UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Deshawn M. DAWSON	)	**DOCKETING**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

On 25 September 2023, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

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

Accordingly, it is by the court on this 4th day of October, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 1.

It is further ordered:

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

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), **DESHAWN M. DAWSON,** United States Air Force, *Appellant.*	))))))))))	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ** No. ACM SXXXXX 25 September 2023

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

On 1 April 2023, a panel of officer and enlisted members sitting as a special court-martial convened at Incirlik Air Base, Turkey, convicted Senior Airman (SrA) Deshawn M. Dawson, contrary to his plea, of one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2019). The military judge sentenced SrA Dawson to 45 days of hard labor, reduction to the grade of E-2, forfeiture of $300.00 pay for two months, and a reprimand. Entry of Judgment, dated 27 April 2023.

On 13 September 2023, SrA Dawson acknowledged receipt of the notice of his right to appeal to the Air Force Court of Criminal Appeals within 90 days. Pursuant Article 66(b)(1)(A), UCMJ, SrA Dawson files his notice of direct appeal with this Court.

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
Megan.crouch.1@us.af.mil

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 25 September 2023.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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(240) 612-4770
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. _____**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Deshawn M. DAWSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 4 October 2023, the court gave notice to Appellant and Appellee that the court was in receipt of a notice of direct appeal from Appellant pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), and that it had not yet received a record of trial in Appellant's case. In the court's notice it ordered the Government to "forward a copy of the record of trial to the court forthwith."

On 5 October 2023, Appellant requested this court suspend Rule 18 until such time a record of trial has been produced by the Government. *See* JT. CT. CRIM. APP. R. 18. On 12 October 2023, the Government responded, opposing the motion, and asking that this court find the suspension of the court's rules is not necessary until a record of trial has been forwarded to the court.

In consideration of the foregoing, and the Government's response, the court denies the Appellant's Motion to Suspend Rule 18. Rule 18 states in relevant part, "Any brief for an accused shall be filed within 60 days after appellate counsel has been notified that [T]he Judge Advocate General has referred the record to the Court." Here, Appellant does not assert that he has been notified that The Judge Advocate General has referred the record to the court. The court has also not yet received the record of trial. Once that notification has occurred and the time for filing a brief begins to run, if Appellant believes that additional time is needed, Appellant may then file for an enlargement of time or seek other appropriate relief as articulated in this court's Rules of Practice and Procedure, and applicable law.

Accordingly, it is by the court on this 20th day of October 2023,

ORDERED:

Appellant's Motion to Suspend Rule 18 is **DENIED.**

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (E-4) **DESHAWN M. DAWSON,** United States Air Force *Appellant*	)))))))))	**MOTION TO SUSPEND RULE 18** Before Panel 1 No. ACM _____ 5 October 2023

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

Pursuant to Rule 23.3(r) and 32 of this Honorable Court's Rules of Practice and Procedure, Senior Airman Deshawn M. Dawson (Appellant) hereby moves this Honorable Court suspend its rules in regard to the time for filing a Brief on Behalf of Appellant, JT. CT. CRIM. APP. R.18, until such a time as the record of trial is delivered to the Department of the Air Force Appellate Defense Division.

On 1 April 2023, a panel of officer and enlisted members sitting as a special court-martial convened at Incirlik Air Base, Turkey, convicted Appellant, contrary to his plea, of one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2019). The military judge sentenced Appellant to 45 days of hard labor, reduction to the grade of E-2, forfeiture of $300.00 pay for two months, and a reprimand. Entry of Judgment, dated 27 April 2023.

On 13 September 2023, Appellant acknowledged receipt of the notice of his right to appeal to the Air Force Court of Criminal Appeals within 90 days. On 25 September 2023, Appellant filed his Notice of Direct Appeal with this Court.

When this case was docketed nine days later, on 4 October 2023, the Record of Trial had not been provided to the Court. In its order, the Court directed that a copy of the Record of Trial

be forwarded to the Court forthwith. However, the order was silent as to any briefing schedule thereafter. Under JT. CT. CRIM. APP. R. 18, Appellant's assignments of error are due sixty days from when the Record of Trial is "referred" to the Court, but the rule appears not to contemplate direct appeals where a notice of appeal might be filed prior to the Record of Trial reaching the Court.

Like the Court, the Appellate Defense Division has not yet received a copy of Appellant's record of trial. Now that Appellant exercised his statutory right to direct appeal under Article 66(b)(1)(A), UCMJ, the undersigned counsel is unable to fulfill her responsibilities under Article 70, UCMJ, until she receives a copy of the Appellant's record of trial. As such, to the extent that JT. CT. CRIM. APP. R. 18 and this Court's order could be read to require briefing within sixty days of docketing, the requirement for assignments of error within sixty days should be suspended.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this Motion to Suspend Rule 18. In the alternative, Appellant respectfully requests this Honorable Court amend its 4 October 2023 to clarify the briefing schedule applicable to Appellant's case.

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
Megan.crouch.1@us.af.mil

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 5 October 2023.

Respectfully submitted,

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
Megan.crouch.1@us.af.mil

12 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DESHAWN M. DAWSON, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO ATTACH AND SUSPEND RULE 18 ACM _____ 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 responds to Appellant's Motion to Attach and Suspend Rule 18. The United States does not believe that suspension of the rules is necessary at this juncture. Rule 18(d) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals states, "*Time for Filing and Number of Briefs.* Any brief for an accused shall be filed within 60 days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court." The Judge Advocate General (TJAG) has not yet referred the record of trial (ROT) to this Court; therefore, Appellant's timeline for filing a brief has yet to begin. There is no rule to suspend.

Rule 3.2 of this Court's Rules of Practice and Procedures states: "The Docket. (a) The Clerk of the Court or designee shall maintain: (1) a regular case docket for cases referred to the Court by TJAG under Articles 66 and 69, UCMJ, and cases returned to the Court under Article 67(e), UCMJ." Although Appellant's case is eligible for Article 66 review, and he has requested Article 66 review, TJAG has not yet referred the completed ROT to the Court under Article 66. So this Court's own rules do not contemplate that a case be considered to be on the docket before TJAG has forwarded the ROT to this Court. As Appellant notes, a verbatim transcript is currently

being prepared. When the verbatim transcript is completed,[1] the entire, complete ROT will be forwarded to the Court.

The United States respectfully requests that this Court not set a particular due date for forwarding of the ROT. This Court does not set deadlines, require appellate filings, or otherwise monitor the production and forwarding of ROTs in automatic review cases. It should not do so for direct appeal cases either. According to Department of the Air Force Instruction (DAFI) 51-201, para. 1.6.2.5, "JAJM is responsible for ROTs for all DAF courts-martial." Per DAF 51-201, paras. 1.8 and 1.7.4, court reporters "records, transcribes, and assembles records for Article 30a, pre-referral judicial proceedings, courts-martial, and other proceedings, as required, in accordance with the MCM, UCMJ, and DAFMAN 51-203," and the "Court Reporter Manager" is "responsible for the centralized management and detailing of all court-reporting and transcription taskings." The Trial Judiciary (JAT) also is "[r]esponsible for the centralized management of the court reporter program and serves as the single point of contact for all requests for transcription assistance and court reporter temporary duty support." DAFI 51-201, para 1.7. In sum, the Air Force already has ample procedures in place for the production of ROTs for forwarding.

[1] Based on conversations between JAJA and JAJG, both parties agree that a verbatim transcript is necessary for meaningful and timely Article 66 review. JAJA needs to see a full transcript to be able to identify and raise issues, and JAJG will need to see a full transcript to be able to respond accordingly. Listening to the audio recording of the entire proceeding would be too time consuming for both sides. Also, providing JAJA with a "means to transform the recording into a text format through voice recognition software or similar means" as mentioned in R.C.M. 1116(b)(1)(A)(i) is not a viable solution at this point. No software that identifies the individual speakers on a recording is known to exist, so JAJA would still have to listen to much, if not all, of the audio recording, to know who is speaking. This would be incredibly time consuming for attorneys who have no training in transcription. JAJG would also have to use the same software and face the same hurdles in order to be able to respond to JAJA's brief. Further, it would likely take over a year to get new software approved and to be functional, based on JAJG's past experience of trying to purchase and use other software.

When this Court sets deadlines for the forwarding of ROTs or verbatim transcripts and requires updates from the government, it creates significant new burdens for JAJG, which must now monitor the production of ROTs, track more deadlines, communicate all deadlines to court reporters, track the court reporters' progress, coordinate regarding any sealed portions of the transcript, and continually file updates or motions for enlargements of time for the production of ROTs. Other than making filings with the Court, these are functions that have already been designated to JAJM and/or JAT and the court reporters by DAFI 51-201. Making things even more difficult, JAJG has no authority over JAT and the court reporters.

The increased workload of having to manage the production of ROTs for direct appeal cases is proving untenable for JAJG. In recent years, JAJG has lost a full-time appellate deputy and now has only 4 active duty counsel (and a remote reservist on a 365-MPA tour) to write briefs. All but one of these attorneys is new to JAJG as of this summer. Simultaneously, JAJG is dealing with an increased workload involving at least 8 upcoming CAAF cases, 2 AFCCA oral arguments, and an increased number of victim petitions under Article 6b. Also, JAJG's Chief and Director of Operations will both be required to travel extensively in October and November 2023 to brief bases regarding the rollout of the Office of Special Trial Counsel.

The United States believes that it is unnecessary for this Court to monitor direct appeal cases before the ROTs are forwarded to the Court. The government writ large understands the requirement to provide appellate defense counsel and this Court with a ROT and is working to comply as quickly as it can in all direct appeal cases. Should Appellant believe forwarding of the ROT has taken too long, he can file for relief for post-trial delay in his assignments of error brief. But the United States does not believe that this Court's involvement pre-forwarding will make the process work any faster. Instead, it will only generate more filing requirements for JAJG and JAJA.

It will take time away from other endeavors, such as writing, editing, and reviewing briefs and pleadings and will make it more difficult to provide timely and high-quality work product that is helpful to this Court. The most workable solution is for this Court to follow the letter of Rule 18, wait for TJAG to forward a completed ROT to the Court, and then, upon receipt of the ROT, start the clock for Appellant to file a brief.

WHEREFORE, the United States respectfully requests that this Court find that suspension of this Court's rules is not necessary until a ROT has been forwarded to the Court.

[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 12 October 2023.

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 _____**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Deshawn M. DAWSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 25 September 2023, Appellant filed a "Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ," with this court. The above-styled case was docketed on 4 October 2023 and the court ordered the Government to "forward a copy of the record of trial to the court forthwith." Over 120 days have elapsed and, to date, the record has not been provided to the court.

Accordingly, it is by the court on this 5th day of February, 2024,

ORDERED:

Government appellate counsel will inform the court in writing not later than **29 February 2024** of the status of this case with regard to this court's 4 October 2023 order.

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. Senior Airman (E-4) **DESHAWN M. DAWSON**, USAF *Appellant*	)))))))))	UNITED STATES' NOTICE OF STATUS OF COMPLIANCE Before Panel No. 1 No. ACM ____ 29 February 2024

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

Pursuant to this Court's 5 February 2024 order, the United States hereby provides notice of status of compliance.

On 4 October 2023, the above-styled case was docked with this Court. On the same date the Court ordered the Government to "forward a copy of the record of trial to the court forthwith." (*Notice of Docketing,* 4 October 2023.) On 5 February 2024 this Court ordered the Government to "inform the court in writing not later than 29 February 2024 of the status of this case with respect to this court's 4 October 2023 order." (*Order,* 5 February 2024.)

Days one through three of trial have been transcribed. The court reporter anticipates completion of days four and five during the week of 3 March 2024. Once complete the court reporter will send to counsel for review.

WHEREFORE, the United States requests this Honorable Court accept this filing as confirmation of the government's compliance with its 5 February 2024 order.

ZACHARY T. EYTALIS, Col, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
(808) 372-7022

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 29 February 2024.

ZACHARY T. EYTALIS, Col, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
(808) 372-7022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**NOTICE OF APPEARANCE**
Appellee,	)	
	)	
v.	)	Before Panel No. 1
	)	
Senior Airman (E-4)	)	
DESHAWN M. DAWSON,	)	No. ACM _____
United States Air Force,	)	
Appellant.	)	31 May 2024

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

COMES NOW the undersigned counsel, pursuant to Rule 13 of this Honorable Court's Rules of Practice and Procedure, and enters an appearance as counsel for Appellant.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 31 May 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 1
Senior Airman (E-4) **DESHAWN M. DAWSON** United States Air Force, *Appellant.*	)	No. ACM _____ 31 May 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 in the above-captioned case. Maj Samantha Golseth has been detailed substitute counsel in undersigned counsel's stead and made her notice of appearance on 31 May 2024. A thorough turnover of the record between counsel has been completed. Maj Crouch is expected to be out of the office on convalescent and parental leave for approximately five months beginning June 2024 and her continued representation of Appellant would only delay his appellate review.

Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

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

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
Megan.crouch.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 May 2024.

Respectfully submitted,

[redacted]

MEGAN R. CROUCH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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(240) 612-4770
Megan.crouch.1@us.af.mil

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Deshawn M. DAWSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

This court ordered the Government to "inform the court in writing not later than 29 February 2024 of the status of this case with respect to this court's 4 October 2023 order."

In its response on 29 February 2024, the Government stated "[t]he court reporter anticipates completion . . . during the week of 3 March 2024." Nearly 120 days have elapsed since the Government's response and, to date, the record has not been provided to the court.

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

ORDERED:

Not later than **26 July 2024**, Government will forward a copy of the record of trial to the court.

Should the record of trial not be provided by 26 July 2024, the court reporter, or an appropriate designee, shall provide a memorandum for record stating the status of the processing of the record of trial in this case not later than **27 July 2024** to the Government to submit to this court in a motion to attach. *See* A.F. Ct. Crim. App. R. 23.3(b). Until the record of trial is returned to the court, such a memorandum of record will be prepared and submitted to the court every seven days thereafter.

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*,	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 1
Senior Airman (E-4) **DESHAWN M. DAWSON** United States Air Force *Appellant.*	)	No. ACM ____
	)	26 July 2024

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

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

Appendix – Dawson – ACM ____ – AFCCA Compliance Order JAT MFR (25 Jul 24)

On 26 June 2024, this Court ordered the Government to "forward a copy of the record of trial to the court" no later than 26 July 2024. (*Order*, dated 26 June 2024). If the record was not provided by the designated time, this Court ordered the court reporter to provide "a memorandum for record [MFR] stating the status of the processing of the record of trial in this case not later than 27 July 2024 to the Government to submit to this court in a motion to attach." (Id.) The record of trial did not arrive to the Court before 26 July 2024. Thus, the attached MFR was written by the court reporter in the above captioned case, and it provides the required update on the record of trial processing.

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

[redacted]
JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 26 July 2024.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
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*,	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 1
Senior Airman (E-4) **DESHAWN M. DAWSON** United States Air Force *Appellant.*	)	No. ACM ____
	)	1 August 2024

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

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

Appendix – Dawson – ACM ____ – AFCCA Compliance Order JAT MFR (31 Jul 24)

On 26 June 2024, this Court ordered the Government to "forward a copy of the record of trial to the court" no later than 26 July 2024. (*Order*, dated 26 June 2024). If the record was not provided by the designated time, this Court ordered the court reporter to provide "a memorandum for record [MFR] stating the status of the processing of the record of trial in this case not later than 27 July 2024 to the Government to submit to this court in a motion to attach," and further ordered that "[u]ntil the record of trial is returned to the court, such a memorandum of record will be prepared and submitted to the court every seven days thereafter." (Id.) The record of trial did not arrive to the Court before 26 July 2024. Thus, the attached MFR was written by the court reporter in the above captioned case, and it provides the required update on the record of trial processing.

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

[redacted]
JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 1 August 2024.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
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*,	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 1
Senior Airman (E-4) **DESHAWN M. DAWSON** United States Air Force *Appellant.*	)	No. ACM ____
	)	9 August 2024

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

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

Appendix – Dawson – ACM ____ – AFCCA Compliance Order JAT MFR (9 Aug 24)

On 26 June 2024, this Court ordered the Government to "forward a copy of the record of trial to the court" no later than 26 July 2024. (*Order*, dated 26 June 2024). If the record was not provided by the designated time, this Court ordered the court reporter to provide "a memorandum for record [MFR] stating the status of the processing of the record of trial in this case not later than 27 July 2024 to the Government to submit to this court in a motion to attach," and further ordered that "[u]ntil the record of trial is returned to the court, such a memorandum of record will be prepared and submitted to the court every seven days thereafter." (Id.) The record of trial did not arrive to the Court before 26 July 2024. Thus, the attached MFR was written by the court reporter in the above captioned case, and it provides the required update on the record of trial processing.

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

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

FOR

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 9 August 2024.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24041**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Deshawn M. DAWSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 25 September 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposed the motion.

We note Appellant's case was docketed with the court on 4 October 2023 and his record of trial was not received until 9 August 2024. Since his date of sentencing, 1 April 2023, 549 days have passed.

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 1st day of October 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **7 December 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]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **DESHAWN M. DAWSON,** United States Air Force, *Appellant.*	)	No. ACM 24041
	)	25 September 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, Senior Airman (SrA) Deshawn M. Dawson, Appellant, hereby moves for an enlargement of time to file his assignments of error. SrA Dawson requests an enlargement for a period of 60 days, which will end on **7 December 2024**. SrA Dawson's case was docketed with this Court on 4 October 2023, but this Court had not yet received the record of trial in his case. Notice of Docketing, 4 October 2023. On 9 August 2024, this Court received his record of trial, beginning the time-period for SrA Dawson to file his assignments of error. From the date of docketing to the present date, 357 days have elapsed. On the date requested, 430 days will have elapsed.

On 31 May 2024, undersigned counsel was detailed as substitute counsel and entered her notice of appearance. Undersigned counsel currently represents 26 clients and is presently assigned 13 cases pending initial brief before this Court. Through no fault of SrA Dawson, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. On 9 August 2024, undersigned counsel received a copy of a verbatim transcript and she has prioritized this case over other cases

on her docket based on the date of docketing. It is currently her third priority, with two cases having higher priority:

1. *United States v. George*, USCA Dkt. No. 24-0206/AF, No. ACM 40397 – The United States Court of Appeals for the Armed Forces granted review and has ordered briefing on one issue. The appellant's grant brief and the joint appendix are due on 8 October 2024.
2. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. The appellant is confined. His case was docketed on 14 December 2023.

SrA Dawson's Case

On 1 April 2023, a panel of officer and enlisted members sitting as a special court-martial convicted SrA Dawson, contrary to his plea, of one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2019). R. at 694; Charge Sheet. The military judge sentenced SrA Dawson to hard labor for 45 days, reduction to the grade of E-2, forfeiture of $300.00 pay for two months, and a reprimand. R. at 761. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

The record of trial consists of 13 prosecution exhibits, 9 defense exhibits, 1 court exhibit, and 41 appellate exhibits. The transcript is 761 pages. SrA Dawson is not confined.

WHEREFORE, SrA Dawson respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
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Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 25 September 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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30 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DESHAWN M. DAWSON, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24041 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]

JENNY A. LIABENOW, 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 30 September 2024.

JENNY A. LIABENOW, 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,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **DESHAWN M. DAWSON,** United States Air Force, *Appellant.*	)	No. ACM 24041
	)	27 November 2024

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

Senior Airman (SrA) Deshawn M. Dawson, Appellant, hereby moves for a second enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SrA Dawson requests an enlargement for a period of 30 days, which will end on **6 January 2025**. SrA Dawson's case was docketed with this Court on 4 October 2023, but this Court had not yet received the record of trial in his case. Notice of Docketing, 4 October 2023. On 9 August 2024, this Court received his record of trial, beginning the time-period for SrA Dawson to file his assignments of error. From the date of docketing to the present date, 420 days have elapsed. On the date requested, 460 days will have elapsed.

SrA Dawson was advised of his right to a timely appeal.[1] He was provided an update of undersigned counsel's progress on his case and advised of this request for an enlargement of time. SrA Dawson agrees with the request for an enlargement of time.

[1] In *United States v. Meires*, 84 M.J. 682, 688 (C.G. Ct. Crim. App. 2024) the Coast Guard Court of Criminal Appeals reverted to conducting "a case-by-case analysis to determine if a given delay is facially unreasonable," (citing *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006)), because "the *Moreno* [and *United States v. Tucker*, 82 M.J. 553 (C.G. Ct. Crim. App. 2022)] time standards are inapt to non-automatic appeals under Article 66(b)(1) (2022) . . . which are procedurally different from automatic appeals and did not exist at the time of *Moreno*."

SrA Dawson's Case

On 1 April 2023, a panel of officer and enlisted members sitting as a special court-martial convicted SrA Dawson, contrary to his plea, of one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2019). R. at 694; Charge Sheet. The military judge sentenced SrA Dawson to hard labor for 45 days, reduction to the grade of E-2, forfeiture of $300.00 pay for two months, and a reprimand. R. at 761. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

The record of trial consists of 13 prosecution exhibits, 9 defense exhibits, 1 court exhibit, and 41 appellate exhibits. The transcript is 761 pages. SrA Dawson is not confined.

Undersigned Counsel's Representation

On 31 May 2024, undersigned counsel was detailed as substitute counsel and entered her notice of appearance. Undersigned counsel currently represents 25 clients and is presently assigned 12 cases pending initial brief before this Court. Through no fault of SrA Dawson, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. On 9 August 2024, undersigned counsel received a copy of a verbatim transcript and she has prioritized this case over other cases on her docket based on the date of docketing. It is currently her third priority, with two cases having higher priority:

1. *United States v. George, Jr.*, USCA Dkt. No. 24-0206/AF – Undersigned counsel filed the appellant's reply brief for a granted issue at the United States Court of Appeals for the Armed Forces (CAAF) on 25 November 2024. She gave her first moot argument

on 26 November 2024 and will be continuing to prepare for the oral argument which has been scheduled at the CAAF on 10 December 2024.

2. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1,627 pages. The appellant is confined overseas. His case was docketed on 14 December 2023. Undersigned counsel has begun her review and is coordinating with the appellant to identify the issues that the appellant wants to raise, however, she needs to complete her review, conduct research, draft the numerous identified assignments of error, and edit the resulting brief before filing. Moreover, discussing the issues with the Appellant is an involved process due to the need to schedule calls across time zones when the confinement facility has availability. This case has priority over SrA Dawson's case because unlike SrA Dawson, the appellant is confined and currently serving his sentence.

Since filing SrA Dawson's first enlargement of time, undersigned counsel has filed an opening brief and reply brief in *United States v. George, Jr*., at the CAAF. Before 10 December 2024, she will have two additional moot arguments, which she will be preparing for over the Thanksgiving holiday. Additionally, from 29 November 2024 through 1 December 2024 (a family day, Saturday, and Sunday), undersigned counsel will be volunteering from approximately 0730 until 1700 in a competitively selected volunteer position at the White House. (Undersigned counsel has recently declined many educational and service opportunities (including attending AJEI, Gateway, and teaching at a Defense Orientation Course) to prioritize her docket but had previously obligated herself for this volunteer position.)

In addition to the above, undersigned counsel was detailed as counsel in *In re Alton*, Misc. Dkt. No. 2024-12, where she familiarized herself with the case to draft and file a substantive motion opposition to the Government's motion to dismiss. She further edited civilian counsel's motion for reconsideration in *United States v. Matthew*, No. ACM 39796 (reh). Both of these filings required relatively short timelines for filing, therefore, undersigned counsel had to prioritize them over SrA Dawson's case.

Further, undersigned counsel completed a brief in *United States v. Benoit, Jr.*, No. ACM 40508; attended multiple multi-hour medical appointments, a Joint Appellate Advocacy Training at Fort Belvoir, Virginia, on 26-27 September 2024, a half-day joint appellate training with JAJG on 23 October 2024, four hours of virtual training, and two arguments; and prepared for and participated as a moot judge in 9 moot arguments for four cases (with each moot taking approximately 90 minutes, which is not inclusive of the time it takes to read the briefings and prepare questions). She also peer reviewed six briefs (reviewing 14 issues) and three motions. She was also on leave (over Indigenous Peoples' Day weekend) on 9-14 October 2024 and on 30 October 2024, and further needed to attend to personal matters related to her mother's health on several days. Additionally, undersigned counsel spends time personally contacting her clients to update them on the statuses of their appeals (which requires coordinating with multiple confinement facilities). During this requested enlargement of time, undersigned counsel anticipates working between the Thanksgiving, Christmas, and New Years holidays.

If this Court is inclined to deny this request for an enlargement of time, undersigned counsel respectfully requests a status conference.

WHEREFORE, SrA Dawson respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
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Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 27 November 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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3 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DESHAWN M. DAWSON, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24041 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 December 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,	)	**APPELLANT'S MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME**
	)	**(THIRD)**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4)	)	
DESHAWN M. DAWSON,	)	No. ACM 24041
United States Air Force,	)	
Appellant.	)	16 December 2024

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

Senior Airman (SrA) Deshawn M. Dawson, Appellant, hereby moves for a third enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SrA Dawson requests an enlargement for a period of 30 days, which will end on **5 February 2025**. SrA Dawson's case was docketed with this Court on 4 October 2023, but this Court had not yet received the record of trial in his case. Notice of Docketing, 4 October 2023. On 9 August 2024, this Court received his record of trial, beginning the time-period for SrA Dawson to file his assignments of error. From the date of docketing to the present date, 439 days have elapsed. On the date requested, 490 days will have elapsed.

SrA Dawson was advised of his right to a timely appeal.[1] He was provided an update of undersigned counsel's progress on his case and advised of this request for an enlargement of time. SrA Dawson agrees with the request for an enlargement of time.

[1] In *United States v. Meires*, 84 M.J. 682, 688 (C.G. Ct. Crim. App. 2024) the Coast Guard Court of Criminal Appeals reverted to conducting "a case-by-case analysis to determine if a given delay is facially unreasonable," (citing *United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006)), because "the *Moreno* [and *United States v. Tucker*, 82 M.J. 553 (C.G. Ct. Crim. App. 2022)] time standards are inapt to non-automatic appeals under Article 66(b)(1) (2022) . . . which are procedurally different from automatic appeals and did not exist at the time of *Moreno*."

SrA Dawson's Case

On 1 April 2023, a panel of officer and enlisted members sitting as a special court-martial convicted SrA Dawson, contrary to his plea, of one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2019). R. at 694; Charge Sheet. The military judge sentenced SrA Dawson to hard labor for 45 days, reduction to the grade of E-2, forfeiture of $300.00 pay for two months, and a reprimand. R. at 761. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

The record of trial consists of 13 prosecution exhibits, 9 defense exhibits, 1 court exhibit, and 41 appellate exhibits. The transcript is 761 pages. SrA Dawson is not confined.

Undersigned Counsel's Representation

On 31 May 2024, undersigned counsel was detailed as substitute counsel and entered her notice of appearance. Undersigned counsel currently represents 22 clients and is presently assigned 10 cases pending initial brief before this Court. Through no fault of SrA Dawson, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. On 9 August 2024, undersigned counsel received a copy of a verbatim transcript, and she has prioritized this case over other cases on her docket based on the date of docketing. It is currently her second priority, with one case having higher priority:

1. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1,627 pages. The appellant is confined overseas. His case was docketed on 14

December 2023. Undersigned counsel has begun her review and is coordinating with the appellant to identify the issues that the appellant wants to raise, however, she needs to complete her review, conduct research, draft the numerous identified assignments of error, and edit the resulting brief before filing (undersigned counsel needs time to be able to obtain a peer and leadership review and will have to coordinate enough time for each review around the Christmas and New Years holidays). Moreover, discussing the issues with the Appellant is an involved process due to the need to schedule calls across time zones when the confinement facility has availability. This case has priority over SrA Dawson's case because unlike SrA Dawson, the appellant is confined and currently serving his sentence.

Since filing SrA Dawson's second enlargement of time on 27 November 2024, undersigned counsel completed in *United States v. George*, *Jr.*, USCA Dkt. No. 24-0206/AF, at the U.S. Court of Appeals for the Armed Forces (CAAF): (1) moot arguments on 3 December 2024 and 6 December 2024; (2) argument at CAAF on 10 December 2024; and (3) between those dates, preparation for each moot argument and argument. On 12 December 2024, undersigned counsel also filed the appellant's supplement to the petition for grant of review in *United States v. Manzano-Tarin*, USCA Dkt. No. 25-0033/AF, and a consent motion for reconsideration and suggestion for *en banc* proceedings in *United States v. Norris*, No. ACM 24045. She further provided three peer reviews to her colleagues and provided edits to civilian counsel's substantive motions in *United States v. Matthew*, No. ACM 39796 (reh). Additionally, undersigned counsel also needed to attend to other matters beyond her docket because undersigned counsel's mother was unexpectedly hospitalized. Since 27 November 2024, there was also a federal holiday on 28 November 2024 and family day on 29 November 2024. Moreover, during the currently granted

enlargement of time, when undersigned counsel will be working on *Casillas*, there will be two federal holidays (25 December 2024 and 1 January 2025) and two family days (26 December 2024 and 2 January 2025). Additionally, between now and the requested date, undersigned counsel anticipates preparing for and participating as a moot judge in six moot arguments to help her colleagues prepare for upcoming arguments at CAAF (which she anticipates will require a total of 10+ hours). Undersigned counsel will also be on leave from 16-21 January 2025 (over Presidents Day weekend) for a family event out of the local area (this will be undersigned counsel's opportunity to see family as she anticipates working between the Thanksgiving, Christmas, and New Years holidays) to complete the appellant's brief in *Casillas*.

If this Court is inclined to deny this request for an enlargement of time, undersigned counsel respectfully requests a status conference.

WHEREFORE, SrA Dawson respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 16 December 2024.

Respectfully submitted,

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17 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DESHAWN M. DAWSON, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24041 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 17 December 2024.

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

UNITED STATES,
Appellee,

v.

Deshawn M. Dawson,
Senior Airman (SrA) (E-4),
United States Air Force
Appellant.

No. ACM 24041

Before Panel No. 1

BRIEF ON BEHALF OF APPELLANT

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Counsel for Appellant

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TABLE OF AUTHORITIES

INTERMEDIATE MILITARY APPELLATE COURT CASES

RULES AND OTHER AUTHORITIES

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Panel No. 1
Senior Airman (SrA) (E-4) **DESHAWN M. DAWSON,** United States Air Force, *Appellant.*	)	No. ACM 24041
	)	28 January 2025

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

Assignments of Error

I.

The record's failure to include audio recordings corresponding to forty-five percent of the court-martial's written transcript—including key portions of the findings proceedings and the entirety of the sentencing proceedings—and the court reporter's false certification that the record of trial is "complete" constitute error warranting reversal of the findings and sentence.

II.

The 186-day delay from sentencing until docketing (caused largely by a 137-day delay from entry of judgment until performance of the ministerial act of notifying SrA Dawson of his right to appeal), the 255-day delay from SrA Dawson's invocation of his right to appeal until certification of a verbatim transcript, and the sixty-four-day delay from certification of the transcript until this Court received it were unreasonable individually and collectively, warranting relief.

III.

The military judge erred by denying the defense motion for a mistrial where the prosecutors failed to timely disclose information known to them that was relevant to a potential ground to challenge a court-martial member.

IV.

The military judge erred by allowing SrA Dawson's commander to testify during the sentencing hearing about the adverse effects SrA Dawson's unit suffered because of limitations placed on his performance of duty due to the "allegations" against him, despite SrA Dawson having been acquitted of two of those three allegations.

V.

The military judge erred by allowing a sentencing witness to recount hearsay statements disparaging SrA Dawson despite her acknowledgement that she did not have "firsthand" knowledge of the matters.

VI.

The entry of judgment erred to SrA Dawson's substantial prejudice by mischaracterizing the portion of the sentence adjudging forfeiture of "$300 of your pay for two months" as "$300 pay, per month, for 2 months," thereby doubling the adjudged forfeitures.

VII.

The cumulative effect of all plain and preserved errors in this case warrants reversal of the findings and sentence.

VIII.

SrA Dawson's constitutional rights were violated when he was convicted of an offense with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously for guilt.[1]

Statement of the Case

At a special court-martial held at Incirlik Air Base, Turkey, from 28 March to 1 April 2023, a panel consisting of officer and enlisted members found SrA Deshawn Dawson, U.S. Air Force, not guilty of two specifications of abusive sexual contact charged under Article 120, Uniform

[1] The defense raises this assignment of error for issue preservation purposes.

Code of Military Justice (UCMJ), 10 U.S.C. § 920,[2] and guilty of one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928.[3] SrA Dawson had pleaded not guilty to all charges and specifications.[4] The military judge sentenced SrA Dawson to a reprimand, reduction to the grade of E-2, forfeiture of "$300 of [his] pay for two months," and hard labor without confinement for forty-five days.[5] The convening authority took no action on the findings or sentence.[6]

Statement of Facts

EE[7] was the alleged victim of all three offenses with which SrA Dawson was charged. She and SrA Dawson were both part of a group of security forces personnel stationed at Incirlik Air

[2] According to the transcript of the findings announcement (for which there is no accompanying audio recording), the court-martial's president failed to state a finding to Charge I, Trial Tr. at 694–95, although the findings worksheet includes a finding of not guilty to that charge. App. Ex. XXXV. The entry of judgment also lists a finding of not guilty to Charge I.

[3] Trial Tr. at 695; App. Ex. XXXV. The version of the UCMJ in effect at the time of the alleged offenses was that reprinted in Appendix 2 of the *Manual for Courts-Martial, United States* [hereinafter MCM] (2019 ed.), as amended by the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019); the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (2021); and the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021). None of those statutes amended either Article 120 or Article 128, UCMJ. The version of the UCMJ in effect at the time of trial was that reprinted in Appendix 2 of MCM (2019 ed.) as amended by the three National Defense Authorization Acts noted above plus the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022).

[4] Trial Tr. at 155.

[5] *Id.* at 761. There is a discrepancy between the written "verbatim" transcript and the summarized transcript, the statement of trial results, and the entry of judgment concerning the forfeiture portion of the sentence. The record does not include an audio recording of the military judge's announcement of the sentence. The forfeiture portion of the sentence set out above is based on the "verbatim" transcript.

[6] Convening Authority Decision on Action (14 Apr. 2023).

[7] At the time of the events and the time of trial, EE was an enlisted member of the United States military. This brief does not extend her the courtesy of referring to her by her rank in compliance with A.F. Ct. Crim. App. R. 17.2(c)(1)(B).

Base, Turkey, who often socialized together when off duty.[8] On the evening of Saturday, 14 May 2022, the group went to a restaurant and other on-base facilities where they ate, drank, danced, and socialized.[9] Again on the evening of Friday, 21 May 2022, the friends gathered together and socialized at various on-base establishments.[10]

One of the abusive sexual contact specifications alleged an incident on 15 May 2022—after midnight on the Saturday night the group was together.[11] The members acquitted SrA Dawson of that offense.[12]

SrA Dawson was charged with committing two offenses on 22 May 2022—after midnight on the Friday night the group was together.[13] One alleged that he committed abusive sexual contact by touching EE's buttocks without her consent with the intent to degrade her.[14] EE was the lone witness who claimed to have knowledge of that allegation.[15] The members acquitted SrA Dawson of that offense.[16] Finally, SrA Dawson was charged with unlawfully striking EE on the face with his hand.[17] EE—who characterized her condition that night as "very very drunk"—testified that she had no recollection of being slapped and, the following day, she did not see any indicia that

[8] *See*, *e.g.*, Trial Tr. at 306, 329, 391–92, 396, 434–35.
[9] *See*, *e.g.*, *id.* at 306, 316–19, 396–402, 405–06, 435–39.
[10] *See*, *e.g.*, *id.* at 331–32, 352, 420–21, 440.
[11] Charge Sheet, Charge I, Specification 1.
[12] Trial Tr. at 694; App. Ex. XXXV.
[13] Charge Sheet, Charge I, Specification 2; *id.*, Charge 2 and its specification.
[14] Charge Sheet, Charge I, Specification 2.
[15] Trial Tr. at 422–24, 448, 471–72, 474.
[16] *Id.* at 695; App. Ex. XXXV.
[17] Charge Sheet, Charge II.

her face had been slapped.[18] She also testified that SrA Dawson was "[e]xtremely" drunk that night.[19]

Two witnesses purportedly testified concerning the alleged slap. While driving to an on-base entertainment venue, SrA Dawson and EE were in the back of a car with KB sitting between them.[20] SrA Dawson and EE were arguing with each other, though no witness could remember about what.[21] KB purportedly testified that after the car stopped and SrA Dawson and EE had gotten out, he saw SrA Dawson slap EE on the cheek.[22] However, no audio recording of KB's testimony is in the record. KH testified that he heard a slapping sound and then saw EE "place[] her hand on her face as if she had just been struck," and start to cry.[23] KH also testified that EE said, "Dawson, you just slapped me."[24] The defense presented evidence that KH's testimony concerning what he heard bore inconsistencies with a previous account he had given.[25] During its case-in-chief, the defense recalled KH as a witness.[26] The record does not include an audio recording of his second appearance on the stand.

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[18] Trial Tr. at 421–22, 442–43. KB, however, purportedly twice testified that EE did remember SrA Dawson slapping her. *Id.* at 385, 387. The record does not include an audio recording of KB's testimony. At the time of the events and the time of trial, KB was an enlisted member of the United States military. This brief does not extend him the courtesy of referring to him by his rank in compliance with A.F. Ct. Crim. App. R. 17.2(c)(1)(B).
[19] Trial Tr. at 441.
[20] *Id.* at 334–35.
[21] *Id.* at 334, 363–64, 366, 388, 422, 442–43.
[22] *Id.* at 363, 364, 366.
[23] *Id.* at 335, 349. At the time of the events and the time of trial, KH was an enlisted member of the United States military. This brief does not extend him the courtesy of referring to him by his rank in compliance with A.F. Ct. Crim. App. R. 17.2(c)(1)(B).
[24] Trial Tr. at 350.
[25] *Id.* at 628–31 (testimony of Staff Sergeant TM, area defense counsel paralegal at Incirlik Air Base, Turkey).
[26] *Id.* at 621–23.

The evening after the alleged slap, after KB had informed EE that SrA Dawson had slapped her, she confronted SrA Dawson, and he denied it.[27] She testified that he also said, "I told you these hands are rated E for everybody," and that he had previously used that phrase at work.[28]

At a member's request, KB was recalled to provide additional testimony.[29] However, the record does not include an audio recording of KB's second appearance as a witness.[30]

Those missing recordings of the testimony of crucial prosecution witnesses account for only a small portion of the missing audio. In all, audio recordings corresponding to forty-five percent of the court-martial transcript are missing. The missing audio recordings include not only the testimony of those crucial witnesses, but also counsel's opening statements, the entire defense findings case, findings instructions, closing arguments, the entirety of the sentencing proceedings, and litigation over the prosecution's late disclosure of information relevant to whether one of the court-martial members should have sat on the case. Even though the record failed to include recordings of almost half of the trial, the court reporter certified that the record of trial was "complete."[31] The record of trial was not complete.

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[27] *Id.* at 369, 383, 427–28, 442.

[28] *Id.* at 428. EE also testified that SrA Dawson said, "I'm really hitting people." *Id.* The record establishes that she did not construe that purported comment as a confession to slapping her. On the contrary, immediately after first testifying about SrA Dawson's use of that phrase, EE characterized him as "denying" slapping her "the entire time." *Id.* In context, it appears that she understood SrA Dawson was speaking sarcastically when he purportedly said, "I'm really hitting people." KB purportedly testified that SrA Dawson made a comment to him to the effect that "these hands were rated E for everyone." *Id.* at 378. The record does not include an audio recording of that purported testimony by KB.

[29] *Id.* at 626 –28, 635–36.

[30] His testimony is purportedly transcribed at *id.* at 635–36.

[31] Certification of the Record of Trial (26 Jun. 2023), "Volume 3 of Volumes 3." Characteristic of the inattention to detail that infuses this case, the record of trial includes two "Volume 3"s. To avoid confusion, in accordance with the volumes' labeling, this brief will identify the first three volumes as "Volume X of Volumes 3" and the final four volumes as "Volume X of Volumes 6." There are actually seven volumes.

The following chart sets out relevant dates in the post-trial processing of this case:

Date	Event	Days Elapsed from Sentencing	Days Elapsed from Previous Event
1 Apr 2023	Sentencing[32]		
27 Apr 2023	Entry of judgment[33]	26	26
26 Jun 2023	Certification of record of trial[34]	86	60
11 Sep 2023	Third Air Force staff judge advocate office's notification to SrA Dawson of his right to appeal his case to this Court[35]	163	77
13 Sep 2023	SrA Dawson's acknowledgement of receipt of notice of right to submit direct appeal[36]	165	2
25 Sep 2023	SrA Dawson's filing of notice of direct appeal with this Court[37]	177	12
4 Oct 2023	Docketing with this Court[38]	186	160
6 Jun 2024	Court reporter's certification of transcript[39]	432	246
9 Aug 2024	This Court's receipt of certified transcript[40]	496	64

[32] Trial Tr. at 761.
[33] Entry of Judgment in the Case of *United States v. SrA Deshawn M. Dawson* (27 Apr. 2023), "Volume 1 of Volumes 3."
[34] Certification of the Record of Trial (26 Jun. 2023), "Volume 3 of Volumes 3."
[35] Memorandum for Airman Deshawn M. Dawson from 3 AF/JA, Subject: Notice of Right to Submit Direct Appeal to the Air Force Court of Criminal Appeals (11 Sep. 2023), "Volume 1 of Volumes 3."
[36] 1st Ind., AMN Deshawn M. Dawson Memorandum for 3AF/CC (13 Sep. 2023), "Volume 1 of Volumes 3."
[37] Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ, United States v. Senior Airman Deshawn M. Dawson (25 Sep. 2023).
[38] AFCCA Court Docket, https://afcca.law.af.mil/docket.html, last accessed 28 January 2025.
[39] Certification of the Transcript in the case of *United States v. Senior Airman Deshawn Dawson* (6 Jun. 2024), "Volume 3 of Volumes 6."
[40] This Court can take judicial notice of its own records to establish that this Court received the certified transcript on 9 August 2024. *United States v. Lovett*, 23 C.M.R. 168, 172 (C.M.A. 1957) ("An appellate court . . . can take judicial notice of its own records.").

Additional relevant facts are included in introductory sections to the assignments of error, *infra*, as appropriate.

Argument

I.

The record's failure to include audio recordings corresponding to forty-five percent of the court-martial's written transcript—including key portions of the findings proceedings and the entirety of the sentencing proceedings—and the court reporter's false certification that the record of trial is "complete" constitute error warranting reversal of the findings and sentence.

Additional Facts

SrA Dawson was tried over a five-day period.[41] The record contains one disc that purports to contain audio of the court-martial.[42] That disc does not include an audio recording of the court-martial session that started at 0831 on 30 March 2023, which is purportedly transcribed on pages 295–326 of the transcript. That missing audio includes opening statements and the testimony of KS.[43] Nor does the record contain an audio recording of the court-martial session that started at 1040 on 30 March 2023, which is purportedly transcribed on pages 358–88 of the transcript. That missing audio includes the testimony of KB—the only witness who purported to see SrA Dawson commit the sole offense of which he was convicted.[44] Also missing are audio recordings of *every* court-martial session from an Article 39(a) session that began at 1543 on Thursday, 30 March

[41] Trial Tr. at 1–761.
[42] Trial Audio, "Disc 1 of 1," "Volume 1 of Volumes 3."
[43] According to the transcript, KS testified about the allegation in Specification 1 of Charge I. The members found SrA Dawson not guilty of that specification. Trial Tr. at 694; App. Ex. XXXV. At the time of the events and the time of trial, KS was an enlisted member of the United States military. This brief does not extend him the courtesy of referring to him by his rank in compliance with A.F. Ct. Crim. App. R. 17.2(c)(1)(B).
[44] Trial Tr. at 366. Another witness—KH—purported to hear the slap and see EE's reaction immediately afterward. *Id.* at 335, 349–50. The alleged victim had no memory of the slap. *Id.* at 421–22, 442–43.

2023, through the court-martial's adjournment at 1609 on Saturday, 1 April 2023.[45] Because of those missing recordings, the record contains no audio corresponding to pages 477 through 761 of the transcript. That portion of the transcript includes the entire defense case on the merits. It specifically includes the testimony upon recall of KB and KH.[46] Thus, the record is missing audio recordings of one or both appearances by the only two witnesses who claimed to have perceived the lone offense of which SrA Dawson was convicted. Also missing are audio recordings of the prosecution's rebuttal findings case,[47] findings instructions,[48] closing arguments,[49] announcement of findings,[50] the entirety of the sentencing proceedings,[51] and litigation over the prosecution's late revelation of information relevant to whether a court-martial member should have sat on this case.[52] In total, there are no audio recordings corresponding to 345 pages—forty-five percent—of the 761-page trial transcript. Despite the missing audio, the court reporter certified that "the Record of Trial [is] accurate and complete in accordance with [Rule for Courts-Martial (R.C.M.)] 1112(b) and (c)(1), DAFMAN 51-201, paragraph 3.4.2, and DAFI 51-201, paragraph 20.48."[53]

Standard of Review

Whether a record of trial is incomplete is reviewed de novo.[54]

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[45] *Id.* at 477–761.
[46] *Id.* at 505–622, 628–33.
[47] *Id.* at 631–33.
[48] *Id.* at 651–63, 686–89.
[49] *Id.* at. 662–86.
[50] *Id.* at 694–95.
[51] *Id.* at 702–61.
[52] *Id.* at 727–28, 742–60.
[53] Certification of the Record of Trial (26 Jun. 2023), "Volume 3 of Volumes 3" (citing R.C.M. 1112(b), (c)(1); Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, ¶ 3.4.2. (14 Apr. 2022); Department of the Air Force Manual 51-203, *Records of Trial*, ¶ 20.48 (21 Apr. 2021)).
[54] *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law and Analysis

R.C.M. 1112(a) requires that a record of every special court-martial be made in the form of a recording "from which sound images may be reproduced to accurately depict the court-martial."[55] R.C.M. 1112(b) requires that the record of trial in every special court-martial include a "substantially verbatim recording of the court-martial proceedings except sessions closed for deliberation and voting."

The record in this case is far from substantially verbatim. "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut."[56] Appellate courts assess whether an omission is substantial on a case-by-case basis.[57] In this case, the omitted audio recordings are substantial both quantitatively and qualitatively.

"Omissions are quantitatively substantial unless 'the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.'"[58] Here, the missing audio recordings span more than two complete days of the trial, accounting for forty-five percent of the written transcript. That far exceeds "nothingness."

The omissions are also qualitatively substantial. Omissions from a record of trial are "qualitatively substantial if the substance of the omitted material 'related directly to the sufficiency

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[55] R.C.M. 1112(a). The version of the R.C.M.s in effect when the record of trial was certified and docketed with this Court is that in the 2019 edition of the MCM as amended by Exec. Order No. 14062 of 20 January 2022, 87 Fed. Reg. 4763 (Jan. 31, 2022), and Annex 1 to Exec. Order No. 14103 of 28 July 2023, 88 Fed. Reg. 50535 (July 28, 2023). The version of the UCMJ in effect when this case was docketed with this Court is that reprinted in Appendix 2 of the 2024 edition of the MCM. Article 66, UCMJ, 10 U.S.C. § 866, has not been amended since that version. Citations to the R.C.M.s in this brief are to the R.C.M.s as they appeared in the 2019 edition of the MCM. Neither Exec. Order No. 14062 nor Annex 1 to Exec. Order No. 14103 altered any MCM provision cited in this brief.

[56] *Henry*, 53 M.J. at 111.

[57] *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

[58] *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (ellipsis in original) (quoting *United States v. Nelson*, 13 C.M.R. 38, 43 (C.M.A. 1953)).

of the Government's evidence on the merits,' and 'the testimony could not ordinarily have been recalled with any degree of fidelity.'"[59] Here, the missing audio recordings cover such crucial portions of the findings proceedings as opening statements, the complete testimony of the sole purported eyewitness to the only charged offense of which SrA Dawson was convicted and that witness's testimony upon recall, the testimony upon recall of the only other witness who claimed to perceive that offense (who claimed to have heard but not seen the slap), the entire defense findings case, the prosecution's rebuttal case, closing arguments, findings instructions, and announcement of findings. Also missing are recordings of all sentencing proceedings. Also missing are recordings of the entire litigation concerning the prosecution's late revelation of information relevant to whether one of the court-martial members should have sat on this case, which is the subject of Assignment of Error III, *infra*. The omitted audio is far more extensive and significant than that in *United States v. Wilson*, where this Court found that the omission of an audio recording of a single Article 39(a) session to announce a corrected sentence was "substantial."[60]

As this Court has recognized, the presence of a written transcript cannot cure a substantial omission in the audio record.[61] A substantially verbatim audio recording is a component of a court-martial record;[62] the transcript is not. Rather, the transcript is merely an attachment to the record.[63] This case demonstrates why that is true. Perhaps in part because the court reporter was operating

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[59] *Id.* (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)).
[60] *United States v. Wilson*, No. ACM 40274, 2023 CCA LEXIS 343, at *5 (A.F. Ct. Crim. App. Aug. 16, 2023).
[61] *United States v. McCoy*, No. ACM 40119, 2022 CCA LEXIS 632, at *2 (A.F. Ct. Crim. App. Oct. 31, 2022) (order); *United States v. Brown*, No. ACM 40066, 2022 CCA LEXIS 625, at *2 (A.F. Ct. Crim. App. Oct. 25, 2022) (order).
[62] R.C.M. 1112(b)(1).
[63] R.C.M. 1114(d) ("If a certified transcript is made under this rule, it shall be attached to the record of trial.").

remotely via video teleconference rather than at the trial site,[64] portions of the transcript for which corresponding audio recordings exist are highly inaccurate. For example, on page 38, the transcript twice misidentifies who is speaking.[65] And consider this segment of the transcript on pages 42–43, with the transcript corrected in line-in/line-out format:

> MJ: Thank you, defense counsel.
>
> Trial counsel, I haven't heard anything, and ~~**defense**~~ **the victim's** counsel**,** I haven't heard ~~**everything**~~ **anything** that is outside of *Mellette* at this point. So, I'm going to ask you again is there any reason to keep the hearing closed and I know you were sort of ~~**indifferent**~~ **ambivalent on it**, I don't want to mischaracterize your position but—
>
> STC: No, Your Honor that's a fair characterization. I concur. I intend to confine my argument ~~**and**~~ **to** address each one **of** the defense**'s** points and I agree that ~~**if we got into protecting**~~ **none of it got into protected** communications—
>
> MJ: Let me hear from victim's counsel real quick and again, what I'm trying to do is obviously, balance the two ~~**convening orders**~~ **competing interests** in the least restrictive manner possible—
>
> VC: And Your Honor, I would agree this point is going to be ~~**three confined retargeted**~~ **pretty confined, pretty targeted** and I think ~~**I can**~~ **on balance I** agree.[66]

[64] *See*, *e.g.*, Trial Tr. at 360.

[65] *Compare* Trial Tr. at 38, lines 11–12, 16 ("MJ") *with* audio file test_20230328-1119_01d96167186eca60 at 29:36–30:22, "Disc 1 of 1," "Volume 1 of Volumes 3" (senior trial counsel's voice).

[66] *Compare* Trial Tr. at 42, line 16–43, line 4 *with* audio file test_20230328-1119_01d96167186eca60 at 38:40–39:52, "Disc 1 of 1," "Volume 1 of Volumes 3."

There is an enormous substantive difference between balancing "two competing interests" versus balancing "two convening orders" or a "pretty confined, pretty targeted" discussion versus "three confined retargeted" discussion. These errors are "like the thirteenth chime of a clock: you not only know it's wrong, but it causes you to wonder about everything you heard before."[67] The transcript does not and cannot serve as a substitute for the missing audio recordings.

A substantial omission in a record of trial raises a presumption of prejudice to an appellant, which the Government must rebut.[68] As the Court of Military Appeals observed, "[S]ince 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."[69] Here, the missing portions of the record encompass both crucial aspects of the findings proceedings and the entirety of the sentencing proceedings. This Court must, therefore, presume prejudice as to both.

Remedy

Article 66(d)(2), UCMJ, provides that this Court "may provide appropriate relief if the accused demonstrates error . . . in the processing of the court-martial after the judgment was entered into the record."[70] The preparation of an incomplete record of trial and the false certification of that incomplete record of trial were processing errors that post-dated the entry of judgment. Accordingly, this Court can order "appropriate relief" to address those errors.

In this case, the appropriate remedy is to set aside the findings and sentence.

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[67] *United States v. Marchena-Silvestre*, 802 F.3d 196, 203 (1st Cir. 2015).
[68] *Henry*, 53 M.J. at 111.
[69] *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981).
[70] Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

While this Court also has the discretion to remand the case for preparation of a substantially verbatim record,[71] that would not be the optimal remedy in this case for two reasons. First, as discussed in Assignment of Error II, *infra*, this case has already been plagued by unreasonable post-trial delay. A remand to correct the Government's erroneous compilation and certification of the record would cause still more delay through no fault of SrA Dawson. Second, this case is the perfect vehicle with which to send a message to Air Force personnel responsible for preparing records of trial. This Court has already noted that post-trial processing errors "are happening at an alarming frequency in the Air Force."[72]

The omission of the audio files in this case is aggravated by the court reporter's false certification that the record of trial was complete. Regardless of whether that false certification was made with knowledge of its falsity or the false certification resulted from dereliction, it is unacceptable.

Further institutional indifference was demonstrated when the record was accepted in the Office of the Judge Advocate General and then forwarded to this Court for docketing. The version of the Department of the Air Force military justice instruction in effect at the time provided, "Incomplete ROTs will be returned to the responsible legal office and will not be considered transferred to JAJM for purposes of metrics and milestones."[73] Yet the incomplete record in this case was not returned; rather, it was forwarded to this Court for docketing.

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[71] *See* R.C.M. 1112(d)(2).
[72] *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. June 7, 2024), *petition granted*, __ M.J. __, No. 24-0208/AF, 2024 CAAF LEXIS 571 (C.A.A.F. Sept. 30, 2024).
[73] DAFI 51-201, at ¶ 20.52.3. (14 Apr. 2022). The current version of the instruction includes a similar provision. DAFI 51-201, *Administration of Military* Justice, ¶ 20.52.3. (24 Jan. 2024).

Setting aside the findings and sentence in this case would send a clear message that this Court demands better. This case—in which the sole offense of which the accused was convicted was of a type that would typically be addressed by administrative action—can send that message without resulting in a windfall to the accused. Setting aside SrA Dawson's federal conviction would merely place him in the position he no doubt would have been in had he not also faced the two Article 120 specifications of which he was acquitted.

WHEREFORE, this Honorable Court should set aside the findings and sentence.

II.

The 186-day delay from sentencing until docketing (caused largely by a 137-day delay from entry of judgment until performance of the ministerial act of notifying SrA Dawson of his right to appeal), the 255-day delay from SrA Dawson's invocation of his right to appeal until certification of a verbatim transcript, and the sixty-four-day delay from certification of the transcript until this Court received it were unreasonable individually and collectively, warranting relief.

Additional Facts

SrA Dawson was sentenced on 1 April 2023; immediately thereafter, the court-martial adjourned.[74] On that same day, he requested representation by an appellate defense counsel.[75] On 14 April 2023, the convening authority declined to act on the findings or sentence.[76] The military judge executed the entry of judgment on 27 April 2023.[77] The court reporter certified the summarized transcript and the record of trial on 26 June 2023.[78]

On 11 September 2023—163 days after sentencing, 137 days after entry of judgment, and

[74] Trial Tr. at 761.
[75] Request for Appellate Defense Counsel (1 Apr. 2023), "Volume 3 of Volumes 3."
[76] Convening Authority Decision on Action – *United States v. SrA Dawson* [*sic*] *M. Dawson* (14 Apr. 2023), "Volume 1 of Volumes 3."
[77] Entry of Judgment (27 Apr. 2023), "Volume 1 of Volumes 3."
[78] Certification of the Transcript (26 Jun. 2023), "Volume 3 of Volumes 3"; Certification of the Record of Trial (26 Jun. 2023), "Volume 3 of Volumes 3."

seventy-seven days after certification of the record—the Third Air Force staff judge advocate's office sent an email to SrA Dawson notifying him of his right to file a direct appeal with this Court.[79] Two days later, SrA Dawson acknowledged receipt of that notice.[80] Counsel filed a notice of appeal on SrA Dawson's behalf twelve days later, on 25 September 2023.[81] This Court docketed SrA Dawson's appeal on 4 October 2023,[82] 186 days after he was sentenced.

On 4 June 2024, the trial counsel certified that he had reviewed the transcript and "determined it to be accurate and complete."[83] On 6 June 2024—432 days after completion of SrA Dawson's court-martial, 406 days after entry of judgment, and 255 days after counsel filed a notice of appeal on SrA Dawson's behalf—the court reporter certified the transcript.[84] This Court received the record of trial on 9 August 2024[85]—496 days after completion of SrA Dawson's court-martial, 470 days after entry of judgment, 319 days after counsel filed a notice of appeal on SrA Dawson's behalf, and sixty-four days after certification of the record of trial.

Standard of Review

A Court of Criminal Appeals necessarily considers de novo whether excessive post-trial delay warrants relief under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

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[79] Memorandum for Airman Deshawn M. Dawson from 3 AF/JA, Subject: Notice of Right to Submit Direct Appeal to the Air Force Court of Criminal Appeals (11 Sep. 2023), "Volume 1 of Volumes 3."
[80] 1st Ind, Notice of Right to Submit Direct Appeal to the Air Force Court of Criminal Appeals (13 Sep. 2023), "Volume 1 of Volumes 3."
[81] Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ, United States v. Senior Airman Deshawn M. Dawson (25 Sep. 2023).
[82] AFCCA Court Docket, https://afcca.law.af.mil/docket.html, last accessed 28 January 2025.
[83] Trial Counsel's Examination of Transcript (4 Jun. 2024), "Volume 3 of Volumes 6." The defense counsel certified that she had reviewed the transcript on the same day. Defense Counsel's Examination of Transcript (4 Jun. 2024), "Volume 3 of Volumes 6."
[84] Certification of the Transcript in the case of *United States v. Senior Airman Deshawn Dawson* (6 Jun. 2024), "Volume 3 of Volumes 6."
[85] This Court can take judicial notice of its own records to establish that this Court received the certified transcript on 9 August 2024. *Lovett*, 23 C.M.R. at 172.

Law and Analysis

This case is marred by three plainly unreasonable delays in post-trial processing. Those periods of delay, individually and collectively, warrant relief under Article 66(d)(2), UCMJ.[86]

First, the Third Air Force staff judge advocate's office took 137 days from entry of judgment to perform the purely ministerial task of advising SrA Dawson of his right to appeal his case to this Court. By the time that office got around to providing the statutorily required notice,[87] 163 days had already passed from sentencing and seventy-seven days had passed from the (inaccurate) certification of the record. That period of delay alone resulted in a presumption of facially unreasonable delay because it directly resulted in SrA Dawson's case being docketed more than 150 days after sentencing. In *United States v. Livak*,[88] this Court considered the standards for presuming unreasonable delay that the Court of Appeals for the Armed Forces prescribed in *United States v. Moreno*[89] and adapted them to the reformed post-trial processing system enacted by the Military Justice Act of 2016.[90] This Court concluded that "the specific requirement in *Moreno* which called for docketing to occur within 30 days of action no longer helps us determine an unreasonable delay under the new procedural rules."[91] Instead, this Court determined that under the new system, it is appropriate to "apply the aggregate standard threshold the majority established in *Moreno*: 150 days from the day Appellant was sentenced to docketing with this court."[92] This Court explained, "This 150-day threshold appropriately protects an appellant's due

[86] While asserting his constitutional right to timely completion of his appeal, SrA Dawson does not allege that the delay thus far has violated his constitutional due process right to timely appeal.
[87] *See* Article 65(c)(1), UCMJ, 10 U.S.C. § 865(c)(1).
[88] *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).
[89] *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006).
[90] Military Justice Act of 2016, Division E, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–42, 130 Stat. 2000, 2894–968 (2016).
[91] *Livak*, 80 M.J. at 633.
[92] *Id.*

process right to timely post-trial and appellate review and is consistent with our superior court's holding in *Moreno*."[93] The record fails to explain why so much time passed before the responsible officials fulfilled their ministerial duty to provide the legally required notice of right to appeal. The Court of Appeals for the Armed Forces has characterized "[d]elays involving [an] essentially clerical task" as "'the least defensible of all' post-trial delays."[94] Once notified, SrA Dawon responded promptly. His notice of appeal was filed only two weeks after an email notifying him of his right to appeal—less than one-sixth the time in which he would have had to file his notice of appeal had the notification to him started the ninety-day clock.[95] This Court docketed his case on 4 October 2023, 186 days after sentencing. That delay was presumptively unreasonable.[96]

A second period of unreasonable delay occurred when another 255 days passed between the filing of the notice of appeal and the court reporter's certification of the transcript. Significantly, that period is more than twice as long as the *Moreno* standards provided for presuming unreasonable delay between end of trial and the convening authority's action—a period that necessarily included preparation of a trial transcript.[97] Under the Military Justice Act of 2016 post-trial processing procedures, this step should require even less time than the end-of-trial-to-convening-authority's-action step during the previous era because additional actions were required during that 120-day period. In its original *United States v. Hennessy* opinion, this Court aptly

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[93] *Id.*
[94] *Moreno*, 63 M.J. at 137 (quoting *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)).
[95] *See* Article 66(c)(1), UCMJ, 10 U.S.C. § 866(c)(1) (establishing ninety-day period for filing notice of appeal starting on the date notice of appellate rights is provided to the accused pursuant to Article 65(c)(1), UCMJ). The ninety-day clock starts on the date the Judge Advocate General deposits a notice to the accused "in the United States mails for delivery by first class certified mail to the accused." Article 65(c)(1), UCMJ, 10 U.S.C. § 865(c)(1). The record includes no indication that such a mailing ever occurred. Nevertheless, even without the ninety-day clock starting, SrA Dawson promptly invoked his right to appeal his case to this Court.
[96] *Livak*, 80 M.J. at 633.
[97] *Moreno*, 63 M.J. at 142.

characterized a 213-day delay from sentencing to completion of a 1,169-page transcript as an "inordinate amount of time" that was "simply too long to be reasonable absent any attending extraordinary circumstances."[98] Here, the 255-day delay from filing of the notice of appeal to completion of the 761-page transcript (less than two-thirds the length of the *Hennessy* transcript) is even more inordinate and unreasonable.

A third period of unreasonable delay occurred when the Government took sixty-four days to perform the clerical task of providing the certified transcript to this Court. That period is more than twice as long as the *Moreno* standards provided for presuming unreasonable delay between the convening authority's action and docketing of the case before the applicable Court of Criminal Appeals.[99] The Court of Appeals for the Armed Forces characterized "[d]elays involving this essentially clerical task" as "'the least defensible of all' post-trial delays."[100] Unreasonable delay at the clerical Military Justice Act of 2016-era transcript transmittal phase is similarly indefensible.

This case demonstrates that dilatory transcription and record compilation has become an institutional problem. In its original *Hennessy* opinion, this Court reasoned that while the dilatory post-trial processing "demonstrate[d] indifference and neglect with regards to this particular case[,] . . . based on this one case alone, we will not find institutional neglect."[101] More recently, in *United States v. Atencio*, this Court expressed concern "about the general lack of urgency demonstrated" in transcribing a court-martial and compiling the record but noted that "we have

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[98] *United States v. Hennessy,* No. ACM 40439, 2024 CCA LEXIS 343 (A.F. Ct. Crim. App. Aug. 20, 2024), *vacated and reconsidered*, 2024 CCA LEXIS 494 (A.F. Ct. Crim. App. Oct. 9, 2024) (order), *upon reconsideration*, No. ACM 40439, 2024 CCA LEXIS 503 (A.F. Ct. Crim. App. Nov. 25, 2024), *reconsideration denied*, No. ACM 40439 (A.F. Ct. Crim. App. Jan. 10, 2025) (order).
[99] *Moreno*, 63 M.J. at 142.
[100] *Id.* at 137 (quoting *Dunbar*, 31 M.J. at 73).
[101] *Hennessy*, 2024 CCA LEXS 343, at *40.

not found that *delays* in transcribing and assembling the record have become an institutional problem."[102] This case provides yet another datapoint suggesting that now it has.[103]

Those individual periods of unreasonable delay combined to produce a collectively unreasonable 496-day delay between sentencing and this Court's receipt of the certified transcript. Such woefully dilatory processing is unacceptable.

This Court is statutorily empowered to "provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial after the judgment was entered into the record."[104] That provision codified the authority the Court of Appeals for the Armed Forces previously recognized for Courts of Criminal Appeals to "grant sentence relief . . . where there has been unreasonable post-trial delay," even absent either prejudice or extraordinary circumstances.[105] This Court should exercise that authority here.

Two key considerations in deciding whether unreasonable post-trial delay warrants relief are "evidence of bad faith or gross indifference to the overall post-trial processing of this case" and "evidence of institutional neglect concerning timely post-trial processing."[106] This Court has previously found that a combination of those two factors may warrant Article 66(d)(2) relief.[107]

The post-trial processing of this case demonstrates gross indifference. First, the Government's designated court reporter prepared a disc of the court-martial's audio that omitted

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[102] *United States v. Atencio*, No. ACM S32783, 2024 CCA LEXIS 543, at *9 (A.F. Ct. Crim. App. Dec. 20, 2024).
[103] *See also* Brief for Appellant at 12–13, *United States v. Gray* (A.F. Ct. Crim. App.) (No. ACM 40648) (filed 21 Jan. 2025) (discussing 293-day delay from docketing to this Court's receipt of 399-page transcript).
[104] Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).
[105] *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).
[106] *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016).
[107] *Valentin-Andino*, 2024 CCA LEXIS 223, at *16–19.

recordings of almost half of the trial. Demonstrating still greater indifference, the court reporter falsely certified that the record was complete. Then, the Third Air Force staff judge advocate's office let 137 days lapse between the entry of judgment and performance of the ministerial duty of notifying SrA Dawson of his right to appeal—and even then, the Third Air Force appears not to have provided notice in the statutorily prescribed manner.[108] That demonstrates gross indifference to both timely and correct post-trial processing. Even more time elapsed between SrA Dawson's prompt invocation of his right to appeal and preparation of a trial transcript: 255 days. Finally, the Government demonstrated yet more institutional indifference by the sixty-four days it took to perform the clerical function of delivering the transcript to this Court. The cumulative 470 days of delay from entry of judgment to providing only a partial record to this Court demonstrates gross institutional indifference.

Regarding "evidence of institutional neglect concerning timely post-trial processing,"[109] the delay in this case is regrettably common. As this Court observed in *United States v. Valentin-Andino*, the "gross indifference to post-trial processing" that "impacted timely processing" of that case was "not an aberration."[110] In *Valentin-Andino*, this Court found "institutional neglect" in post-trial processing, thereby "caus[ing] delays in appellate review."[111] This case provides still more evidence of such gross indifference adversely affecting timely post-trial processing.

Remedy

Just as this Court did in *Valentin-Andino*, it should order relief due to the unreasonable post-trial delay in this case. For comparable reasons as discussed in the remedy section of

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[108] *See supra* note 95. SrA Dawson does not allege prejudice arising from the apparent failure to provide notice in the statutorily prescribed manner as he promptly and successfully invoked his right to appeal to this Court.
[109] *Gay*, 74 M.J. at 744.
[110] *Valentin-Andino*, 2024 CCA LEXIS 223, at *17.
[111] *Id.*

Assignment of Error I, *supra*, the appropriate remedy in this case is to set aside the findings and sentence. "[T]o tolerate is to condone and to condone is ultimately to normalise."[112] The shoddy, plodding post-trial processing of this case is intolerable. Granting the requested relief would avoid its normalization.

WHEREFORE, SrA Dawson respectfully requests this Honorable Court set aside the findings and the sentence.

III.

The military judge erred by denying the defense motion for a mistrial where the prosecutors failed to timely disclose information known to them that was relevant to a potential ground to challenge a court-martial member.

Additional Facts

Late in the trial—amidst the defense's sentencing case—a dramatic event occurred. The military judge convened an Article 39(a) session and announced that information had been received suggesting that one of the members—Technical Sergeant (TSgt) AS—"may have known Senior Airman Dawson, seen him in a poker game, was in a group chat with him."[113]

The assistant trial counsel then stated that "what the government discovered today is that [TSgt AS] was in fact at some of these poker games that – with the accused."[114] In actuality, the prosecution team learned that information three days previously—before the panel was seated—

[112] Amardo Rodriguez, *A New Rhetoric for a Decolonial World*, 20 POSTCOLONIAL STUDIES 1, 4 (2017).
[113] Trial Tr. at 727. As discussed in Assignment of Error I, *supra*, the record includes no audio recording of any of the litigation concerning this issue.
[114] *Id.* This was not the first time on-base poker tournaments had become an issue in the trial. The military judge previously denied a defense motion to disqualify the assistant trial counsel because he had often played poker at the same table as SrA Dawson and conversed with him, including as recently as the weekend before the court-martial commenced. *Id.* at 18–26.

but failed to disclose it.[115] The assistant trial counsel proceeded to inform the military judge:

> [TSgt AS] did in fact sit at a table with [SrA Dawson] approximately four days before the beginning of trial, and before the beginning of *voir dire*. So, they were observed having a conversation. It's not sure what the conversation was about, but that they did in fact communicate with one another. . . . [T]hey are in a group chat, Facebook group chat, with one another. They being [TSgt AS] and Senior Airman Dawson.[116]

The senior defense counsel stated that the defense team was considering options based on the newly disclosed information.[117] The defense then resumed its sentencing case.[118]

The parties and the military judge revisited the issue following sentencing arguments.[119] The defense moved for a partial mistrial based on the information the prosecution team had belatedly disclosed about TSgt AS.[120] The senior defense counsel asserted that had the information been known sooner, it would have been the basis for additional voir dire and might have led to either a challenge for cause or a different choice as to which member the defense would have challenged peremptorily.[121]

The military judge called the chief of civil law for the 39th Air Base Wing Office of the Staff Judge Advocate, Capt JC, as a witness.[122] In marked contrast to what the assistant trial counsel had previously told the court, Capt JC testified that *before the panel was seated*, he had told the trial counsel that at an on-base Force Support Squadron-sponsored poker tournament held

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[115] *Id.* at 746–47 (testimony of Capt JC, chief of civil law for the 39th Air Base Wing Office of the Staff Judge Advocate). Contrary to the assistant trial counsel's statement on the record, the military judge found as fact that Capt JC "told trial counsel before the panel was seated that he saw Tech Sergeant [AS] playing poker with the accused last Saturday." *Id.* at 758.
[116] *Id.* at 727.
[117] *Id.* at 728.
[118] *Id*.
[119] *Id.* at 742.
[120] *Id.*
[121] *Id.* at 742–43.
[122] *Id.* at 744–45.

four days before the court-martial began, he, SrA Dawson, and TSgt AS played at the same table and engaged in "small talk."[123] He estimated that there were six to eight people at the "small table."[124] Capt JC also testified that at previous poker tournaments, he had seen SrA Dawson and TSgt AS at the same table "more than five times."[125]

Following Capt JC's testimony, TSgt AS was called to the stand.[126] She testified that while it is possible she had played poker with SrA Dawson, she did not recognize him.[127] She also testified that she did not recognize SrA Dawson as a member of a Facebook Messenger group chat that included regular poker players.[128]

While arguing for a partial mistrial, the senior defense counsel proffered that although the trial counsel had revealed to the defense before the members were seated that TSgt AS played poker, the trial counsel failed to disclose to the defense that "another judge advocate had seen her at tables with the accused, as recently as four days before."[129] The senior defense counsel stated that had the trial counsel disclosed that information to the defense, it would have "led to a different and more specific line of questioning, which . . . ultimately would have led to both challenges for cause and the exercise of peremptory challenges knowing this information."[130] The senior defense counsel did not dispute that TSgt AS did not remember playing poker with SrA Dawson; in fact, he implied that SrA Dawson also did not remember playing poker with TSgt AS.[131] But he explained to the military judge:

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[123] *Id.* at 746–47.
[124] *Id.* at 746.
[125] *Id.* at 747.
[126] *Id.* at 748.
[127] *Id.* at 749.
[128] *Id.* at 750.
[129] *Id.* at 751.
[130] *Id.*
[131] *Id.* at 755–56.

> [K]nowing that [TSgt AS] has been seen regularly by Captain [JC] at the table with Senior Airman Dawson and that as few as four days before she was at a table near him potentially making small talk, and then she apparently could not, still cannot recognize him, that might raise questions in the defense's mind about her ability to pick up on subtle details and important facts. Skills that are important for a panel member to have. And again, that would inform the defense's use of both challenges for cause and, importantly, I'll refer the court to the footnoted [*sic*] *US v. CommissoCameso* [*sic*[132]], to its use of peremptory challenges that may have given the defense a reason to think that Tech Sergeant [AS] was not someone who was well-suited to the duty of being a panel member. So not having that information, which was not only known to the legal office but specifically to trial counsel before the panel was seated.[133]

In response to a query from the military judge, the senior defense counsel reiterated that the trial counsel had not previously informed the defense of what Capt JC had revealed about TSgt AS and SrA Dawson playing at the same table; rather, the trial counsel had disclosed only that TSgt AS regularly played poker.[134]

While arguing the motion, the senior trial counsel stated, "[O]nly until this full conversation with Captain [JC], as he said this morning, did this issue really raise a concern with the trial team."[135]

The military judge found that Capt JC "told trial counsel before the panel was seated that he saw Tech Sergeant [AS] playing poker with the accused last Saturday."[136] He also found that TSgt AS "did not recognize the accused at group *voir dire* or upon being questioned at the motion hearing."[137] Nevertheless, the military judge also found that "[u]nder the objective standard, [TSgt AS] gave objectively incorrect answers" during voir dire.[138] Yet the military judge denied relief,

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[132] *United States v. Commisso*, 76 M.J. 315 (C.A.A.F. 2017).
[133] Trial Tr. at 751–52 (paragraph break omitted).
[134] *Id.* at 752.
[135] *Id.* at 754.
[136] *Id.* at 758.
[137] *Id.*
[138] *Id.* at 760.

reasoning that "despite the government's seeming failure to appraise [*sic*] the defense as soon as it became aware, presumably, the defense could have become aware sooner in this situation."[139] He concluded, "The court here was not burdened intolerably by preventing the accused from exercising the challenge for cause; the defense motion for mistrial is denied."[140]

Standard of Review

An appellate court reviews a military judge's ruling on a motion for mistrial under an abuse of discretion standard.[141] A military judge commits an abuse of discretion by: (1) basing a ruling on findings of fact that are not supported by the evidence, (2) using incorrect legal principles; (3) applying correct legal principles in a clearly unreasonable way; or (4) failing to consider important facts.[142] Here, an additional standard affects this Court's analysis. Because, as discussed in Assignment of Error I, *supra*, the record does not include an audio recording of any of the litigation of this issue, prejudice must be presumed.[143]

Law and Analysis

It is a hallmark of the military justice system that a "trial counsel" represents not "an ordinary party to a controversy," but rather "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[144] The Court of Appeals for the Armed Forces followed those stirring words with the admonition: "Every attorney in a

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[139] *Id.*
[140] *Id.*
[141] *United States v. Rudometkin*, 82 M.J. 396, 400 (C.A.A.F. 2022).
[142] *United States v. Ramirez*, 84 M.J. 173, 176 (C.A.A.F. 2024).
[143] *Henry*, 53 M.J. at 111.
[144] *United States v. Andrews*, 77 M.J. 393, 404 (C.A.A.F. 2018) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

court-martial has a duty to uphold the integrity of the military justice system."[145] The prosecutors in this case failed to perform that duty.

Before the members were seated, the prosecution team learned information that was obviously relevant to whether a particular member should sit on the court-martial: just four days before, that member played poker with the accused. Yet instead of informing either the opposing party or the military judge of that important information, the prosecutors kept it to themselves. That was error.

R.C.M. 912(c) imposes a special duty on military prosecutors: "Trial counsel shall state any ground for challenge for cause against any member of which trial counsel is aware." As the military judge found, before impanelment, the prosecutors were aware that a member had close contact with the accused four days earlier. That implicates the ground for challenge that a member should not sit "in the interest of having the court-martial free from substantial doubt as to . . . fairness[] and impartiality."[146] Yet they said nothing.

Here, the military judge held it against the accused that the defense counsel did not somehow independently ferret out the information that the prosecutors knew but chose not to disclose. That approach is inconsistent with the venerable case of *United States v. Schuller*, in which the Court of Military Appeals held, "We are unwilling to charge the accused with the consequences of a failure to exercise due care, when it appears that trial counsel had actual knowledge of the disqualification, but still failed to disclose it, as it was his duty to do."[147] Significantly, in a case that cites *Schuller*, the Court of Appeals for the Armed Forces explained that R.C.M. 912(c) "does not presume that the trial counsel acts as the arbiter of the merits of a

[145] *Andrews*, 77 M.J. at 404.
[146] R.C.M. 912(f)(1)(N).
[147] *United States v. Schuller*, 17 C.M.R. 101, 105 (C.M.A. 1954).

challenge. Rather, the rule was designed to allow the defense to explore the *potential conflict* through *voir dire*, with the judge as the decision maker on the merits of the challenge."[148] The information the prosecution team knew clearly established a *potential conflict*. The prosecution team, therefore, erred by failing to disclose it. And the military judge, in direct contravention of *Schuller*, erred when he reasoned that the defense's failure to somehow intuit the information excused the prosecution team's failure to disclose what they *knew*.

The military judge further abused his discretion by limiting his analysis to the exercise of causal challenges. In *United States v. Commisso*, the Court of Appeals for the Armed Forces emphasized that "[v]oir dire is a valuable tool . . . . [for] determining how to exercise peremptory challenges."[149] The Court added, "The military judge's conclusion that Appellant might not have exercised his peremptory challenge in the event that his implied bias challenges failed, defies common sense."[150] Here, had the prosecution team fulfilled its duty to reveal the information in a timely fashion, had the defense had an opportunity to *voir dire* TSgt AS about the issue, and had a causal challenge been unsuccessful, the information may have led the defense team to exercise its peremptory challenge differently. In fact, there was an independent reason to be concerned about TSgt AS sitting as a member: she was not only rated by Col SC[151]—the court-martial president—but was recommended for court-martial service by him after he had already been detailed as a member of the court-martial.[152] Thus, this case presents the highly unusual situation

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[148] *United States v. Dunbar*, 48 M.J. 288, 290 (C.A.A.F. 1998) (first italics added).
[149] *Commisso*, 76 M.J. at 324 n.8 (all alterations in original) (quoting *United States v. Jefferson*, 44 M.J. 312, 318 (C.A.A.F. 1996)).
[150] *Commisso*, 76 M.J. at 324 n.8.
[151] Trial Tr. at 174.
[152] MDG/CC, Memorandum for All Reviewing Authorities (21 Mar. 2023), "Volume 3 of Volumes 3." (The copy of that document in the defense copy of the record is missing its two attachments, the court-member questionnaires of TSgt AS and MSgt KP.) Col SC was detailed as a member on 9 March 2023—12 days before he recommended two enlisted members, including

of one court-martial member helping to pick another. Given that anomaly, little would have been required to convince the defense team to peremptorily challenge TSgt AS in lieu of TSgt KC.[153]

Remedy

The remedy for the prosecution's failure to provide information about a potential member that might have been grounds for challenge is reversal of the stages of the trial at which the member deliberated and voted.[154] Accordingly, the proper remedy here is reversal of the findings and sentence. That remedy will have the added benefit of encouraging prosecutors in future cases to fulfill their responsibility to disclose promptly information of which they are aware that could potentially provide grounds for a challenge, thereby promoting justice and avoiding similar appellate issues.

WHEREFORE, this Honorable Court should set aside the findings and sentence.

TSgt AS, to serve on the court-martial panel with him. Special Order AB-3, Headquarters, 39th Air Base Wing (USAF), Incirlik Air Base, Turkey (9 Mar. 2023), "Volume 1 of 3." Additionally, there is ambiguity in the record as to whether the convening authority intended to detail TSgt AS. *See* Special Order AB-4, Headquarters, 39th Air Base Wing (USAFE), Incirlik Air Base, Turkey (23 Mar. 2023), "Volume 1 of 3." The special order that detailed her to the court-martial began with, "The following member is detailed . . . ." After this singular antecedent, the special order named two members, the second of whom was TSgt AS. The document was signed by the staff judge advocate, not by the convening authority. The singular antecedent raises substantial doubt as to whether the convening authority actually intended to detail both MSgt KP and TSgt AS to the court-martial. However, Court of Appeals for the Armed Forces precedent provides that, absent evidence of the convening authority's intent to the contrary, ambiguities in detailing will be resolved in accordance with the trial participants' understanding. *United States v. Mack*, 58 M.J. 413, 416 (C.A.A.F. 2003).

[153] Trial Tr. at 290.

[154] *See*, *e.g.*, *United States v. Glenn*, 25 M.J. 278, 280 (C.M.A. 1987) (setting aside sentence where member about whom the prosecution failed to disclose grounds for challenge participated in sentencing in a guilty plea case).

IV.

The military judge erred by allowing SrA Dawson's commander to testify during the sentencing hearing about the adverse effects SrA Dawson's unit suffered because of limitations placed on his performance of duty due to the "allegations" against him, despite SrA Dawson having been acquitted of two of those three allegations.

Additional Facts

These additional facts apply to both Assignments of Error IV and V.

The prosecution's sentencing case consisted of a one-page personal data sheet and the testimony of Lieutenant Colonel (Lt Col) AG, the 39th Security Forces Squadron Commander, who was SrA Dawson's commanding officer.[155] Before Lt Col AG took the stand, the defense objected to her testimony, asserting that it did not constitute proper matters in aggravation under R.C.M. 1001(b)(4).[156] It is impossible to recount with precision the defense's rationale for the objection, as the transcript is garbled and there is no corresponding audio recording. For example, the defense counsel almost certainly did not say that "we believe the commander is going to testify about the effect on federal grand discipline," as the transcript states.[157] Nevertheless, the gist of the defense objection was that it was improper for the prosecution to elicit testimony about SrA Dawson being removed from duty due to the pendency of the charges against him and the effects on the unit of his removal from duty.[158] The assistant trial counsel argued the evidence was admissible under one decision by this Court and another by the Court of Military Appeals.[159] The military judge

[155] Trial Tr. at 703–14; Pros. Ex. 13. As discussed in Assignment of Error I, *supra*, there is no audio corresponding to the purported transcription of Lt Col AG's testimony.
[156] Trial Tr. at 704.
[157] *Id.*
[158] *Id.* at 704–06.
[159] *Id.* at 706 (citing *United States v. Key*, 55 M.J. 537 (A.F. Ct. Crim. App. 2001), *aff'd on other grounds*, 57 M.J. 246 (C.A.A.F. 2002); *United States v. Thornton*, 32 M.J. 112 (C.M.A. 1991)).

overruled the objection.[160] He ruled that Lt Col AG could testify about the effect of the accused's removal from duty but could not "talk about administrative burden due to the court-martial process."[161]

Early in Lt Col AG's testimony, she stated that "[s]ince the allegations came to me," she had had more frequent interactions with SrA Dawson and referred to him being "on do not arm status."[162] She subsequently explained:

> Bringing him down on Arming status essentially means that he can't perform all the duties and functions that he is assigned to do. So, in this particular case I ended up removing him from his flight, into another section, logistics and readiness section because he wasn't able to arm. With that, that flight is just down a member until we get a back fill to replace the member.[163]

In response to the assistant trial counsel's question about the impact of being down a member, Lt Col AG replied, "[J]ust speaking again of Senior Airman Dawson, so that flight has so many posts and patrols that they have every day; that's one less member that they can use to cover that."[164] She continued, "So it affects the rest of the flight in post rotations, possible [days off,] or those type of things."[165]

Lt Col AG testified that she had only limited personal knowledge of SrA Dawson's performance of duty: "on flight I'll be completely honest, he kind of blends in, you know we have a pretty large unit. So, I didn't know him or of his duties specifically while he was on flight. He didn't stand out."[166] She later explained that after the allegations arose, SrA Dawson was moved

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[160] Trial Tr. at 706.
[161] *Id.*
[162] *Id.* at 708.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*

to the S-4 section, which handled "logistics, vehicle stuff, some of the equipment type things."[167] She then focused on SrA Dawson's performance in the S-4 section. She started by explaining that "he is often in a detail where they are asked to do things, random things throughout the unit or for support of the unit."[168] She continued, "It's been brought to me on numerous occasions—"[169] The defense counsel interjected with a hearsay objection.[170] The military judge ruled, "I don't know what the answer is gonna be so at the this [*sic*] point overruled."[171] In response to the assistant trial counsel's request to "describe some of the things that you've observed of Airmen [*sic*] Dawson in that particular S-4 section," Lt Col Goodwin testified:

> So observed, I see him in his details, working those details, and I'm not sure you know what the objection is, but *it was brought to me* on attitude, while he's been working those details on at least two occasions, where he is asked to do something and he drags his feet or he doesn't do it. Which then the detail that continues that trend and so that's been an issue since he's been in the S-4 section.[172]

In response to the assistant trial counsel's request that she elaborate, Lt Col AG stated:

> So, *what was brought to me, again I didn't see it firsthand, but what was brought to me by senior NCOs* was they asked him to do something and he doesn't get it done. They ask him again to do it and he has kind of a flippant attitude about going and getting it done, like they are bothering him or asking him to do something that's unreasonable.[173]

Responding to another follow-up question from the assistant trial counsel, Lt Col AG expounded:

> So they all watch each other and they all feed off of each other quite frankly, and so if one of them is not going to do it others are going to follow suit with that, and *that is something that's been brought to me* on at least two occasions with Senior Airman Dawson specifically.[174]

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[167] *Id.* at 710.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 710–11 (emphasis added).
[173] *Id.* at 711 (emphasis added).
[174] *Id.* (emphasis added).

The prosecution's sentencing argument expressly referenced Lt Col AG's testimony. The trial counsel argued:

> We've heard from Lieutenant Colonel [AG] about how [SrA Dawson] conducts himself with senior NCOs who are trying to help rehabilitate him. They were trying to help him be the Airman that he claims he wants to be, and his attitude in those situations is to not do the work that has been requested. When multiple people get him to do it, he does it begrudgingly. And when he does it begrudgingly, his attitude portrays it on the rest of the S-4 team. Your Honor, this demonstrates a lack of rehabilitative potential and supports a sentence for bad conduct discharge.[175]

Later in his sentencing argument, the trial counsel again referenced Lt Col AG's testimony:

> [W]hen we talked about two-thirds forfeitures for two months, this is primarily coming down to the fact that, as Colonel [AG] acknowledged, he is not performing his primary duties. Primary duties he's performing that aren't consistent with his rank . . . . He is performing duties, but he's not performing them the way he should be. He's ignoring directions to perform tasks over the last six months, and then when he does, he does them begrudgingly, and he brings the rest of the unit down. Simply said, he shouldn't be receiving the same pay as members who are doing the job with full effort.[176]

Standard of Review

A military appellate court "review[s] a military judge's decision on the admission of evidence in aggravation at sentencing for an abuse of discretion."[177] Here, an additional standard affects this Court's analysis. Because, as discussed in Assignment of Error I, *supra*, the record does not include an audio recording of any of the sentencing proceedings, prejudice must be presumed.[178]

Law and Analysis

R.C.M. 1001(b)(4) allows the prosecution to "present evidence as to any aggravating circumstances directly relating to or resulting from the *offenses of which the accused has been*

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[175] *Id.* at 733 (paragraph break omitted).
[176] *Id.* at 734–35.
[177] *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009).
[178] *Henry*, 53 M.J. at 111.

found guilty."[179] The principal case on which the military judge relied to overrule the defense objection to Lt Col AG's testimony—this Court's decision in *United States v. Key*—was similarly tied to the offenses of which the accused was convicted. This Court emphasized that Airman First Class (A1C) Key "abused his position of special trust" while also "involv[ing] a co-worker in his offenses."[180] This Court found that removing A1C Key and his co-worker from the unit "was a sufficiently direct and immediate result of his offenses to be admissible as evidence in aggravation."[181]

Here, the prosecution failed to carry its burden to establish that SrA Dawson's removal from his primary duties directly resulted from the offenses of which he was found guilty. In marked contrast to the facts in *Key*, here Lt Col AG testified that the frequency of her interactions with SrA Dawson increased "[s]ince the *allegations* came to me."[182] In the very next sentence, she referred to "bringing him down on do not arm status."[183] Lt Col AG's testimony fails to establish that SrA Dawson was put on "do not arm" status, with the resulting adverse consequences to his unit, because of the sole offense of which he was convicted. Rather, she used the plural word "allegations," suggesting that the "do not arm" status resulted partially or entirely from the two abusive sexual contact offenses of which SrA Dawson was acquitted. The record fails to establish that SrA Dawson would have been put on "do not arm" status if the only allegation against him was that he slapped a friend on the cheek with insufficient force to leave a visible mark the next morning. The two offenses of which SrA Dawson was acquitted each carried the possibility—if tried by a general court-martial—of confinement for seven years, a dishonorable discharge, and

[179] R.C.M. 1001(b)(4) (emphasis added).
[180] *Key*, 55 M.J. at 539.
[181] *Id*.
[182] Trial Tr. at 708 (emphasis added).
[183] *Id*.

forfeiture of all pay and allowances.[184] The sole offense of which SrA Dawson was convicted, on the other hand, had a presidentially prescribed maximum punishment of confinement for six months, a bad-conduct discharge, and forfeiture of all pay and allowances.[185] It is probable that SrA Dawson was placed on "do not arm" status entirely because of the two abusive sexual contact allegations and not the face-slap incident. But there is no need to speculate. The "Government bears the burden of establishing an adequate foundation for admission of evidence against an accused."[186] The prosecution failed to meet that burden.

The military judge abused his discretion by allowing the prosecution to present Lt Col AG's testimony over defense objection without carrying its burden under R.C.M. 1001(b)(4) to establish that the subject of her testimony directly resulted from the offenses of which SrA Dawson was convicted. Nowhere did her testimony satisfy that burden.

The military judge's error prejudiced SrA Dawson. By overruling the defense's objection,[187] the military judge indicated that he erroneously considered Lt Col AG's testimony about SrA Dawson's removal from his primary duties to be proper evidence in aggravation. That suggests that while fashioning the sentence, he erroneously considered the limitations placed on SrA Dawson's performance of duty due to the "allegations" against him.

Remedy

When a military appellate court "finds error in the admission of sentencing evidence (or sentencing matters), the test for prejudice is 'whether the error substantially influenced the

[184] Pt. IV, ¶ 60.d.(4), MCM (2019 ed.). By operation of R.C.M. 1003(b)(4), reduction in pay grade would also be an authorized portion of the sentence of an enlisted member.
[185] Pt. IV, ¶ 77.d.(2)(a), MCM (2019 ed.). Again by operation of R.C.M. 1003(b)(4), reduction in pay grade would also be an authorized portion of the sentence of an enlisted member.
[186] *United States v. Maxwell*, 38 M.J. 148, 150 (C.M.A. 1993).
[187] Trial Tr. at 706.

adjudged sentence.'"[188] The Government bears the burden of demonstrating that the admission of the erroneous evidence was harmless.[189] An appellate court considers de novo "four factors when deciding whether an error substantially influenced an appellant's sentence: '(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.'"[190] Here, the Government cannot meet its burden to show harmlessness. The offense in this case was exceptionally minor. The prosecution's sentencing case consisted exclusively of a personal data sheet and Lt Col AG's testimony.[191] The defense put on a sentencing case that included character letters from an officer and two noncommissioned officers as well as testimony from SrA Dawson's mother.[192] And the prosecution expressly used the erroneously admitted evidence in its sentencing argument by emphasizing that SrA Dawson "is not performing his primary duties. Primary duties he's performing that aren't consistent with his rank . . . ."[193]

While the fact that the sentencing authority was a military judge who is presumed to know and apply the law is generally considered when assessing whether the Government has met its burden to demonstrate harmlessness,[194] here that factor is inconsequential. The military judge admitted the improper evidence in aggravation over defense objection, demonstrating that he erroneously believed it was appropriate to consider Lt Col AG's testimony about effects on the

[188] *United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022) (quoting *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018)).
[189] *United States v. Cunningham*, 83 M.J. 367, 372 (C.A.A.F. 2023).
[190] *Id.* (quoting *Edwards*, 82 M.J. at 247).
[191] Prosecution Exhibits13; Trial Tr. at 703–14.
[192] Defense Exhibits E–G; Trial Tr. at 719–26.
[193] Trial Tr. at 734.
[194] *Cunningham*, 83 M.J. at 372.

unit arising from "allegations" against SrA Dawson. Thus, notwithstanding the general presumption, here the military judge did not know and apply the law correctly.

The appropriate remedy in this case, where the only offense for which the accused was sentenced was minor and where the prosecution presented evidence in aggravation that improperly relied on alleged offenses of which the accused was acquitted, is to set aside the sentence.

WHEREFORE, this Court should set aside the sentence.

V.

The military judge erred by allowing a sentencing witness to recount hearsay statements disparaging SrA Dawson despite her acknowledgement that she did not have "firsthand" knowledge of the matters.

Standard of Review

A military appellate court "review[s] a military judge's decision on the admission of evidence in aggravation at sentencing for an abuse of discretion."[195] Here, an additional standard affects this Court's analysis. Because, as discussed in Assignment of Error I, *supra*, the record does not include an audio recording of any of the sentencing proceedings, prejudice must be presumed.[196]

Law and Analysis

Lt Col AG's testimony featured highly prejudicial secondhand accounts offered over defense objection. The Court of Appeals for the Armed Forces has observed, "The Military Rules of Evidence are applicable to sentencing, thus providing procedural safeguards to ensure the reliability of evidence admitted during sentencing."[197] In this case, those procedural safeguards were breached.

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[195] *Ashby*, 68 M.J. at 120.
[196] *Henry*, 53 M.J. at 111.
[197] *United States v. McDonald*, 55 M.J. 173, 176 (C.A.A.F. 2001) (internal citation omitted).

One of the most basic evidentiary rules is that hearsay that does not fall within an exception is inadmissible.[198] And for good reason. As the Supreme Court has explained, the hearsay rule "is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact."[199] The Court expounded:

> Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or under circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.[200]

Here, the sentencing authority improperly received prejudicial hearsay testimony that suffered from those defects.

While testifying about SrA Dawson's work in the S-4 section, Lt Col AG stated, "It's been brought to me on numerous occasions—"[201] That statement was an obvious precursor to the introduction of hearsay testimony. And it was. Recognizing this fact, the defense lodged a proper hearsay objection.[202] Yet the military judge responded, "at the this [*sic*] point overruled."[203] A slew of prejudicial hearsay followed. The military judge never revisited his hearsay ruling and the prosecution team relied heavily on the hearsay statements it had elicited from Lt Col AG during sentencing argument.[204]

In her response to the first question after the overruled objection, Lt Col AG testified that "*it was brought to me* on attitude, while he's been working those details on at least two occasions,

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[198] Mil. R. Evid. 802, MCM (2019 ed.).
[199] *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973).
[200] *Id*.
[201] Trial Tr. at 710.
[202] *Id.*
[203] *Id*.
[204] *Id.* at 733–35.

where he is asked to do something and he drags his feet or he doesn't do it."[205] That obviously constitutes inadmissible hearsay. But wait; there's more. Lt Col AG began her answer to the next question by stating, "So, what was brought to me, again I didn't see it firsthand, but what was brought to me by senior NCOs . . . ."[206] Rarely does a witness telegraph so clearly that what is about to follow is inadmissible hearsay. Yet Lt Col AG continued without interruption, "[T]hey asked [SrA Dawson] to do something and he doesn't get it done. They ask him again to do it and he has kind of a flippant attitude about going and getting it done, like they are bothering him or asking him to do something that's unreasonable."[207] Even that was not the end of the obviously inadmissible hearsay. Lt Col AG's final answer on direct examination once again mentioned adverse information that had "been brought to me on at least two occasions with Senior Airman Dawson specifically."[208]

The prosecution's repeated elicitation of damaging hearsay statements after the military judge overruled a proper defense objection was error. That error was not rendered harmless by the fact that, at the defense's request, the military judge relaxed the rules of evidence *after* Lt Col AG had testified.[209] Had the military judge not improperly admitted Lt Col AG's damaging hearsay statements during the prosecution's opening sentencing case, the defense no doubt would have avoided assiduously any evidence that would have opened the door to the admission of those

[205] *Id*. at 711 (emphasis added).
[206] *Id*.
[207] *Id*.
[208] *Id*.
[209] *Id.* at 718.

hearsay statements on rebuttal, when the military judge could have relaxed the rules of evidence for the prosecution.[210]

Remedy

For comparable reasons to those discussed in the remedy section of Assignment of Error V, *supra*, the appropriate remedy for the military judge's admission of obviously improper hearsay testimony is to set aside the sentence. Such relief is even more appropriate here because the prosecution relied so heavily on the hearsay evidence in its sentencing argument,[211] demonstrating that the Government itself viewed it as material.

WHEREFORE, this Court should set aside the sentence.

VI.

The entry of judgment erred to SrA Dawson's substantial prejudice by mischaracterizing the portion of the sentence adjudging forfeiture of "$300 of your pay for two months" as "$300 pay, per month, for 2 months," thereby doubling the adjudged forfeitures.

Additional Facts

According to the "verbatim" court-martial transcript, the military judge announced the following forfeiture portion of the sentence: "Forfeit $300 of your pay for two months."[212] The court reporter certified that the transcript "is an accurate reflection of the proceeding of the court."[213] The trial counsel similarly certified that he had reviewed the transcript and "determined

[210] *See* R.C.M. 1001(d)(3); *United States v. Manns*, 50 M.J. 767, 770 (N-M. Ct. Crim. App. 1999) ("even if the rules of evidence are relaxed, the Government is limited to presenting evidence which actually rebuts or refutes evidence presented by the defense"), *aff'd*, 54 M.J. 164 (C.A.A.F. 2000).
[211] Trial Tr. at 733–35.
[212] *Id*. at 761. As discussed in Assignment of Error I, *supra*, there is no audio recording corresponding to the purported transcription of the military judge's announcement of sentence.
[213] Certification of the Transcript (6 Jun. 2024), "Volume 3 of Volumes 6."

it to be accurate and complete."[214] Nevertheless, both the statement of trial results and the entry of judgment state that the adjudged forfeitures were "$300 pay, per month, for 2 months."[215]

Standard of Review

"The standard of review for determining whether post-trial processing was properly completed is de novo."[216] Here, an additional standard affects this Court's analysis. Because, as discussed in Assignment of Error I, *supra*, the record does not include an audio recording of the military judge's announcement of the sentence, prejudice must be presumed.[217]

Law and Analysis

If the words "per month" are omitted from the adjudged forfeitures, "the amount announced shall be the total amount to be forfeited."[218] R.C.M. 1111(b)(2) requires that the entry of judgment include "[t]he sentence, accounting for any modifications made by reason of any post-trial action by the convening authority or any post-trial ruling, order, or other determination by the military judge . . . ." In this case, no post-trial action, ruling, or order altered the sentence. Thus, the entry of judgment was required to include the forfeitures as announced on the record. According to the transcript as certified by both the court reporter and the trial counsel, it did not. That was error. SrA Dawson was prejudiced by that error, as it doubled the total forfeitures from $300 to $600.

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[214] Trial Counsel's Examination of Transcript (4 Jun. 2024), "Volume 3 of Volumes 6."
[215] Entry of Judgment in the Case of *United States v. SrA Deshawn M. Dawson*, 2 (27 Apr. 2023), "Volume 1 of Volumes 3"; Statement of Trial Results in the Case of *United States v. SrA Deshawn M. Dawson*, 2 (3 Apr. 2023), "Volume 1 of Volumes 3." There are minor non-substantive differences in the two documents' punctation when reciting the forfeiture portion of the sentence. The summarized transcript similarly records the forfeiture portion of the sentence as: "To forfeit $300.00 pay per month for 2 months." Summarized Tr. at 114, "Volume 3 of Volumes 3."
[216] *United States v. Sheffield*, 60 M.J. 591, 592 (A.F. Ct. Crim. App. 2004).
[217] *Henry*, 53 M.J. at 111.
[218] *United States v. Clelan*, No. ACM 37150, 2009 CCA LEXIS 35, at *4 (A.F. Ct. Crim. App. Jan. 29, 2009) (per curiam).

Remedy

Merely returning the improperly forfeited $300 to SrA Dawson now would not eliminate that prejudice due to "the time value of money—the fact that [a] dollar today is worth more than a dollar tomorrow."[219] Conversely, $300 today is worth less than $300 in 2023, when the adjudged forfeitures took effect. To ensure an absence of prejudice, this Court should set aside the adjudged forfeitures entirely.

VII.

The cumulative effect of all plain and preserved errors in this case warrants reversal of the findings and sentence.

Standard of Review

The cumulative effect of all plain errors and preserved errors is assessed *de novo*.[220]

Law and Analysis

"Under the cumulative-error doctrine, 'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'"[221] Reversal is appropriate where the cumulative errors denied the accused a fair trial.[222] In this case, the cumulative errors denied SrA Dawson a fair trial as to both findings and sentence.

Remedy

WHEREFORE, this Court should set aside the findings and sentence.

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[219] *Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 384 (1998) (alternation in original; internal quotation marks deleted) (quoting DAVID R. HERWITZ & MATTHEW J. BARRETT, MATERIALS ON ACCOUNTING FOR LAWYERS 221 (2d ed. 1997)).
[220] *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011).
[221] *Id*. (quoting *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992)).
[222] *Id*.

VIII.

SrA Dawson's constitutional rights were violated when he was convicted of an offense with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously for guilt.

Additional Facts

The defense filed a motion for a unanimous verdict, which the prosecution opposed.[223] The military judge denied the motion.[224] While delivering findings instructions, the military judge informed the members, "As the findings do not require a unanimous agreement, no one will ever know how you voted in this case or whether you concurred with the findings ultimately announced."[225] He later expressly instructed the members:

> The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have four members, that means three members must concur in any finding of guilty. If you have at least three votes of guilty of any offense then that will result in a finding of guilty for that offense.[226]

The members found SrA Dawson guilty of one specification of assault consummated by a battery.[227] It is unknown and unknowable whether that conviction was based on a vote of 3–1 or 4–0.

Standard of Review

The standard of review for questions of constitutional law is de novo.[228]

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[223] Trial Tr. at 12; App. Ex. VI; App. Ex. VII.
[224] Trial Tr. at 700; App. Ex. XXXVIII.
[225] Trial Tr. at 652; App. Ex. XXXVI at 1.
[226] Trial Tr. at 687; App. Ex. XXXVI at 10. As discussed in Assignment of Error I, *supra*, the record does not include an audio recording of the findings instructions.
[227] Trial Tr. at 695; App. Ex. XXXV.
[228] *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016).

Law and Analysis

In *United States v. Anderson*, the Court of Appeals for the Armed Forces held that non-unanimous findings of guilty do not violate a court-martial accused's constitutional rights.[229] SrA Dawson acknowledges that, absent intervening Court of Appeals for the Armed Forces or Supreme Court case law, this Court is bound by the *Anderson* opinion. Nevertheless, SrA Dawson maintains that *Anderson* was wrongly decided and expressly preserves this issue for further appellate review.

Remedy

WHEREFORE, this Honorable Court should reverse the findings of guilty and the sentence.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 January 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Air Force Appellate Defense Division

[229] *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024).

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **DESHAWN M. DAWSON** United States Air Force *Appellant.*	)	No. ACM 24041 11 February 2025

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

Pursuant to Rule 23.3(m)(5)-(6), the United States respectfully requests that it be allotted seven additional days to file its answer brief in the above captioned case with this Court, making the new due date Thursday, 6 March 2025. The United States' answer brief was originally due on Thursday, 27 February 2025.

Appellant filed his notice of direct appeal on 25 September 2023 and docketed with this Court on 4 October 2023. (*Notice of Direct Appeal*, dated 25 September 2023; *Notice of Docketing*, 4 October 2023). On 9 August 2024, a verbatim transcript and the record of trial were provided to the parties. On 28 January 2025, Appellant filed his brief with this Court. As of the date of this filing 496 days have elapsed since docketing, and 186 days will have elapsed from receipt of the verbatim transcript. From date of docketing until the original due date 512 days will have elapsed, and from the date of docketing to the new due date, 519 days will have elapsed. From receipt of the verbatim transcript until the original due date 202 days will have elapsed, and from receipt of the verbatim transcript to the new due date, 209 days will have elapsed.

There is good cause for the enlargement of time in this case. Undersigned counsel is preparing for oral argument before the Court of Appeals for the Armed Forces (CAAF) in United States v. Csiti, 2024 CAAF LEXIS 533 (C.A.A.F. 2024). Argument is scheduled for 25 February 2025. The government appellate division will be closed from 14-17 February 2025 due to the HAF family day and the President's Day holiday. Undersigned counsel will be preparing for her CAAF oral argument over the course of the long weekend. The week of 18-21 February 2025, undersigned counsel will be preparing her CAAF oral argument for two different moots, and she will be assisting three other government appellate counsel during six other moots in preparation for all four upcoming CAAF oral arguments: United States v. Arroyo, 2024 CAAF LEXIS 592 (C.A.A.F. 2024); United States v. Aguirre, 2024 CAAF LEXIS 624 (C.A.A.F. 2024); and United States v. Roan, 2024 CAAF LEXIS 545 (C.A.A.F. 2024). In addition, this Court specified an additional issue and ordered briefing in United States v. Hilton (ACM 40500). Undersigned counsel is the counsel of record on Hilton and will be writing the government's response. The government's response to the specified issue is due on 24 February 2025. Undersigned counsel will be on preapproved leave from 27-28 February 2025.

To address two of Appellant's assignments of error, undersigned counsel has reached out to the base legal office and the court reporter for a post-trial chronology and for a complete copy of the audio. To date, counsel has received a post-trial chronology from the base legal office and a copy of the audio from the court reporter. Counsel is comparing the audio to the transcript to verify that it is complete. Undersigned counsel has reviewed Appellant's eight issue brief and much of the record of trial in this case, and she is currently working through the 761-page transcript while listening to the audio of the proceedings provided by the court reporter.

The additional seven days will accommodate the upcoming holiday and undersigned counsel's preparation for and argument at CAAF and work on the specified issue in Hilton. No other counsel can provide a response in this case sooner, as they have been assigned other cases.

WHEREFORE, the United States respectfully requests this Court grant the United States' motion for an enlargement of time of seven days to file an answer brief in the above captioned case.

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CERTIFICATE OF SERVICE

I certify that the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 11 February 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S OPPOSITION TO UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
Appellee,	)	
v.	)	
	)	Before Panel No. 1
Senior Airman (SrA) (E-4)	)	
DESHAWN M. DAWSON,	)	No. ACM 24041
United States Air Force,	)	
Appellant.	)	13 February 2025

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

COMES NOW Appellant, SrA Deshawn M. Dawson, by and through undersigned counsel, and pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, opposes the United States' first motion for enlargement of time.

This case has already suffered from inordinate post-trial delay. The Government now seeks to add to that delay. SrA Dawson reasserts his constitutional right to timely completion of his appeal.[1] This Court should deny the motion and hold the Government to its current deadline of 27 February 2025.

WHEREFORE, this Honorable Court should deny the Government's motion.

Respectfully submitted,

[redacted]

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[1] SrA Dawson previously invoked that right in his brief. Br. on Behalf of Appellant, *United States v. Dawson*, No. ACM 24041 (A.F. Ct. Crim. App. brief filed Jan. 28, 2025), at 17 n.86.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 13 February 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Air Force Appellate Defense Division

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24041**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Deshawn M. DAWSON	)	**PANEL CHANGE**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 24th day of February, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before a Special Panel
Senior Airman (E-4) **DESHAWN M. DAWSON** United States Air Force *Appellant.*	)	No. ACM 24041 27 February 2025

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

Pursuant to Rule 23.3(m)(5)-(6), the United States respectfully requests that it be allotted seven additional days to file its answer brief in the above captioned case with this Court, making the new due date Thursday, 13 March 2025. The United States' answer brief was originally due on Thursday, 27 February 2025 and this Court granted a first enlargement of time for seven additional days resulting in a due date of Thursday, 6 March 2025.

Appellant filed his notice of direct appeal on 25 September 2023 and docketed with this Court on 4 October 2023. (*Notice of Direct Appeal*, dated 25 September 2023; *Notice of Docketing*, 4 October 2023). On 9 August 2024, a verbatim transcript and the record of trial were provided to the parties. On 28 January 2025, Appellant filed his brief with this Court.

As of the date of this filing 512 days have elapsed since docketing, and 216 days will have elapsed from receipt of the verbatim transcript. From date of docketing until the original due date 512 days will have elapsed, and from the date of docketing to the new due date, 526 days will have elapsed. From receipt of the verbatim transcript until the original due date 202 days will have elapsed, and from receipt of the verbatim transcript to the new due date, 216 days will have elapsed.

There is good cause for the enlargement of time in this case. Undersigned counsel spent two weeks preparing for oral argument before the Court of Appeals for the Armed Forces (CAAF) in United States v. Csiti, 2024 CAAF LEXIS 533 (C.A.A.F. 2024). Argument occurred 25 February 2025. The government appellate division was closed from 14-17 February 2025 due to the HAF family day and the President's Day holiday. Undersigned counsel prepared for her CAAF oral argument over the course of the long weekend. The week of 18-21 February 2025, undersigned counsel prepared for two different moots, and she assisted three other government appellate counsel during six other moots in preparation for all four CAAF oral arguments that occurred the week of 24 February 2025: United States v. Arroyo, 2024 CAAF LEXIS 592 (C.A.A.F. 2024); United States v. Navarro Aguirre, 2024 CAAF LEXIS 624 (C.A.A.F. 2024); and United States v. Roan, 2024 CAAF LEXIS 545 (C.A.A.F. 2024). In addition, this Court specified an additional issue and ordered briefing in United States v. Hilton (ACM 40500). And undersigned counsel answered the specified issue in Hilton by the due date of 24 February 2025. This week undersigned counsel attended all four arguments at CAAF, provided feedback in office hotwashes after each, and participated in a moot for another government appellate counsel's upcoming oral argument before this Court. Undersigned counsel is also assigned to another CAAF case, United States v. Braum, 2025 CAAF LEXIS 83 (C.A.A.F. 2025), and the government's answer in that case is due 18 March 2025, but counsel is seeking an extension of time in that case.

This case is undersigned counsel's priority now that preparation for CAAF argument is over, but from 10 February 2025 until 27 February 2025, counsel has had little spare time to answer Appellant's eight assignments of error. Reservist support has been employed to assist with answering some of the issues.

Appellant alleges among other things that that the record of trial is incomplete because 45% of the audio is missing from the record of trial, but the record contains a verbatim transcript. To address Appellant's assignment of error, undersigned counsel reached out to the base legal office and the court reporter for a complete copy of the audio, and counsel has received the full audio. Now counsel is comparing the audio to the transcript to verify that the audio the government is seeking to attach to the record is complete. But counsel did not realize how tedious comparing the approximately 26 hours of transcription to the 761-page transcript would be. She has reviewed 13% of the audio so far. Counsel has reviewed Appellant's eight issue brief and much of the record of trial in this case. Other members of JAJG will be assisting in completing the review of the audio. Undersigned counsel has completed answers for two of the eight issues.

The additional seven days will allow counsel time to work the remaining issues with reservist support. No other counsel can provide a response in this case sooner, as they have been assigned other cases. The attorneys who have some availability will be assisting in reviewing the audio from this case and comparing it to the transcript.

WHEREFORE, the United States respectfully requests this Court grant the United States' motion for an enlargement of time of seven days to file an answer brief in the above captioned case.

JOCELYN Q. WRIGHT, Maj, USAF
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CERTIFICATE OF SERVICE

I certify that the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 27 February 2025.

JOCELYN Q. WRIGHT, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S OPPOSITION TO**
	)	**UNITED STATES' MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before a Special Panel
Senior Airman (E-4)	)	
DESHAWN M. DAWSON,	)	No. ACM 24041
United States Air Force,	)	
Appellant.	)	28 February 2025

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

COMES NOW Appellant, by and through undersigned counsel, and pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure opposes the United States' second motion for enlargement of time.

SrA Dawson's second assignment of error asserts that this case has suffered from inordinate post-trial delay caused, to a significant degree, by dilatory and inattentive preparation of the record of trial.[1] The United States' second motion for enlargement of time is predicated largely on difficulties in remedying the flaws in the record of trial caused by its own agents.[2] The additional delay the United States seeks would exacerbate the adverse effects of what this Court has characterized as "a systemic problem indicating institutional neglect" arising from "incomplete records of trial," including repeated instances of "the record of trial not containing audio recording

[1] Brief on Behalf of Appellant, *United States v. Dawson*, No. ACM 24041 (A.F. Ct. Crim. App. brief filed Jan. 28, 2025), at 15–22.
[2] United States' Motion for Enlargement of Time (Second), *United States v. Dawson*, No. ACM 24041 (A.F. Ct. Crim. App. motion filed Feb. 27, 2025), at 3.

of the court-martial."[3] This Court should deny the United States' attempt to inject even more delay into this case predicated on the very error for which SrA Dawson seeks relief.

SrA Dawson reasserts his constitutional right to timely completion of his appeal.[4]

WHEREFORE, this Court should deny the United States' motion and maintain the current deadline of 6 March 2025 for its answer.

Respectfully submitted,

[redacted]

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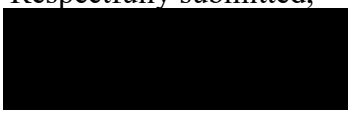
[3] *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17–18 (A.F. Ct. Crim. App. June 7, 2024), *petition granted*, __ M.J. __, No. 24-0208/AF, 2024 CAAF LEXIS 571 (C.A.A.F. Sept. 30, 2024).

[4] SrA Dawson previously invoked that right in his brief and again in his opposition to the United States' motion for a first enlargement of time. Br. on Behalf of Appellant, *United States v. Dawson*, No. ACM 24041 (A.F. Ct. Crim. App. brief filed Jan. 28, 2025), at 17 n.86; Appellant's Opposition to United States' Motion for Enlargement of Time (First), *United States v. Dawson*, No. ACM 24041 (A.F. Ct. Crim. App. motion filed Feb. 13, 2025), at 1.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 February 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before a Special Panel
Senior Airman (E-4) **DESHAWN M. DAWSON** United States Air Force *Appellant.*	)	No. ACM 24041
	)	12 March 2025

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

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INDEX OF BRIEF

VIII.

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

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

COURT OF APPEALS FOR THE ARMED FORCES

SERVICE COURTS OF CRIMINAL APPEALS

FEDERAL CIRCUIT COURTS

OTHER AUTHORITIES

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before a Special Panel
Senior Airman (E-4) **DESHAWN M. DAWSON** United States Air Force *Appellant.*	)	No. ACM 24041
	)	12 March 2025

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

ISSUES PRESENTED

I.

[WHETHER T]HE RECORD'S FAILURE TO INCLUDE AUDIO RECORDINGS CORRESPONDING TO FORTY-FIVE PERCENT OF THE COURT-MARTIAL'S WRITTEN TRANSCRIPT—INCLUDING KEY PORTIONS OF THE FINDINGS PROCEEDINGS AND THE ENTIRETY OF THE SENTENCING PROCEEDINGS—AND THE COURT REPORTER'S FALSE CERTIFICATION THAT THE RECORD OF TRIAL IS "COMPLETE" CONSTITUTE ERROR WARRANTING REVERSAL OF THE FINDINGS AND SENTENCE.

II.

[WHETHER T]HE 186-DAY DELAY FROM SENTENCING UNTIL DOCKETING (CAUSED LARGELY BY A 137- DAY DELAY FROM ENTRY OF JUDGMENT UNTIL PERFORMANCE OF THE MINISTERIAL ACT OF NOTIFYING SRA DAWSON OF HIS RIGHT TO APPEAL), THE 255-DAY DELAY FROM SRA DAWSON'S INVOCATION OF HIS RIGHT TO APPEAL UNTIL CERTIFICATION OF A VERBATIM TRANSCRIPT, AND THE SIXTY-FOUR-DAY DELAY FROM CERTIFICATION OF THE TRANSCRIPT UNTIL THIS COURT RECEIVED IT WERE UNREASONABLE INDIVIDUALLY AND COLLECTIVELY, WARRANTING RELIEF.

III.

[WHETHER T]HE MILITARY JUDGE ERRED BY DENYING THE DEFENSE MOTION FOR A MISTRIAL WHERE THE PROSECUTORS FAILED TO TIMELY DISCLOSE INFORMATION KNOWN TO THEM THAT WAS RELEVANT TO A POTENTIAL GROUND TO CHALLENGE A COURT-MARTIAL MEMBER.

IV.

[WHETHER T]HE MILITARY JUDGE ERRED BY ALLOWING SRA DAWSON'S COMMANDER TO TESTIFY DURING THE SENTENCING HEARING ABOUT THE ADVERSE EFFECTS SRA DAWSON'S UNIT SUFFERED BECAUSE OF LIMITATIONS PLACED ON HIS PERFORMANCE OF DUTY DUE TO THE "ALLEGATIONS" AGAINST HIM, DESPITE SRA DAWSON HAVING BEEN ACQUITTED OF TWO OF THOSE THREE ALLEGATIONS.

V.

THE MILITARY JUDGE ERRED BY ALLOWING A SENTENCING WITNESS TO RECOUNT HEARSAY STATEMENTS DISPARAGING SRA DAWSON DESPITE HER ACKNOWLEDGEMENT THAT SHE DID NOT HAVE "FIRSTHAND" KNOWLEDGE OF THE MATTERS.

VI.

[WHETHER T]HE ENTRY OF JUDGMENT ERRED TO SRA DAWSON'S SUBSTANTIAL PREJUDICE BY MISCHARACTERIZING THE PORTION OF THE SENTENCE ADJUDGING FORFEITURE OF "$300 OF YOUR PAY FOR TWO MONTHS" AS "$300 PAY, PER MONTH, FOR 2 MONTHS," THEREBY DOUBLING THE ADJUDGED FORFEITURES.

VII.

[WHETHER T]HE CUMULATIVE EFFECT OF ALL PLAIN AND PRESERVED ERRORS IN THIS CASE WARRANTS REVERSAL OF THE FINDINGS AND SENTENCE.

VIII.

[WHETHER] SRA DAWSON'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED OF AN OFFENSE WITH NO REQUIREMENT THAT THE COURT-MARTIAL PANEL (THE FUNCTIONAL EQUIVALENT OF THE JURY) VOTE UNANIMOUSLY FOR GUILT.

STATEMENT OF CASE

Appellant pleaded not guilty to all charges and specifications. (*Entry of Judgment*, dated 27 April 2023, ROT, Vol. 1). A panel of officer and enlisted members sitting as a special court-martial convicted Appellant of one charge and one specification of assault consummated by a battery, in violation of Article 128, UCMJ. (*Entry of Judgment*, ROT, Vol. 1). The court-martial acquitted Appellant of one charge and two specifications of abusive sexual contact in violation of Article 120, UCMJ. (Id.). The military judge sentenced Appellant to a reduction in grade to E-2, forfeitures of $300 pay per month for two months, and 45 days hard labor without confinement. (Id.).

STATEMENT OF FACTS

Appellant went out to a club with a group of friends that included SrA EE, SrA KH, and SrA KB. (R. at 332.) After the club, SrA KH as the designated driver, drove the group to the After Six – a diner and bowling alley complex on Incirlik Air Base that was right next to the dorms. (R. at 331-333, 364.) Appellant and SrA EE were both drinking. (R. at 332.) While in the car, Appellant and SrA EE were talking and eventually arguing. (R. at 333, 364.) Neither SrA KH nor SrA KB remember the content of the argument. (R. at 333, 364.)

SrA KH parked the car and everyone else got out of the vehicle; he was the last one to get out of the car. (R. at 334, 351.) Then he heard a slap. (R. at 334.) Although he did not see the slap, he saw SrA EE put her hand up to her face, and he saw her start to cry. (R. at 335, 349.)

SrA KH heard SrA EE say, "Dawson, you just slapped me." (R. at 350.) Meanwhile, SrA KB was standing outside the car while Appellant and SrA EE argued, then SrA KB saw Appellant slap SrA EE across the face with his hand. (R. at 363, 366.) SrA KB separated Appellant and SrA EE, and he took SrA EE back to the dormitory to console her. (R. at 334, 336, 367.) SrA KH took Appellant into After Six. (R. at 334.) SrA KH testified that the Appellant appeared unaffected by the interaction with SrA EE. (R. at 336.)

SrA EE testified that she did not remember most of the evening or being slapped in the face because she was heavily intoxicated. (R. at 410.) Appellant had no legal justification for slapping SrA EE. The members found Appellant guilty of slapping SrA EE in the face with his hand. (R. at 695.)

ARGUMENT

I.

THE RECORD OF TRIAL'S OMISSION OF THE COURT-MARTIAL AUDIO IS NOT A SUBSTANTIAL OMISSION WARRANTING RELIEF.

Additional Facts

The record contains a 761-page substantially verbatim transcript of all sessions of the proceeding. (*Transcript*, ROT, Vol. 4-6). In addition, the Government obtained the missing portions of the audio from the court reporter and moved this Court to attach the audio in its motion to attach. (*United States' Motion to Attach*, dated 13 March 2025, Appx. B).

Standard of Review

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

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

Law and Analysis

Even though portions of the audio recording were missing upon docketing with the Court, the missing portions were insubstantial omissions because the record contained a verbatim transcript that was available to Appellant and this Court. Even if this Court decides the missing portions of the audio constitute a substantial omission that renders a record incomplete and raises a presumption of prejudice, Appellant did not experience prejudice. And the Government negated any potential prejudice by providing the missing audio recording of the proceedings. Thus, the Government remedied any alleged error so that this Court can complete an informed review of Appellant's case.

A. Under United States v. Reedy, the partially omitted audio is not an omission warranting relief because a verbatim transcript was available in the record.

The court reporter produced a certified verbatim transcript of the entire court-martial proceeding from arraignment to the announced sentence and included it in the record. (*Transcript*, ROT, Vol. 3-6.) According to Appellant's calculations 55 percent of the audio was included in the record. (App. Br. at 6.) The verbatim transcript and the partial audio are sufficient for this Court to review Appellant's case, and according to this Court's decision in United States v. Reedy the lack of audio is not an omission because the verbatim transcript is included in the record. 2024 CCA LEXIS 40, *17-18 (A.F. Ct. Crim. App. 2 February 2024) (unpub. op.). The missing audio does not constitute an omission. Id.

Article 54 states that 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. 10 U.S.C. § 954(c)(2). A verbatim transcript was prepared in this case even though the military judge did not adjudge a punitive discharge, confinement, or forfeiture of pay for more than six months. Appellant was sentenced to 45 days hard labor without confinement and $300 pay, per month, for 2 months[1]. (*Entry of Judgment*, ROT Vol. 1 at 2.) Rule for Court-Martial 1112(b) states that a record of trial shall include "[a] substantially verbatim recording of the court-martial proceedings." Article 1, UCMJ, defines a "record" (in connection with a court-martial proceeding) as: "(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(14) (emphasis added).

In Reedy this Court decided that a verbatim transcript, despite loss of the entire proceeding audio, was sufficient to complete the record because either an "official written transcript" or "an official audiotape" – not both – was sufficient for a verbatim recording of the court-martial proceedings. Reedy, unpub. op. at *17-18. This case is like Reedy, because even though audio is missing, the Government "compiled a record of trial and utilized a certified transcription of the court-martial proceedings to meet the applicable requirements. This is sufficient." Id. at *17. The partial omission of the audio does not constitute error worthy of relief.

B. If the Court considers the missing portions of audio an omission, it is an insubstantial one that does not hinder this Court's ability to conduct Article 66 review.

If this Court decides the missing portions of the audio constitute an omission, it is an insubstantial one because a verbatim transcript was inserted into the record. A substantial

[1] Appellant challenges the forfeiture amount in Issue VI due to an alleged ambiguity in the record.

omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. United States v. Henry, 53 M.J. 108, 111 (C.A.A.F. 2000) (citing United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions in the record of trial do not raise a presumption of prejudice or affect the record's characterization as complete. Id. The threshold question is whether the item is substantial, either qualitatively or quantitatively. United States v. Davenport, 73 M.J. 373, 377 (C.A.A.F. 2014) (citing United States v. Lashley, 14 M.J. 7, 9 (C.M.A. 1982)).

In Henry our superior court listed examples where courts found an insubstantial omission such as a flier given to the members, a court member's written question, and an accused's personnel record. 53 M.J. at 111. Generally, these were found to be insubstantial omissions because a description or discussion of the missing item could be found elsewhere in the record. *See* United States v. Johnson, 33 M.J. 1017 (A.C.M.R. 1991) (a missing flier given to the members); United States v. Baker, 21 M.J. 618 (A.C.M.R. 1985) (missing a court member's written question);and United States v. Harper, 25 M.J. 895 (A.C.M.R. 1988) (a missing personnel record). Henry also provided examples of substantial omissions that rendered the record of trial incomplete: unrecorded sidebar conferences where evidence was admitted, a videotape admitted during sentencing, and three defense exhibits. 53 M.J. at 111 (citing United States v. Gray, 7 M.J. 296 (CMA 1979); United States v. Seal, 38 M.J. 659 (A.C.M.R. 1993); United States v. Stoffer, 53 M.J. 26 (C.A.A.F. 2000)). These were substantial omissions that were unavailable elsewhere in the record. Although portions of the audio were missing in this case, the information contained in them exists elsewhere in the record – the verbatim transcript.

Here, a verbatim transcript of the entire court-martial proceedings exists and is part of the record of trial, (*Transcript*, ROT, Vol. 3-6), and according to Appellant's calculations 55 percent

of the audio is also available in the record. (App. Br. at 6.) As this Court explained in Reedy, "Even assuming *arguendo* that the absence of the audio recording in the record of trial amounted to an omission, such omission was insubstantial as the certified transcription is available for all to reference." Reedy, unpub. op. at *18. If this Court finds the missing audio to be an omission it is insubstantial.

C. The verbatim transcript is substantially verbatim even if errors exist in it.

The verbatim transcript contains some errors, but it is substantially verbatim and fulfills the requirement for a verbatim transcript of the proceedings under R.C.M. 1112(b). Appellant alleges that the verbatim transcript contains inaccuracies in the transcription. (App. Br. at 12.) But importantly Appellant is not alleging that the court reporter failed to transcribe entire portions of the proceeding, just that some errors exist in the transcription. (App. Br. at 12.) Military jurisprudence does not demand perfection from court reporters. "Our superior court has long interpreted Article 54(a), UCMJ, to require a transcript of general court-martial proceedings that is ***substantially verbatim***." United States v. Oliver, 2017 CCA LEXIS 59, *55 (A.F. Ct. Crim. App. 27 January 2017) (unpub. op.) (citing United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982)) (internal quotations omitted) (emphasis added). "Logically, if [the Rules for Court-Martial] required every transcript to be word for word, 'every record could be assailed as deficient' because '[m]any, if not all, records fail to record every word spoken at a hearing.'" Davenport, 73 M.J. at 377 (citing United States v. Nelson, 3 C.M.A. 482, 486, 13 C.M.R. 38, 42 (1953)). "As such, a transcript may be deemed 'substantially verbatim' though it has certain omissions." Id. If omissions can still result in a substantially verbatim transcript, then minor errors – that are not omissions of entire sections of a proceeding – in transcription can also result in a substantially verbatim transcript.

The transcript was created by the court reporter and reviewed by both trial counsel and trial defense counsel. (*Defense Counsel's Examination of the Transcript in the case of United States v. Senior Airman Deshawn Dawson*, 4 June 2024, ROT, Vol. 3; *Trial Counsel's Examination of the Transcript in the case of United States v. Senior Airman Deshawn Dawson*, 4 June 2024, ROT, Vol. 3.) If the transcript was inaccurate, Appellant's own counsel was given the opportunity to make corrections. Military appellate counsel also acted as senior trial defense counsel in this case, (R. at 3; App. Br. at 1), and he would have had the opportunity to review the transcript and fix these errors – that he now identifies on appeal – before the defense team signed off on the transcript examination. Since Appellant's counsel reviewed the transcript and raised no objections, Appellant should not be able to complain now that the transcript is inadequate for this Court to conduct its appellate review.

D. Appellant was not prejudiced and has been afforded meaningful appellate review.

Even if the audio's partial omission is considered a substantial omission, Appellant was not prejudiced by the error because a substantially verbatim transcript was available to him and the Government provided the missing audio to Appellant and this Court on the date of this filing. (*United States Motion to Attach*, dated 6 March 2025.) This Court would have been able to conduct an informed review of Appellant's case with only the verbatim transcript. Because the verbatim transcript ***and*** audio are available, this Court can certainly conduct an informed review of Appellant's case. If this Court can conduct an informed review, then it is unlikely that Appellant was prejudiced by the omission. *See* United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001) (finding although the nonverbatim record contained a substantial omission, the court found it adequate to conduct an informed review).

Appellant did not articulate any rationale that warrants a remedy for the lack of audio. Appellant exercised his appellate rights, raised eight assignments of error, and cited the verbatim transcript throughout his brief. The lack of audio did not preclude the Appellant from challenging the findings and sentence. In United States v. Morrill, the Court found that, despite the omission of the transcription of an Article 39(a) session from the record, the presumption of prejudice was rebutted, and the record was adequate to permit informed review. ARMY 20140197, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App. 31 October 2016) (unpub. op.). This case is no different; the verbatim transcript permits an informed review by this Court and any reviewing authorities.

Appellant does not desire a remand in this case. Instead, Appellant requests the most extreme remedy available: set aside of his findings and sentence. This Court should not grant any relief – let alone the most extreme relief available – because the Government remedied any alleged error by providing the audio to this Court, and Appellant was not prejudiced by the partial omission of the audio. This Court already had the benefit of a substantially verbatim transcript to conduct a proper appellate review, and now it has the benefit of the full audio recording. Appellant will receive meaningful appellate review. This Court should deny this assignment of error.

II.

APPELLANT DID NOT EXPERIENCE PREJUDICE AS A RESULT OF THE POST-TRIAL DELAY, AND NO RELIEF IS WARRANTED.

Additional Facts

On 23 December 2022, Congress amended Articles 66 and 69, UCMJ[2]. As amended, Article 66 expanded the CCA's jurisdiction to any judgment of a court-martial, irrespective of sentence, that includes a finding of guilty. 10 U.S.C. § 866(b)(1)(A) (2022).

At the time of Appellant's trial, verbatim transcripts were not required for all findings of guilt. Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial*, dated 21 April 2021, para. 11.1.1. With respect to Appellant's conviction, a verbatim transcript would only have been required if his sentence had included death, dismissal, punitive discharge, or confinement for more than six months. Id. at 11.1.1.1. Since it did not, the court reporter prepared and completed the summarized transcript on 4 June 2023. (*U.S. Motion to Attach*, Appx. B).

April 2023

Appellant was sentenced on 1 April 2023. (*Entry of Judgment* (EOJ), ROT, Vol. 1). On 3 April 2023, the military judge signed the Statement of Trial Results. (*U.S. Motion to Attach*, Appx. A at 2). On 5 April 2023, the base legal office obtained the audio of the proceeding. (Id.). On 11 April 2023 trial defense counsel submitted the Appellant's matters for consideration by the convening authority. (Id.). On 14 April 2023, the convening authority signed the Convening Authority Decision on Action, and the base legal office distributed it to all parties.

[2] National Defense Authorization Act for Fiscal Year 2023 (FY23 NDAA), Pub. L. No. 117-263, §544, 136 Stat. 2395 (Dec. 23, 2022).

(Id.). On the same day the EOJ was sent to the military judge for review and signature. (Id.) On 27 April 2023, the military judge signed the EOJ. (Id.).

May 2023

On 1 May 2023, the base legal office checked in with the court reporter to determine the status of the summarized transcript. (Id. at 3). On 6 May 2023, the court reporter provided part of the summarized transcript for review by trial counsel and defense counsel. (Id.). On 9 May 2023, the court reporter sent the entire summarized transcript to counsel for review. (*U.S. Motion to Attach*, Appx. B. at 3). On 25 May 2023, trial counsel checked in with defense counsel to determine how much longer they needed to review the summarized transcript. (*U.S. Motion to Attach*, Appx. A at 2).

June 2023

On 5 June 2023, trial counsel followed up with defense counsel again to determine how much longer they needed to review the summarized transcript. (Id.). On 8 June 2023, trial counsel provided their edits and ask the court reporter to certify the transcript without defense counsel inputs due to undue delay in the defense's review. (Id.). Defense counsel provided inputs on 19 June 2023. (Id.). On 26 June 2023, the court reporter provided the exhibit list, and the court reporter certification of the transcript and record of trial. (Id.).

July 2023

On 5 July 2023, defense counsel certified the final transcript and submitted their certification to the court reporter. (Id.). On 6 July 2023, the court reporter provided the court reporter chronology. (Id.). On 14 July 2023, the base legal office reviewed the record of trial. (Id.). On 17 July 2023, the base legal office served the record of trial on Appellant. (Id.). On 19 July 2023, the base legal office sent the record of trial to 3 AF/JA for review via certified

mail. (Id.). On 31 July 2023, 3 AF/JA and the base legal office finished reviewing the record of trial.

August 2023

On 21 August 2023, the court reporter made changes to the exhibit index based on edits from 3 AF/JA. (Id.). On 25 August 2023, the base legal office followed up with the court reporter, and she sent the updated index list on 31 August 2023. (Id.). On 31 August 2023, 3 AF/JA added the exhibit list to the record of trial and forwarded it to JAJM. (Id.).

September 2023

On 11 September 2023, 3AF/JA notified Appellant that he had 90-days to the right to a direct appeal. (*Notice of Right to Submit Direct Appeal to the Air Force Court of Criminal Appeals*, dated 21 September 2023, ROT, Vol. 1). On 25 September 2023, Appellant filed with this Court a "Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ." (*Notice of Appeal*, dated 25 September 2023). The court reporter received a notification of a request for verbatim transcript on 26 September 2023. (*U.S. Motion to Attach*, Appx. B at 4).

October 2023

On 4 October 2023, this Court issued a Notice of Docketing and ordered that Appellant's case be "referred to Panel 1" for appellate review and the Government to "forward a copy of the record of trial to the court forthwith." (*Notice of Docketing*, dated 4 October 2023). On 5 October 2023, 3 AF/JA sent the record of trial – without a copy of the transcript – to JAJM's appellate records division. (*U.S. Motion to Attach*, Appx. A at 3).

January 2024

After transcribing two other cases and taking two weeks of leave between September 2023 and January 2024, the court reporter began transcribing the verbatim transcript for this case

on 12 January 2024. (*U.S. Motion to Attach*, Appx. B at 5). From 12-19 January 2024, the court reporter transcribed this case. (Id.). From 21 January 2023 until 3 February 2023, the court reporter was TDY and correcting cases. (Id.).

February 2024

On 5 February 2024, this Court ordered compliance with its 4 October 2023 order for the Government "to forward a copy of the record of trial to the court forthwith." (*Order*, dated 5 February 2024). From 5 to 24 February 2024, the court reporter transcribed this case. (*U.S. Motion to Attach*, Appx. B at 5). From 25 February 2023 until 9 March 2024, the court reporter was on leave and then TDY. (Id.).

March 2024 to August 2024

On 9 March 2024, the court reporter sent the first three days of transcription to counsel for review. (Id. at 4). She took leave from 9-19 March 2024, and on 15 March 2024 she sent out the last two days of transcription for review by counsel. (Id. at 6). On 24 April 2024, trial counsel sent the court reporter edits to the verbatim transcript. (Id.). The court reporter was on leave from 27 April 2024 until 12 May 2024. Between 3 May 2024 and 30 May 2024, trial counsel and defense counsel returned their last sets of edits to the court reporter. (Id.). On 3 June 2024, the court reporter received final edits from trial counsel. (Id.). On 4 June 2024, trial counsel sent their transcript certification, and on 6 June 2024, defense counsel sent their transcript certification. (Id.). On 6 June 2024, the court reporter sent the final transcript to the base legal office and uploaded the verbatim transcript to Webdocs. (Id.). On 7 June 2024, the base legal office sent the verbatim transcripts to 3 AF/JA. (*U.S. Motion to Attach*, Appx. A at 5). On 26 June 2024, the base legal office sent the transcripts to JAJM via certified mail – with the understanding that mail takes approximately two to three weeks, sometimes longer – and they

were received at Joint Base Andrews on 30 July 2024. (Id.). On 9 August 2024, the verbatim transcript and the record of trial were provided to the parties and Court.

Recent Procedural History

After the certified verbatim transcript was delivered to this Court, Appellant requested and received three enlargements of time, all of which were opposed by the Government. Appellant submitted his brief on 28 January 2025, after 482 days had elapsed since the case was docketed on 4 October 2023. The Government requested two enlargements of time in this case totaling 14 days. The Appellant opposed the Government enlargements of time, but this Court granted them. From docketing of the case to docketing the record, 310 days elapsed. From docketing of the case with this Court to the date of this filing, 526 days have elapsed. From the Court's receipt of the record containing the verbatim transcript to the date of this filing, 217 days have elapsed.

Standard of Review

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

Law and Analysis

Appellant did not experience any prejudice because of the post-trial delay in his direct appeal case where he was only sentenced to 45 days hard labor without confinement, a reduction in rank, and forfeitures. (*EOJ*, ROT, Vol. 1). A facially unreasonable post-trial delay occurs when either (1) the aggregate standard of 150 days from the day the appellant sentencing to docketing with this Court is exceeded, Livak, 80 M.J. at 633, or (2) 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. Moreno, 63 M.J. at 142-143. When a case does not meet one of these two standards, the delay is presumptively unreasonable. 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. Id. 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. Appellant's due process rights were not violated because the length of the delay was not egregious; there is no evidence of a "deliberate attempt to delay" the post-trial processing "in order to hamper the defense;" and there is no prejudice to Appellant. So, relief is unwarranted.

A. This Court should decline to apply the 150-day standard to nonautomatic direct appeal cases.

This Court should decline to apply Livak post-trial processing standard to this case because the 150-day period from sentencing to docketing with this Court is unsuitable when, at the time of post-trial processing, there was no requirement to produce a verbatim transcript. Instead, the Court should examine post-trial processing on a case-by-case basis to determine if the time taken to produce the verbatim transcript and docket the record violated Appellant's due process rights.

B. The post-trial delays were not egregious, even if the delays were facially unreasonable. And the reasons for the delay are attributable to workload or simple negligence, not an attempt to hamper Appellant's post-trial rights.

The length of the delay and the reasons for the delay go hand in hand in this case. Much of the delay in this case is attributable to the unique circumstances involving the amendment to Article 66 and the expansion of the right to appellate review. The summarized transcript was completed on 5 July 2023 and the case was docketed (without the record of trial) on 4 October

2023. The record of trial with a complete verbatim transcript was provided to this Court on 9 August 2024, and most of the delays occurred because of the court reporter's workload and leave schedule. (*U.S. Motion to Attach*, Appx. B). While these delays are attributed to the government, and this factor should weigh in Appellant's favor, this Court should not weigh it heavily against the Government.

Appellant alleges three specific periods in the delay were unreasonable: (1) the EOJ until advisement of Appellant's right to notice of appeal; (2) the notice of appeal to certification of transcript; and (3) certification of the transcript until provision of the full record to Court. (App. Br. at 17-20).

The first delay between the EOJ the notice of Appellant's right to direct appeal was not egregious or unreasonable. The EOJ was signed on 27 April 2023, and Appellant was advised of his right to direct appeal on 11 September 2023 – 137 days later. During those 137 days, the base legal office completed the record of trial, certified the summarized transcript, and delivered the record of trial to 3 AF/JA. The Government worked diligently to prepare the record of trial in this case completing its final review on 31 July 2023 – only 122 days after sentencing. (*U.S. Motion to Attach*, Appx A at 3). The court reporter took the month of August to edit and finalize the exhibit list because the transcription of three other cases near their Moreno deadline took priority over Appellant's case. (*U.S. Motion to Attach*, Appx B at 4.) But once the exhibit list was received, the record was sent to JAJM on 31 August 2023 – 126 days after the EOJ was signed.

The applicable regulations required that the record of trial be completed and then forwarded to the reviewing authority before the Appellant was notified that he had a right to appeal. Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military*

Justice, dated 14 April 2022, ¶ 24.14.1. The base legal office followed this regulation and completed the record of trial before Appellant was notified of his right to appeal. Taking 137 days to complete the record of trial is not unreasonable because military courts have used the aggregate 150-day standard to determine whether the time to complete a record of trial before docketing is reasonable. *See* Moreno; Livak. Although the 150-day standard from sentencing to docketing should not apply in this case, the standard is still an indication of a reasonable amount of time to complete a record of trial and notify Appellant– no matter the triggers for the post-trial processing clock. *See* Livak, 80 M.J. at 633; Moreno, 63 M.J. at 142-143.

The GCMCA forwarded the record of trial on 31 August 2023. (*U.S. Motion to Attach*, Appx. A at 3). The DAFI 51-201 did not provide a timeline in which the GCMCA or JAJM were to notify Appellant of his right to appeal. But in this case, the 3 AF/JA notified the Appellant on 11 September 2023, only 11 days after sending the record of trial to JAJM and 137 days after the EOJ was signed. Appellant responded that he wanted to appeal on 26 September 2024 – 152 days after the EOJ was signed. And the case was docketed with this Court on 4 October 2024 – 160 days after the EOJ was signed. In all, the timeline was not unreasonable.

The second delay from Appellant filing his notice of appeal on 25 September 2023 until the transcript was certified on 6 June 2024 was 255 day long. The delay was the result of policy changes requiring verbatim transcripts for direct appeal cases. While awaiting the verbatim transcript for the record of trial, the case was docketed with this Court twenty-three days after Appellant filed his notice of appeal. A verbatim transcript had not been prepared because prior to Appellant's filing his notice of appeal, the Government had no cause to prepare a verbatim transcript in his case under the guidance in DAFMAN 51-203, ¶ 11.1.1. While this is past the 150-day benchmark set by Livak, this delay is not so unreasonable as to warrant sentencing

relief. CAAF previously found that a delay of nearly 500 days was not so great a delay as to cause public doubt on the "military justice system's fairness and integrity." *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022). In Anderson, CAAF held that 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity." 82 M.J. at 86. The delay in this case – which is less than the delay in Anderson – would not cause the public to doubt the fairness and integrity of the military justice system. Id. Indeed, the delay in preparing a verbatim transcript was based on the court reporter's workload, and the sudden need to transcribe a court-martial that would not have ordinarily needed a verbatim transcript.

The third delay from the certification of the transcript on 6 June 2024 until provision of the full record to Court on 9 August 2024, 64 days elapsed. The delay is largely attributable to the complex shipping delays from Incirlik AB to the Court. (*U.S. Motion to Attach*, Appx. A at 5.) The required copies of the verbatim transcript were mailed to JAJM on 26 June 2024, and 3 AF/JA notified JAJM that Turkish postal services took longer to send items overseas. (Id.). On 22 July 2024, the package arrived in New York. (Id.). And on 30 July 2024, the transcripts arrived to JAJM. (Id.). On 31 July 2024 JAJM confirmed receipt but noted required documents were not uploaded to Webdocs, and the court reporter uploaded them on 8 August 2024. (Id.). The complete record of trial was provided to this Court on 9 August 2024, which was 333 days after Appellant filed his notice of appeal.

Nothing in the record indicated a "deliberate attempt" by the court reporter to delay or hamper Appellant's post-trial rights. Barker, 407 U.S. at 531. "A more neutral reason such as negligence … should be weighed less heavily." Id. At most, negligence is what we have in this case, not a nefarious attempt to injure Appellant. The chronologies from the base legal office

paralegal and the court reporter, show that though there were small delays throughout the process, all parties attempted to move the case swiftly through post-trial processing. (*U.S. Motion to Attach*, Appx A, B). Much of the delay in this case is attributable to the unique circumstances involving the amendment to Article 66 and the expansion of the right to appellate review. Any other delays should be attributed to "negligence" rather than deliberate delay

Even if the delay in this case was presumptively unreasonable, that does not end the inquiry. The delay alone is not sufficient to justify relief—it merely triggers a due process analysis. As discussed, the reasons for the delay do not support that there was due process violation under the Barker analysis.

C. Appellant asserted his right to a speedy post-trial review.

This factor weighs in favor of Appellant. He asserted his right to timely review and appeal. (*Appellant's Opposition to Government Motion for EOT (1st)*, dated 13 February 2025; *Appellant's Opposition to Government Motion for EOT (2d)*, dated 28 February 2025).

D. Appellant experienced no 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. 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).

Appellant does not allege any particularized or generalized prejudice caused by delay. (App. Br. at 18-21.) Instead, Appellant states, "The shoddy, plodding post-trial processing of this case is intolerable. Granting the requested relief would avoid its normalization." (App. Br. at 22). But this is an anomalous situation tied to a congressional change in Article 66 that did not have a corresponding policy change for transcription at the time of Appellant's trial. This is not a situation that is likely to become normalized or recur because new procedures are in place requiring verbatim transcripts for cases that would qualify for direct appeals. *See* DAFI 51-201, dated 3 October 2024, ¶ 20.47.1 ("A certified verbatim transcript is required in all general and special courts-martial in which there is a finding of guilty.").

In United States v. Dunbar, a "general assertion" is insufficient to establish prejudice. 31 M.J. 70, 73 (C.A.A.F. 1990) (finding appellant failed to support his claim that he was denied two college scholarships because he had not received his DD Form 214 due to a post-trial delay). If a generalized assertion is insufficient, then Appellant's complete lack of an assertion of prejudice is also insufficient. Here Appellant stated the law and then provided no indication of oppressive incarceration pending appeal (because he was never incarcerated), undue anxiety and concern, impairment of a retrial, or any other prejudice. In balancing the other three factors, 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 does not even argue for relief under Tardif in his brief. (App. Br. at 18-21). But the Government will articulate why such relief is unnecessary here. An appellant may be entitled to relief under United States v. Tardif even without a showing of actual prejudice "if [the

court] deems relief appropriate under the circumstances." 57 M.J. 219, 224 (C.A.A.F. 2002). 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. 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 – assault consummated by a battery of a fellow Airman – of which Appellant was convicted and the absence of Governmental bad faith.

The existence of a post-trial delay does not require relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225. In this case, Appellant did not experience any prejudice from any post-trial delay, and a remedy is not warranted. The four Barker factors and the six Gay factors weigh in the Government's favor, and the delay was not an egregious and prejudicial delay requiring post-trial sentencing relief from this Court. This Court should deny this assignment of error.

III.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANT'S MOTION FOR A MISTRIAL.

Additional Facts

TSgt AS was selected as a panel member in this case. (R. at 291.) During group voir dire, the military judge asked, "Does anyone know the accused in this case?" (R. at 169.) The military judge recorded the response, "That's a negative response by the members," including TSgt AS. (Id). During individual voir dire of TSgt AS, senior trial counsel asked, "So, the question was asked, during the general questioning about whether they know the accused in this case. Even if you don't know the accused, do you think you may have seen him around base or recognize the face?" She responded, "No." (R. at 273.) Senior defense counsel followed up by asking, "Do you ever play poker on base?" TSgt AS responded, "Yes, I do." (R. at 274.) Senior defense counsel then asked questions about whether TSgt AS encountered assistant trial counsel at these poker events, and she said that she had seen him but did not interact with him.[3] (R. at

[3] Assistant trial counsel was voir dired at the beginning of the court-martial because he attended FSS organized poker games on base multiple times and encountered Appellant at these events. (R. at 25). Ultimately, the military judge decided assistant trial had not acted in any way that was inconsistent with his role as trial, and he denied defense's motion to disqualify assistant trial counsel. (R. at 26).

274.) Senior defense counsel did not ask whether TSgt AS recognized Appellant from the poker games.

Before the announcement of the sentence, trial defense counsel brought a motion for a mistrial based on a disclosure by Capt JC, an assistant judge advocate in the 39th Air Base Wing Legal Office. (R. at 742, 744.) Capt JC explained that after arraignment but before the panel was seated, he told the trial team that he recognized TSgt AS from the poker games and saw her playing at the same table as the Appellant just a few days before the court-martial began. (R. at 745-746.) Before the panel was seated trial counsel told trial defense counsel that TSgt AS regularly played poker and that they thought trial defense counsel would want to know that information. (R. at 752.) But trial defense counsel alleged that the trial counsel failed to disclose the specific circumstances under which they learned the information – specifically that "another judge advocate had seen her at tables with the accused, as recently as four days before." (R. at 751.)

During the hearing on the motion, Capt JC testified that he was at a FSS poker game on base, and "[d]uring that poker game myself, the accused, and the member [TSgt AS] were at the same table for a period of time. The table consisting of like 6 to 8 individuals." (R. at 746.) Approximately 17 people attended the poker games. (R. at 746.) Trial defense counsel argued that TSgt AS either lacked candor with the court when she failed to disclose interactions with Appellant, or at the very least, she lacked the ability to observe and retain details thus she was not suited to being a panel member. (R. at 742-743, 751-752.)

The court-martial voir dired the member and her interactions with Appellant. (R. at 748-750.) The military judge asked, "Have you ever played poker with the accused?" (R. at 748-749.) TSgt AS responded, "It is possible; I don't recognize everyone." (Id.). The military judge

followed up by asking, "So, you don't recognize the accused?" (Id.). And TSgt AS responded, "No, sir." (R. at 748-749.) When asked again, TSgt AS reiterated that she did not recognize Appellant from the poker nights that she played at least once a week. (R. at 749.)

The military judge provided an oral ruling. (R. at 758-760). First, he laid out the standard for a mistrial:

> The military judge has discretion to declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising in the proceedings, which would cast substantial doubt upon the fairness of the proceedings. Due process does not require a new trial every time a jury has been placed in a compromising situation, and that the power to grant a mistrial should be used with great caution under urgent circumstances for plain and obvious reasons.

(R. at 758). Then the military judge reiterated the standard for challenging members:

> As a matter of due process, the accused has a constitutional right as well as a regulatory right to a fair and impartial panel. RCM 912(f)(1) requires impartiality on the part of the panel members for their removal if their impartiality is jeopardized; a member shall be excused for cause when it appears that the member should not sit as a member in the interest in having the court-martial free from substantial doubt as to the legality, fairness, and impartiality. That is RCM 912(f)(1).

(R. at 759.) "A panel member is dishonest when he fails to exhibit complete candor, but the test for a member's dishonesty is not whether the panel member was fully malicious or intended to deceive; it is whether they gave objectively correct answers." (R. at 759.) The military judge decided that TSgt AS did not intentionally mislead the court, but her answers during voir dire were objectively incorrect based on the testimony of Capt JC. (R. at 760.) The military judge went on to say, "Nonetheless, the defense could have easily discovered the issue by exercising due diligence." (R. at 760.) The trial defense counsel had the benefit of the court member data sheets, the information that TSgt AS played poker on base, and Appellant's memory of the poker

games. (R. at 760). "So, despite the Government's seeming failure to appraise the defense as soon as it became aware, presumably, the defense could have become aware sooner in this situation." (R. at 760.) The military judge ultimately decided:

> Here, the evidence was such that if the defense had exercised due diligence, it could have become aware of any potential issues with [TSgt AS] and their client's proximity in FSS poker events, either upon the receipt of the court member data sheets or at the time of group *voir dire.* Indeed, Senior Airman Dawson was at these events, to which Captain [JC] describes as such. The court here was not burdened intolerably by preventing the accused from exercising the challenge for cause...

(R. at 760). The military judge denied the motion for a mistrial. (R. at 760.)

Standard of Review

This Court reviews a military judge's ruling on a mistrial for an abuse of discretion. R.C.M. 915; United States v. Carter, 79 M.J. 478, 482 (C.A.A.F. 2020). "Absent clear evidence of an abuse of discretion, this Court will not reverse a military judge's determination on a motion for mistrial.'" Carter, 79 M.J. at 482 (citing United States v. Short, 77 M.J. 148, 150 (C.A.A.F. 2018)). An abuse of discretion occurs when:

> (1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record, (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge fails to consider important facts.

United States v. Rudometkin, 82 M.J. 396, 401 (C.A.A.F. 2022) (internal citations omitted).

Law and Analysis

The military judge did not abuse his discretion by denying Appellant's motion for a mistrial. He developed facts on the record to support his application of the law. He stated the correct legal principles and properly applied them to the facts. And he did not fail to consider important facts. "The military judge may, as a matter of discretion, declare a mistrial when such

action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a); Rudometkin, 82 M.J. at 396. "A mistrial may be declared as to some or all charges, and as to the entire proceedings or as to only the proceedings after findings." Id. Ultimately, the military judge found that no substantial doubt was cast on the fairness of the proceeding and no miscarriage of justice occurred.

The military judge properly articulated the mistrial law on the record, by citing the applicable Rules for Court-Martial – R.C.M. 915(a) and R.C.M. 912(f) – and relevant case law such as United States v. Commisso, 76 M.J. 315 (C.A.A.F. 2017) (military judge abused his discretion by not granting a mistrial due to panel member misconduct) and United States v Albaaj, 65 M.J. 167 (C.A.A.F. 2007) (panel member committed misconduct when he told the military judge that he did not know any of the witnesses who would testify at the servicemember's trial). (R. at 758-760.) None of the military judge's statements of law were clearly erroneous. (Id.). And Appellant does not challenge the military judge's statement of the law; he only argues that the military judges should have given Appellant his requested remedy of a mistrial. (App. Br. at 26-29.)

Appellant argues that error occurred because trial counsel did not provide information about TSgt AS to trial defense counsel sooner. (App. Br. at 26-27.) The question here is not whether trial counsel erred, it is whether the military judge erred in deciding not to grant a remedy. The military judge did not err by denying Appellant's motion for a mistrial. The military judge agreed there was error. He found error because TSgt AS – a panel member – gave objectively incorrect answers during voir dire, and trial counsel should have been clearer about

what they knew about TSgt AS when they initially told trial defense counsel that she played poker on base. (R. at 759-760.)

The military judge balanced the error against the fact that trial defense counsel had the information they needed to draw out a potential bias in voir dire – assuming *arguendo* one even existed. The fact that trial defense counsel had information that could have used to develop more questions for TSgt AS would have weighed against the need for an extreme remedy like a mistrial. The military judge did not find that the error was so egregious that it called into question the fairness of the proceedings – so no remedy was required, let alone a mistrial. (R. at 760.) Finding error but deciding it did not create an unfairness worthy of a remedy was within the military judge's discretion. Even if he found error, there was no requirement that he automatically provide Appellant's requested – and extreme – remedy of a mistrial.

In Commisso, the defense had no reason "to probe into any potential bias toward sexual assault victims or against the accused" because the members said they did not know about Appellant's case – but they had been exposed to his case. Commisso, 76 M.J. at 319. In this case, trial defense counsel had reason – and enough information – to probe into whether TSgt AS interacted with Appellant at the poker games. Three key pieces of information were provided to trial defense counsel that could have been used to develop a challenge against TSgt AS. First, Incirlik is a small tight-knit base with limited off-base access. (R. at 22.) Second, before individual voir dire, trial counsel told trial defense counsel that TSgt AS regularly played poker. (R. at 751.) Third, in individual voir dire, TSgt AS admitted that she played poker, and that she recognized trial counsel from the poker games, but also stated that she did not recognize Appellant. (R. at 273.) Even though TSgt AS said she did not recognize Appellant, trial defense counsel had enough information to challenge her observation skills by asking if she played with

Appellant but forgot. Appellant as an active participant in his own defense could have provided counsel with the information about the size of the poker games and could have told his counsel if he recognized TSgt AS and the number of times he interacted with her. The knowledge that TSgt AS was at these games coupled with the information that Incirlik is a small tight-knit base provided trial defense counsel with enough fodder to ask more questions about TSgt AS's interactions with Appellant.

This case is different than Albaaj, 65 M.J. at 168. In Albaaj, a panel member had interacted with the appellant's brother – a witness in the case – ahead of trial and viewed him in a negative light. Id. During trial, the member realized he knew the witness, but despite this realization, he did not alert the court-martial. Id. Ultimately, the Court of Criminal Appeals for the Armed Forces (CAAF) concluded that "[w]hen viewed objectively, the circumstances of the relationship combined with the member's failure to disclose it to the military judge injure the perception of fairness in the military justice system." Id. But in this case, TSgt AS did not recognize Appellant at the beginning of the trial during voir dire, and she still did not recognize him at the end of the trial when the court-martial voir dired her during the mistrial hearing. If she could not recall any interactions with Appellant, she could not have an implicit bias for or against him. She did not know who he was. TSgt AS's complete lack of memory of Appellant did not "cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a); Rudometkin, 82 M.J. 396.

The military judge was within his discretion to decide that this issue – TSgt AS's objectively incorrect answers during voir dire – did not warrant the "extraordinary remedy" of a mistrial. Ashby, 68 M.J. at 122. The military judge exercised "great caution" when using his discretion. R.C.M. 915(a), Discussion. He ordered a hearing on the issue, established a factual

basis on the record by examining Capt JC and TSgt AS. Ultimately, he determined the facts in this case did not rise to "urgent circumstances" or "plain and obvious reasons" warranting a mistrial. Id. "[A] mistrial is an unusual and disfavored remedy. It should be applied only as a last resort to protect the guarantee for a fair trial," United States v. Diaz, 59 M.J. 79, 90 (C.A.A.F. 2003), or "where the military judge must intervene to prevent a miscarriage of justice." United States v. McFadden, 74 M.J. 87, 89 (C.A.A.F. 2015) (internal citations omitted). Here there are no questions as to the trial's fairness and no miscarriage of justice occurred. The mixed findings in this case indicate the panel was discerning, and ultimately, they acquitted Appellant of two abusive sexual contact offenses. (R. at 694-695). One panel member would not be able to hold the proceedings hostage with a bias for or against Appellant because three of four panel members needed to agree to convict Appellant of an offense. And two were required to acquit him. 10 U.S.C. § 852(b)(2). One panel member would not be able to dictate the outcome of the trial with their biases thus resulting in a miscarriage of justice. Nothing in the record indicated TSgt AS influenced the panel in such a way that the fairness of the proceedings would have been compromised.

The military judge predicated his ruling on findings of fact that the record supported. Rudometkin, 82 M.J. at 401. The military judge used correct legal principles. Id. He applied correct legal principles to the facts, and the application was not clearly unreasonable, even if reasonable minds may differ on the outcome. Id. And the military judge considered all the important facts before coming to a decision. Id. The military judge did not abuse his discretion in deciding the extreme remedy of a mistrial was inappropriate here. This Court should deny this assignment of error.

IV.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ALLOWING THE COMMANDER'S TESTIMONY ON UNIT IMPACT.

Standard of Review and Law

This Court reviews a military judge's decision to admit sentencing evidence for an abuse of discretion. United States v. Ediger, 68 M.J. 243, 248 (C.A.A.F. 2010). A military judge abuses his discretion when his legal findings are erroneous, or when he makes a clearly erroneous finding of fact. *See* United States v. Barker, 77 M.J. 377, 383 (C.A.A.F. 2018); United States v. Eugene, 78 M.J. 132, 134 (C.A.A.F. 2018).

When the Court finds error in the admission of sentencing evidence (or sentencing matters), the test for prejudice is "whether the error substantially influenced the adjudged sentence." Barker, 77 M.J. at 384 (quoting United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009). The Government bears the burden of demonstrating that the admission of erroneous evidence was harmless. United States v. Flesher, 73 M.J. 303, 318 (C.A.A.F. 2014).

"[I]t is highly relevant when analyzing the effect of error on the sentence that the case was tried before a military judge, who is presumed to know the law." Barker, 77 M.J. at 384 (citing United States v. Bridges, 66 M.J. 246, 248 (C.A.A.F. 2008)).

Mission impact on the unit that is a sufficiently direct and immediate result of an appellant's offenses is admissible in sentencing as evidence in aggravation. *See* United States v. Thornton, 32 M.J. 112, 113 (C.M.A. 1991) (holding that the appellant no longer being permitted access to classified materials and the time and effort expended by the service in training the appellant were proper unit mission impact evidence in aggravation); United States v. Key, 55 M.J. 537, 538-539 (A.F. Ct. Crim. App. 2001) (holding that testimony explaining how the

accused's removal from the customer service section left it "short-handed and heavily tasked," and "required everyone else to work harder, reduced efficiency, and lowered morale" was admissible under R.C.M. 1001(b)(4)), *aff'd*, 57 M.J. 246 (C.A.A.F. 2002).

Additional Facts

The Government called Appellant's commander, Lt Col AG, during the sentencing phase of his court-martial. Prior to Lt Col AG taking the witness stand, the defense objected, stating that Lt Col AG was going to "testify about removing members from flight, members having to go to OSI to get interviewed, and that [Appellant] was put on the do not arm list, and had to be removed from flight, and that [Amn EE] was removed from flight." (R. at 704-05.) The defense argued these actions were "decisions of the command" and "based on an impending investigation," and were not a direct impact of Appellant's actions. (R. at 705-706.) The Government countered by citing Key and Thornton and arguing that Lt Col AG's testimony was about unit impact. (R. at 706.)

The military judge ruled as follows:

> Okay, it appears just to be disagreement over the parameters of unit impact. While I'm familiar with the propositions, the cases [that were cited]. So, in Key the accused's supervisor was permitted to testify about the accused removal from duty, from the duty section and created a heavier burden on the others to work harder and reduce morale and efficiency that's common on the unit impact. I will not allow the witness to talk about administrative burden due to the court-martial process. I think that's what defense mentioned. So, please trial counsel, direct your witness accordingly.
>
> . . .
>
> And finally, as you cited Thornton, the accused's inability to perform duties as a result of their crimes, may be admissible. That's the Thornton case that you cited. Okay with what I just stated defense, your objection is at this point, overruled. The witness will testify according to the—again, the parameters that I've set forth.

(Id.)

During her testimony, Lt Col AG was asked about her interactions with Appellant. Lt Col AG said that "before notification of the incident it was probably sparse," but that "[s]ince the allegations came to me a little more frequent interaction." (R. at 708.) This interaction involved "bringing him down on do not arm status" and welfare checks. (Id.). When asked if his arming status impacted the unit, Lt Col AG responded, "Absolutely," noting that her unit (Security Forces) is "armed every day because of our mission." Lt Col AG said, "Bringing him down on [a]rming status essentially means that he can't perform all the duties and functions that he is assigned to do." Lt Col AG said that in this case she removed Appellant from his flight because he was not able to arm, which took his flight down a member. Lt Col AG said this affected the rest of the flight in post rotations. (Id.).

Regarding Appellant, Lt Col AG stated "on flight I'll be completely honest, he kind of blends in, you know we have a pretty large unit," adding, "He didn't stand out." (R. at 709.) On cross-examination, Lt Col AG acknowledged that her squadron had 370 to 380 members and that approximately 250 of those were enlisted personnel. (R. at 713.) Lt Col AG acknowledged that removing someone from a flight was "something that happens in our career field," and that the actions taken in this case were not unique. (Id.). When asked if Appellant was "easily replaceable" considering the size of the unit, Lt Col AG responded, "So easily replaceable in the fact that there is enough Airmen, but [Appellant] still taking a 300—so the unit size is 368 total so that's 367 now, so 366 with bringing in Airman [EE] down which is my decision, two less people for the overall mission." (R. at 714.)

Analysis

Lt Col AG's testimony regarding unit impact from Appellant's actions was properly admissible in this case, and the military judge did not abuse his discretion in allowing it. To start, a "military judge is presumed to know the law and apply it correctly, [and] is presumed capable of filtering out inadmissible evidence . . . ." United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000). Here, however, the military judge showed he knew the law regarding unit impact when he immediately discussed both Key and Thornton with counsel as soon as it was cited. Moreover, the military judge immediately ruled that while evidence regarding unit impact was allowed, he would *not* allow the Government to elicit testimony about the "administrative burden due to the court-martial process." (R. at 706.) Again, these actions show the military judge was well aware of the law regarding proper unit impact evidence, applied it correctly, and that he was capable of filtering out inadmissible evidence. Thus, there is no abuse of discretion.

Still, Appellant claims error, arguing that Lt Col AG's testimony made it unclear whether Appellant was removed from his primary duties because of the offense for which he was found guilty. (App. Br. at 34). Since Lt Col AG used the phrased "since the allegations came to me," Appellant believes "Lt Col AG's testimony fails to establish that [Appellant] was put on 'do not arm' status, with the resulting adverse consequences to his unit, because of the sole offense of which he was convicted." (Id.) Appellant believes that since Lt Col AG "used the plural word 'allegations'," this suggests "that that the 'do not arm' status resulted partially or entirely from the two abusive sexual contact offenses of which SrA Dawson was acquitted." (Id.) Appellant believes it is "probable that [Appellant] was placed on 'do not arm' status entirely because of the two abusive sexual contact allegations and not the face-slap incident." (Id. at 35).

Appellant is mistaken. The testimony regarding Appellant's assault of SrA EE shows it was harsh and unapologetic. SrA KH testified hearing Appellant open-hand slap SrA EE across her face. (R. at 334-35.) SrA KH said the slap was "hard enough to hear" and that SrA EE immediately "started crying." (R. at 335.) SrA KH also testified that SrA EE, after being slapped, said, "[Appellant's first name], you just slapped me." (R. at 350.) Meanwhile, according to SrA KH, Appellant did not seem to care. (R. at 336.)

SrA KB also saw Appellant slap SrA EE. (R. at 363.) SrA KB recalled SrA EE confronting Appellant about the slap and how Appellant denied it. (R. at 369.) Appellant also made a statement that SrA KB interpreted to mean Appellant felt it was alright to hit SrA EE. (R. at 378.) SrA KB testified, "[Appellant] stated that 'I told you these hands were rated E for everyone.'" (Id.)

SrA EE, Appellant's victim, testified that she and Appellant were "on the same flight together," adding that they saw "each other daily, during work." (R. at 395.) As a result of his assault upon her, SrA EE stated in her unsworn victim statement that Appellant "used to be a friend and someone I trusted," but that he "betrayed that trust" when he slapped her in the face. (R. at 715.)

Here, Appellant stood accused of unapologetically slapping a female coworker who worked in the same flight as him and who saw Appellant "daily" while performing her work duties. Worse still, when SrA EE confronted Appellant about his actions, he showed no remorse to her and even said that his hands – the very weapons he used to assault SrA EE – were "rated E for everyone."[4] Given the facts and circumstances of this case, this Court can be certain that

[4] Appellant's flippant attitude towards his assault against a fellow Security Forces member continues in his brief when he calls his assault against SrA EE an "exceptionally minor" offense. (App. Br. at 36).

Lt Col AG would have removed Appellant from his flight (which was the same as his victim) and reassigned him to another location in the unit pending the outcome of the assault allegation. Further, though Lt Col AG used the term "allegations," this Court can further be certain that the military judge recognized Lt Col AG's actions in reassigning Appellant would have occurred even if the sole allegation against Appellant had been slapping a fellow Security Forces member who was assigned to the very same flight as Appellant and who saw her attacker daily.

The alternative – that Lt Col AG (1) would have allowed Appellant to continue to be armed in the presence of his victim, who he stood accused of slapping, on a daily basis; and (2) would have forced SrA EE to work with and see her attacker, who would be armed, on a daily basis – is simply not steeped in reality. There was no abuse of discretion here in the military judge allowing Lt Col AG's testimony.

Yet, even if it was error, there is no prejudice. First, Appellant's counsel, on cross-examination, had Lt Col AG admit that Appellant was just one of approximately 250 enlisted personnel in her unit, that losing Appellant and SrA EE took the unit size from 368 to 366, and even got Lt Col AG to state Appellant was "easily replaceable in the fact that there is enough Airmen." (R. at 714). These acknowledgements by Lt Col AG, which were elicited by defense questioning, served to lessen any prejudice Lt Col AG's testimony regarding unit impact had on the military judge's ultimate sentence.

To that end, the military judge's sentence also shows Lt Col AG's testimony about reassigning Appellant had little to no impact on the sentence, and certainly did not "substantially influence" it. *See* Barker, 77 M.J. at 384. As Appellant admits in his brief, Appellant faced a maximum punishment of six months confinement, a bad-conduct discharge, and forfeiture of all pay and allowances. (App. Br. at 35.) However, Appellant received *no* confinement at all and

no punitive discharge. Instead, Appellant received 45 days hard labor without confinement, a reduction in grade to E-2 (two grades), and forfeiture of $300 pay per month for two months, a sentence which very closely aligned with what Appellant's own defense counsel argued was sufficient punishment for the case. (*See* R. at 761, *Entry of Judgment* at ROT, Vol. I; *see also* R. at 736, where trial defense counsel argued in sentencing, "The punishment that is sufficient but not greater than necessary is a reprimand and reduction to E-3, and 30 days of hard labor without confinement.")

Notably, Appellant fails to state exactly what part of his lenient sentence was allegedly "substantially influenced" by any perceived abuse of discretion by the military judge. Instead, Appellant asks for the windfall of having his entire sentence set aside. This Court should decline Appellant's invitation. Again, Appellant's sentence included no bad-conduct discharge and not a single day of confinement. Instead, the sentence included 45 days of hard labor without confinement (which was just 15 days more than what Appellant's own counsel said was appropriate), a reduction in rank of just two grades (which was just one grade more than what Appellant's own counsel said was appropriate), a reprimand (which Appellant's counsel said was appropriate) and a grand total of $600 in forfeitures.

This adjudged sentence by the military judge shows any admission of erroneous evidence was harmless and did not substantially influence the sentence. *See* Barker, 77 M.J. at 384; Flesher, 73 M.J. at 318. Moreover, the fact that Appellant was sentenced by a military judge, and not members, should provide this Court further pause in granting Appellant any relief, let alone the windfall Appellant suggests of setting aside his *entire* sentence. *See* Barker, 77 M.J. at 384.

In sum, the military judge did not abuse his discretion in admitting Lt Col AG's testimony. Yet, even if he did, the adjudged sentence in this case was not substantially influenced by any erroneous evidence. As such, this Court should deny Appellant's claim.

V.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ALLOWING THE COMMANDER'S TESTIMONY ON UNIT IMPACT.

Standard of Review and Law

The standard of review and law for this issue is the same as that in Issue IV above.

Additional Facts

During her testimony in sentencing, the trial counsel asked Lt Col AG about Appellant's demeanor and attitude since being reassigned to the logistics (S-4) section. (R. at 710.) When Lt Col AG began to answer the question, saying, "It's been brought to me on numerous occasions," Appellant's counsel made a hearsay objection. (Id.). The military judge overruled the objection, stating, "I don't know what the answer is gonna be so at this point overruled." (Id.).

Lt Col AG then stated, "So observed, I see him in his details, working those details . . . but it was brought to me on attitude, while he's been working those details on at least two occasions, where he is asked to do something and he drags his feet or he doesn't do it." (R. at 711.) Lt Col AG continued, "So, what was brought to me, again I didn't see it firsthand, but what was brought to me by senior NCOs was they asked him to do something and he doesn't get it done," adding, "They ask him again to do it and he has kind of a flippant attitude about going and getting it done, like they are bothering him or asking him to do something that's unreasonable." (Id.). Lt Col AG then stated how this sort of attitude begins to permeate through

the flight, stating, "So they all watch each other and they all feed off of each other quite frankly, and so if one of them is not going to do it others are going to follow suit with that, and that is something that's been brought to me on at least two occasions with [Appellant] specifically." (Id.).

During this portion of Lt Col AG's testimony, Appellant's counsel never renewed the hearsay objection or asked the military judge for a ruling. Instead, Appellant's counsel began the cross-examination of Lt Col AG by asking, "based on my understanding of your testimony those are not anything that you personally observed, correct?" (R. at 712.) Lt Col AG responded, "Correct." Lt Col AG also said, "Correct," when asked that, generally, she did not have enough data on Appellant. (Id.).

During Appellant's sentencing case-in-chief, Appellant offered various character letters. (R. at 717.) When the Government objected on a basis of foundation, authentication, and hearsay, the defense requested the court relax the rules of evidence, which the military judge granted. (R. at 718.)

Analysis

Lt Col AG's testimony regarding Appellant's duty performance in the S4 section was properly admissible in this case and the military judge did not abuse his discretion in allowing it. To start, as noted in Issue IV above, a "military judge is presumed to know the law and apply it correctly, [and] is presumed capable of filtering out inadmissible evidence . . . ." Robbins, 52 M.J. at 457. Here, even if Lt Col AG's testimony at issue is considered hearsay testimony, both her testimony, as well as the questions from Appellant's counsel, made it very clear to the military judge that the information she had on Appellant's work performance was not firsthand but instead was reported to her by Appellant's supervisors.

Considering the military judge was responsible for adjudging Appellant's sentence and the degree of Lt Col AG's firsthand knowledge of Appellant's duty performance was repeatedly highlighted to the military judge both by her own answers and by questions from counsel, this Court can presume the military judge filtered out any inadmissible evidence and sentenced Appellant only on admissible evidence. *See* Robbins, 52 M.J. at 457; *see also* Barker, 77 M.J. at 384.

Importantly, Appellant in his own sentencing case, introduced multiple character letters which Appellant's own counsel characterized as showing Appellant "helping others" and "positively impact[ing] the morale of his fellow Airmen." (R. at 736; *see also* Def. Exs. E-G). Considering Appellant's counsel specifically asked the military judge to relax the rules of evidence when the Government objected to these letters for hearsay and other purposes, the Government would then have been able to recall Lt Col AG and have her rebut these claims of "positively impact[ing] the morale of his fellow Airmen." In doing so, Lt Col AG would have testified to the very same information she provided in her initial testimony – namely that Appellant was not performing the duties tasked to him and that his actions were having a negative and cascading effects on other Airmen in the unit.

This Court, on at least two occasions, have held that such testimony, even if considered hearsay, is permitted in this circumstance. In United States v. Wyrozynski, 7 M.J. 900, 902 (A.F.C.M.R. 1979), this Court said, "A unit commander, as part of his responsibilities, must educate himself with respect to the job performance of members of his command. He may do this by asking supervisors and personally observing an individual at work." Then, in United States v. Boughton, 16 M.J. 649, 650 (A.F.C.M.R. 1983), this Court, citing Wyrozynski, stated, "A commander is responsible for the welfare and discipline of everyone under his command and

may properly testify in rebuttal during the sentencing portion of the trial, as to his knowledge of the conduct and performance of his subordinate even when the knowledge is imparted to him by others."

Thus, even if it was error to admit this testimony during the Government's sentencing case-in-chief, Lt Col AG's testimony would have been properly admissible in the Government's rebuttal case to rebut Appellant's contention that he had a positive effect on morale in his unit.

In his brief, however, Appellant contends that his defense team "no doubt would have avoided assiduously any evidence that would have opened the door to the admission of those hearsay statements on rebuttal" if the military judge had not allowed Lt Col AG's testimony during the Government's sentencing case. (App. Br. at 39-40.)

Appellant's revisionist claim is doubtful here. As shown by the transcript, Lt Col AG made the alleged hearsay statements on page 711, and the defense counsel then cross-examined her over the next three pages of transcript. (R. at 712-714.) The Government then rested its sentencing case. (R. at 714.) After SrA EE's victim impact statement, which lasted less than one page of transcript on page 715, the defense immediately began its case-in-chief by offering, among other things, the character letters mentioned above. (R. at 716-17; *see also* Def. Exs. E-G.) Here, Appellant's contention, essentially, is that the statements about his positive impacts on unit morale were only introduced in these character letters because of Lt Col AG's testimony and that if Lt Col AG's testimony had not been admitted, they would have "avoided assiduously" admitting any evidence that would open the hearsay door. But those letters, which included discussion on Appellant's positive impacts on unit morale, were provided to the Government *before* Lt Col AG ever testified, providing a clear indication that the defense was planning to admit those letters (including the unit morale language) *before* they ever heard Lt Col AG testify.

Appellant's contention here that the defense introduced these character letters only after the military judge allowed Lt Col AG's testimony is not supported by the record or the clear actions and intent of Appellant's trial defense counsel. Appellant's counsel intended to admit those letters in full before Lt Col AG testified and then did introduce those letters in full during Appellant's case-in-chief, thus opening the door for the Government to provide rebuttal evidence regarding Appellant's true impact on morale in his unit. Appellant's expressed request to relax the rules of evidence, which included hearsay, along with this Court's opinions in Boughton and Wyrozynski, render any error on the part of the military judge harmless.

Finally, just as in Issue IV above, even if there was error, there is no prejudice. First, Lt Col AG, as well as Appellant's counsel during cross-examination, made it abundantly clear that Lt Col AG did not have much information on Appellant's duty performance. This acknowledgement by Lt Col AG, which were elicited by both the Government and defense questioning, served to lessen any prejudice Lt Col AG's testimony regarding Appellant's duty performance had on the military judge's ultimate sentence.

To that end, for the same reasons detailed in Issue IV regarding prejudice, the military judge's sentence also shows Lt Col AG's testimony about Appellant's duty performance had little to no impact on the sentence, and certainly did not "substantially influence" it. *See* Barker, 77 M.J. at 384. Here, though he faced a maximum punishment of six months confinement and a bad-conduct discharge, Appellant received *no* confinement at all and *no* punitive discharge. Instead, Appellant received a sentence that was very closely aligned with what Appellant's own defense counsel argued was sufficient punishment for the case. (*See* R. at 761, *Entry of Judgment*, ROT, Vol. 1; *see also* R. at 736.)

Notably, as in Issue IV above, Appellant again fails to state exactly what part of his lenient sentence was allegedly "substantially influenced" by any perceived abuse of discretion by the military judge. Instead, Appellant asks for the windfall of having his entire sentence set aside. This Court should again decline Appellant's invitation. Again, Appellant's sentence included no bad-conduct discharge and not a single day of confinement. Instead, the sentence included 45 days of hard labor without confinement (which was just 15 days more than what Appellant's own counsel said was appropriate), a reduction in rank of just two grades (which was one grade more than what Appellant's own counsel said was appropriate), a reprimand (which Appellant's counsel said was appropriate), and a grand total of $600 in forfeitures.

This adjudged sentence by the military judge shows any admission of erroneous evidence was harmless and did not substantially influence the sentence. *See* Barker, 77 M.J. at 384; Flesher, 73 M.J. at 318. Moreover, the fact that Appellant was sentence by a military judge, and not members, should provide this Court further pause in granting Appellant any relief, let alone the windfall Appellant suggests of setting aside his *entire* sentence. *See* Barker, 77 M.J. at 384.

In sum, the military judge did not abuse his discretion in admitting Lt Col AG's testimony. Yet, even if he did, the adjudged sentence in this case was not substantially influenced by any erroneous evidence. As such, this Court should deny Appellant's claim.

VI.

THE MILITARY JUDGE SENTENCED APPELLANT TO $300 PAY PER MONTH FOR TWO MONTHS.

Standard of Review and Law

This Court reviews whether an approved sentence conflicts with the UCMJ de novo. *See* United States v. Warner, 25 M.J. 64 (C.M.A. 1987).

A sentence to forfeitures shall state the exact amount in whole dollars to be forfeited each

month, and the number of months the forfeiture will last. R.C.M. 1003(b)(2); *see also* United States v. Gaston, 62 M.J. 404, 408 (C.A.A.F. 2006) (holding a military judge erred by adjudging a sentence that included forfeiture of "two-thirds pay per month for six months" rather than a whole dollar amount); United States v. Johnson, 32 C.M.R. 127, 128 (C.M.A. 1962) (holding that an announced sentence that included "$70.00 forfeiture of pay for six months" was limited to forfeiture in the total amount of $70.00). If the announced sentence does not include the phrase "per month," appellate courts have concluded that the amount announced is deemed to be the total amount to be forfeited. *See* United States v. Rendon, 58 M.J. 221, 222 (C.A.A.F. 2003) (affirming a total forfeiture of only $521.00 where the military judge erred in adjudging sentence that included forfeiture of "one-half pay for six months").

Additional Facts

Appellant was sentenced in his court-martial by a military judge on 1 April 2023. According to audio from the trial, the military judge sentenced Appellant to, among other things, "forfeit $300 of your pay *per month* for two months." (*See U.S. Motion to Attach,* Appx. B at test_20230401-1600_01d964b308944a80 at 08:55)[5] (emphasis added).

On 11 April 2023, Appellant's trial defense counsel submitted a Request for Clemency memorandum. Notably, one of Appellant's trial defense counsel who submitted that request, Maj FJ, is also Appellant's current appellate defense counsel. In that request, Maj FJ and his co-counsel state that Appellant was sentenced to, among other things, "forfeiture of $300 of pay *per month* for 2 months." (*See Request for Clemency Memorandum,* dated 11 April 2023) (emphasis added).

[5] Contemporaneous with this filing, the Government also filed a Motion to Attach audio files of all proceedings of Appellant's court-martial. This file is part of that motion.

On 27 April 2023, the military judge signed the Entry of Judgement (EOJ) in Appellant's case. The EOJ states, "This judgment reflects the result of the court-martial, as modified by any post-trial actions, rulings, or orders, if any, and is hereby entered into the record on 27 April 2023." The sentence in the EOJ as it relates to forfeitures states, "$300 pay, *per month*, for 2 months." (*See* EOJ) (emphasis added).

The summarized version of Appellant's transcript states the military judge sentenced Appellant "To forfeit $300.00 pay *per month* for 2 months." (Summarized R. at 114) (emphasis added). This summarized transcript was certified by the court reporter on 26 June 2023. Most importantly, Appellant's trial defense counsel, Maj FJ, stated that he examined the transcript in accordance with DAFI 51-201 and DAFMAN 51-203 on 5 July 2023. (*See* Summarized Transcript.) Again, Maj FJ is Appellant's current appellate defense counsel.

After this Court docketed Appellant's case, a verbatim transcript was completed for Appellant's court-martial. That transcript, which was certified in June 2024, states the military judge sentenced Appellant to, among other things, "[f]orfeit $300 of your pay for two months." (R. at 761.)

Analysis

Here, the audio from Appellant's trial clearly shows the military judge sentenced Appellant to "forfeit $300 of your pay *per month* for two months." The summarized transcript shows Appellant was sentenced to forfeitures of $300 pay per month for two months. Even worse for Appellant, the military judge stated in his EOJ that the sentence *he adjudged* included forfeitures of "$300 pay per month for 2 months."

Yet, perhaps most fatal to Appellant's claim are the words of his own appellate defense counsel who, while acting as his trial defense counsel, plainly acknowledged in a clemency

memorandum that Appellant was indeed sentenced to "forfeiture of $300 of pay *per month* for 2 months." (*See Request for Clemency Memorandum*, dated 11 April 2023) (emphasis added).

The evidence before this Court shows the verbatim transcript includes a transcription error related to the forfeitures portion of Appellant's sentence. In contrast to the forfeiture sentence stated in the verbatim transcript, all evidence before this Court shows Appellant was sentenced by the military judge to forfeit $300 pay *per month* for two months. The audio of the proceedings shows it, the EOJ completed by the military judge, *who sentenced Appellant*, shows it, and the acknowledgment of Appellant's own trial defense counsel, who is now his appellate defense counsel, shows it. Thus, contrary to his claims, there is no error in the EOJ. As a result, this Court should deny Appellant's claim and approve his sentence as adjudged.

VII.

APPELLANT FAILS TO ESTABLISH CUMULATIVE ERROR.

Standard of Review

"The cumulative effect of all plain errors and preserved errors is reviewed de novo." United States v. Pope, 69 M.J 328, 334 (C.A.A.F. 2011) (citations omitted).

Law and Analysis

This Court will reverse a conviction only if it finds that the cumulative errors denied Appellant a fair trial. Id. (citations omitted).

As discussed throughout the Government's answer, no errors occurred at the trial level, much less several errors, and therefore nothing prevented Appellant from receiving a fair trial. The cumulative error doctrine requires the finding of error to invoke it. *See* United States v. Gray, 51 M.J. 1, 61 (C.A.A.F. 1999) ("The implied premise of the cumulative-error doctrine is the existence of errors . . . Assertions of error without merit are not sufficient to invoke this

doctrine"). Given the fact none of the issues raised by Appellant are errors, this Court should affirm the findings of guilt and sentence.

VIII.

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

Standard of Review

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

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members in accordance with Article 52. (R. at 687.) Appellant filed a motion for appropriate relief requesting a unanimous verdict instruction. (App. Ex. VI.) The military judge denied the requested relief. (R. at 700; App. Ex. XXXVIII.) Appellant now argues, in light of the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 28.)

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

CAAF addressed the applicability of Ramos to courts-martial in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023) *certiorari denied* by Anderson v. United States, 218 L. Ed. 2d 21, 2024 U.S. LEXIS 827, 2024 WL 674728 (U.S., 20 February 2024). Our superior Court reaffirmed that servicemembers do not have a Sixth Amendment right to a jury trial. Id. at 295. CAAF rejected the same claims Appellant raises now:

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

Id. at 298. CAAF held that Fifth Amendment due process does not require unanimous verdicts in courts-martial. Id. at 300. Further, our superior Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at 302. This Court should follow CAAF's binding precedent and deny Appellant's assignment of error.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 12 March 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before a Special Panel
Senior Airman (E-4) **Deshawn M. Dawson,** United States Air Force, *Appellant.*	)	No. ACM 24041
	)	19 March 2025

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

Pursuant to Rule 18(d)(2) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant, Senior Airman Deshawn M. Dawson, replies to the United States' answer filed on 12 March 2025 (hereinafter Government's Brief).

Assignment of Error I

> **The Government's argument that the omission of audio recordings of forty-five percent of the trial is not substantial because of the availability of a written transcript is inconsistent with controlling presidentially prescribed regulations and this Court's case law.**

The Military Justice Act of 2016 amended Article 54(c) of the Uniform Code of Military Justice (UCMJ) to provide that a record of trial "shall contain such matters as the President may prescribe by regulation."[1] Carrying out that express delegation, President Trump required that "[t]he 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

[1] National Defense Authorization Act for 2017, Pub. L. No. 114-328, § 5238, 130 Stat. 2000, 2918 (2016) (codified at 10 U.S.C. § 854(c)(1)). Division E of the National Defense Authorization Act is the Military Justice Act of 2016. *See* Pub. L. No. 114-328, § 5001, 130 Stat. at 2894. Article 54, UCMJ, has not been amended since enactment of the Military Justice Act of 2016. The Government's brief incorrectly indicates that Article 54, UCMJ, is codified at 10 U.S.C. § 954. Government's Brief at 6.

voting."[2] President Trump further specified that "[a] record of trial is complete if it complies with the requirements of [Rule for Courts-Martial (R.C.M.) 1112](b)," which include the requirement for a substantially verbatim recording of the court-martial proceedings.[3] Lest there be any doubt that the recording must include audio of the court-martial proceedings rather than a mere written transcript, President Trump also directed that the record of a general or special court-martial "shall be independent of any other document and shall include a recording of the court-martial. Court-martial proceedings may be recorded by videotape, audiotape, or other technology from which sound images may be reproduced to accurately depict the court-martial."[4]

In addition to requiring a sound recording of a court-martial that is "independent of any other document," the President ordered that "[i]f a certified transcript is made under [R.C.M. 1114], it shall be attached to the record of trial."[5] Thus, a certified transcript is a required *attachment to* the record of trial but, unlike audio recordings, is not a *part of* the record of trial of a general or special court-martial.

A record of trial that does not include a substantially verbatim recording of the court-

[2] Exec. Order No. 13825 of March 1, 2018, 83 Fed. Reg. 9889, 10046 (2018) (codified at Rule for Courts-Martial 1112(b), *Manual for Courts-Martial, United States* (2024 ed.) (*MCM*)). Executive Order 14103 of July 28, 2023, made an amendment to R.C.M. 1112(b)(5) that is irrelevant to the issues currently before this Court. *See* 88 Fed. Reg. 50535, 50568 (2023). R.C.M. 1112(b) is otherwise unchanged since Executive Order 13825.

[3] Exec. Order No. 13825, 83 Fed. Reg. at 10046 (codified at R.C.M. 1112(d)(2)). R.C.M. 1112(d)(2) is unchanged since Executive Order 13825.

[4] Exec. Order No. 13825, 83 Fed. Reg. at 10046 (codified at R.C.M. 1112(a)). R.C.M. 1112(a) is unchanged since Executive Order 13825.

[5] Exec. Order No. 13825, 83 Fed. Reg. at 10050 (codified at R.C.M. 1114(d)). R.C.M. 1114(d) is unchanged since Executive Order 13825.

martial proceedings is incomplete.[6] Here, where audio recordings of forty-five percent of the court-martial proceedings are not part of the record, the omissions are both quantitatively and qualitatively substantial.

Contrary to the Government's argument,[7] the presence of a certified transcript cannot cure the absence of audio recordings of forty-five percent of the court-martial proceedings. The Military Justice Act of 2016 expressly delegated to the President the authority to prescribe the contents of records of general, special, and summary courts-martial.[8] For general and special courts-martial, the President prescribed audio recordings as a part of the record (in fact, the key part of the record as reflected by its primacy in R.C.M. 1112(b)) and a transcript as a mere attachment to the record.[9] The Government suggests that rather than looking to that express requirement adopted pursuant to a specific delegation of congressional authority concerning the contents of records of trial, this Court look to the general definitional provision of Article 1(14) of the UCMJ.[10] That general definitional provision was enacted by the Military Justice Act of 1983.[11] To whatever extent there is tension between the 1983 general definitional provision and

[6] *United States v. Valentin-Andino*, 83 M.J. 537, 540–41 (A.F. Ct. Crim. App. 2023) ("the record of trial is incomplete because it does not include a substantially verbatim recording of the court-martial proceedings"), *petition granted on other grounds*, __ M.J. __, No. 24-0208/AF (C.A.A.F. Sept. 30, 2024).
[7] Government's Brief at 5–8.
[8] National Defense Authorization Act for 2017, Pub. L. No. 114-328, § 5238, 130 Stat. at 2918 (codified at 10 U.S.C. § 854(c)(1)).
[9] Exec. Order No. 13825, 83 Fed. Reg. at 10046, 10050 (codified at R.C.M. 1112(a), R.C.M. 1112(b)(1), R.C.M. 1114(d)).
[10] Government's Brief at 6 (citing UCMJ art. 1(14), 10 U.S.C. § 801(14)).
[11] Military Justice Act of 1983, Pub. L. No. 98-209, § 6(a), 97 Stat. 1393, 1400 (1983).

the operative 2016 statutory language, the more recent and the more specific prevails.[12]

This Court has, consistent with the reasoning above, remanded records for correction due to missing audio recordings notwithstanding the presence of a verbatim transcript.[13] But regardless of the general rule, *here* the transcript is not a sufficient alternative to an audio recording. Nothing demonstrates that point better than the Government's own brief. The Government's argument in response to Appellant's sixth assignment of error—raising an inconsistency between the "verbatim" transcript and the entry of judgment concerning the adjudged forfeitures—depends on contradicting the "verbatim" transcript with the audio recordings.[14] Appellant's opening brief identified additional inaccuracies in the transcript.[15] The transcript in this case is not a reliable record of the court-martial's proceedings, as the

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[12] Under the *lex posterior derogat legi priori* canon of statutory construction, where two statutory provisions appear to conflict, the later in time prevails. *See, e.g.*, *Patterson v. Independent School Dist.*, 742 F.2d 465, 468 (8th Cir. 1984); *Harding v. VA*, 448 F.3d 1373, 1376 n.2 (Fed. Cir. 2006). *See also The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889) ("[T]he last expression of the sovereign will must control."). That case arose in the context of a statute that was inconsistent with a previous treaty, but the concept applies equally to two inconsistent statutes. Another well-established canon of statutory construction provides that "the specific governs the general." *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992). *See also United States v. Wilson*, 73 M.J. 529, 533 (A.F. Ct. Crim. App. 2014) ("applying ordinary canons of statutory construction, the more specific provision trumps the general one").

[13] *E.g.*, *United States v. McCoy*, No. ACM 40119, 2022 CCA LEXIS 632 (A.F. Ct. Crim. App. Oct. 31, 2022) (order) (rejecting Government argument that audio recordings are not necessary where a verbatim transcript exists); *United States v. Brown*, No. ACM 40066, 2022 CCA LEXIS 625 (A.F. Ct. Crim. App. Oct. 25, 2022) (order) (same). *Accord United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43, at *16 (A.F. Ct. Crim. App. Jan. 20, 2022). The suggestion to the contrary in *United States v. Reedy*, No. ACM 40358, 2024 CCA LEXIS 40, at *17–18 (A.F. Ct. Crim. App. Feb. 2, 2024), *petition denied*, 84 M.J. 417 (C.A.A.F. 2024), appears to be an outlier. *Reedy*'s reasoning is inconsistent with not only this Court's own case law, but also with R.C.M. 1112(a)'s requirements that: (1) the court-martial proceedings be "recorded by" technological means "from which sound images may be reproduced to accurately depict the court-martial," (2) the record "be independent of any other document," and (3) the record "shall include a recording of the court-martial."

[14] *See* Government's Brief at 45 ("Here, the audio from Appellant's trial clearly shows the military judge sentenced Appellant to 'forfeit $300 of your pay *per month* for two months.'").

[15] *See* Brief on Behalf of Appellant at 12, 30.

Government's own brief demonstrates. The transcript's presence certainly does not cure the absence of the presidentially required sound recording of the court-martial proceedings "independent of any other document."[16]

The substantial omission from the required contents of the record cannot be cured by the Government's currently pending motion to attach the audio recordings.[17] Even if this Court were to grant that motion, it would not complete the record of trial. As this Court ruled in a case in which the Government moved to attach missing exhibits to the record, "[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions [to attach] does not change the fact that the record, as certified and submitted to the court, is incomplete."[18] In another case, this Court similarly observed, "We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the [record of trial]."[19] Last year alone, this Court remanded at least four incomplete records for correction under R.C.M. 1112(d) notwithstanding Government motions to attach the missing item or items.[20] *Covitz* is particularly

[16] R.C.M. 1112(a).
[17] United States' Motion to Attach Documents (filed 12 Mar. 2025).
[18] *United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. June 9, 2022) (per curiam).
[19] *United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2 (A.F. Ct. Crim. App. Oct. 26, 2022) (order).
[20] *United States v. Martinez*, No. ACM 39903 (reh), 2024 CCA LEXIS 551 (A.F. Ct. Crim. App. Dec. 16, 2024) (order); *United States v. Covitz*, No. ACM 40139 (reh), 2022 CCA LEXIS 751 (A.F. Ct. Crim. App. Dec. 6, 2024) (order); *United States v. Williams*, No. ACM 40485, 2024 CCA LEXIS 450 (A.F. Ct. Crim. App. Aug. 6, 2024) (order); *United States v. Boren*, No. ACM 40296, 2024 CCA LEXIS 246 (A.F. Ct. Crim. App. June 24, 2024) (order). *See also United States v. Matthew*, No. ACM 39796 (reh), 2024 CCA LEXIS 460, at *34–37 (A.F. Ct. Crim. App. Oct. 31, 2024) (finding a substantial omission from the record of trial, noting case law indicating that the record cannot be completed by means of a motion to attach, but finding no prejudice resulting from the omission); *United States v. Casillas*, No. ACM 40499, 2024 CCA LEXIS 394 (A.F. Ct. Crim. App. Sept. 24, 2024) (remanding for correction where the record of trial omitted audio of the arraignment and two preliminary hearing exhibits notwithstanding a Government motion to attach the missing audio).

relevant since that case involved the proper remedy for the omission of an audio recording of the appellant's arraignment.[21] This Court determined that, notwithstanding a Government motion to attach the missing audio recording, the proper remedy was a remand to correct the record.[22] On the other hand, this Court does not require remand where the missing items are not included among the President's prescribed required contents of the record of a general or special court-martial but are, rather, mere attachments.[23] Here, R.C.M. 1112(b) expressly includes the missing item—a substantially verbatim sound recording of the court-martial proceedings—as a matter that the "record of trial in every general and special court-martial shall include."

Although the presidentially prescribed option of remand is available, this Court should not use it here. Rather, this Court should invoke its express statutory authority to "provide appropriate relief" for "error or excessive delay in the processing of the court-martial," both of which are present in this case.[24] Here, such appropriate relief would be to set aside the findings and sentence.

As of today, 718 days have passed from Appellant's sentencing. And as of today, a legally compliant record of trial does not exist. Remanding the case to the trial level for correction would result in still more delay. This Court should end this case's drain on limited appellate resources. The only offense of which Appellant was convicted was slapping a friend on the face with insufficient force to leave a mark the next day. But for the two abusive sexual contact

[21] *Covitz*, 2022 CCA LEXIS 751, at *1.
[22] *Id.* at *3.
[23] *E.g.*, *United States v. Garron*, No. ACM 40239, 2023 CCA LEXIS 67 (A.F. Ct. Crim. App. Feb. 9, 2023) (per curiam) (missing preliminary hearing exhibit and missing recording of the preliminary hearing cured by government motion to attach the items to the record of trial); *United States v. Jones*, No. ACM 40113, 2022 CCA LEXIS 584 (A.F. Ct. Crim App. Oct. 17, 2022) (missing attachments to a clemency submission cured by government motion to attach the items to the record of trial).
[24] UCMJ art. 66(d)(2), 10 U.S.C. § 866(d)(2).

specifications of which Appellant was acquitted, a special court-martial for that slap would have been, as Vizzini of *The Princess Bride* would say, inconceivable.[25] Ending this case now would promote judicial efficiency while also reaching a just result for Appellant and sending a clear message to the Government concerning this Court's expectations for reasonably timely post-trial processing spanning the initial construction of the record, review of that record en route to this Court, and the proper mechanism for correcting any errors uncovered along the way.

Assignment of Error II

The Government knocks down a strawman argument of its own creation while failing to rebut Appellant's actual argument concerning the unreasonable post-trial delay that has infused this case.

As of today, 718 days have elapsed since this case was docketed with this Court. A record of trial complying with the presidentially prescribed requirements for a special court-martial still does not exist. Yet the Government maintains that the delay "was not egregious."[26] This Court should recalibrate the Government's egregiousness meter.

Even though Appellant expressly eschewed a due process challenge to the appellate delay in his case thus far, the Government devotes roughly five pages of its brief to slaying a chimeric due process post-trial delay dragon.[27] In the Government's zeal to address that unraised issue, it fails to grapple with Appellant's actual argument.

The Government expresses surprise that "Appellant does not even argue for relief under *Tardif* in his brief."[28] Why would he? *Tardif* was a 2002 Court of Appeals for the Armed Forces

[25] THE PRINCESS BRIDE (Act III Communications 1987).
[26] Government's Brief at 16.
[27] *Compare* Brief on Behalf of Appellant at 17 n.86 ("While asserting his constitutional right to timely completion of his appeal, SrA Dawson does not allege that the delay thus far has violated his constitutional due process right to timely appeal.") *with* Government's Brief at 16–21 (referring to "due process" six times).
[28] Government's Brief at 21 (referencing *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002)).

decision construing a portion of Article 66, UCMJ, that has since been substantively amended.[29] A significant event occurred between that decision and the unreasonable post-trial delay in this case: the Military Justice Act of 2016 expressly authorized this Court to grant "appropriate relief" for "error or excessive delay in the processing of the court-martial after the judgment was entered into the record."[30] Congress enacted that provision in the exercise of its constitutional authority to "make Rules for the Government and Regulation of the land and naval Forces."[31] That current statute—not a Court of Appeals for the Armed Forces case construing a superseded UCMJ provision—is the relevant source of authority that Appellant asked and asks this Court to invoke.[32] Yet the Government fails to even cite Article 66(d)(2), much less address how it applies to this case.

In lieu of answering Appellant's actual argument, the Government offers legally and factually unsupportable propositions.[33] For example, the Government states, "Taking 137 days to complete the record of trial is not unreasonable because military courts have used the aggregate 150-day standard to determine whether the time to complete a record of trial before docketing is reasonable. *See* Moreno; Livak."[34] One obvious problem with this argument is that, here, 137 days was not the period from *sentencing* to *docketing*. That is the actual span for which *Livak*

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[29] *Tardif*, 57 M.J. at 220–25. *Tardif* construed the Courts of Criminal Appeals' authority to address post-trial delay under the then-existing version of Article 66(c), UCMJ. The Military Justice Act of 2016 substantially amended the statutory provision that *Tardif* construed. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5330, 130 Stat. at 2932–33 (codified as further amended at 10 U.S.C. § 866).

[30] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5330, 130 Stat. at 2932–33 (codified as further amended at 10 U.S.C. § 866(d)(2)).

[31] U.S. CONST. art. I, § 8, cl. 14.

[32] *See* Brief on Behalf of Appellant at 16–17, 20.

[33] *Cf. United States v. Honea*, 77 M.J. 181, 184 (C.A.A.F. 2018) (commending appellate government counsel for "admirably and appropriately conced[ing] during oral argument before this Court, this case is 'a mess'").

[34] Government's Brief at 18 (referencing *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020)).

provides an aggregate 150-day threshold—a threshold the Government violated in this case.[35] Nor did the 137-day period the Government touts in this case involve the completion of a verbatim transcript of the sort to which the *Moreno* standard applied. Rather, during that 137-day period, a court reporter prepared a *summarized* record of trial. That court reporter later took another 255 days to prepare a "verbatim" record, which the Government then took another sixty-four days to file with this Court.[36] This Court should reject the Government's false equivalency.

Instead of offering good cause for its dilatory processing, the Government repeatedly invokes its own negligence as extenuation for the post-trial delay in this case. For example, in an argument heading, the Government observes that "the reasons for the delay are attributable to workload or simple negligence, not an attempt to hamper Appellant's post-trial rights."[37] The Government later argues, "At most, negligence is what we have in this case, not a nefarious attempt to injure Appellant."[38] The Government then triples down on its negligence justification, arguing that delays not "attributable to the unique circumstances involving the amendment to Article 66 and the expansion of the right to appellate review . . . should be attributed to 'negligence' rather than deliberate delay."[39] The reader is left wondering whether the Government understands that negligence is a bad thing.[40] This Court should take action to ensure such an understanding.

The Government's brief is silent as to two particularly disturbing aspects of the post-trial processing of this case: (1) the court reporter's erroneous 26 June 2023 certification that the record

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[35] *Livak*, 80 M.J. at 633. *See* Brief on Behalf of Appellant at 7 (demonstrating that 186 days passed from sentencing to docketing).
[36] *See* Brief on Behalf of Appellant at 16.
[37] Government's Brief at 16 (bold omitted).
[38] *Id.* at 19.
[39] *Id.* at 20.
[40] *See MCM*, pt. IV, ¶ 18.c.(3)(c) ("A person is derelict in the performance of duties when that person . . . negligently fails to perform that person's duties . . . .").

of trial was complete; and (2) the Office of the Judge Advocate General's failure to note the incomplete record when originally received and return it for correction.[41] The Government even moves to attach a declaration from the court reporter that fails to elucidate why her 26 June 2023 certification of the record of trial was in error.[42]

This Court should respond to the Government's acknowledged negligence in post-trial processing by exercising its statutory authority under Article 66(d)(2), UCMJ, to order "appropriate relief." Here—where the only offense resulting in a conviction was exceedingly minor, the post-trial delay was extensive and remains ongoing, and the problems are indicative of institutional neglect concerning timely post-trial processing—the appropriate remedy is to set aside the findings and sentence.[43]

Assignment of Error III

This Court should reject the Government's attempt to downplay the prosecutors' failure to disclose information to the defense counsel and military judge relevant to whether there were potential grounds on which to challenge a member.

The Government confines its analysis of the prosecutors' disturbing conduct in this case to one sentence: "The question here is not whether trial counsel erred, it is whether the military judge erred in deciding not to grant a remedy."[44] The Government's attempt to divert this Court's gaze from the prosecutors is telling. It is also legally wrong. The prosecution team's conduct in this case is relevant to the proper remedy.

As discussed in Appellant's opening brief, this case is analogous to *United States v. Schuller*, in which the Court of Military Appeals noted, "We are unwilling to charge the accused

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[41] *See* Brief on Behalf of Appellant at 14 (citing Department of the Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 20.52.3. (14 Apr. 2022)).
[42] United States' Motion to Attach Documents (filed 12 Mar. 2025) at Appendix B.
[43] *See Valentin-Andino*, 2024 CCA LEXIS 223, at *17–18 (finding "a systemic problem indicating institutional neglect" arising from "incomplete records of trial").
[44] Government's Brief at 27.

with the consequences of a failure to exercise due care, when it appears that trial counsel had actual knowledge of the disqualification, but still failed to disclose it, as it was his duty to do."[45] Consistent with its nothing-to-see-here approach, the Government does not even cite *Schuller*, much less attempt explain why it does not make the prosecutors' actions directly relevant to the decision of this issue.

The Government is simply wrong when it asserts that "Appellant does not challenge the military judge's statement of the law; he only argues that the military judges [sic] should have given Appellant his requested remedy of a mistrial."[46] On one of the very pages the Government cites in support of that mistaken proposition, Appellant's opening brief argued that "the military judge, in direct contravention of *Schuller*, erred when he reasoned that the defense's failure to somehow intuit the information excused the prosecution team's failure to disclose what they *knew*."[47] On that same page, Appellant's opening brief argued, "The military judge further abused his discretion by limiting his analysis to the exercise of causal challenges. In *United States v. Commisso*, the Court of Appeals for the Armed Forces emphasized that '[v]oir dire is a valuable tool . . . . [for] determining how to exercise peremptory challenges.'"[48] Those arguments disprove the Government's assertion that Appellant "does not challenge the military judge's statement of the law; he only argues that the military judges should have given Appellant his requested remedy of a mistrial." Moreover, the Government fails to address, much less rebut, the latter argument that the military judge's ruling was influenced by an erroneous view of the law because he confined his analysis to a potential causal challenge, overlooking the effect of the prosecutors' failure to disclose the

[45] Brief on Behalf of Appellant at 27 (quoting *United States v. Schuller*, 17 C.M.R. 101, 105 (C.M.A. 1954)).
[46] Government's Brief at 27 (citing Brief on Behalf of Appellant at 26–29).
[47] Brief on Behalf of Appellant at 28.
[48] *Id.* at 28 (citing *United States v. Commisso*, 76 M.J. 315, 324 n.8 (C.A.A.F. 2017) (all alterations in original) (quoting *United States v. Jefferson*, 44 M.J. 312, 318 (C.A.A.F. 1996))).

relevant information in a timely fashion on the defense's exercise of its peremptory challenge.[49] The military judge's approach was influenced by an erroneous view of the law because it was inconsistent with the Court of Appeals for the Armed Forces' opinion in *Commisso*. It was, therefore, an abuse of discretion.

Instead of addressing the peremptory challenge issue, the Government argues that one member cannot compel either a conviction or an acquittal.[50] While true, that does not insulate a court-martial from reversal where a military judge errs in ruling on a challenge for cause.[51] Nor does it insulate a court-martial from reversal where, as here, the prosecution team failed to disclose information that could have formed the basis for a possible challenge.

Assignment of Error IV

The Government does not dispute that the plain language of a prosecution sentencing witness's testimony indicates she presented testimony in aggravation, over defense objection, predicated at least in part on allegations of which Appellant was acquitted.

R.C.M. 1001(b)(4) allows the prosecution to "present evidence as to any aggravating circumstances directly relating to or resulting from the *offenses of which the accused has been found guilty*."[52] The Government does not contest that the plain language of Lieutenant Colonel (Lt Col) AG's testimony indicated she removed Appellant from performing armed law enforcement duties at least in part because of the two abusive sexual contact allegations of which he was acquitted.[53] Instead, the Government pretends that the sole offense of which Appellant was convicted was serious.[54] It was not. Appellant slapped a friend on the cheek while both were off-duty and while

[49] *See* Brief on Behalf of Appellant at 28–29.
[50] Government's Brief at 30.
[51] *See, e.g.*, *United States v. Wood*, 74 M.J. 238, 245 (C.A.A.F. 2015).
[52] R.C.M. 1001(b)(4) (emphasis added).
[53] *See* Government's Brief at 34.
[54] Government's Brief at 35.

both were intoxicated.[55] The slap did not leave any visible trace on Appellant's friend's face as of the next morning.[56] She would not even have known it occurred but for someone else telling her.[57]

The Government's argument on this issue includes a disconcerting word: "Here, Appellant stood accused of unapologetically slapping a *female* coworker . . . ."[58] This Court should reject any implicit suggestion that slapping a female friend's cheek is a more serious offense than slapping a male friend's cheek. The Government also overstates its case when it says that Appellant "said that his *hands*—the very *weapons* he used to assault [] EE—were 'rated E for everyone.'"[59] Aside from the histrionics of referring to Appellant's hands as "weapons," the only eyewitness to the slap testified that Appellant used "[h]is hand."[60] Singular. Thus, in responding to a challenge predicated on Lt Col AG's telling use of the plural "allegations," the Government inaccurately uses the plural "hands" as the purported means by which the offense occurred.

The Government speculates that regardless of the Article 120 allegations, "Lt Col AG would have removed Appellant from his flight (which was the same as his victim) and reassigned him to another location in the unit pending the outcome of the assault allegation."[61] While that is far from a self-evident proposition, any command response to the slap alone would, no doubt, have been expeditious. Only when coupled with the two abusive sexual contact allegations of

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[55] Trial Tr. at 441–42.
[56] *Id.* at 443.
[57] *Id.* at 442.
[58] Government's Brief at 35 (emphasis added).
[59] *Id.* (emphasis added). The Government's brief violated this Court's Rules by referring to EE by her grade twenty-eight times. *See* A.F. Ct. Crim. App. R. 17.2(c)(1) ("To the extent practicable, filings shall not include personally identifiable or sensitive information, to include, but not limited to, . . . (B) Rank, unit, and duty title of complainants, crime victims, or law enforcement agents."). The quotation above removes one of those improper references.
[60] Trial Tr. at 363 (direct examination of KB).
[61] Government's Brief at 36.

which Appellant was acquitted would a more serious—and time-consuming—disposition come into play. So, even assuming *arguendo* that some limited interruption of Appellant's performance of his regular duties would have occurred as a result of the slap, the length of any such removal no doubt would have been far less (and almost certainly negligible) for the slap alone. Any negative effect on the unit would have been, at most, trifling. Lt Col AG's testimony about the adverse effects on her unit of Appellant's removal from his armed law enforcement duties was, therefore, improperly predicated on the offenses of which Appellant was acquitted—as her plain language indicated.

The Government also argues, as it is wont to do, that even if error occurred, it created no prejudice.[62] However, the prosecution team at trial certainly seemed to believe that the evidence was significant, as it was a point of emphasis during sentencing argument.[63]

It is true, as the Government suggests, that Appellant received a relatively mild sentence.[64] That reflects the exceedingly minor nature of his offense. The Government complains that "Appellant fails to state exactly what part of his lenient sentence was allegedly 'substantially influenced' by any perceived abuse of discretion by the military judge."[65] We do not pretend to be mind readers. Having never seen another special court-martial case in which an accused was convicted only of slapping a friend's cheek, we do not know the average sentencing range for such an offense. That said, it is a fair inference that having heard Lt Col AG's effect-on-the-unit testimony and apparently operating under the mistaken belief that it was admissible evidence in aggravation, the military judge probably adjudged a more severe sentence than he would have absent that testimony. This Court should eliminate any such prejudice by setting aside the

[62] *Id.*
[63] Trial Tr. at 734.
[64] Government's Brief at 37.
[65] *Id.*

sentence. Alternatively, the trial counsel's argument expressly tied Lt Col AG's testimony about Appellant's removal from performing his usual duties to a request for "two-thirds forfeitures for two months."[66] The military judge imposed a sentence that included—according to the certified "verbatim" transcript—"Forfeit $300 of your pay for two months."[67] If this Court declines to set aside the entire sentence as a remedy, it should set aside at least the forfeitures, which the trial counsel tied to the improperly admitted effect-on-the-unit evidence in aggravation.

Assignment of Error V

Contrary to the Government's argument, trial defense counsel can (and regularly do) adjust their trial strategy in light of developments in a case, such as a military judge's evidentiary ruling.

During the Government's sentencing case, Lt Col AG offered damaging testimony that was obviously hearsay.[68] At that point, the military judge had not relaxed the rules of evidence; the hearsay testimony was starkly inadmissible. The Government now argues that those errors do not matter because the military judge *later* relaxed the rules of evidence at the defense's request and the defense *later* offered evidence that might have opened the door to at least portions of the hearsay testimony on rebuttal.[69] The Government's argument is akin to the armchair baseball fan who thinks that a runner thrown out trying to steal second base cost his team a run because the next batter hit a home run. In reality, as the late Hall of Fame Baltimore Orioles manager Earl Weaver often said, "Everything changes everything."[70] It is not merely speculative but implausible that the same home-run pitch would have been thrown in the same count with the

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[66] Trial Tr. at 734.
[67] *Id.* at 761.
[68] *Id.* at 710–11.
[69] Government's Brief at 40.
[70] Thomas Boswell, *2015 MVP Is Out to Prove Himself in '17; He'll Need To*, WASH. POST (Feb. 19, 2017), at D1 ("Perhaps baseball's first law should be the old Earl Weaver quote that 'Everything changes everything.'").

same swing and the same result had the runner not tried to steal second. What is true of baseball is no less true of litigation. It is not merely speculative but implausible that the defense's sentencing case would have proceeded in exactly the same manner had the military judge not erroneously overruled the defense hearsay objection during Lt Col AG's testimony.[71] Trial lawyers make adjustments on the fly, such as redacting exhibits or changing the scope of examinations to avoid opening a door to otherwise inadmissible damaging evidence.

Yet the Government seems to assume that Appellant's defense counsel were incapable of making such adjustments, noting for example that defense character letters "were provided to the Government *before* Lt Col AG ever testified, providing a clear indication that the defense was planning to admit those letters (including the unit morale language) *before* they ever heard Lt Col AG testify."[72] If so, the defense counsel also provided the character letters to the prosecution team before the military judge overruled a defense objection to Lt Col AG's testimony immediately prior to her taking the stand,[73] before Lt Col AG started to answer a question with, "It's been brought to me on numerous occasions—,"[74] before the defense counsel made a hearsay objection,[75] and before the military judge erroneously overruled that hearsay objection.[76] The Government assumes Appellant's trial defense counsel would have woodenly plodded forward with their planned sentencing case notwithstanding those developments. But, as the Earl of Baltimore recognized, everything changes everything. The Government cannot insulate the military judge's clearly erroneous ruling by rank speculation about what would have happened in a hypothetical universe in which the military judge sustained the defense's hearsay objection.

[71] Trial Tr. at 710.
[72] Government's Brief at 41. The Government's brief includes no citation supporting this assertion.
[73] Trial Tr. at 706.
[74] *Id.* at 710.
[75] *Id.*
[76] *Id.*

There is no reason to think the defense's case would have proceeded exactly as it did had the military judge not erred.

The Government again errs by attempting to analogize this case to two of this Court's earlier opinions, *United States v. Boughton* and *United States v. Wyrozynski*.[77] In both *Boughton* and *Wyroznkski*, the testimony at issue was offered in the government's *rebuttal* sentencing case. In finding no error in *Boughton*, this Court observed, "The rules of evidence may be relaxed during the accused's presentation of his mitigation case. Likewise, the rules may be relaxed as to the Government's rebuttal of such evidence."[78] Similarly, in finding no error in *Wyrozynski*, this Court noted the "relaxed evidentiary rules in this stage of the trial."[79] Here, in stark contrast, the testimony at issue occurred during the Government's opening sentencing case before any relaxation of the rules of evidence.

The Government also argues that this Court should "presume the military judge filtered out any inadmissible evidence and sentenced Appellant only on admissible evidence."[80] Yet at the trial level, during sentencing argument, the United States' representative emphasized Lt Col AG's improper hearsay testimony.[81] The United States' representative at trial did not want the military judge to filter out the hearsay statements the prosecution had elicited from Lt Col AG. He certainly did not assume the military judge would do so. Nor should this Court. Where, as here, the military judge allowed clearly inadmissible, damaging hearsay statements into evidence, this Court should set aside the resulting sentence.

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[77] Government's Brief at 40–41 (discussing *United States v. Boughton*, 16 M.J. 649, 650 (A.F.C.M.R. 1983) (per curiam), and *United States v. Wyrozynski*, 7 M.J. 900, 902 (A.F.C.M.R. 1979)).
[78] *Boughton*, 16 M.J. at 649 (internal citation omitted).
[79] *Wyrozynski*, 7 M.J. at 902.
[80] Government's Brief at 40.
[81] Trial Tr. at 733, 734–35.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 March 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Air Force Appellate Defense Division

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24041**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Deshawn M. DAWSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 12 March 2025, Appellee submitted a motion to attach three declarations, two from paralegals and one from a court reporter. Additionally, Appellee submitted a summarized transcript prepared for this case and the complete audio recordings of Appellant's court-martial proceedings. Appellee purports the attachments are responsive to Appellant's allegations of error in the post-trial processing of his case and the compilation of the record of trial. Appellee contends attaching the documents is appropriate because "doing so is necessary for resolving issues raised by materials in the record," quoting *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020).

On 20 March 2025, Appellant opposed the motion.

Having considered Appellee's motion, the Appellant's opposition, and the applicable law, we grant the motion to attach. We defer consideration of any applicability of *United States v. Jessie* and related case law to the attachment until we complete our Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's entire case.

Accordingly, it is by the court on this 21st day of March, 2025,

ORDERED:

Appellee's Motion to Attach dated 12 March 2025 is **GRANTED**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO ATTACH DOCUMENTS
v.	)	Before a Special Panel
Senior Airman (E-4) **DESHAWN M. DAWSON** United States Air Force *Appellant.*	)	No. ACM 24041
	)	12 March 2025

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

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

- **Appendix A - Declaration of SSgt Kayla L. Stevens, dated 10 February 2025 (6 pages)**
- **Appendix B – Declaration of Ms. Madison Ury, dated 4 February 2025 (7 pages and 1 disc)**
- **Appendix C - Declaration of MSgt Tracy Kuehner, dated 13 March 2025 (3 pages)**
- **Appendix D – Summarized Transcript of United States v. Dawson Uploaded to the WebDocs website (127 pages)**

The attached declaration is responsive to Appellant's allegations of missing proceeding audio and a post-trial speedy trial violation in Issues I and II of Appellant's Assignments of Error, dated 28 January 2025.

SSgt Kayla L. Stevens is a military justice paralegal at Incirlik Air Base, Turkey. To create the attached post-trial chronology, she reviewed the record of trial post-sentencing documents, the Special Court-Martial checklist completed by the case paralegal and trial team at the time of the court-martial, e-mail exchanges, and case reports from AMJAMS and DCMS. She then prepared the attached declaration explaining how she created the chronology.

Ms. Madison Ury was the court reporter for the above captioned case. She reviewed her files, located the original audio for this case, and sent the audio via DoD Safe to undersigned counsel. She also created a post-trial chronology for her involvement in this case. She then prepared the attached declaration.

MSgt Tracy Kuehner is the NCOIC of Military Justice at 3 AF/JA. To create the attached post-trial chronology, she reviewed the record of trial post-sentencing documents and coordinated with members of 3 AF/JA who were at the office during the post-trial processing of Appellant's case. She then prepared the attached declaration explaining how she created the chronology.

Our Superior Court 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)).

Appendix B to this filing provides the complete audio for the proceeding. The issue of incomplete audio is raised by materials in the record, and the attachment is necessary to resolve that issue. This Court should accept this filing rather than remanding the case for correction. According to R.C.M. 1112(c), the court reporter ordinarily certifies that the record of trial contains all of the items required by R.C.M. 1112(b). One of the required items is the "substantially verbatim recording of the court-martial proceedings." R.C.M. 1112(b)(1). The court reporter's declaration should satisfy this Court that the attached verbatim transcript is what it purports to be.

The appendices also contain post-trial chronologies to account for the time between the announcement of Appellant's sentence and docketing with this Court – a timeframe Appellant challenges on appeal in Issue II. The attached documents are relevant and necessary to address whether the record of trial is complete and the alleged post-trial delay – issues that are raised by materials that are currently in the record. The summarized transcript was not initially attached to Appellant's record of trial because of policy changes requiring a verbatim transcript. The issue of what sentence the military judge announced is raised by materials in the record, and the summarized transcript (and audio of proceedings) is necessary to resolve those matters. *See* Issue VI.

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

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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 12 March 2024.

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

UNITED STATES,	)	**APPELLANT'S OPPOSITION TO**
	)	**UNITED STATES' MOTION TO**
Appellee,	)	**ATTACH DOCUMENTS**
	)	
	)	
v.	)	Before a Special Panel
	)	
Senior Airman (E-4)	)	No. ACM 24041
Deshawn M. Dawson,	)	
United States Air Force,	)	
Appellant.	)	19 March 2025

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

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, Appellant, Senior Airman Deshawn M. Dawson, opposes the United States' Motion to Attach Documents, dated 12 March 2025 (Government Motion to Attach).

Introduction

The Uniform Code of Military Justice, the *Manual for Courts-Martial*, and this Court's case law provide two permissible approaches where, as here, a substantial required portion of the record of trial is missing. This Court can and should resolve the incomplete record of trial by ending this case pursuant to the express authority the Military Justice Act of 2016 granted this Court to "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record."[1] Alternatively, the President of the United States has provided that a superior competent authority may return an incomplete or defective record of trial to the military judge for correction.[2] As discussed below,

[1] National Defense Authorization Act for 2017, Pub. L. No. 114-328, § 5330(b)(2), 130 Stat. 2000, 2933 (2016) (codified at 10 U.S.C. § 866(d)(2)). Division E of the National Defense Authorization Act is the Military Justice Act of 2016. *See* Pub. L. No. 114-328, § 5001, 130 Stat. at 2894.

[2] Rule for Courts-Martial 1112(d), *Manual for Courts-Martial, United States* (2024 ed.) [hereinafter R.C.M.]).

this Court has repeatedly recognized that presidentially prescribed approach as the proper method for correcting a substantial omission in a required portion of a record of trial. The Government, however, seeks a third option: correction of a substantial omission in the record of trial by motion to attach.[3] Significantly, the Government offers no authority in support of its requested approach.[4]

This Court should deny the Government's motion. As explained below, the optimal response to the substantial omissions from the record of trial here is to set aside the finding of guilty to the only offense of which Appellant was convicted—slapping a friend on the cheek—and the sentence.

Facts

The record of trial the Government filed with this Court is missing audio recordings corresponding to approximately forty-five percent of the written transcript.[5] Among the portions of the court-martial for which the record contains no audio recordings are opening statements, the testimony of the only witness who claimed to see Appellant slap EE, the entire defense case on the merits, the prosecution's rebuttal case, findings instructions, closing arguments, announcement of findings, the entirety of the sentencing proceedings, and litigation over the prosecution's late revelation of information relevant to whether a court-martial member should have sat on this case.[6] Despite the missing audio, the court reporter certified that "the Record of Trial [is] accurate and complete in accordance with [Rule for Courts-Martial (R.C.M.)] 1112(b) and (c)(1), DAFMAN

[3] Government Motion to Attach at 2.
[4] This portion of the Government's motion cites R.C.M. 1112(b), R.C.M. 1112(b)(1), and R.C.M. 1112(c), *id.* at 2, none of which provides any authority for correcting an omission from a record of trial by means of a motion to attach at the Court of Criminal Appeals level.
[5] The recordings in the record of trial contain no audio of the court-martial sessions purportedly transcribed on pages 295–326, 355–88, or 477–761 of the transcript. *Compare* Trial Audio, "Disc 1 of 1" *with* Trial Tr.
[6] *Compare* Trial Audio, "Disc 1 of 1" *with* Trial Tr. at 295–301, 359–88, 493–636, 651–89, 694–95, 702–61.

51-201, paragraph 3.4.2, and DAFI 51-201, paragraph 20.48."[7]

On 12 March 2025—711 days after Appellant was sentenced—the Government moved to attach what purport to be the missing audio recordings. The Government also sought to attach a declaration from the same court reporter who erroneously certified the completeness of the record of trial in June 2023.[8]

Law and Analysis

The Military Justice Act of 2016 amended Article 54(c) of the Uniform Code of Military Justice (UCMJ) to provide that a record of trial "shall contain such matters as the President may prescribe by regulation."[9] Carrying out that express delegation, President Trump required that "[t]he 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."[10] President Trump further specified that "[a] record of trial is complete if it complies with the requirements of [R.C.M. 1112](b)," which include the requirement for a substantially verbatim recording of the court-martial proceedings.[11] Lest there be any doubt that the recording must include audio of the court-martial proceedings rather than a mere written transcript,

[7] Certification of the Record of Trial (26 Jun. 2023), "Volume 3 of Volumes 3" (citing R.C.M. 1112(b), (c)(1); Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, ¶ 3.4.2. (14 Apr. 2022); Department of the Air Force Manual 51-203, *Records of Trial*, ¶ 20.48 (21 Apr. 2021)).

[8] Government Motion to Attach at Tab B.

[9] National Defense Authorization Act for 2017, Pub. L. No. 114-328, § 5238, 130 Stat. at 2918 (codified at 10 U.S.C. § 854(c)(1)). Article 54, UCMJ, has not been amended since enactment of the Military Justice Act of 2016. The Government's brief incorrectly indicates that Article 54, UCMJ, is codified at 10 U.S.C. § 954. United States' Answer to Assignments of Error (filed 12 Mar. 2025), at 6.

[10] Exec. Order No. 13825 of March 1, 2018, 83 Fed. Reg. 9889, 10046 (2018) (codified at R.C.M. 1112(b)). Executive Order 14103 of July 28, 2023, made an amendment to R.C.M. 1112(b)(5) that is irrelevant to the issues currently before this Court. *See* 88 Fed. Reg. 50568, 50568 (2023). R.C.M. 1112(b) is otherwise unchanged since Executive Order 13825.

[11] Exec. Order No. 13825, 83 Fed. Reg. at 10046 (codified at R.C.M. 1112(d)(2)). R.C.M. 1112(d)(2) is unchanged since Executive Order 13825.

President Trump also directed that the record of a general or special court-martial "shall be independent of any other document and shall include a recording of the court-martial. Court-martial proceedings may be recorded by videotape, audiotape, or other technology from which sound images may be reproduced to accurately depict the court-martial."[12]

In addition to requiring a sound recording of a court-martial that is "independent of any other document," President Trump ordered that "[i]f a certified transcript is made under [R.C.M. 1114], it shall be attached to the record of trial."[13] Thus, a certified transcript is a required *attachment to* the record of trial but, unlike audio recordings, is not a *part of* the record of trial of a general or special court-martial.

A record of trial that does not include a substantially verbatim recording of the court-martial proceedings is incomplete.[14] Here, where audio recordings corresponding to forty-five percent of the court-martial proceedings are not part of the record, the omissions are both quantitatively and qualitatively substantial.

The presence of a certified transcript cannot cure the absence of audio recordings of forty-five percent of the court-martial proceedings. The Military Justice Act of 2016 expressly delegated to the President the authority to prescribe the contents of records of general, special, and summary courts-martial.[15] For general and special courts-martial, the President prescribed sound recordings as the record and a transcript as a mere attachment to the record.[16] The

[12] Exec. Order No. 13825, 83 Fed. Reg. at 10046 (codified at R.C.M. 1112(a)). R.C.M. 1112(a) is unchanged since Executive Order 13825.
[13] Exec. Order No. 13825, 83 Fed. Reg. at 10050 (codified at R.C.M. 1114(d)). R.C.M. 1114(d) is unchanged since Executive Order 13825.
[14] *United States v. Valentin-Andino*, 83 M.J. 537, 540–41 (A.F. Ct. Crim. App. 2023), *petition granted on other grounds*, __ M.J. __, No. 24-0208/AF (C.A.A.F. Sept. 30, 2024).
[15] National Defense Authorization Act for 2017, Pub. L. No. 114-328, § 5238, 130 Stat. at 2918 (codified at 10 U.S.C. § 854(c)(1)).
[16] Exec. Order No. 13825, 83 Fed. Reg. at 10050 (codified at R.C.M. 1112(a), R.C.M. 1112(b)(1), R.C.M. 1114(d)).

Government suggests that rather than looking to that express requirement adopted pursuant to a specific delegation of congressional authority, this Court look to the general definitional provision of Article 1(14) of the UCMJ.[17] That general definitional provision was enacted by the Military Justice Act of 1983.[18] To whatever extent there is tension between the 1983 general definitional provision and the operative 2016 statutory language, the more recent and the more specific prevails.[19]

This Court has, consistent with the reasoning above, remanded records for correction due to missing audio recordings notwithstanding the presence of a verbatim transcript.[20] But regardless of the general rule, *here* the transcript is not a sufficient alternative to an audio recording. Nothing demonstrates that point better than the Government's own brief. The

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[17] United States' Answer to Assignments of Error at 6 (citing UCMJ art. 1(14), 10 U.S.C. § 801(14)).

[18] Military Justice Act of 1983, Pub. L. No. 98-209, § 6(a), 97 Stat. 1393, 1400 (1983).

[19] Under the *lex posterior derogat legi priori* canon of statutory construction, where two statutory provisions appear to conflict, the later in time prevails. *See, e.g.*, *Patterson v. Independent School Dist.*, 742 F.2d 465, 468 (8th Cir. 1984); *Harding v. VA*, 448 F.3d 1373, 1376 n.2 (Fed. Cir. 2006). *See also The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889) ("[T]he last expression of the sovereign will must control."). That case arose in the context of a statute that was inconsistent with an earlier treaty, but the concept applies equally to two inconsistent statutes. Another well-established canon of statutory construction provides that "the specific governs the general." *Morales v. Trans World Airlines*, 504 U.S. 374, 384 (1992). *See also United States v. Wilson*, 73 M.J. 529, 533 (A.F. Ct. Crim. App. 2014) ("applying ordinary canons of statutory construction, the more specific provision trumps the general one").

[20] *E.g.*, *United States v. McCoy*, No. ACM 40119, 2022 CCA LEXIS 632 (A.F. Ct. Crim. App. Oct. 31, 2022) (order) (rejecting Government argument that audio recordings are not necessary where a verbatim transcript exists); *United States v. Brown*, No. ACM 40066, 2022 CCA LEXIS 625 (A.F. Ct. Crim. App. Oct. 25, 2022) (order) (same). *Accord United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43, at *16 (A.F. Ct. Crim. App. Jan. 20, 2022). The suggestion to the contrary in *United States v. Reedy*, No. ACM 40358, 2024 CCA LEXIS 40, at *17–18 (A.F. Ct. Crim. App. Feb. 2, 2024), *petition denied*, 84 M.J. 417 (C.A.A.F. 2024), appears to be an outlier. *Reedy*'s reasoning is inconsistent not only with this Court's own case law, but also with R.C.M. 1112(a)'s requirements that: (1) the court-martial proceedings be "recorded by" technological means "from which sound images may be reproduced to accurately depict the court-martial," (2) the record "be independent of any other document," and (3) the record "shall include a recording of the court-martial."

Government's argument in response to Appellant's sixth assignment of error—raising an inconsistency between the "verbatim" transcript and the entry of judgment concerning the adjudged forfeitures—depends on contradicting the "verbatim" transcript with the audio recordings.[21] The transcript in this case is not a reliable record of the court-martial's proceedings, as the Government's own brief demonstrates. The transcript's presence certainly does not cure the absence of the presidentially required sound recording of the court-martial proceedings "independent of any other document."[22]

The substantial omission from the required contents of the record cannot be cured by the Government's motion seeking to attach the audio. As this Court ruled in a case in which the Government moved to attach missing exhibits to the record, "[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions [to attach] does not change the fact that the record, as certified and submitted to the court, is incomplete."[23] In another case, this Court similarly observed, "We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the [record of trial]."[24] Last year alone, this Court remanded at least four incomplete records for correction under R.C.M. 1112(d) notwithstanding Government

[21] *See* United States' Answer to Assignments of Error at 45 ("Here, the audio from Appellant's trial clearly shows the military judge sentenced Appellant to 'forfeit $300 of your pay *per month* for two months.'").
[22] R.C.M. 1112(a).
[23] *United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. June 9, 2022) (per curiam).
[24] *United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2 (A.F. Ct. Crim. App. Oct. 26, 2022) (order).

motions to attach the missing item or items.[25] *Covitz* is particularly relevant since that case involved the proper remedy for the omission of an audio recording of the appellant's arraignment.[26] This Court determined that, notwithstanding a Government motion to attach the missing audio recording, the proper remedy was a remand to correct the record.[27] On the other hand, this Court does not require remand where the missing items are not included among the President's prescribed required contents of the record of a general or special court-martial but are, rather, mere attachments.[28] Here, R.C.M. 1112(b) expressly includes the missing item—a substantially verbatim recording of the court-martial proceedings—as a matter that the "record of trial in every general and special court-martial shall include."

Although the presidentially prescribed option of remand is available, this Court should not use it here. Rather, this Court should invoke its express statutory authority to "provide appropriate relief" for "error or excessive delay in the processing of the court-martial," both of

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[25] *United States v. Martinez*, No. ACM 39903 (reh), 2024 CCA LEXIS 551 (A.F. Ct. Crim. App. Dec. 16, 2024) (order); *United States v. Covitz*, No. ACM 40139 (reh), 2022 CCA LEXIS 751 (A.F. Ct. Crim. App. Dec. 6, 2024) (order); *United States v. Williams*, No. ACM 40485, 2024 CCA LEXIS 450 (A.F. Ct. Crim. App. Aug. 6, 2024) (order); *United States v. Boren*, No. ACM 40296, 2024 CCA LEXIS 246 (A.F. Ct. Crim. App. June 24, 2024) (order). *See also United States v. Matthew*, No. ACM 39796 (reh), 2024 CCA LEXIS 460, at *34–37 (A.F. Ct. Crim. App. Oct. 31, 2024) (finding a substantial omission from the record of trial, noting case law indicating that the record cannot be completed by means of a motion to attach, but finding no prejudice resulting from the omission); *United States v. Casillas*, No. ACM 40499, 2024 CCA LEXIS 394 (A.F. Ct. Crim. App. Sept. 24, 2024) (remanding for correction where the record of trial omitted audio of the arraignment and two preliminary hearing exhibits notwithstanding a Government motion to attach the missing audio).

[26] *Covitz*, 2022 CCA LEXIS 751, at *1.

[27] *Id.* at *3.

[28] *E.g.*, *United States v. Garron*, No. ACM 40239, 2023 CCA LEXIS 67 (A.F. Ct. Crim. App. Feb. 9, 2023) (per curiam) (missing preliminary hearing exhibit and missing recording of the preliminary hearing cured by government motion to attach the items to the record of trial); *United States v. Jones*, No. ACM 40113, 2022 CCA LEXIS 584 (A.F. Ct. Crim App. Oct. 17, 2022) (missing attachments to a clemency submission cured by government motion to attach the items to the record of trial).

which are present in this case.[29] Here, such appropriate relief would be to set aside the findings and sentence.

As of today, 718 days have passed since Appellant's sentencing. And as of today, a legally compliant record of trial does not exist. Remanding the case to the trial level for correction would result in still more delay. This Court should end this case's drain on limited appellate resources. The only offense of which Appellant was convicted was slapping a friend on the face. But for the two Article 120 specifications of which Appellant was acquitted, a special court-martial for that slap would have been, as Vizzini of *The Princess Bride* would say, inconceivable.[30] Ending this case now would promote judicial efficiency while also reaching a just result for Appellant and sending a clear message to the Government concerning this Court's expectations for post-trial processing spanning the initial construction of the record, review of that record en route to this Court, and the proper mechanism for correcting any errors uncovered along the way.

WHEREFORE, this Court should deny the United States' Motion to Attach and, instead, set aside the findings and sentence.

Respectfully submitted,

[redacted] [redacted]

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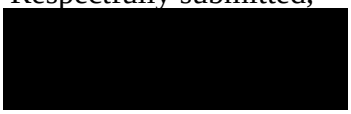
[29] UCMJ art. 66(d)(2), 10 U.S.C. § 866(d)(2).
[30] THE PRINCESS BRIDE (Act III Communications 1987).

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 March 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION TO CITE SUPPLEMENTAL AUTHORITY**
v.	)	Before a Special Panel
Senior Airman (E-4) **Deshawn M. Dawson,** United States Air Force, *Appellant.*	)	No. ACM 24041
	)	1 April 2025

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

Pursuant to Rule 23.3(d) of this Honorable Court's Rules of Practice and Procedure, Appellant, Senior Airman Deshawn M. Dawson, moves to cite supplemental authority.

The Court of Appeals for the Armed Forces' decision in *United States v. Valentin-Andino*, __ M.J. __, No. 24-0208 (C.A.A.F. Mar. 31, 2025), available at https://www.armfor.uscourts.gov/opinions/2024OctTerm/240208.pdf, is relevant to two points in Appellant's case. Additionally, two recent decisions by this Court addressing post-trial delay standards' application in cases not subject to automatic review are relevant to this case's outcome.

A. *Valentin-Andino* supports Appellant's argument that Article 54(c), Uniform Code of Military Justice (UCMJ), rather than the general definitional provision of Article 1(14), UCMJ, governs what must be included in the record of trial of a special court-martial.

As Appellant argued in both his reply brief and his opposition to the Government's motion to attach, the UCMJ provision that governs what must be included in the record of trial of a special court-martial case is Article 54(c), UCMJ, 10 U.S.C. § 854(c) ("Contents of Record"), not the definition that appears in Article 1(14), UCMJ, 10 U.S.C. § 801(14). In making that argument, Appellant relied on, *inter alia*, the canon of statutory construction that a specific provision prevails over a general one. Appellant's Reply Brief at 3–4 (filed 19 Mar. 2025); Appellant's Opposition

to United States' Motion to Attach Documents at 5 (filed 19 Mar. 2025). The Court of Appeals for the Armed Forces' unanimous opinion in *Valentin-Andino* supports that argument. In determining which paragraph of Article 66(d) governs the Courts of Criminal Appeals' authority to grant relief for post-trial delay, the Court of Appeals for the Armed Forces observed:

> "[i]t is fundamental that a general statutory provision may not be used to nullify or to trump a specific provision, irrespective of the priority of enactment." *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1013 (9th Cir. 2000) (stating that a general statutory rule does not govern unless there is no more specific rule (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989))).

Valentin-Andino, No. 24-0208, slip op. at 9 n.4 (alteration in original).

The Court reasoned that "Article 66(d)(2) is a specific provision incorporated to govern errors of excessive delay in post-trial processing, and we will not undermine its express limitations by grafting onto it our case law concerning more generalized provisions." *Id.* Similarly, Article 54(c) is a specific provision incorporated to govern the contents of records of trial. Under *Valentin-Andino*, neither Article 54(c)'s express provisions nor the President's express provisions acting under the authority that subsection delegated to him may be undermined by a general definitional provision.

B. *Valentin-Andino* establishes that Article 66(d)(2), UCMJ, rather than *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), is the relevant source of authority for this Court's consideration of the unreasonable post-trial delay in this case.

In its Answer, the Government observed, "Appellant does not even argue for relief under Tardif in his brief. (App. Br. at 18-21)." United States' Answer to Assignments of Error at 21 (filed 12 Mar. 2025). Nevertheless, the Government stated that it "will articulate why such relief is unnecessary here." *Id.* It then offered the legal proposition that "An appellant may be entitled to relief under United States v. Tardif even without a showing of actual prejudice 'if [the court] deems relief appropriate under the circumstances.' 57 M.J. 219, 224 (C.A.A.F. 2002)." *Id.* at 21–22

(alteration in original). Appellant's reply brief countered that Article 66(d)(2), UCMJ—"not a Court of Appeals for the Armed Forces case construing a superseded UCMJ provision—is the relevant source of authority that Appellant asked and asks this Court to invoke." Appellant's Reply Brief at 8. *Valentin-Andino* confirms Appellant's position. Mirroring Appellant's analysis, *Valentin-Andino* held that "the CCA erred to the extent it granted *Tardif* relief under Article 66(d)(1) because errors regarding post-trial delay are now solely governed by Article 66(d)(2). Accordingly, *Tardif* and its progeny have been superseded by Article 66(d)(2)." *Valentin-Andino*, No. 24-0208, slip op. at 9 n.4. As Appellant argued in both his opening and reply briefs, Article 66(d)(2) empowers this Court to provide "appropriate relief" for the "error" and "excessive delay" that has characterized the post-trial processing of this case. Here, such "appropriate relief" would be to set aside the findings and the sentence.

C. The ongoing post-trial delay in this case is unreasonable without regard to the 150-day threshold established by *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020).

Appellant's opening brief observed that the government failed to docket his case within the 150-day standard established by this Court's decision in *Livak*. Brief on Behalf of Appellant at 17–18 (filed 28 Jan. 2025). Appellant's reply brief also discussed the *Livak* standard. Appellant's Reply Brief at 8–9. On the same day Appellant filed his reply brief, this Court held that "the 150-day threshold established in *Livak* does not apply to appeals by an accused under Article 66(b)(1)(A), UCMJ, filed after Congress amended Articles 66 and 69, UCMJ, effective 23 December [2022]."[1] *United States v. Boren*, No. ACM 40296 (f rev), 2025 CCA LEXIS 103, at

[1] The opinion's reference to amendments to Articles 66 and 69, UCMJ, appears to be to section 544 of the National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395, 2582–84 (2022). The effective date of those amendments was the date of enactment, 23 December 2022, with the proviso that the amendments did not apply to any matter submitted to a Court of Criminal Appeals or Judge Advocate General before the date of enactment. *See id.* at § 544(d), 136 Stat. at 2583–84.

*47 (A.F. Ct. Crim. App. Mar. 19, 2025). The following week, in another case that did not qualify for an automatic appeal, this Court held "that neither *Livak* nor [*United States v. Moreno*, 63 M.J. 129, 136 (C.A.A.F. 2006),] are directly applicable to Appellant's case from sentencing to docketing with this court, as these cases considered post-trial processing delays for appeals filed before Congress amended Articles 66 and 69, UCMJ." *United States v. Gray*, No. ACM 40648, 2025 CCA LEXIS 122, at *15 (A.F. Ct. Crim. App. Mar. 24, 2025). Significantly, this Court added, "That said, we do believe it is possible that an appellant could demonstrate a case-specific facially unreasonable delay outside of *Livak* and *Moreno* that would trigger a *Barker* due process analysis." *Id.* (referring to *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

Appellant does not argue that the unreasonable post-trial delay in his case constitutes a due process violation. *See* Brief on Behalf of Appellant at 17 n.86. However, his case is replete with "case-specific facially unreasonable delay" warranting relief under Article 66(d)(2), UCMJ, without regard to the *Livak* threshold. As explained in his opening brief, a facially unreasonably period of 163 days passed from sentencing until the Third Air Force staff judge advocate's office advised Appellant of his right to appeal (with no showing that such advice was ever provided in the legally required manner). *Id.* at 17. Another facially unreasonable period of 255 days passed from the filing of Appellant's notice of appeal until the court reporter's certification of the transcript. *Id.* at 18. A third facially unreasonable period of sixty-four days passed from certification of the transcript until it was delivered to this Court. *Id.* at 19.

Most significantly, a record of trial including the contents required by Rule for Courts-Martial 1112(b), *Manual for Courts-Martial, United States* (2024 ed.), *still* does not exist today, exactly two years from Appellant's date of sentencing. Without regard to *Livak*, that is unreasonable.

WHEREFORE, this Honorable Court should grant this motion.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 1 April 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Air Force Appellate Defense Division

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24041**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Deshawn M. DAWSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 28 January 2025, Appellant, through counsel, filed his assignments of error brief with this court. In his first of eight assignments of error (AOEs), Appellant claims that "failure to include audio recordings corresponding to forty-five percent of the court-martial's written transcript . . . constitute error warranting reversal of the findings and sentence." On 12 March 2025, the Government filed its answer to Appellant's brief, but also moved this court to attach several declarations, to include the original audio recording for the case which they identified as an attachment to Appendix B of its motion. Appellant opposed the motion, and the court granted it on 21 March 2025.[1]

After review of the Appellant's complete record of trial, the court discovered multiple closed sessions conducted in Appellant's case, both captured in the transcript and in the audio recordings, were not properly sealed in accordance with Rule for Courts-Martial (R.C.M.) 1113, *Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*). These materials include transcript pages 36–43, 552–53, and 569–79 of the closed sessions, and the original audio recording and the audio recording attached to Appendix B by the Government as part of its 12 March 2025 motion to attach.

Neither party has brought this matter to the court's attention. Nor has either party requested that these matters be sealed. Nevertheless, the court may *sua sponte* order these matters sealed in accordance with R.C.M. 1113 (2024 *MCM*).

The Clerk of the Court will ensure transcript pages 36–43, 552–53, and 569–79 and the two discs containing the audio recording of the trial are properly sealed. However, we order the Government to produce an audio

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[1] The Government's motion to attach included matters also relating to Appellant's second assignment of error.

recording of the open sessions of Appellant's court-martial on a disc separate from the discs currently containing the closed sessions and move to have it attached to the record of trial,

Accordingly, it is by the court on this 10th day of April, 2025,

ORDERED:

The Government shall take all steps necessary to ensure **transcript pages 36–43, 552–53, and 569–79 and the two discs containing closed session audio** in the possession of any Government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.[2]

However, if appellate government counsel and appellate defense counsel possess any of the documents 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 items to be sealed in their possession.

It is further ordered:

The Government will also take all steps necessary to produce an audio recording of the open sessions of Appellant's court-martial on a disc separate from the two discs containing closed sessions and properly move to have the disc attached to Appellant's record of trial **not later than 21 April 2025**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S CONSENT**
	)	**MOTION TO RECONSIDER**
Appellee,	)	**INTERLOCUTORY ORDER**
	)	
	)	
v.	)	Before a Special Panel
	)	
Senior Airman (E-4)	)	No. ACM 24041
Deshawn M. Dawson,	)	
United States Air Force,	)	
Appellant.	)	11 April 2025

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

Pursuant to Rules 23.3(k) and 31.1 of this Honorable Court's Rules of Practice and Procedure, Appellant, Senior Airman Deshawn M. Dawson, moves that the Court reconsider its interlocutory order of 10 April 2025. Neither the United States Court of Appeals for the Armed Forces nor any Court other this this Honorable Court has obtained jurisdiction over this case. Appellate Government counsel have authorized us to state that the United States consents to this motion.

This Court's order of 10 April 2025 noted, in part, that the transcript of the closed session transcribed on pages 36 to 43 of the trial transcript was "not properly sealed in accordance with Rule for Courts-Martial (R.C.M.) 1113, *Manual for Courts-Martial, United States* (2024 ed.)."[1] This Court ordered that portion of the record of trial sealed.[2] Although the military judge initially ordered that portion of the transcript sealed, he subsequently retracted that order.[3] At the end of the

[1] *United States v. Dawson*, No. ACM 24041, slip op. at 1 (A.F. Ct. Crim. App. Apr. 10, 2025) (order).
[2] *Id.*
[3] *See* Trial Tr. at 36, 43.

closed session, the senior trial counsel stated, "I don't believe there's any need to seal the preceding argument."[4] The military judge agreed: "I had ordered sealed, but I will retract my order not to have that portion sealed and it will not be sealed, that portion of the closed hearing." *Id.* The entire closed session consisted of counsel's arguments to the military judge concerning whether certain prescriptions, diagnoses, and treatments that did not fall within Military Rule of Evidence 513's scope should be made available to the defense.[5] Both the senior trial counsel and the military judge recognized that nothing had occurred in the closed session warranting sealing of the transcript. That is consistent with the defense's objection to closure of the hearing before it was closed.[6] Because the military judge retracted his order that the transcript of the closed session be closed, R.C.M. 1113 did not require removing and sealing those portions of the trial transcript. While this Court has authority to order those pages sealed notwithstanding the military judge's retraction of his own sealing order, there is no content-based need for sealing that portion of the transcript. Sealing those portions of the transcript and the associated audio recordings would be inconsistent with the principle that records of military justice proceedings should be open and available to the public to the maximum extent practicable.[7]

This Court's order also referred to a closed Article 39(a) session that occurred on 31 March 2023 that is transcribed on pages 552 to 553 of the trial transcript. While the transcript includes

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[4] *Id.* at 43.
[5] *Id.* at 36–43.
[6] *Id.* at 34.
[7] *See*, *e.g.*, Uniform Code of Military Justice art. 140a(a)(4), 10 U.S.C. § 940a(a)(4). *See also Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." (footnotes omitted)); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) ("The right to public access to criminal trials extends to courts-martial. Indeed, we believe that public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public." (internal citations omitted)).

bracketed references to those pages being sealed,[8] in fact—in contrast to his statement at the start of the earlier closed session—the military judge did not order those pages of the transcript sealed. A review of those pages of the transcript reveals that nothing occurred in that closed session that would warrant their sealing. In fact, the session was almost immediately opened when the witness who was expected to testify was not present. The military judge's failure to order those pages of the transcript sealed was no doubt a recognition of that fact. Because the military judge did not order the transcript of that closed session sealed, there was no requirement to seal them pursuant to R.C.M. 1113, which applies to "exhibits, proceedings, or other materials ordered sealed by the . . . military judge."[9] Again, while this Court has the authority to order the sealing of portions of a transcript, given those pages' content, there is no need for this Court to exercise that authority.

Finally, this Court's order referred to a closed Article 39(a) session that occurred on 31 March 2023 that is transcribed on pages 569 to 578 of the trial transcript. As with the earlier closed session that day, the military judge did not order that the transcript of that session be sealed. The military judge apparently closed that session due to a belief that information protected under Military Rule of Evidence 412 might come up.[10] None did.[11] That is no doubt the reason why the military judge did not order that the transcript of that session be sealed.[12] The only reference to those portions of the transcript being sealed are bracketed inserts apparently incorrectly entered by the court reporter.[13] Because there was no order sealing those portions of the transcript, there was

[8] Trial Tr. at unnumbered page between pages 551 and 552, 552, 553.
[9] R.C.M. 1113(a).
[10] Trial Tr. at 551, 567–68.
[11] *Id.* at 569–79.
[12] *See id.* at 578.
[13] *Id.* at unnumbered page between 568 and 569, 569, 579.

no violation of R.C.M. 1113. Nor is there any content-based necessity for this Court to seal those pages of the transcript.

WHEREFORE, Appellant moves that this Honorable Court reconsider and rescind its order of 10 April 2025.

Respectfully Submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 11 April 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION FOR LEAVE TO FILE AND MOTION TO SEAL PORTIONS OF BRIEF ON BEHALF OF APPELLANT**
Appellee,	)	
v.	)	Before a Special Panel
Senior Airman (E-4) **Deshawn M. Dawson,** United States Air Force, *Appellant*.	)	No. ACM 24041
	)	18 April 2025

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

COMES NOW Appellant, Senior Airman Deshawn M. Dawson, by and through his undersigned counsel, and moves pursuant to Rule 23 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals and Rule 23.3 of this Honorable Court's Rules to seal portions of pages 12 and 13 of the Brief on Behalf of Appellant filed on 28 January 2025 and for leave to file this motion.

By order of 10 April 2025, this Court ordered sealed certain portions of the trial transcript and audio recording that Appellant's brief had quoted on pages 12 and 13. *United States v. Dawson*, No. ACM 24041 (A.F. Ct. Crim. App. Apr. 10, 2025) (order). This Court subsequently denied a consent motion to reconsider that order. *United States v. Dawson*, No. ACM 24041 (A.F. Ct. Crim. App. Apr. 14, 2025) (denial stamp). In light of this Court's order, Appellant moves to seal portions quoting the now-sealed materials on pages 12 and 13 of the brief filed on 28 January 2025. Attached to this motion is a copy of the brief with quotations from the now-sealed portions of the trial transcript and audio recording redacted.

WHEREFORE, Appellant requests this Honorable Court grant this motion.

Respectfully Submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 18 April 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellant*	)	**MOTION FOR ENLARGEMENT OF TIME TO COMPLY WITH COURT ORDER OUT OF TIME**
v.	)	Before Panel No. 1
Senior Airman (E-4) **DESHAWN M. DAWSON,** United States Air Force, *Appellee.*	)	No. ACM 24041 21 April 2025

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

Pursuant to Rule 23 and Rule 18.5, the United States respectfully requests a seven-day enlargement of time to comply with this Court's 10 April 2025 order. Appellant filed his Notice of Direct Appeal on 25 September 2023. This case was docketed with this Court on 4 October 2023. Appellant filed his assignments of error on 28 January 2025. After receiving two enlargements of time, the government filed its answer to Appellant's brief on 12 March 2025.

On 10 April 2025, this Court ordered the government to "take all steps necessary to produce an audio recording of the open sessions of Appellant's court-martial on a disc separate from the two discs containing closed sessions and properly move to have the disc attached to Appellant's record of trial not later than 21 April 2025." This is the United States' first request for an enlargement of time with regard to the compliance order and third overall. As of the date of this request, 566 days have elapsed since docketing with this Court. If the enlargement of time is granted, the United States response will be due on 28 April 2025 and 573 days will have

elapsed. The government respectfully requests a seven-day enlargement of time to comply with this Court's 10 April 2025 order.

On 11 April 2025, appellate defense counsel submitted a consent motion to reconsider this Court's interlocutory appeal to seal portions on the transcript and portions of the audio. The government consented to this motion. On 14 April 2025, this Court denied the consent motion. Since this Court's denial of the consent motion, undersigned counsel reached out to the base legal office in Turkey, and court reporter to ensure compliance with the order. Undersigned counsel is coordinating with the court reporter – who is currently located in Aviano, Italy – to ensure the correct recordings are on the ordered audio discs. Undersigned counsel also reached out to the appellate defense counsel and the area defense counsel, to ensure compliance with the order.

The motion is made out of time because the undersigned counsel underestimated the time necessary to acquire new discs of the proceedings in the event the consent motion was denied.

In light of the above, the government respectfully requests a seven-day enlargement of time to comply with this Court's 10 April 2025 order. The requested seven-day enlargement of time will allow the government to confirm the recordings with the court reporter, burn the sealed recordings to a disc, and provide them to the Court.

For these reasons, the United States respectfully requests this Honorable Court grant this motion for leave to file out of time.

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FOR

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 the Air Force Appellate Defense Division on 21 April 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**UNITED STATES' RESPONSE TO COMPLIANCE ORDER**
v.	)	Before a Special Panel
Senior Airman (E-4) **DESHAWN M. DAWSON** United States Air Force *Appellant.*	)	No. ACM 24041
	)	25 April 2025

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

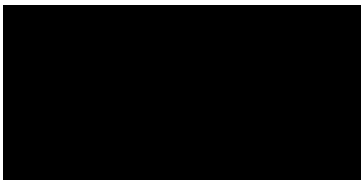
On 10 April 2025, this Court ordered the following in the above captioned case:

> The Government shall take all steps necessary to ensure transcript pages 36–43, 552–53, and 569–79 and the two discs containing closed session audio in the possession of any Government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.

Undersigned appellate government counsel ensured that the government's copies of the record of trial housed at the base legal office and NAF were sealed in accordance with the order. The area defense counsel confirmed that they destroyed their copies of the sealed materials. Appellate defense counsel confirmed Appellant does not possess any sealed materials. The appellate defense and government counsel will destroy the remaining materials once appellate review is complete in compliance with this Court's order.

In accordance with this Court's order, the Government also supplied the Court with a new copy of the audio recording for the open sessions in this case.

WHEREFORE, the United States respectfully requests that this Court accept this response to its compliance order.



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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 25 April 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**MOTION TO ATTACH DOCUMENTS**
v.	)	Before a Special Panel
Senior Airman (E-4) **DESHAWN M. DAWSON** United States Air Force *Appellant.*	)	No. ACM 24041
	)	25 April 2025

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

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

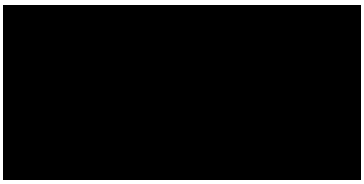
- **Appendix – Recording of Open Court-Martial Sessions (1 disc)**

The attached declaration is responsive to this Court's 10 April 2025 order. This Court ordered portions of the court-martial audio and verbatim transcript to be sealed. In addition, this Court ordered:

> The Government will also take all steps necessary to produce an audio recording of the open sessions of Appellant's court-martial on a disc separate from the two discs containing closed sessions and properly move to have the disc attached to Appellant's record of trial not later than 21 April 2025.

On 22 April 2025, this Court granted a seven-day enlargement of time for the Government to comply with this order. (*Order*, dated 22 April 2025.) The attachment to this motion to attach are responsive to this Court's order. This appendix is responsive to the Court's order. The attached disc contains an audio recording of the open sessions.

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



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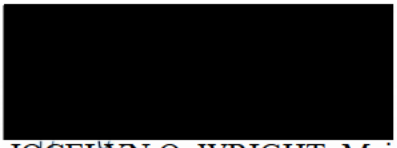
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 25 April 2025.



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