# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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

The record of trial in the above-styled case was returned to this court on 2 April 2024 by the Military Appellate Records Branch (JAJM) for re-docketing with the court.

Accordingly, it is by the court on this 2d day of April, 2024,

**ORDERED:**

That the record of trial in the above styled matter is referred to Panel 3.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **MERITS BRIEF** |
| v. | ) | Before Panel No. 3 |
| Technical Sergeant (E-6) **KAYE P. DONLEY,** United States Air Force, *Appellant.* | ) | No. ACM 40350 (f rev) |
| | ) | 19 April 2024 |

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

**Submission of the Case Without Specific Assignments of Error**

On 22 January 2024, Technical Sergeant (TSgt) Kaye P. Donley, Appellant, assigned six errors, to include that his record of trial was incomplete because it omitted the military judge's ruling on the defense motion in limine which should have been captured in Appellate Exhibit XXX. *United States v. Donley*, No. ACM 40350, slip. op. at 2 (A.F. Ct. Crim. App. 19 March 2024). This Honorable Court remanded TSgt Donley's case to the Chief Trial Judge, Air Force Trial Judiciary, for correction of the record and deferred addressing the remaining assignments of error. *Id*. at 3-4. On 2 April 2024, TSgt Donley's case was docketed with this Court for further review. Notice of Docketing, 2 April 2024.

The undersigned appellate defense counsel attests she has, on behalf of TSgt Donley, carefully examined the record of trial in this case, including the Certificate of Correction, dated 31 March 2024, and the newly attached version of Appellate Exhibit XXX, dated 15 May 2022. TSgt Donley assigns no error to this newly attached version of Appellate Exhibit XXX but specifically preserves and maintains the assignments of error raised in his briefs, dated 22 January 2024 and 28 February 2024.

TSgt Donley also raises one additional issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix.

Respectfully submitted,

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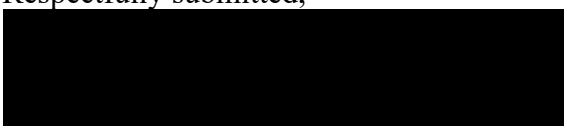
**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 April 2024.

Respectfully submitted,



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## APPENDIX

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

**THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BECAUSE ITS APPLICATION IS NOT CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION, AND THIS COURT CAN DECIDE THAT QUESTION.**

After his conviction, the Government made the determination that TSgt Donley's case met the firearm prohibition under 18 U.S.C. § 922. Entry of Judgment, 21 July 2022, at 4.

### Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

### Law and Analysis

The test for applying the Second Amendment is:

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

*N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 2129-30 (2022), (citation omitted).

In applying this test, the Fifth Circuit recently held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.' Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated." *United States v. Rahimi*, 61 F.4th 443,461 (5th Cir. 2023), *cert granted*, __ U.S.__, 2023 U.S. LEXIS 2830 (30 June 2023) (citation omitted). Notably, Rahimi was "involved in five shootings" and pled guilty

to "possessing a firearm while under a domestic violence restraining order." *Id.* at 448. Rahimi agreed to this domestic violence restraining order. *Id.* at 452.

The Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 461 (quoting *Bruen*, 142 S. Ct. at 2129-30). Therefore, the Government bears the burden of justifying its regulation "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id*.

Second, the Fifth Circuit recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at 451. The Fifth Circuit explained that "*Heller*'s reference to 'law-abiding, responsible' citizens meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* at 452.

Third, the Fifth Circuit held that "[t]he Government fails to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id*. at 460. If the Government failed to prove that our Nation's historical tradition of firearm regulation did not include a violent offender who pled guilty to possessing a firearm while under an agreed upon domestic violence restraining order, then it likely cannot prove that its firearm prohibition on TSgt Donley is constitutional.

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

the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760. However, this Court emphasized, "To be clear, we do not hold that this court lacks authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority." *Id.*

Six months after this Court's decision in *Lepore*, the United States Court of Appeals for the Armed Forces (CAAF) decided *United States v. Lemire*. In that decision, CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." 82 M.J. 263, at n* (C.A.A.F. 2022). CAAF's direction that the Army Court of Criminal Appeals fix—or order the Government to fix—the promulgating order, is at odds with this Court's holding in *Lepore*.

CAAF's decision in *Lemire* reveals three things: First, the CAAF has the power to order the correction of administrative errors in promulgating orders—even via unpublished decisions regardless of whether the initial requirement was a collateral consequence. Second, CAAF believes that Courts of Criminal Appeals have the power to address collateral consequences under Article 66 as well since it "directed" the Army Court of Criminal Appeals to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if CAAF and the Courts of Criminal Appeals have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders even if the court deems them to be a collateral consequence.

Additionally, *Lepore* is distinguishable from this case. In *Lepore*, this Court made clear that "[a]ll references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at 760 n.1. This Court then emphasized "the mere fact that a firearms prohibition annotation, *not required by the Rules for Courts-Martial*, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." *Id.* at 763 (emphasis added). The 2019 rules, however, contain language that both the Statement of Trial Results and the Entry of Judgment contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6); 1111(b)(3)(F). At the time TSgt Donley's Statement of Trial Results was signed, paragraph 13.3 of the Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 8 April 2022, required the Statement of Trial results to include "whether the following criteria are met . . . firearm prohibitions." As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered. Even if this Court does not find this argument persuasive, it still should consider the issue under *Lepore* since this issue is not an administrative fixing of paperwork, but an issue of constitutional magnitude.

**WHEREFORE**, TSgt Donley requests this Court find the Government's firearm prohibition is unconstitutional, and order that the Government correct the Statement of Trial Results and Entry of Judgment.[1]

[1] As this Court is likely aware, the CAAF has granted review of the same issue presented here. *See, e.g.*, *United States v. Lampkins*, No. 24-0069/AF, 2024 CAAF LEXIS 105 (C.A.A.F. Feb. 22, 2024) (order granting review).

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**,
*Appellee*,

v.

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

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No. ACM 40350

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**BRIEF ON BEHALF OF APPELLANT**

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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

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

**Assignments of Error**

**I.**

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

**II.**

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

**III.**

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

**IV.**

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

**V.**

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

**VI.**

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

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

## Statement of the Case

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

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

## Statement of Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Argument

## I.

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

### Additional Facts

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

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

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

*30 June 2019, Downstairs Incident*

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

*30 June 2019, Upstairs Incident*

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

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

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

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

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

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

*TSgt Donley's Recorded Statements Discuss the Downstairs Incident*

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

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

*Id*. (emphasis added).

*The Government's Opening Statement and Closing Argument*

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

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

*MED Stated the Upstairs Incident was the Charged Conduct*

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

*TSgt Donley was Acquitted of the Upstairs Strangulation Allegation*

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

**Standard of Review**

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

**Law and Analysis**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II.

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

### Additional Facts

*Findings Deliberation Began with Eight Members*

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

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

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

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

*Before Announcement of the Findings, the Panel President was Excused*

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

*Instruction to Seven-Member Panel to Review the Findings*

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

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

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

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

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

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

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

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

**Standard of Review**

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

**Law and Analysis**

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

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

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

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

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

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

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

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

## III.

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

### Additional Facts

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

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

**Standard of Review**

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original). Military appellate courts review for plain error, but "the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." *Tovarchavez*, 78 M.J. at 462.

**Law and Analysis**

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

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

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

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

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

## IV.

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

### Additional Facts

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

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

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

**Standard of Review**

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

**Law and Analysis**

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

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

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

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

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

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

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

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

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

## V.

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

### Standard of Review

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

### Law and Analysis

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

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

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

This Court should view these directives alongside *Moreno*'s mandate, which compelled the Government to docket the ROT at a CCA within 30 days of action to avoid a presumption of facially unreasonable delay. *Moreno*, 63 M.J. at 142. Because of changes to the *Manual for Courts-Martial*, this Court updated that standard in *United States v. Livak*, finding a "150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in *Moreno*." 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

The Government's failure to meet *Livak's* deadline of 150 days triggers an analysis of the four non-exclusive factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). The *Barker* factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 80 M.J. at 135 (citation omitted). When examining the reason for the delay this Court determines "how much of the delay was under the Government's control [and] assess[es] any legitimate reasons for the delay…." *Anderson*, 82 M.J. at 86 (finding "no indication of bad faith on the part of any of the Government actors").

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

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

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

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

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

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

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

## VI.

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

Respectfully submitted,

[redacted]

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

**CERTIFICATE OF FILING AND SERVICE**

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

Respectfully submitted,

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**,<br>*Appellee,*<br><br>v.<br><br>Technical Sergeant (E-6)<br>**KAYE P. DONLEY**,<br>United States Air Force<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**<br><br>No. ACM 40350 (f rev)<br><br>Panel No. 3<br><br>6 May 2024 |

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

**ASSIGNMENT OF ERROR ON FURTHER REVIEW**

**[WHETHER]THE GOVERNMENT CAN[] PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BECAUSE ITS APPLICATION IS NOT CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION, AND [WHETHER] THIS COURT CAN DECIDE THAT QUESTION.**[1]

**STATEMENT OF THE CASE**

Appellant's statement of the case is accepted.

**STATEMENT OF FACTS**[2]

Appellant was convicted of one specification of Sexual Assault against his wife, in violation of Article 120, UCMJ. (*Entry of Judgment*, 21 July 2022, ROT, Vol 1.) Appellant was also convicted of one specification of Assault Consummated by a Battery Upon a Spouse, in violation of Article 128, UCMJ. (Id.)

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

[2] The United States also incorporates its statement of facts, and any additional facts, from its original Answer to Appellant's Assignments of Error, filed with this Court on 21 February 2024.

The maximum punishment for Sexual Assault is forfeiture of all pay and allowances, confinement for 30 years, and a mandatory dishonorable discharge. Manual for Courts-Martial, United States, (2019 ed.) (MCM), pt. IV, ¶ 60.d(2). The maximum punishment for Assault Consummated by a Battery Upon a Spouse is forfeiture of all pay and allowances, confinement for two years, and a dishonorable discharge. MCM, pt. IV, ¶ 77.d(2)(f). The members sentenced Appellant to be reduced to the grade of E-3, confinement for three years, and a dishonorable discharge. (*Statement of Trial Results*, 22 June 2022, ROT, Vol 1.) The Staff Judge Advocate's first indorsement to the Statement of Trial Results in Appellant's case contains the following statement: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (Id.) The Entry of Judgment contained a similar endorsement. (*Entry of Judgment*, 21 July 2022, ROT, Vol 1.)

## ARGUMENT

**THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF THIS COURT DID POSSESS JURISDICTION TO REVIEW THIS ISSUE, THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT CORRECTLY ANNOTATED THAT APPELLANT'S CONVICTION REQUIRED THAT HE BE CRIMINALLY INDEXED PER THE FIREARM PROHIBITION UNDER 18 U.S.C. § 922.** [3]

[3] This issue is raised in the appendix pursuant to Grostefon.

***Law and Analysis***

Appellant asserts that 18 U.S.C. § 922 is unconstitutional because the government cannot prove that barring his possession of firearms is "consistent with the nation's historical tradition of firearm regulation." (App. Br., Appendix at 4-7.) Appellant asserts that any prohibitions on the possession of firearms runs afoul of the Second Amendment, U.S. CONST. amend. II, and the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (analyzing New York's concealed carry regime). Appellant's constitutional argument is without merit. *See, e.g.,* United States v. Denney, No. ACM 40360, 2024 CCA LEXIS 101 (A.F. Ct. Crim. App. 8 March 2024) (finding no discussion or relief merited for similar arguments by appellant convicted of child pornography distribution) (unpub. op.) (internal citations omitted).

The Gun Control Act of 1968, 18 U.S.C. § 922, makes it unlawful for any person, *inter alia*, "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" or "who has been discharged from the Armed Forces under dishonorable conditions."Id. at § 922(g)(1), (6). Appellant was convicted of one Charge and one Specification of Sexual Assault, in violation of Article 120, UCMJ, and one Charge and one Specification of Assault Consummated by a Battery Upon a Spouse, in violation of Article 128b, UCMJ, both of which are crimes punishable by imprisonment for a term exceeding one year.[4] (*See Entry of Judgment*, ROT, Vol. 1.) Additionally, Appellant received a mandatory minimum sentence of a dishonorable

[4] Persons *accused* of any offense punishable by imprisonment for a term exceeding one year, which has been referred to a general court-martial, also may not possess a firearm. *See* Department of the Air Force Instruction (DAFI) 51-201, dated 14 April 2022, para. 29.30.8 (citing 18 U.S.C. § 922(n)).

discharge for his Sexual Assault conviction, which, when executed, qualifies as a discharge under "dishonorable conditions." (Id.)

**A. This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922, because that requirement is not part of the findings or sentence.**

This Court lacks jurisdiction under Article 66, UCMJ, to order the correction of the Statement of Trial Results or Entry of Judgment on the grounds requested by Appellant. In United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021), this Court held that it "lacks authority under Article 66, UCMJ, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition" in a court-martial order. Yet Appellant argues here that, because the Court of Appeals for the Armed Forces (CAAF) in United States v. Lemire, 82 M.J. 263, n.* (C.A.A.F. 9 March 2022) (decision without published opinion), ordered the Army to correct a promulgating order that annotated an appellant as a sex offender, this Court now has the authority to modify his Statement of Trial Results and Entry of Judgment. (App. Br. at 6). Appellant argues that CAAF's decision in Lemire reveals three things: (1) That CAAF has the authority to correct administrative errors in promulgating orders; (2) by extension, CAAF believes that the service courts of criminal appeal (CCAs) have power to correct administrative errors under Article 66, UCMJ; and (3) CAAF believes both appellate courts have the authority to address constitutional errors in promulgating orders even if they amount to collateral consequences of a conviction. (Id.)

Appellant bases his argument solely on an asterisk footnote to a summary decision without a published opinion issued by CAAF that contained no analysis or reasoning why correction was a viable remedy in that case. *See* Lemire, 82 M.J. 263, n.*. This Court has previously declined to rely on such an incomplete analysis. In Lepore, 81 M.J. at 762, this Court even declined to rely on its own past opinion in United States v. Dawson, 65 M.J. 848 (A.F. Ct. Crim. App. 2007),

because that opinion contained no jurisdictional analysis when the Court summarily ordered the correction of the promulgating order. Appellant asks this Court to follow a mere footnote in a decision without a published opinion, which contains no analysis of jurisdiction and no language indicating that correction of a Statement of Trial Results or Entry of Judgment is proper.

Rule 30.4(a) of this Court's Rules of Practice and Procedure states:

> Published opinions are those that call attention to a rule of law or procedure that appears to be overlooked or misinterpreted or those that make a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the Court's decision to the public, the parties, military practitioners, and judicial authorities.

Because the Lemire decision from CAAF does not call attention to a rule of law or procedure and does not provide any rationale, it does not qualify as "precedent" and should not be followed. In any event, Lemire involved sex offender registration, not firearms prohibitions. CAAF indeed ordered removal of the designation for sex offender registration from a promulgating order, but its decision did not adjudicate the constitutional question posed here, which is unrelated to the actual findings and sentence in the case. This Court should therefore not read Lemire as requiring an evaluation of the constitutionality of firearms prohibitions for convicted Airmen, or the propriety of the Air Force's regulations requiring indexing.

This Court's jurisdiction is defined entirely by Article 66, UCMJ, which specifically limits its authority to only act "with respect to the findings and sentence as entered into the record. . . ." Article 66(d)(1)(A)); *see generally* United States v. Arness, 74 M.J. 441 (C.A.A.F. 2015) (discussing that CCAs are courts of limited jurisdiction, defined entirely by statute). Article 66, UCMJ, provides no statutory authority for this Court to act on the collateral consequences of conviction. In Lepore, this Court noted the many times it has held that it lacked jurisdiction where appellants sought relief for "alleged deficiencies unrelated to the legality or appropriateness of the

court-martial findings or sentence." 81 M.J. at 762 (citations omitted). This Court should reach the same conclusion here.

Although this Court has the authority to modify errors in an entry of judgment under R.C.M. 1111(c)(2), the authority is limited to modifying errors in the performance of its duties and responsibilities, so that authority does not extend to determining the constitutionality of a collateral consequence. Further, the question Appellant asks this Court to determine is fundamentally different from the situations in which our sister courts have corrected errors on promulgating orders. For example, in United States v. Pennington, No. 20190605, 2021 CCA LEXIS 101, at *5 (A. Ct. Crim. App. 2 March 2021) (unpub. op.), the Army Court of Criminal Appeals ordered modification of the statement of trial results in that case to correct erroneous dates, the wording in charges, the reflection of pleas the appellant entered, and other such clerical corrections. The errors corrected in Pennington are the types of errors that R.C.M. 1111(c)(2) is in place to correct.

Moreover, both the Navy-Marine Corps and the Air Force Courts of Criminal Appeal have held that matters outside the UCMJ and MCM, such as Defense Incident-Based Reporting System (DIBRS) codes and indexing requirements under 18 U.S.C. § 922, are outside their authority under Article 66, UCMJ. *See* United States v. Baratta, 77 M.J. 691 (N-M. Corps Ct. Crim. App. 2018); Lepore, 81 M.J. at 763. Both courts reasoned that they only possessed jurisdiction to act with respect to the findings and sentence as approved by the convening authority. Id. But here, even under the updates made to Article 66(d), UCMJ, this Court's jurisdiction is still limited to acting "with respect to the findings and sentence as entered into the record." 10 U.S.C. § 866(d). The annotation on the first indorsements to the Entry of Judgment and Statement of Trial Results is simply not a part of the finding or sentence entered into the record. Nor does R.C.M. 918 list the firearm prohibition requirements from 18 U.S.C. § 922(g) as part of a court-martial finding. Thus,

18 U.S.C. § 922(g)'s firearm prohibitions and the indexing requirements that follow that statute are well outside the scope of this Court's jurisdiction.

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

Even if this Court has jurisdiction to review this issue, Appellant is not entitled to relief. The Staff Judge Advocate (SJA) followed the appropriate Air Force regulations in signing the first indorsement to the Statement of Trial Results and Entry of Judgment. Appellant received a conviction for qualifying offenses under 18 U.S.C. § 922(g)(1). *See* DAFI 51-201, dated 14 April 2022, para. 29.32.

Furthermore, para. 29.30. to that DAFI, which applies in this case, shows the SJA correctly annotated the firearm prohibition on the first indorsement:

> If a service member is convicted at a GCM of a crime for which the maximum punishment exceeds a period of one year, this prohibition is triggered regardless of the term of confinement adjudged or approved.

Para. 29.30.1.1.

> Persons who have been discharged from the Armed Forces under dishonorable conditions . . . This condition is memorialized on the STR and EoJ, which must be distributed in accordance with the STR/EoJ Distribution List … This prohibition does not take effect until after the discharge is executed.

Para. 29.30.5.

Appellant's convictions and sentences qualified him for criminal indexing per 18 U.S.C. § 922(g)(1), (6), and the first indorsements to the Entry of Judgment and Statement of Trial Results

properly annotated the prohibition in accordance with DAFI 51-201.[5] Thus, there is no error for this Court to correct.

**C. The Firearm Possession Prohibitions in the Gun Control Act of 1968 are Constitutional.**

In Bruen, the Supreme Court held the standard for applying the Second Amendment is:

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

142 S. Ct, at 2129-2130. In his concurrence, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008) (finding that the Second Amendment is an individual, not collective, right), and McDonald v. City of Chicago, 561 U.S. 742 (2010) (applying that right to the states), that the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2162 (Kavanaugh, J., concurring) (citations omitted). Accordingly, the proper interpretation of the Second Amendment allows for a "variety" of gun regulations. Id. (citing Heller, 554 U.S. at 636).

The majority opinions in Heller and McDonald also stand for the principle that the right secured by the Second Amendment is not unlimited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose …. *[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons* and the mentally ill or laws

[5] While the Statement of Trial Results and Entry of Judgment Indorsements indeed annotate the firearm prohibition, they are not what legally mandates the indexing. DAFI 51-201 is the regulation that requires indexing and contains the detailed requirements that mandate notification to relevant law enforcement agencies. Appellant's challenge here is thus misplaced.

> forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 573 (emphasis added).

Appellant acknowledges that both Bruen and Heller limit the application of the Second Amendment to "law abiding, responsible citizens." (App. Br. at 5). Even so, Appellant nonetheless cites to United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), for the proposition that the Government cannot prove that Appellant's firearm prohibition is in keeping with the United States' historical tradition of firearm regulation. Id. But this is contrary to what the Fifth Circuit in Rahimi held. That court concluded that the term "law abiding, responsible citizens," was "shorthand in explaining that [Heller's] holding … should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]" Rahimi, 61 F.4th at 451 (citing Heller, 554 U.S. at 626-627). The Rahimi court went on to assert that Bruen's reference to "ordinary, law abiding" citizens was no different than Heller—it was meant to exclude "from the Court's discussion groups that have historically been stripped of their Second Amendment Rights[.]" Id. The Court determined that defendant Rahimi did not fall into that category of felons prohibited from owning a firearm at the time he was convicted of violating the firearm prohibition under 18 U.S.C. § 922(g)(8), since Rahimi was only subject to an agreed-upon domestic violence restraining order at the time he was convicted. Id. at 452. Thus, he did not have a felony conviction at the time he was charged with illegal possession of a firearm. Id. The Fifth Circuit thus found that the Government had not shown that 18 U.S.C. § 922(g)(8)'s restriction of his Second Amendment rights "fit [] within our Nation's historical traditional of firearm regulation." Id. at 460.

The appellant in Rahimi was in a fundamentally different position than Appellant here. In this case, Appellant has been convicted of two offenses punishable by well over a year of confinement (*i.e.*, felonies). He is thus prohibited from owning a firearm under 18 U.S.C. § 922(g)(1). Both the Supreme Court and the Fifth Circuit acknowledge that felony convictions are part of the United States' longstanding tradition on firearm prohibitions. Moreover, these cases do not distinguish between violent and non-violent felonies—prior to Bruen, the Fifth Circuit opined, "[i]rrespective of whether [an] offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens." United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004). The Court found that limiting a felon's ability to keep and possess firearms was not inconsistent with the "right of Americans generally to individually keep and bear their private arms as historically understood" in the United States. Id.; *accord* Folajtar v. Attorney General of the United States, 980 F.3d 897 (3rd Cir. 2020) (upholding the constitutionality of 18 U.S.C. § 922(g)(1) as applied to felons—including non-violent felons—based upon the Second Amendment's history and tradition). Thus, Appellant's conviction for both felony offenses places him squarely within the United States' longstanding tradition of firearm prohibitions.

Appellant's convictions for Sexual Assault and Assault Consummated by a Battery Upon a Spouse prove that he falls squarely into the categories of individuals that should be prohibited from possessing a firearm. Thus, the Indorsements in the Entry of Judgment and Statement of Trial Results correctly annotated that Appellant is subject to 18 U.S.C. § 922's prohibitions. Appellant is not entitled to relief.

## CONCLUSION

**WHEREFORE**, this Court should affirm the findings and sentence.

TYLER L. WASHBURN, Capt, USAF
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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 6 May 2024 via electronic filing.

TYLER L. WASHBURN, Capt, USAF
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# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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

It is by the court on this 7th day of May, 2024,

**ORDERED:**

The record of trial in the above styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review.

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

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal