful command influence, the appellant must show: "(1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness." United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013) (citations omitted). "[T]he initial burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation. Id.

> Once an issue of unlawful command influence is raised by some evidence, the burden shifts to the government to rebut an allegation of unlawful command influence by persuading the Court beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings or sentence.

Id. (citing United States v. Biagese, 50 M.J. 143, 151 (C.A.A.F. 1999)).

The other type of UCI, that is, the appearance of UCI, appears to have been eliminated by Congress's passage in 2020 of the amendment of Article 37(c). *See* National Defense Act for Fiscal Year 2020, Pub. L. No. 116-92, §532, 133 Stat. 1359-61 (2019); United States v. Vargas, Misc. Dkt. No. 2024-09, 2024 CCA LEXIS 337, *10-11 (A.F. Ct. Crim. App. 15 Aug. 2024) (unpub. op.) (concluding Article 37(c) by its "plain terms" limits relief to situations where violations resulted in material prejudice to the substantial rights of the accused); United States v.

Davis, Army Misc. No. 20240078, 2024 CCA LEXIS 259, *25-26 (A. Ct. Crim. App. 24 Jun. 2024) (unpub. op.) (finding that premising relief on demonstration of material prejudice to substantial right eliminated apparent UCI as a potential course of relief); *compare* United States v. Horne, 82 M.J. 283, 284 n.1 (C.A.A.F. 2022) (declining to address the amended version of Article 37(c)); United States v. Lopez, C.G. Docket No. 1487, 2024 CCA LEXIS 278, *11 (C.G. Ct. Crim. App. 11 Jul. 2024) (unpub. op.) (deciding not to resolve whether Article 37(c) eliminates apparent unlawful influence).

Analysis

As a threshold matter, Appellant submitted to the Court a motion to attach certain materials (a transcript and audio from a Board of Inquiry) that addressed a complaint of unlawful command influence (UCI), not his Moreno claim. (Appellant's Motion to Attach, dated 18 July 2024.) Those materials should not be considered by this Court. The Court of Appeals for the Armed Forces held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). Because the issue of UCI was not raised by materials in the existing record, the Court should not permit Appellant to add extraneous materials to create a new issue.

Even if this Court chooses to consider these extra-material records under Jessie, Appellant is not entitled to relief. Appellant is alleging apparent unlawful command influence based on the preferring commander, Lt Col MC, answering questions about whether he had other options for handling Appellant's case, such as an Article 15 or letter of reprimand. (App. Br., Appx. at 1.) When asked if he was receiving pressure from a higher commander to prefer charges, Lt Col MC answered concisely – "No." Nevertheless, Appellant is arguing there was apparent unlawful command influence because Lt Col MC made mention of his thought that charges like domestic

violence were above his commander level. (App. Br., Appx. at 1-3.) Appellant believes the first answer, followed by the second answer as to whether Lt Col MC received pressure from a higher commander to prefer charges is sufficient to satisfy a prima facie case of apparent and actual unlawful command influence. (App. Br., Appx. at 3.) Clearly the argument of *actual* command influence fails. The record is devoid of any evidence to support actual command influence. Even the argument of apparent unlawful command influence is weak. Lt Col MC answered, "No," when Appellant's defense counsel at the BOI asked if there could have been unlawful command influence.

The proffered facts – that Lt Col MC answered "no" to the question of whether he received pressure to prefer charges after stating that he thought domestic violence was above his command level – does not support the existence of unlawful command influence. On the contrary – the facts prove beyond a reasonable doubt that Lt Col MC was not unlawful influenced by his command. If this Court finds that Appellant has raised the specter of unlawful command influence by virtue of the first question (Lt Col MC's thought that a commander above his level had to deal with charges like domestic violence) sufficient for the burden to shift to the government to disprove it –Lt Col MC's second answer (that he did not receive pressure from a higher commander), was sufficient to satisfy the burden beyond a reasonable doubt that there was no unlawful command influence. Further, Lt Col MC clarified in his response that he thought domestic violence charges had to go to a higher commander but stated that "it's not" the case. Because Appellant has not made any showing of prejudice, he cannot be granted relief by this Court on an apparent unlawful influence claim. Vargas, 2024 CCA LEXIS at *10-11.

Appellant's apparent unlawful command influence claim is rebutted by Lt Col MC's emphatic denial that he was influenced by any higher commander. Therefore, this assignment of error should be denied.

VI.

APPELLANT'S CONVICTIONS FOR DOMESTIC VIOLENCE ARE LEGALLY SUFFICIENT.[7]

CONCLUSION

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

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[7] We have addressed this Issue VI, which Appellant raised pursuant to Grostefon, under Issue I, above.

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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 Appellate Defense Division on 19 August 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO ATTACH MATERIALS
v.	)	No. ACM 40193 (reh)
Capt (O-3) **COLIN R. COVITZ**, USAF, *Appellant.*	)	Before Panel No. 1 19 August 2024

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

Pursuant to Rule 23(b) of this Court's Rules of Practice and Procedure, the United States hereby submits this Motion to Attach Materials to address Appellant's claims in Issue II and III of his Assignments of Error (AOE). The materials are:

1. Audio recording of Appellant's 26 June 2023 arraignment
2. The declaration of the Non-Commissioned Officer in Charge (NCOIC) of Military Justice, Creech Air Force Base, Nevada, dated 8 August 2024

In Appellant's Issue II of the AOE, he claims the absence of the audio recording of his 26 June 2023 arraignment, despite the verbatim transcription of the hearing, requires relief or remand. Thus, the audio recording will allow this Court to determine whether Appellant has suffered any prejudice from the missing audio. Contemporaneously with the electronic filing of this Motion, a representative of the United States will hand-deliver to the Clerk of the Court a disk containing the audio recording of Appellant's 26 June 2023 arraignment. The undersigned provided the audio recording to Appellant's counsel on 9 August 2024. The declaration of the Creech AFB NCOIC of Military Justice authenticates the audio recording.

In Appellant's Issue III, he claims he is entitled to relief for an alleged violation of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006). The declaration of the Creech AFB NCOIC of Military Justice adds additional detail about the post-trial processing of Appellant's case. The

Court of Appeals for the Armed Forces held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that, "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). The issue of post-trial delay is raised by materials currently in the record but is not "fully resolvable by those materials." Jessie, 79 M.J. at 445. The declaration of the Creech AFB NCOIC of Military Justice addresses the post-trial processing of Appellant's case. Thus, it is relevant and necessary to resolve and disprove Appellant's claim that the United States deprived him of his due process right to speedy appellate review.

Attaching the proposed materials is necessary to explain fully the legal office's speedy post-trial processing and, thus, help resolve Issue II and Issue III in Appellant's Assignments of Error.

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

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CERTIFICATE OF FILING AND SERVICE

I ce1tify that a copy of the foregoing was delivered to the Comt, the Air Force Appellate Defense Division, and civilian defense counsel on 19 August 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Panel No. 1
Captain (O-3) **COLIN R. COVITZ,** United States Air Force, *Appellant.*	)	No. ACM 40193 (reh)
	)	30 August 2024

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

Appellant, Captain (Capt) Colin R. Covitz, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer, dated 19 August 2024 (Ans.). In addition to the arguments in his opening brief, filed on 18 July 2024 (App. Br.), Capt Covitz submits the following arguments.

I.

CAPTAIN COVITZ'S DOMESTIC VIOLENCE CONVICTIONS ARE FACTUALLY INSUFFICIENT.

1. This Court does not yield to the factfinder's determination.

"In conducting [its] unique appellate role, [this Court takes] a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (cleaned up) (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)). This well-established principle provides this Court with the latitude, and the duty, to evaluate the strength

of the evidence presented. Yet the Government repeatedly asks this Court to defer to the finder of fact. This Court should not. Courts of criminal appeals deal only in convicted offenses. *See generally* Article 66, UCMJ, 10 U.S.C. § 866. If every evidentiary weakness could be swept away by saying a factfinder considered it, this Court's statutory mandate would prove hollow.

Time and again the Government repeats this mantra that a finder of fact considered certain evidence. (Ans. at 9 ("The military judge should be presumed to have given the audio the appropriate weight he felt it deserved in light of the live testimony from the victim and other corroborating evidence presented by the Government."), 9–10 ("The fact finder was in the best position to weight and evaluate the credibility of witnesses and testimony . . . . While Appellant can point to a few discrepant statements from CC's testimony, CC's testimony was clearly found to be credible by the fact finder in this case. The military judge observed CC's demeanor as she testified, and heard, in detail, about what transpired between Appellant and CC on 10 February 2020." (citations omitted)), 10 ("[T]here was ample evidence for the military judge to have found CC credible."), 12 ("CC was not able to explain the timing at trial; but the military judge also heard the recording which captured CC telling Appellant, 'You just assaulted me' to which Appellant responded, 'You're lucky I didn't snap your fucking neck.'"), 15 ("The trier of fact was free to reject Appellant's assertion that he was defending himself, and was free to believe CC's testimony. Ultimately, they believed CC.").) This Court should take a "fresh, impartial look" and not simply defer to what happened at trial. Things go wrong in courts-martial, which

is why we have appeals. For instance, Capt Covitz's case is before this Court for the second time. *United States v. Covitz*, No. ACM 40193, 2022 CCA LEXIS 563, at *40 (A.F. Ct. Crim. App. 29 Aug. 2024) (setting aside the findings and sentence because the military judge abused his discretion in denying challenges to two members).

Additionally, the Government mixes standards when it addresses factual and legal sufficiency together. With regard to CC's lack of memory and downplaying her role, it argues, "Considering the evidence in the light most favorable to the prosecution and that the military judge personally observed the witnesses, there was factually and legally sufficient evidence to support Appellant's convictions." (Ans. at 10.) This is incorrect: evidence is not considered in the light most favorable to the prosecution in factual sufficiency review. *See Wheeler*, 76 M.J. at 568.

2. The audio and CC's testimony cannot meet the high burden of proof beyond a reasonable doubt of the offense charged.

In the opening brief, Capt Covitz pointed out that the case rested chiefly on an audio recording—which sounds terrible but proves little—and CC's dubious testimony. (App. Br. at 11–14.) The Government largely agrees that this is the central evidence but urges this Court to the opposite conclusion that the conviction is factually sufficient. (Ans. at 9.) Yet the combination of CC's testimony and the audio recording cannot suffice to prove the offenses beyond a reasonable doubt.

One problematic area of CC's testimony was her lack of memory and downplaying of her own testimony. (*See* App. Br. at 12–13.) This matters because the specifics of what happened—where and in what manner the touching occurred—are crucial to each specification. If this Court finds her testimony hard to believe for

these reasons, it fatally undercuts the Government's case. To this the Government has little to say other than that "there was ample evidence for the military judge to have found CC credible." (Ans. at 10.) But, again, this Court's job is to make its own judgment. And even accounting for the fact this Court did not see the witness, the substance of the testimony itself undercuts her credibility.

Another questionable aspect of her testimony is the behavior during the recording, specifically the inexplicable claim in the audio that Capt Covitz strangled her three minutes into the recording, even though this second "strangulation" cannot fit into any version of her testimony. She admitted as much on the stand. (RR. at 202.) The Government's response: "[T]he military judge also heard the recording which captured CC telling Appellant, 'You just assaulted me' to which Appellant responded, 'You're lucky I didn't snap your fucking neck.'" (Ans. at 12 (citing RR. at 91).) The impulse is to distract from the problems of CC's testimony by focusing on the bad moments in the audio; that is exactly the issue that Capt Covitz raised in the opening brief. (App. Br. at 10.) This Court should focus on the questionable testimony and not merely the discomforting aspects of the audio.

The Government also credits CC for making admissions during her testimony. (Ans. at 11–12.) In part, it does so by citing admissions that CC made in cross-examination. (Ans. at 11–12 (citing RR. at 186–89).) But these limited admissions only came after prying the concessions from CC and confronting her with her prior statements. (*See* App. Br. at 12–13.)

Finally, the Government downplays CC's motive to embellish on the recording, stating that she would have no such motive "because she was not concerned about being evicted." (Ans. at 13.) We cannot know whether this was actually her concern at that point. What we do know is that CC *did* embellish on the recording. There, she accused Capt Covitz of choking her when, according to her trial testimony, he had not choked her, and she accused him of pulling her hair when, according to her trial testimony, he never did. (RR. at 202.)

3. The discrepancy in the evidence on how Capt Covitz touched CC's neck undermines the factual sufficiency of the charge.

In the facts section, the Government notes the following with regard to Capt Covitz's family court testimony: "The most significant difference in Appellant's recounting of what happened and CC's was that CC said it was Appellant's hand that was on her neck and not Appellant's knee." (Ans. at 4.) But in argument, it does not even acknowledge this discrepancy. Perhaps the Government on appeal, like the Government at trial, is unsure how to handle this inconvenient testimony from Capt Covitz. At trial, the Government tried to use Capt Covitz's family court testimony for its intent, but not for the fact that he admitted placing his knee on her neck. Seven witnesses testified to his character for truthfulness. (RR. at 289, 291, 300–01, 313, 323, 331, 340, 349.) He made these admissions while completely unaware there was a recording. There is not a good reason to question his credibility on this point—he is admitting to the actus reus of strangulation, just performed in a different way. The inconsistency between her account and his account should trouble

this Court, even if it does not trouble the Government. This is yet another reason to find the evidence factually insufficient.

4. The evidence supports Capt Covitz's self-defense claim.

Capt Covitz argued that he had an objectively reasonable apprehension of imminent harm when he put his knee on CC's stomach. (App. Br. at 15–16.) The Government reads this to mean that "Appellant believes that strangulation was a reasonable response" to the apprehension of harm from CC throwing a boot, pushing him, hitting him, and scratching him. (Ans. at 14.) This requires clarification. With regard to Specification 4 of the Charge, placing his knee on her stomach, this indeed was a reasonable response to imminent harm, especially after CC threw objects at his head. (App. Br. at 15–16 (citing RR. at 159).) But for Specification 1—the strangulation—the Government misses a key aspect of the argument. Because the Government chose to charge strangulation by placing a hand on CC's neck, self-defense is not the issue. (App. Br. at 16 ("The question of whether the knee to the neck would have passed muster in the self-defense analysis is irrelevant because that was not the theory the Government chose to pursue.").) Capt Covitz's position remains that his hand never touched her neck; indeed, he admitted to placing his knee on CC's neck to restrain her. If charged with *that* offense, Capt Covitz would assert self-defense. But here self-defense is not even necessary because the Government charged a different offense—placing his hands on her neck.

To summarize, this Court should analyze self-defense for Specification 4 of the Charge. Presumably, the military judge found the apprehension of harm reasonable for Specifications 2 and 3 of the Charge when he acquitted Capt Covitz. Indeed, the

Government curiously relies on self-defense facts that related to acquitted offenses when making its argument on Specifications 1 and 4. (Ans. at 14.) This Court should conclude that, given the bodily harm that CC already caused, Capt Covitz met the standard for self-defense for Specification 4 of the Charge.

5. Conclusion

This Court should perform a de novo review of the evidence, *Washington*, 57 M.J. at 399, and conclude the convictions are not proven beyond a reasonable doubt.

WHEREFORE, Capt Covitz respectfully requests this Honorable Court set aside the finding and the sentence.

II.

THE RECORD OF TRIAL'S OMISSION OF THE ARRAIGNMENT AUDIO REQUIRES RELIEF OR, AT A MINIMUM, REMAND FOR CORRECTION.

R.C.M. 1112(b) requires the inclusion of "[a] substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting." The Government instead points this Court to the definition in Article 1, UCMJ, 10 U.S.C. § 801 (2018), which defines "record" to include either a transcript or the audio. (Ans. at 18.) Thus, it argues, there is no omission because the record of trial contains a transcript. This Court, in an unpublished opinion, used the same logic. *United States v. Reedy*, No. ACM 40358, 2024 CCA LEXIS 40, at *17–18 (A.F. Ct. Crim. App. 2 Feb. 2024). *Reedy* was incorrectly decided on this point.

It is a basic principle of statutory construction that specific terms prevail over more general terms. *FDIC v. Bates*, 42 F.3d 369, 372 (6th Cir. 1994) (citing *Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204 (1932)). While, of course, the UCMJ is a creature

of statute and the Rules for Courts-Martial are not, the same principle of specific trumping general applies. The President can, and did, use more specific language in R.C.M. 1112. *United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997) ("The military has a hierarchical scheme as to rights, duties, and obligations. The highest source of these is the Constitution, followed by the Uniform Code of Military Justice, the Manual for Courts-Martial, departmental regulations, service regulations, and the common law While a lower source on the hierarchy may grant additional or greater rights than a higher source, those additional rights may not conflict with a higher source.") (citations omitted). The mandatory contents, in R.C.M. 1112, include "a substantially verbatim recording." R.C.M. 1112(b)(1). The attachments to the record of trial include "[a]ny transcription of the court-martial proceedings created pursuant to R.C.M. 1114." R.C.M. 1112(f)(8). Under the logic of *Reedy*, "record" includes both, and thus R.C.M. 1112(b) and (f) would be interchangeable. No court has embraced this holding. *See United States v. Kershaw*, No. ACM 40455, 2024 CCA LEXIS 354, at *5 (A.F. Ct. Crim. App. 26 Aug. 2024) (remanding because the record of trial lacked certain audio recordings).

The President, quite clearly, required a substantially verbatim recording of proceedings, which is different than a transcript. This Court should provide relief for the failure to provide a complete record of trial or, at a minimum, remand for completion of the record.

WHEREFORE, Capt Covitz respectfully requests this Honorable Court provide sentencing relief or remand to correct the record. Capt Covitz also renews his demand for speedy appellate review.

III.

CAPTAIN COVITZ IS ENTITLED TO SENTENCE RELIEF BECAUSE OF THE 155-DAY DELAY BETWEEN ANNOUNCEMENT OF THE SENTENCE AND DOCKETING WITH THIS COURT.

As Capt Covitz explained in his declaration, his legal process has stretched on for four years and was marked by innumerable errors. This latest iteration is but the culmination of that error-filled process. And yet again, the result is incomplete. *See* Issue II, *supra* (explaining that the record is still not complete). Here, this Court may "tailor an appropriate remedy, if any is warranted, to the circumstances of the case." *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

Tardif relief is the primary mechanism by which Capt Covitz has requested relief. Applying the non-exhaustive factors from *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), relief is warranted. The Government claims that none are met. But as this Court has recently stated, the Air Force has a problem of "institutional neglect" in post-trial processing. *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. 7 Jun. 2024). This is but another example.

While the case for *Tardif* relief is stronger, the standard is also met under *United States v. Moreno*, 63 M.J. 129, 138 (C.A.A.F. 2006). The Government excuses the reasons for the delay because the court reporter was otherwise engaged. This

may be true, but this is part of the problem. The Air Force has overtaxed its court reporters, and the burden falls on appellants, who must wait while cases are consistently docketed too late.

The Government also faults Capt Covitz for failing to demand speedy appellate review in his post-trial submission of matters. (Ans. at 24.) It cites *Moreno* to place blame on Capt Covitz, but reading *Moreno* shows the Government stretches the case too far. In *Moreno*, where the appellant made *no* request for speedy appellate review, the Court of Appeals for the Armed Forces had this to say:

> We do not believe this factor weighs heavily against Moreno under the circumstances of this case. The obligation to ensure a timely review and action by the convening authority rests upon the Government and Moreno is not required to complain in order to receive timely convening authority action. Similarly, Moreno bears no responsibility for transmitting the record of trial to the Court of Criminal Appeals after action. Nor is it unreasonable to assume, as Moreno argues, that a convicted person wants anything other than a prompt resolution of his appeal.

63 M.J. at 138 (citations omitted). Capt Covitz, too, wanted nothing but speedy appellate review, as he suggests in his declaration when he made clear he wanted to begin appellate work as soon as possible. (Declaration of Colin Covitz, 9 Jul. 2024.) That his appellate case is delayed—whether because of the Government's post-trial processing or his counsel's workload inhibiting immediate work on his case—the fault does not lie with Capt Covitz. And yet, the Government concludes that Capt Covitz's request for speedy appellate review "is not entitled to strong evidentiary weight for this factor, and therefore this factor weights in the [G]overnment's favor." (Ans. at 24.) Even if the demand for speedy appellate review came during briefing and not

immediately upon the sentence, it does not follow that this factor favors the Government.

Whether through *Moreno* or *Tardif*, this Court should provide due relief to Capt Covitz.

WHEREFORE, Capt Covitz respectfully requests this Court dismiss the case with prejudice. In the alternative, he requests this Court grant sentence relief in the form of reduced confinement.

IV.

AS APPLIED TO CAPTAIN COVITZ, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."[1]

Two brief points on this issue. First, the Government highlights a DoD Instruction that applies 18 U.S.C. § 922 to acts of physical force against current or former spouses. (Ans. at 28 (citing DoD Instruction 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel, E2.8, ¶ 6.1.4.3 (21 August 2007, incorporating Change 1, 20 September 2011)).) Capt Covitz and CC were never married, so this provision is not applicable to him.

Second, and more broadly speaking, the Government looks to the wrong timeframe to provide a basis for imposing firearm restrictions. The modern definition of "crime of violence" is not the issue here. (Ans. at 29 (citing 18 U.S.C.

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022).

§§ 924(c)(3)(A), 3156(a)(4)(A)).) The operative test instead looks to the historical tradition of firearms regulation to determine whether restrictions are permissible. *See Bruen*, 597 U.S. at 24.

vVHEREFORE, Capt Covitz respectfully requests this Court hold Section 922(g)'s firearm prohibition unconstitutional as applied to him and order correction of the Statement of Trial Results and Entry of Judgment to indicate that nofirearm prohibition applies in his case.

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 30 August 2024.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40193 (reh)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Colin R. COVITZ	)	
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

During our Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's case, we identified that Appellate Exhibits IX–XII are filings related to Mil. R. Evid. 513 and were not ordered sealed by the military judge as required by Mil. R. Evid. 513(e)(6). *See also H.V.Z. v. United States*, _M.J._, No. 23-0250, 2024 CAAF LEXIS 410, at *22 (C.A.A.F. 2024) (holding that "even if the patient's medical records are not privileged under [Mil. R. Evid.] 513(a), the production or admission of those records is still 'subject to the procedural requirements of [Mil. R. Evid.] 513(e)'" (quoting *United States v. Mellette*, 82 M.J. 374, 381 (C.A.A.F. 2022)). The court concludes Appellate Exhibits IX–XII should have been ordered sealed as they contain sensitive material and are filings related to proceedings subject to the protections of Mil. R. Evid. 513(e)(6).

The court has determined that there is good cause for Appellate Exhibits IX–XII to be sealed. *See* Rule for Courts-Martial 1113(a), Discussion ("Upon request or otherwise for good cause, a military judge may seal matters at his or her discretion."). Therefore, we order Appellate Exhibits IX–XII be sealed. The Clerk of Court will ensure the filings to be sealed are properly sealed in the original record of trial retained by the court, and we order the Government to take the corrective action outlined in the decretal paragraph below.

Accordingly, it is by the court on this 9th day of September, 2024,

ORDERED:

The Government shall take all steps necessary to ensure **Appellate Exhibits IX–XII** in the possession of any government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be destroyed.

However, if appellate government counsel and appellate defense counsel possess the appellate exhibits to be sealed, counsel are authorized to retain copies of same in their possession until completion of this court's Article 66(d), UCMJ, 10 U.S.C. § 866(d), review of Appellant's case, to include the period for

reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After this period, appellate government counsel and appellate defense counsel shall destroy any retained copies of the exhibits to be sealed in their possession.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40193 (reh)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Colin R. COVITZ	)	
Captain (O-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 30 September 2022, this court set aside the findings of guilty and sentence as to Specifications 1–4 of the Charge and the Charge in Appellant's initial court martial and authorized a rehearing on findings and sentence. *United States v. Covitz*, No. ACM 40193, 2022 CCA LEXIS 563, at *40 (A.F. Ct. Crim. App. 30 Sep. 2022) (unpub. op.).

This court retains jurisdiction over the rehearing on findings and sentence. "Once a [C]ourt of [C]riminal [A]ppeals has jurisdiction of a case, 'no action by a lower court or convening authority will diminish it.'" *United States v. Johnson*, 45 M.J. 88, 90 (C.A.A.F. 1996) (internal quotation marks omitted) (quoting *United States v. Boudreaux*, 35 M.J. 291, 295 (C.M.A. 1992)) (additional citation omitted); *see also United States v. Davis*, 63 M.J. 171, 177 (C.A.A.F. 2006) ("[J]urisdiction . . . was fixed for purposes of appeal, new trial, . . . and new review and action by the convening authority. A rehearing relates back to the initial trial and to the appellate court's responsibility to ensure that the results of a trial are just.")

On 17 January 2023, Specifications 1–4 of the Charge and the Charge were re-referred to trial by general court-martial. On 12 July 2023, at Creech Air Force Base, Nevada, a military judge, sitting as a general court-martial, found Appellant guilty, contrary to his pleas, of Specifications 1 and 4 of the Charge for domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928b.[1] After the military judge entered his findings of guilty, but before the sentence was announced and pursuant to an unreasonable multiplication of charges motion by the Defense, the military judge merged Specifications 1 and 4 of the Charge for *both* findings and sentencing. As part

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

of this ruling, the military judge modified the language of Specification 1 to reflect the merger of Specifications 1 and 4 for findings and sentence.

> When specifications are merged for findings because of unreasonable multiplication, the result is supposed to be a *new* specification containing the allegations of the merged specifications. . . . Where specifications are merged for findings, there is no implication that an accused was not found guilty of any of the specifications that were merged, in contrast to the situation where a military judge grants dismissal of one or more specifications r*ather than* merger.

United States v. Fauntleroy, Docket No. 1375, 2014 CCA LEXIS 942, at *6 (C.G. Ct. Crim. App. 21 May 2014) (unpub. op.) (emphasis added). However, in this case the military judge did not enter findings on the record as to the modified Specification 1, nor did he completely account for the disposition of the original arraigned-upon Specifications 1 and 4. Instead, the military judge announced *dismissal* of Specification 4 by announcing, "Specification 4 of the charge is dismissed. The dismissal of specification 4 of the charge will ripen into dismissal with prejudice upon completion of appellate review."

At trial, the military judge sentenced Appellant to five months' confinement, forfeiture of $6,127.00 pay per month for five months, and a reprimand. On 22 July 2023, Appellant submitted a clemency request asking the convening authority to "reduce [Appellant's] adjudged forfeitures of $6,127.00 pay per month for 5 months . . . by 94 days" in accordance with Rule for Courts-Martial (R.C.M.) 305(k), considering Appellant's previously served and set aside confinement of eight months.[2] Additionally, Appellant requested that the convening authority suspend any remaining forfeitures after the requested reductions, if any.

On 28 August 2023, the convening authority took no action on the findings, but granted in part Appellant's request to reduce the adjudged forfeitures. In the Decision on Action (DoA) memorandum, the convening authority reduced the adjudged forfeiture to $925.00 pay per month for 5 months. The convening authority also disapproved Appellant's adjudged reprimand. However, the convening authority's DoA memorandum did not address Appellant's request to suspend the remaining forfeitures, if any.

[2] At his original trial of 18 June 2021, Appellant was sentenced to a dismissal, confinement for eight months, and forfeiture of all pay and allowances.

On 18 September 2023, the military judge signed a corrected entry of judgment (EoJ). While the military judge made correction to the amount of the forfeiture directed by the convening authority in his DoA memorandum, several other errors remain in the EoJ:

- The EoJ does not *account for* the modifications made by the convening authority on the adjudged forfeiture as required in R.C.M. 1111(b)(2). Put another way, the EoJ does not reflect that there was a reduction in the adjudged forfeitures as a result of action by the convening authority on the adjudged sentence.
- While the EoJ correctly reflects the convening authority's decision to disapprove the reprimand, the EoJ does not *account for* the convening authority's action on the adjudged sentence of a reprimand.
- The findings portion of the EoJ reflects a finding of guilty as to the modified Specification 1, but no such finding was entered into the record at trial.
- The EoJ reflects that Specification 4 was "withdrawn *without prejudice* . . . such prejudice to attach upon completion of appellate review." (Emphasis added). This also does not reflect the findings of the Court as entered into the record at trial.
- The EoJ does not reflect the military judge's findings as to the original arraigned-upon Specification 1 of the Charge, as it does not appear anywhere on the EoJ.

Further, the charge sheet re-referred on 17 January 2023 has not been updated to reflect the following changes: (1) the change in pay discussed at trial, (2) the military judge's ruling regarding the merging of Specifications 1 and 4, and (3) the rewording of Specification 1 discussed *infra*. Specifications 1 and 4 of the original charge sheet were not modified after date of referral.

On 18 July 2024, Appellant filed his assignments of error with this court, alleging, *inter alia*, "the record of trial's omission of the arraignment audio requires relief, or at a minimum, remand for correction." On 19 August 2024, Appellee filed its answer to Appellant's assignments of error, both contesting Appellant's request and separately filing a motion to attach two matters to the record of trial: (1) the audio recording of Appellant's 26 June 2023 arraignment, and (2) a declaration of the noncommissioned officer (NCOIC) of the Military Justice section at Creech Air Force Base, Nevada, dated 8 August 2024. On 30 August 2024, in his reply brief, Appellant opposed the Appellee's motion to attach. Appellant requested this court provide relief related to the failure to attach the arraignment audio, or at a minimum, remand the case for correction

to attach the arraignment audio. *See*, *e.g.*, *United States v. Kershaw*, No. ACM 40455, 2024 CCA LEXIS 354, at *5 (A.F. Ct. Crim. App. 26 Aug. 2024) (unpub. op.) (remanding because the record of trial lacked certain audio recordings).

As a result of the several identified issues discussed *infra*, we find it appropriate to order the Government to show cause why the court should not remand Appellant's case to the Chief Trial Judge, Air Force Trial Judiciary, prior to completing its review under Article 66, UCMJ, 10 U.S.C. § 866.

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

ORDERED:

Not later than 17 October 2024, counsel for the Government shall **SHOW GOOD CAUSE** as to why this court should not remand the record back to the trial judiciary and order a new hearing specifically to address the findings and sentence of the court, or take any other action required. If the Government cannot answer to the court by that date, the Government will inform the court in writing not later than **14 October 2024** of the status of its compliance with this order.

The court will rule on Appellee's Motion to Attach, dated 19 August 2024, during its Article 66, UCMJ, review, of Appellant's case.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' ANSWER TO SHOW CAUSE ORDER
v.	)	No. ACM 40193 (reh)
Capt (O-3) **COLIN R. COVITZ**, USAF, *Appellant.*	)	Before Panel No. 1 16 October 2024

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

The United States hereby submits this Response to the Court's Show Cause Order dated 17 September 2024. For the reasons discussed herein, we oppose a remand for a new hearing for the military judge to re-announce findings or for re-sentencing. We also oppose remand to make changes to the Charge Sheet. However, we do not oppose a remand for the Convening Authority to issue a new decision on action memorandum (CADAM) to address Appellant's request to suspend remaining forfeitures, so we also do not oppose remand for correction of the entry of judgment (EOJ) and inclusion in the record of the missing audio recording of Appellant's 26 June 2023 arraignment.

PROCEDURAL HISTORY

On 18 June 2021, a general court-martial composed of officers convicted Appellant, contrary with his pleas, of one charge with four specifications of domestic violence in violation of Article 128b, Uniform Code of Military Justice (UCMJ). (Original Record at 1115.)

On 30 September 2022, this Court set aside the findings and sentence and authorized a rehearing. United States v. Covitz, No. ACM 40193, 2022 CCA LEXIS 563 (A.F. Ct. Crim. App. 30 Sep. 2022) (unpub. op.).

Appellant was arraigned on 26 June 2023. At the rehearing, on 10-12 July 2023, a general court-martial composed of a military judge alone convicted Capt Covitz, contrary to his pleas, of two specifications of domestic violence in violation of Article 128b, UCMJ. (Rehearing Record at 22, 386.) The military judge sentenced Appellant to five months of imprisonment, forfeiture of $6,127 pay per month for five months, and a reprimand. (Rehearing Record at 462.)

On 28 August 2023, the convening authority took no action on the findings in the CADAM. He granted in part Appellant's request to reduce the adjudged forfeitures from $6,127 per month for five months to $925 per month for five months, but he failed to address Appellant's request to suspend the remaining forfeitures, if any. Finally, the convening authority disapproved Appellant's adjudged reprimand.

On 14 December 2023, the case was re-docketed with this Court.

On 18 July 2024, Appellant submitted his Assignments of Error (AOE).

On 19 August 2024, the government submitted a Motion to Attach materials, including the audio recording of Appellant's 26 June 2023 arraignment and a declaration, as well as our Answer to the AOE.

On 30 August 2024, Appellant submitted his Reply brief.

On 17 September 2024, this Court *sua sponte* directed the following: "Not later than 17 October 2024, counsel for the Government shall SHOW GOOD CAUSE as to why this court should not remand the record back to the trial judiciary and order a new hearing specifically to address the findings and sentence of the court, or take any other action required." (*Order*, dated 17 September 2024.) The Court's Order cited issues with how the military judge merged the two specifications, how the military judge entered findings and a dismissal on the record, the CADAM's failure to address Appellant's request to suspend remaining forfeitures, errors on the

EOJ, the absence of updates to the charge sheet re-referred on 17 January 2023, and the missing audio recording of Appellant's arraignment.

DISCUSSION

A. Remand for a New Hearing to address the Findings or Sentencing is Unnecessary and Would Not Promote Judicial Economy

1. Additional Facts

Trial defense submitted a "Motion to Dismiss Specifications for Unreasonable Multiplication of Charges" on 8 June 2023. (App. Ex. XV; R. at 27.) In it, they sought dismissal of Specifications 2 through 4 or, alternatively, merger for sentencing of those Specifications into Specification 1 as an unreasonable multiplication of charges (UMC). (Id.) At the conclusion of the trial, the military judge found Appellant guilty of Specifications 1 and 4 and then immediately addressed the defense motion to dismiss or for merger. (R. at 386.) The military judge deferred ruling on the motion for purposes of findings but granted the motion for sentencing purposes:

> With respect to the portion of the motion that the defense requests, essentially dismissal of, in this case. What would be Specification 4 of the Charge and essentially merged with Specification 1 of the Charge for findings. The court defers ruling on that portion of the motion at this time. With respect to the portion of the motion that deals with at the very least, merger of the offenses for sentencing purposes. The court grants the defense's motion in that respect. Essentially, for purposes of sentencing the parties can be assured that the court will treat the – essentially the range of punishments as one offense. And not split them out separately and somehow increase the accused punitive exposure.
>
> And then in the event the court grants the portion of the motion, with respect for merger for findings, that essentially will subsume be treating it as a single offense for sentencing. . . .

(R. at 386-87.)

During the sentencing phase of the court-martial, but before Appellant called four witnesses and provided Appellant's unsworn statement, the military judge explained the applicable

law regarding UMC and ruled on the defense motion, granting the merger of Specifications 1 and 4 for findings purposes:

> The Court concludes that while the holding in U.S. v. Morris applies to Article 128 offenses. Given the nature of the specifications charged in this case as being assault type offenses, in the context of domestic violence that same rationale applies. Having weighed the Quiroz factors, the court concludes the following. A, the accused timely objected at trial. B, Specifications 1 and 4 are not aimed at distinctly separate criminal acts but rather comprise a single assault as they are united in time, circumstance, and impulse. C, Specifications 1 and 4 exaggerate the accused criminality and unreasonably increases the accused punitive exposure. And D, the court also concludes that the drafting of charges in this case was due to exigencies of proof and not due to prosecutorial overreach or abuse.
>
> Having given all the factors appropriate weight, the court concludes the defense has satisfied its burden. To demonstrate, it is entitled to the following relief. Specification 4 is merged with specification 1 of the charge for both findings and sentencing purposes.
>
> Specification 1 of the charge now reads, "In that, [Appellant], United States Air Force, 556th Test and Evaluations Squadron, Creech Air Force Base, Nevada, did, at or near, Las Vegas, Nevada, On or about 10 February 2020, commit an assault upon [Victim C.C.], an intimate partner of the accused, by strangling her with his hand, and did, at or near Las Vegas, Nevada, on or about 10 February 2020, unlawfully pin [Victim C.C.], an intimate partner of the accused, to the floor, by putting his knee on her stomach."
>
> Specification 4 of the charge is dismissed. The dismissal of specification 4 of the charge will ripen into dismissal with prejudice upon completion of appellate review.

(R. at 403-04.)

Later, after the sentencing witnesses and arguments of the parties, the military judge sentenced Appellant. (R. at 462.)

The statement of trial results (STR) and EOJ both included for Specification 1 the language merged into it from Specification 4. (ROT, Vol. 1, *STR* and *EOJ*.)

2. Analysis

A remand for a new hearing for the military judge to re-announce findings or for re-sentencing is unnecessary. It was clear the military judge intended Appellant to be found guilty of the newly merged Specification 1 and that he did sentence Appellant for that newly merged Specification 1. There is nothing in the record to indicate to the contrary.

In the case cited in the Court's Order, United States v. Fauntleroy, No. 1375, 2014 CCA LEXIS 942 (C.G. Ct. Crim. App. 21 May 2014) (unpub. op.), the Coast Guard Court of Criminal Appeals (CCA) stated:

> When specifications are merged for findings because of unreasonable multiplication, the result is supposed to be a new specification containing the allegations of the merged specifications. Such details about precisely what an accused has been found guilty of should be clearly set forth in the record.

Id. The opinion continued, "Any post-trial recitation of specifications merged for findings would show a conviction of only a single merged specification." Id. at *6 n.3. In this case, Appellant's STR and EOJ clearly reflect the merger. For Specification 1, it lists under "Arraigned Offense(s)":

> Did, at or near Las Vegas, Nevada, on or about 10 February 2020, commit an assault upon C.C., an intimate partner of the accused, by strangling her with his hand (*amended after arraignment based on court ruling to add the words "and did, at or near Las Vegas, Nevada, on or about 10 February 2020, unlawfully pin C.C., an intimate partner of the accused, to the floor by putting his knee on her stomach."*)

(ROT, Vol. 1, *STR* and *EOJ (*emphasis added*).*) And the STR and EOJ for Specification 4, under "Finding," states, "Dismissal without prejudice *after merger of Specification 4 with Specification 1*. The dismissal will ripen to "with prejudice" upon completion of appellate review." (Id. (emphasis added).) Therefore, it is clear from the record what the military judge's intent was, that is, Appellant was convicted and sentenced for the merged Specification 1.

The Fauntleroy opinion acknowledged "a widespread misunderstanding of merger and its implementation." Id. at *6. This might be due, in part to the Discussion to R.C.M. 906(b)(12), regarding the timing of rulings on motions regarding unreasonable multiplication of charges, "A ruling on this motion ordinarily should be deferred until after findings are entered." Manual for Courts-Martial (MCM), 2019 ed. The military judge followed that procedure.

If there was any arguable error by the military judge on findings or sentence, this Court has the authority to correct it without remanding the case for a rehearing. That is, regarding findings, the Court can deem Specifications 1 and 4 merged. In United States v. Massey, No. ACM 40017, 2023 CCA LEXIS 46 (A.F. Ct. Crim. App. 30 Jan. 2023) (unpub. op.), *rev. denied*, 83 M.J. 317 (C.A.A.F. 2023), this Court consolidated three specifications of wrongful solicitation that arose from "a single message" into one specification pursuant to its authority under Article 66(d), UCMJ. Id. at *40. Notably, in Massey, this Court did not "dismiss" any of the specification that it merged. Id.

The military judge's unnecessary dismissal of Specification 4 after the merger into Specification 1 does not require a rehearing, because the Court can correct the findings in the STR and the EOJ to be consistent with the military judge's rulings and findings. In United States v. Goundry, No. ARMY 20220218, 2023 CCA LEXIS 204 (Army Ct. Crim. App. 6 Apr. 2023) (unpub. op.), the Army Court of Criminal Appeals found two specifications multiplicious, merged them for findings, and amended the first of the two specifications to reflect the facts in both the original specifications. Id. at *5 n.6. In United States v. Brinkman-Coronel, No. ARMY 20220225, 2024 CCA LEXIS 131 (Army Ct. Crim. App. 22 Mar. 2024) (unpub. op.), the Army Court of Criminal Appeals corrected the STR twice: the STR reflected a "not guilty" finding when that specification had been merged into another specification for sentencing, and it reflected for a

third specification, "Dismissed after merger with other findings," when the military judge in fact sentenced the appellant for that offense. Id. at *2 n.2. Because service appellate courts can direct merger of specifications for findings, amend specifications to reflect merger, and correct STRs and EOJs that incorrectly note dismissal of merged charges, this Court can do so in this case. That is, this Court can and should affirm the finding of guilt for merged Specification 1 and correct the STR and EOJ to reflect no finding for Specification 4, without remanding the case for a rehearing.

The record is clear that the military judge sentenced Appellant only for the newly merged Specification 1. But even if the record had not been clear, the Court would be able to affirm the sentence based on the military judge's stated intent to merge Specification 4 into Specification 1 before he sentenced Appellant. (R. at 402-04.) In United States v. Injerd, No. ACM 40111, 2022 CCA LEXIS 727 (A.F. Ct. Crim. App. 20 Dec. 2022) (unpub. op.), because the military judge did not announce a total period of confinement, there was ambiguity as to whether the military judge intended the sentences for two of ten specifications to (a) run concurrently with each other but consecutively to the other eight charges and specifications, or to (b) run concurrently with all the other eight charges and specifications. Id. at *30-32. However, the STR and EOJ provided a total period of confinement consistent with the former. As a result, this Court made logical conclusions of the military judge's intent in sentencing from the context of his announcement of the sentence and his signature on the STR. Id. at *33.

> In reaching this result, we hew closely to the principle that "[a] sentence need not be so clear as to eliminate every doubt, but sentences should be clear enough to allow an accused to ascertain the intent of the court or of the members." United States v. Stewart, 62 M.J. 291, 294 (C.A.A.F. 2006) (citation omitted). In that regard, the sentence "should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." Id. (internal quotation marks and citation omitted).

Id. at *33-34. As this Court did in Injerd, the Court should conclude that the military judge in Appellant's case merged Specification 4 into Specification 1 and sentenced Appellant only for the merged Specification 1. Thus, it is unnecessary for remand of this case for clarification of Appellant's findings and sentence.

Remanding for a re-hearing would not promote judicial economy and would delay consideration of Appellant's issues on appeal. Moreover, re-opening the findings raises the concern that it would trigger an unnecessary new sentencing proceeding, as well.

B. **The Court Should Not Remand to Modify the Charge Sheet**

The Court should not remand the case for the government to modify the Charge Sheet because of the military judge's merger of Specifications 1 and 4. Instead, this Court can modify the EOJ.[1] In United States v. Hennis, 40 M.J. 865 (A.F.C.M.R. 1994), the Air Force Court of Military Review found two specifications multiplicious and consolidated them into one merged single specification, without directing remand for correction of any documents Id. at 870-71. Even if this Court deems modification of the Charge Sheet necessary, it could do so on its own authority. *See* United States v. Harris, No. ARMY 20130310, 2015 CCA LEXIS 70, *2 fn*. (Army Ct. Crim.App. 25 Feb. 2015) (*per curiam*) (unpub. op.) (Court renumbered Specifications on charge sheet where government failed to do so as directed by military judge), *rev. denied*, 75 M.J. 13 (C.A.A.F. 2015).

[1] The error in pay on the Charge Sheet is a minor administrative error that was addressed on the record, and does not form a sufficient basis for remand. (R. at 389-90.)

C. Remand is Appropriate for Some, but Not All, Errors Put Forth in the Court's Order

1. No Remand is Necessary for the EOJ for citing dismissal "without prejudice" until completion of appellate review

At the conclusion of the military judge's ruling on the defense motion to dismiss or for merger, the stated, "Specification 4 of the charge is dismissed. The dismissal of specification 4 of the charge will ripen into dismissal with prejudice upon completion of appellate review." (R. at 404.) That is what is indicated in the EOJ.[2] While the military judge did not use the term "without prejudice" for the dismissal prior to completion of appellate review, that is, logically, exactly what was intended by the ruling it would not be "with prejudice" until completion of appellate review. Thus, remand is not needed to correct the EOJ on this point.

2. Remand is Appropriate to Direct the Convening Authority to Issue a new CADAM to address Appellant's Request to Suspend Forfeitures

As the Court's Order notes, the Convening Authority did not address Appellant's request to suspend any remaining forfeitures after his requested reduction. Thus, we do not oppose remand for the Convening Authority to issue a new decision on action memorandum (CADAM) that addresses Appellant's request to suspend remaining forfeitures.

3. Remand is Appropriate to Correct the EOJ to Provide an Explanation of Clemency Granted and Denied

The EOJ correctly note the ultimate changes in Appellant's sentence from clemency. That is, it indicates forfeitures of $925 for five months and it indicates no reprimand. However, as the Court's Order notes, the EOJ fails to explain that those components of Appellant's sentence resulted from the convening authority granting Appellant's clemency request. Additionally, the

[2] The Court's Order uses the word "withdrawn," but the military judge and the EOJ uses the word "dismissed."

EOJ fail to address Appellant's request to suspend any remaining forfeitures after reducing the forfeitures. Thus, it is appropriate to remand the record for correction of the EOJ.

4. Remand is Appropriate to Include the Audio Recording of Appellant's Arraignment

Although the government has submitted a motion to attach the missing audio recording of Appellant's 26 June 2023 arraignment, because remand is otherwise appropriate for correction of the EOJ, it is also appropriate to direct the government, on remand, to include in the record the audio recording of the arraignment and for the military judge to correct the record under R.C.M. 1112(d).

WHEREFORE, the United States opposes in part and does not oppose in part, as described above, this Court remanding the record to the Chief Trial Judge, Air Force Trial Judiciary, for correction.

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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 defense counsel on 16 September 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Captain (O-3) **COLIN R. COVITZ,** United States Air Force, *Appellant*.	)	**MOTION FOR LEAVE TO FILE AND REPLY TO APPELLEE'S ANSWER TO SHOW CAUSE ORDER** Before Panel No. 1 No. ACM 40193 (reh) 23 October 2024

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

Pursuant to Rules 23(d) and 23.3 of this Honorable Court's Rules of Practice and Procedure, Captain (Capt) Colin R. Covitz moves for leave to file a reply to the Appellee's Answer to this Court's Show Cause Order. Pursuant to Rule 23(d), Capt Covitz's motion for leave to file is combined with the underlying pleading. This Court should grant the motion for leave in order to have the positions of all parties before determining the proper action in this case.

On 17 September 2024, this Court ordered the Government to show cause why it should not remand the case to the trial judiciary and order a new hearing to address the findings and sentence of the court. The Government provided its answer on 16 October 2024 (Ans.). Capt Covitz files this reply.

Capt Covitz largely agrees with the Government on this Court's approach to remedying the numerous errors in the Entry of Judgement (EOJ) and completing the record, but disagrees in part with the mechanics of the correction.

Regarding the EOJ, the military judge's intent to effectuate merger for findings and sentence is clear on the record. The failure to execute this procedurally, in the EOJ, Statement of Trial Results (STR), and charge sheet, is remediable. Capt Covitz agrees that a new hearing (if this Court envisions an Article 39(a), UCMJ, session with the parties in attendance) is unnecessary. Since a remand is required for record completeness, a new EOJ and STR could be generated on remand. Capt Covitz prefers this option. However, this Court may correct errors in the STR and EOJ that relate to findings and sentence, which is true here. *See United States v. Williams*, __ M.J. __, 2024 CAAF LEXIS 501, at * 12–13 (C.A.A.F. 2024) (holding the court of criminal appeals acted ultra vires when making STR corrections that did not relate to findings or sentence). As for the charge sheet, since, again, remand is required for correcting the record, it would be a simple matter to update the charge sheet in line with the remedy of the other errors. Capt Covitz prefers this happen as part of remand. But as the Government points out, other courts of criminal appeals have taken comparable action. (Ans. at 8 (citing *United States v. Harris*, No. ARMY 20130310, 2015 CCA LEXIS 70, at *2 & n* (A. Ct. Crim. App. 25 Feb. 2015) (per curiam)).)

Finally, Capt Covitz agrees that remand is required to obtain the audio of the arraignment. Capt Covitz asks this Court to consider the additional delays necessitated by the Government's record inaccuracies when determining whether relief is warranted for Assignments of Error II and III.

WHEREFORE, Capt Covitz respectfully requests remand as described above to remedy the record errors and consideration of the additional delays when determining whether relief is warranted for Assignments of Error II and III.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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

[redacted]
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Capt (O-3) **COLIN R. COVITZ**, USAF, *Appellant.*	))))))))))	UNITED STATES' MOTION FOR LEAVE TO FILE AND MOTION TO AMEND ORDER No. ACM 40193 (reh) Before Panel No. 1 13 December 2024

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

Pursuant to Rules 23(d) and 23.3 of this Honorable Court's Rules of Practice and Procedure, the United States moves for leave to file a Motion to Amend the 6 December 2024 Order of this Court, so the Order remanding the record for correction also directs the inclusion of a new statement of trial results (STR), convening authority decision on action memorandum (CADAM), and entry of judgment (EOJ). Pursuant to Rule 23(d), the motion for leave to file is combined with the underlying pleading.

On 18 July 2024, Appellant filed his assignments of error (AOE) to the rehearing, alleging, among other things, "the record of trial's omission of the arraignment audio requires relief, or at a minimum, remand for correction."

On 19 August 2024, the United States filed its Answer to Appellant's AOE and, separately, a motion to attach the audio recording of Appellant's 26 June 2023 arraignment, along with a declaration regarding the audio recording's authenticity.

On 30 August 2024, Appellant opposed the United States' motion to attach, again requesting relief, including remand for correction.

On 17 September 2024, this Court issued an order for the United States to show cause why the record should not be returned for correction.

On 16 October 2024, the United States submitted an answer to the show cause order in which we did not oppose remand for correction. We agreed that remand was appropriate to include the missing audio recording, a new CADAM to provide an explanation of clemency granted and denied, and a new EOJ to address Appellant's request to suspend remaining forfeitures.

On 23 October 2024, Appellant filed a reply to the United States' answer to the show cause order, agreeing that a new EOJ and STR should be generated on remand and included in the record.

On 6 December 2024, this Court issued its Order remanding the record for correction. The Order directed the inclusion of the missing audio recording. However, it did not address the 17 September 2024 show cause order, the United States' 16 October 2024 answer, Appellant's 23 October 2024 reply, or whether the correction to the record should include a new STR, CADAM, and EOJ.

WHEREFORE, the United States moves for leave to file this motion and moves for the Court to amend its 6 December 2024 Order to include remand for correction of the record to include a new STR, CADAM, and EOJ.

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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 (Maj Matthew L. Blyth) on 13 December 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**RESPONSE TO GOVERNMENT MOTION TO AMEND ORDER**
v.	)	Before Panel No. 1
Captain (O-3) **COLIN R. COVITZ,** United States Air Force, *Appellant*.	)	No. ACM 40193 (reh) 17 December 2024

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

Pursuant to Rules 23.2 of this Honorable Court's Rules of Practice and Procedure, Captain (Capt) Colin R. Covitz files this response to the Government Motion for Leave to File a Motion to Amend Order, dated 13 December 2024.

Capt Covitz believes either this Court or a military judge on remand could make the necessary corrections to the Entry of Judgment (EOJ) and Statement of Trial Results (STR). Since the case is being remanded, it would be straightforward enough to fix it on remand. What Capt Covitz would like to reiterate is that any resolving issues with the EOJ and STR does not require an Article 39(a) hearing with the parties, and instead can be resolved via email similar to most remands for correction of the record.

WHEREFORE, Capt Covitz responds to the Government motion.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 17 December 2024.

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