UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32784**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jaden T. FLOYD	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 10 July 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 11th day of July, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **18 September 2024.**

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

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

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 3
Senior Airman (E-4) **JADEN T. FLOYD,** United States Air Force, *Appellant.*	)	No. ACM S32784
	)	10 July 2024

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Jaden T. Floyd, Appellant, hereby moves for an enlargement of time to file assignments of error. SrA Floyd requests an enlargement for a period of 60 days, which will end on **18 September 2024**. The record of trial was docketed with this Court on 21 May 2024. From the date of docketing to the present date, 50 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: nicole.herbers@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 July 2024.

[redacted]

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: nicole.herbers@us.af.mil

11 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JADEN T. FLOYD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32784 Panel No. 3

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

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

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

[redacted]

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 11 July 2024.

[redacted]

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 3
Senior Airman (E-4) **JADEN T. FLOYD,** United States Air Force, *Appellant.*	)	No. ACM S32784
	)	6 September 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Jaden T. Floyd, Appellant, hereby moves for his second enlargement of time to file an Assignment of Error (AOE). SrA Floyd requests an enlargement for a period of 30 days, which will end on **18 October 2024**. The record of trial was docketed with this Court on 21 May 2024. From the date of docketing to the present date, 108 days have elapsed. On the date requested, 150 days will have elapsed.

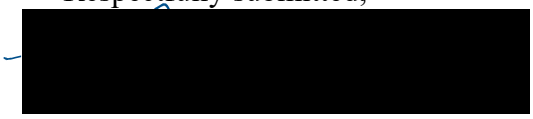
On 18 December 2023, consistent with his plea, a military judge sitting alone in a special court-martial at Whiteman Air Force Base, Missouri, convicted SrA Floyd of one charge and specification of larceny of military property, in violation of Article 121, UCMJ, 10. U.S.C. § 921. R. at 72. SrA Floyd was sentenced to a bad-conduct discharge, three months confinement, reduction in grade to E-1, and a reprimand. R. at 174. The Convening Authority took no action on the findings or sentence. Convening Authority Decision on Action, 5 January 2024. The record of trial (ROT) is three volumes, consisting of fifteen prosecution exhibits, twelve defense exhibits, and te exhibits. The transcript is 175 pages. SrA Floyd is not confined.

GRANTED
11 SEP 2024

Through no fault of SrA Floyd, undersigned counsel has been working on other assigned matters and has not yet finished review of this case. However, SrA Floyd's case is counsel's highest priority. Accordingly, an enlargement of time is necessary to allow undersigned counsel to finalize review of this case and advise SrA Floyd regarding potential errors.

WHEREFORE, SrA Floyd respectfully requests that this Honorable Court grant the requested enlargement of time for the good cause shown.

Respectfully submitted,



NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: nicole.herbers@us.af.mil

CERTIFICATE OF FILING AND SERVICE

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

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: nicole.herbers@us.af.mil

10 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JADEN T. FLOYD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32784 Panel No. 3

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 10 September 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Senior Airman (E-4) **JADEN T. FLOYD** United States Air Force *Appellant*	)	No. ACM S32784 18 October 2024

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

Assignments of Error

I.

WHETHER THE GOVERNMENT'S 155-DAY POST-TRIAL DELAY ENTITLES SENIOR AIRMAN FLOYD TO APPROPRIATE RELIEF.

II.[1]

WHETHER THE CONDITIONS OF SRA FLOYD'S CONFINEMENT SUBJECTED HIM TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT AND ARTICLE 55, UCMJ, 10 U.S.C. § 855, OR RENDER HIS SENTENCE INAPPROPRIATELY SEVERE.

III.

WHETHER THE SENTENCE THAT INCLUDED A PUNITIVE SEPARATION IS INAPPROPRIATELY SEVERE.

Statement of the Case

On 18 December 2023, at Whiteman Air Force Base, Missouri, a special court-martial composed of a military judge alone convicted Appellant, Senior Airman (SrA) Jaden T. Floyd,

[1] SrA Floyd personally raises issues II and III pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Pursuant to Rule 18.2 of this Court's Rules of Practice and Procedure, these issues are raised in the attached Appendix.

consistent with his plea, of one charge and specification of larceny of military property of a value more than $1,000 in violation of Article 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 921. R. at 72. The military judge sentenced SrA Floyd to a reprimand, a reduction in rank to E-1, confinement for three months, and a bad-conduct discharge. R. at 174. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 5 January 2024.

Statement of Facts

The sentence was adjudged on 18 December 2023. R. at 174. Within one month, the convening authority issued a decision on action and the military judge entered the judgment of the court martial on 23 January 2024. Entry of Judgment (EOJ), 23 January 2024.

There are two chronologies within the record of trial; one from the detailed court-reporter and one from the court-reporter who completed the transcript. The detailed reporter's chronology is titled "Reporter's Chronology." Record of Trial (ROT) Vol. 2, Reporter's Chronology. The transcription chronology is titled "Court Reporter's Chronology." ROT Vol. 2, Court Reporter's Chronology.

The Government did not "attempt to meet the Moreno date" until 112 days after the court-martial was adjourned, when the detailed court reporter asked for transcription assistance on 8 April 2024. Reporter's Chronology at 4. The Government produced a transcript on 23 April 2024, fifteen days after assistance was requested. Court Reporter's Chronology. That same day, the detailed court reporter certified the record and provided the transcript to the servicing legal office. Reporter's Chronology at 5-6. Despite the record of trial being certified as accurate and complete as of 5 February 2024, ROT Vol. 2, Court Reporter Record of Trial Certification (Certification), the Government took twenty-eight more days to insert this transcript into the record and deliver the record to this Court on 21 May 2024.

SrA Floyd was placed on Appellate Leave on 1 March 2024. ROT Vol. 2, Required Excess Leave, 1 March 2024. SrA Floyd was diagnosed with multiple sclerosis in June 2024. Decl. of SrA Floyd, 4 Oct. 2024 (Decl. of SrA Floyd). Post-confinement, SrA Floyd's symptoms of multiple sclerosis were progressing, but were not as severe as they are currently. *Id.* SrA Floyd experiences tremors, is a fall risk, and he has slowed speech. *Id.* He requires assistance from his family to communicate. *Id.* His memory and neurological functioning are impacted by multiple sclerosis. *Id.* The Government's delay in getting his case docketed with this Court has impeded his ability to assist in his defense on appeal. *Id.*

Argument

I.

THE GOVERNMENT'S 155-DAY POST-TRIAL DELAY ENTITLES SENIOR AIRMAN FLOYD TO APPROPRIATE RELIEF.

Standard of Review

This Court reviews de novo whether an appellant's due process rights are violated because of post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). In the absence of a due process violation, this Court considers whether relief for excessive post-trial delay is warranted consistent with this Court's authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d). *Id*.

Law and Analysis

1. Due Process Violation

Convicted servicemembers have a due process right to the timely review and appeal of court-martial convictions. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). The "unique" review powers of military courts "call[] for . . . even greater diligence and timeliness than is found in the civilian system." *Diaz v. JAG of the Navy*, 59 M.J. 34, 39 (C.A.A.F. 2003).

The Government violated the aggregated 150-day timeline from sentencing to docketing the case with this Court. *Livak*, 80 M.J. at 633. SrA Floyd was sentenced on 18 December 2023, and the case was not docketed with this Court until 21 May 2024. R. at 174. The 155 days from sentencing to docketing creates a presumption of unreasonable post-trial delay. *Livak*, 80 M.J. at 633.

A presumption of unreasonable post-trial delay triggers the four-factor analysis promulgated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135 (citing *Barker*, 407 U.S. at 530). All four factors must be balanced but no single factor is dispositive. *Id*. at 136 (citations omitted). A review of these factors demonstrates a due process violation in SrA Floyd's case.

First, the length of delay was unreasonable. The Government exceeded the *Moreno* threshold by five days. *Livak*, 80 M.J. at 633. While this delay is not the most extraordinary, it still exceeds the timeline established by *Livak*, which was placed to protect appellants' due process rights. *Id.* Like *United States v. Cook*, No. ACM 40333, 2024 CCA LEXIS 276, at *76 (A.F. Ct. Crim. App. 3 Jul. 2024), when the Government exceeded the 150-day threshold by fifty days and that factor resolved in favor of the Appellant, this factor resolves in SrA Floyd's favor because the Government exceeded the 150-day threshold, which, at its baseline, is presumptively unreasonable. Moreover, "[t]he CAAF has never held that the specific time standards in *Moreno* were the *exclusive* means by which an appellant could demonstrate facially unreasonable delay in violation of constitutional due process rights." *United States v. Hong*, No. ACM 39830 (f rev), 2022 CCA LEXIS 120, at *7-8 (A.F. Ct. Crim. App. 24 Feb. 2022) (relying on *United States v. Swanson*, No. ACM 38827, 2016 CCA LEXIS 648, at *21 (A.F. Ct. Crim. App. 27 Oct. 2016)).

The Army Court of Criminal Appeals' outlook from *United States v. Winfield*, 83 M.J. 662, 665 (A. Ct. Crim. App. 2023), also reinforces the unreasonable length of delay here. In *Winfield*, the Army Court decided not to follow its earlier-established 150-day timeline because it was not helping cases move through the appellate process any faster. *Id.* (citations omitted). The Army Court noted some cases could require more than 150 days while other cases required much less time. *Id*.

In assessing whether the length of delay is unreasonable, then, the question becomes: Is there anything that could justify the 155 days the Government took to assemble the small record of trial in this case? The answer is no. Looking at factors which could justify the delay as outlined in *Winfield*, 83 M.J. at 666, there were no actual operational exigencies, in-court coverage issues, court reporter availability issues, nor unusual resource shortfalls noted within the Government's explanation. *Compare* Reporter's Chronology (where it was not until 8 April 2024 that the court reporter requested assistance), *with* Court Reporter's Chronology (where within 15 days of the request for assistance, the 175-page transcript was transcribed, corrected, and returned completed). Moreover, while the Reporter's Chronology documented normal duties which were assigned a higher priority that SrA Floyd's case, there is no legitimate reason to justify waiting to request transcription assistance, especially when the record was otherwise assembled and certified as complete two months earlier on 5 February 2024. Certification. This case is neither voluminous nor complicated; it is a one-specification guilty plea with a three-volume ROT. A discretionary, administrative delay like this is unjustified and cannot serve to excuse the Government's inability to meet the 150-day threshold. *See United States v. Arriaga*, 70 M.J. 51, 57 (A. Ct. Crim. App. 2011) (where two deployed captains, a pregnant trial counsel, inexperienced remaining captains in the office, and a heavy caseload did not justify a 243-day delay for the fully-litigated 8-volume

record of trial). In light of the length of the delay, which is not reasonable based on this case, and knowing that the specific time standards are not dispositive, this factor resolves in SrA Floyd's favor.

Second, the Government provided no justifiable reason for the delay. The court reporter did provide a chronology showing competing priorities common to the field. Reporter's Chronology. However, nothing within that timeline gives any justification for waiting 112 days to ask for transcription assistance. *Id.* This record consists of a three-volume guilty plea with a short transcript and very few exhibits. Moreover, the record of trial was certified as complete and accurate on 5 February 2024. Certification. The Government has not explained why it waited to get any assistance with transcription. *See* Reporter's Chronology. This Court has previously found that a transcription of 1,169 pages was not so oppressively long to justify delays in the post-trial processing. *United States v. Hennessy*, No. ACM 40439, 2024 CCA LEXIS 343, at *37 (A.F. Ct. Crim. App. 20 Aug. 2024). If a transcript ten times longer than the instant one is not so "oppressively long" as to justify delay, the same is true in this case. Reporter's Chronology.

Further, the Government cannot justify why it took an additional twenty-eight days to insert the transcript into the certified record and forward the case. Reporter's Chronology (where the transcript was forwarded for inclusion in the certified record of trial on 23 April 2024). Moreover, this delay, which related to the assembly of the record and forwarding to an appellate court, is the least defensible. *See United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990) (where delay in the administrative handling and forwarding of the record of trial and related documents to an appellate court is the least defensible of all and worthy of the least patience). This stage of appellate processing involves no discretion or judgment and unlike other stages of appeal, it involves no analysis of legal or factual issues. *Id.* Thus, there is no explanation provided here that would

justify the need for more than 150 days to carry out the clerical tasks of transcribing the proceedings and assembling the record.

As in this case, when the Government fails to provide a reason for the delay, this Court may infer its own. For example, in *Hennessy*, this Court inferred a lack of urgency on behalf of the Government as emblematic of "gross indifference" to overall the post-trial processing of that case. *Hennessy*, 2024 CCA LEXIS 343, at *37 (quoting *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016)). This Court, in reviewing the explanations provided, could similarly conclude that the Government's lack of urgency demonstrates a gross indifference to the post-trial processing of SrA Floyd's case. This factor resolves in favor of SrA Floyd.

The third factor does not weigh heavily against SrA Floyd. Prior to the docketing of his case with this Court, SrA Floyd was confined, and did not impede the processing of his case. SrA Floyd was not a party to the Government's delay in the transcription or forwarding of this case. Reporter's Chronology. Given SrA Floyd did not impede or impact the processing of his case post-trial to docketing, this fact should negate this factor resolving strongly in favor of the Government. *See Hennessy*, 2024 CCA LEXIS 343 at *39. Moreover, SrA Floyd asserts his right to speedy appellate review.

The Government's delay in forwarding this case for appeal impacted SrA Floyd's ability to participate fully in his appeal, establishing prejudice. Courts have long recognized that delay in appellate review may result from oppressive incarceration, particularized anxiety and concern, and impairment of his ability to prepare an appeal. *Moreno*, 63 M.J. at 138-39 (citations omitted). SrA Floyd's ability to prepare his appeal was impacted by the delay and the intervening onset of primary progressive multiple sclerosis. Decl. of SrA Floyd. The Government's delay in getting

SrA Floyd's record to this Court delayed his access to appellate defense counsel. *Id.* Without that delay, SrA Floyd could have participated in his appeal without the significant difficulties he faces now, which include progressive neurological issues including difficulties with his memory and with both written and oral communication. *Id.* Due to these neurological changes, there is no way to know what information SrA Floyd could have recalled that could assist in his defense. The benefit of a clear memory is gone and cannot be retrieved. *Id.* This directly impacts his ability to assist in his appeal. This factor resolves in SrA Floyd's favor.

Even without a specific finding of prejudice, a due process violation may also be found "when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). Our superior court "expect[s]" the service Courts of Criminal Appeals to "document the reasons for delay" and "exercise [] institutional vigilance." *Moreno*, 63 M.J. at 143.

Under the balancing required by *Toohey*, the delay is egregious. A delay of 155 days is not justifiable and, as this Court knows, SrA Floyd's case is not unique. This Court has remanded multiple cases for post-trial delays and errors and has answered the question of whether post-trial delays should garner relief in numerous cases in the past several years. *See, e.g.*, *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *18 (A.F. Ct. Crim. App. 7 Jun. 2024) (noting that this Court has remanded approximately twenty cases for post-trial errors and has reviewed cases with significant delays in appellate review). In evaluating whether this delay is egregious, this Court should consider the Government's repeated, unaddressed, and uncorrected lack of institutional vigilance in post-trial processing. A finding that no violation of SrA Floyd's due process rights occurred because the Government got "close" to the 150-day mark

would be untenable in light of this demonstrated neglect by the Government. Without meaningful relief, the Government will never be incentivized to change. This is exactly the sentiment the Army Court of Criminal Appeals expressed in *Winfield*, in which that court abandoned its own 150-day benchmark in favor of a case-by-case analysis of reasonableness. *Winfield*, 83 M.J. at 665. So too here, this Court should give no further allowances to the Government when the Government has repeatedly shown evidence of institutional neglect in post-trial processing that caused significant post-trial delays. *Valentin-Andino*, 2024 CCA LEXIS 223 at *18 (citations omitted).

Moreover, a member of the public might reasonably question the fairness and integrity of the military justice system when seeing the Government's continued, unaddressed failures to meet the demands of post-trial processing. Thus, after balancing all the *Barker* factors and considering that "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding," it is apparent that the Government's post-trial processing delay violated SrA Floyd's due process rights. *Moreno*, 63 M.J. at 136 (citations omitted).

Given the due process violation, SrA Floyd respectfully requests this Honorable Court set aside the portion of his sentence that calls for a bad-conduct discharge.

2. Article 66(d) Relief

Pursuant to this Court's Article 66, UCMJ, authority, this Court may also "grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), [UCMJ,] if it deems relief appropriate under the circumstances." *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). This Court has identified a list of factors to consider in evaluating whether relief under Article 66, UCMJ, should be granted for post-trial delay. *Gay*, 74 M.J. at 744. These factors include how long the delay exceeded appellate review standards, the

reasons for the delay, whether the government acted with bad faith or gross indifference, evidence of institutional neglect, harm to the appellant or to the institution, whether relief is consistent with the goals of both justice and good order and discipline, and whether the lower court can provide any meaningful relief. *Id*. No single factor is dispositive, and this Court may consider other appropriate factors. *Id*.

Looking at the first and second factors, the delays have exceeded appellate review standards, and the explanations provided within the record show no good cause for such delays. These are outlined *supra* and are not re-articulated here. Both resolve in SrA Floyd's favor.

As to the third factor, while there is no evidence the Government acted in bad faith, the Government's dilatory conduct reveals its indifference. On the issue of institutional neglect, it must be noted the Government consistently struggles to timely and accurately complete post-trial processing. *See Valentin-Andino*, 2024 CCA LEXIS 223, at *18 (citations omitted). The lengthy, yet non-exhaustive, list of cases with delays in post-trial processing should continue to vex this Court. Given the plethora of cases this Court has remanded for the same or similar issues in post-trial processing resulting in delays, the Government must be properly incentivized to abide by the law. This Court can and should provide that incentive in this case, wherein the interests of justice and "appropriateness" weigh in favor of granting SrA Floyd relief.

Looking at the fourth factor, this Court has evidence of institutional neglect in post-trial processing. While this Court's recent decisions have noted that there were no other records of trial that suggested transcription completion delays have become an institutional problem, *Hennessy*, 2024 CCA LEXIS 343, at *39-40, transcription delays are part and parcel with the Government's institutional neglect toward post-trial processing. Moreover, since the decision in *Hennessy*, another case of post-trial delay attributable to delays in transcription is before this Court. *See*

United States v. Atencio, No. ACM S32783, Brief on Behalf of Appellant, 11 Sep. 2024. These three cases, alongside the cases cited by this Court in *Valentin-Andino*, show the Government's institutional neglect toward *post-trial processing*, which encompasses all aspects of assembling a complete record, including transcription, audio, exhibits, convening orders, and charge sheets. The issue of institutional neglect is broader than the specific error seen here and in *Hennesey* and *Atencio*—that is, the Government shows no diligence in moving a case forward post-conviction. This factor resolves in SrA Floyd's favor.

As to the remaining factors, they also resolve in SrA Floyd's favor. As outlined *supra*, allowing these delays harms the military justice system and the Air Force as an institution. The Government has repeatedly demonstrated gross indifference to post-trial processing. *Valentin-Andino*, 2024 CCA LEXIS 223, at *18. The Government is not "worthy" of this Court's continued "patience." *Dunbar*, 31 M.J. at 73. To the extent providing relief to SrA Floyd incentivizes the Government to do better, it is consistent with the goals of both justice and good order and discipline. This Court can still provide "meaningful relief" to SrA Floyd despite the passage of time. *Gay*, 74 M.J. at 744. In sum, while none of these factors are dispositive, the "essential inquiry" of the "appropriateness" of relief resolves in SrA Floyd's favor. *Toohey*, 63 M.J. at 362.

WHEREFORE, SrA Floyd respectfully requests this Honorable Court set aside the portion of his sentence that calls for a bad-conduct discharge.

Respectfully submitted,

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

APPENDIX

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

II.

THE CONDITIONS OF SRA FLOYD'S CONFINEMENT SUBJECTED HIM TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT AND ARTICLE 55, UCMJ, 10 U.S.C. § 855, OR RENDER HIS SENTENCE INAPPROPRIATELY SEVERE.

Additional Facts

SrA Floyd was held without cause in solitary confinement, due to a paperwork issue. Decl. of SrA Floyd. He spent upwards of three weeks at a time without access to fresh air, being held exclusively inside the confinement facility. *Id.* The confinement facility at Whiteman Air Force Base did not have a way to allow inmates to have regular access to the outdoors. *Id.* Going outside required the unit to provide escorts, and only two people from SrA Floyd's unit ever assisted in getting him outside. *Id.* Several times during his confinement, the food was inedible, and no alternative options were provided for SrA Floyd. *Id.*

SrA Floyd was prescribed multiple psychotropic medications for depression, anxiety, and post-traumatic stress disorder (PTSD), which were required to be taken at the same time on regular intervals to avoid destabilization of his symptoms. *Id.* SrA Floyd had to repeatedly ask for his mental health medications, resulting in delays in taking them and subsequent worsening of his symptoms. *Id.* He did not feel right in his own body. *Id.*

Standard of Review

Military courts are permitted to "determine on direct appeal if the adjudged or approved sentence is being executed in a manner that offends the Eighth Amendment or Article 55." *United*

States v. White, 54 M.J. 469, 472 (C.A.A.F. 2001). This is because, "[u]nlike civilians, military prisoners have no civil remedy for alleged constitutional violations." *Id*.

The question of whether the "facts alleged constitute cruel and unusual punishment" or constitute a violation of Article 55, UCMJ, is reviewed de novo. *United States v. Pullings*, 83 M.J. 205, 211 (C.A.A.F. 2023); *White*, 54 M.J. at 471.

Law and Analysis

The Eighth Amendment and Article 55, UCMJ, prohibit the imposition of cruel and unusual punishment. U.S. CONST. amend. VIII; 10 U.S.C. § 855. The Court of Appeals for the Armed Forces (C.A.A.F.) applies the Supreme Court's interpretation of the Eighth Amendment to claims raised by military prisoners under both the Eighth Amendment and Article 55, UCMJ. *White*, 54 M.J. at 473.

"[T]he Eighth Amendment prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976)). To establish an Eighth Amendment violation in military courts, an appellant must show:

> (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [their] health and safety; and (3) that [they] ha[ve] exhausted the prisoner-grievance system . . . and that [they have] petitioned for relief under Article 138, UCMJ.

Pullings, 83 M.J. at 209.

The Supreme Court has held that "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." *Estelle*, 429 U.S. at 104 (internal quotation marks and citation omitted). In *Pullings*, the C.A.A.F. went further, articulating that appellants must demonstrate that they

suffered serious harm, or were put at risk of suffering serious harm, from prison officials' deliberate indifference to prove an Eighth Amendment violation.[2] *Pullings*, 83 M.J. at 213.

Delaying access to time-sensitive medications for depression, anxiety, and PTSD, combined with no access to the outside for days on end demonstrates deliberate indifference to SrA Floyd's serious medical needs and amounts to the unnecessary and wanton infliction of pain prohibited by the Eighth Amendment. As a result of the Government's actions, SrA Floyd's mental health worsened, and his physical health deteriorated to the point where he was experiencing falls and slowed speech. Decl. of SrA Floyd. Yet these signs and symptoms went unaddressed. *Id.* He was also later diagnosed with primary progressive multiple sclerosis, which can be exacerbated by lack of access to natural sunlight. *Id.*

While SrA Floyd did not file an Article 138 complaint, he did ask confinement personnel to fix the issues with his medications and told them when his food was inedible. *Id.* Understanding SrA Floyd is required to first exhaust administrative remedies before seeking relief from the appellate court, there is cause for SrA Floyd to have not pursued such relief. *United States v. Clark*, No. ACM, 2024 CCA LEXIS 378, *10 (A.F. Ct. Crim. App. 6 Sep. 2024). SrA Floyd's deteriorating mental and physical health throughout confinement, combined with the lack of unit support and isolation, left him without real access to the outside world and ability to file the Article 138 complaint. Decl. of SrA Floyd.

[2] The Supreme Court has never held that the showing of a "serious harm" is necessary to prevail for a medical Eighth Amendment claim. *See, e.g., Erickson v. Pardus,* 551 U.S. 89, 90 (2007); *Nelson v. Campbell*, 541 U.S. 637, 645 (2004); *Deshaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 198 n.5 (1989). Rather, the prisoner need only demonstrate deliberate indifference to a "serious" medical need. *Compare Estelle*, 429 U.S. at 105 (establishing the medical standard of deliberate indifference to a serious medical need), *with Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (explaining the standard for non-medical Eighth Amendment claims, including the creation of conditions which pose a substantial risk of "serious harm.").

Even if this Court determines there was no violation of the Eighth Amendment or Article 55, UCMJ, it can still grant relief under Article 66, UCMJ. *Gay*, 75 M.J. at 269. "[I]f an appellant claims that post-trial confinement conditions unlawfully increased the severity of the sentence, a [Court of Criminal Appeals] must consider whether the sentence is correct in law." *United States v. Guinn*, 81 M.J. 195, 201 (C.A.A.F. 2021). As outlined above, SrA Floyd's complaints related to his mental and physical health, and lack of edible food indicate confinement personnel denied him access to necessities. Considering the entirety of the circumstances, the conditions of SrA Floyd's confinement warrant relief.

WHEREFORE, SrA Floyd respectfully requests this Honorable Court set aside the portion of his sentence that calls for a bad-conduct discharge.

III.

THE SENTENCE THAT INCLUDED A PUNITIVE DISCHARGE IS INAPPROPRIATELY SEVERE.

Additional Facts

SrA Floyd's theft was intertwined with his deteriorating mental health. R. at 29. SrA Floyd did not feel in control of his thoughts and struggled with suicidal ideations. R. at 30, 150-51. As a result, he decided to take items left over after a unit move as a way to feel something. R. at 29-30, Pros. Ex. 1. The Government recovered all items taken by SrA Floyd, and there was no mission failure as a result of the items being taken from the unit because the unit was not aware any items were missing until the Office of Special Investigations reported the loss to them. R. at 88-89, 130. SrA Floyd's service record was not untarnished. *See* Pros. Ex. 5-8. However, these administrative actions were related to job knowledge and performance, not to misconduct. *Id.*

SrA Floyd had seven individuals provide character letters, all of which described him as a good worker, with ability to rebound from this conviction. *See* Def. Ex. B-H. SrA Floyd had

overcome substantial odds to graduate high school and join the military. Def. Ex. L. Post-preferral, SrA Floyd continued to volunteer, Def. Ex. K, and volunteered over 100 hours. R. at 152. He also worked on his mental health and resiliency. Def. Ex. J.

Standard of Review

Sentence appropriateness is reviewed *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law and Analysis

This Court may consider whether the sentence is inappropriately severe and in doing so, set aside the sentence to modify the sentence to a lesser sentence. Article 66(e)(1)(B) and (f)(2)(A), UCMJ, 10 U.S.C. § 866(e)(1)(B) and (f)(2)(A). Considerations in determining whether a sentence is inappropriately severe include "the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Fields, 74 M.J.* 619, 625 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Bare*, 63 M.J. 707, 714, A.F. Ct. Crim. App. 2006)). "The breadth of the power granted to the Courts of Criminal Appeals to review a case for sentence appropriateness is one of the unique and longstanding features of the [UCMJ]." *United States v. Hutchison*, 57 M.J. 231, 233 (C.A.A.F. 2002) (citations omitted). This Court's role in reviewing sentences under Article 66 is to "do justice," as distinguished from the discretionary power of the convening authority to grant mercy. *See United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998).

In determining whether a sentence should be approved, the Court's authority is "not legality alone, but legality limited by appropriateness." *United States v. Atkins*, 23 C.M.R. 301, 303 (C.M.A. 1957). In reviewing whether the adjudged punishment here is appropriate, there are two reasons this Court should reassess the sentence. First, SrA Floyd's theft and the circumstances

surrounding it are not particularly aggravating. Second, the matters in mitigation and extenuation warrant relief from the sentence.

SrA Floyd's sentence is inappropriately severe in light of the nature of the offense of which he was convicted. In reviewing the record, the circumstances of the theft did not demonstrate harm to the Government. All items were recovered and were not even missed by the unit. R. at 88-89, 130, 132. These items had sat unattended for months, were missing for a period of two weeks, and the unit regained full use of them. R. at 29-30, 88-89. While this Court has declined to find a sentence too severe when the circumstances of the crime are aggravating, conversely, this Court has granted relief when the circumstances of the crime are not "particularly aggravating." *Compare United States v. Flores*, No. ACM 40294, 2023 CCA LEXIS 165, at *18 (A.F. Ct. Crim. App. 13 Apr. 2023), *aff'd*, 84 M.J. 277 (C.A.A.F. 2024)), *with United States v. Douglas*, No. ACM 40324, 2024 CCA LEXIS 254, at *9 (A.F. Ct. Crim. App. 27 Jun. 2024). Like *Douglas*, given the lack of any matters that are particularly aggravating given all the property was recovered and returned, relief is warranted.

Second, matters in mitigation and extenuation support relief. This offense occurred in the context of SrA Floyd's deteriorating mental health. R. at 29. SrA Floyd has demonstrated his innate ability to meet adversity head-on and persevere to succeed. Def. Ex. L. Despite facing charges, SrA Floyd continued to volunteer and was recognized for his efforts. Def. Ex. K, R. at 152. Moreover, SrA Floyd accepted responsibility for his conduct and pled guilty. In considering the nature of the offense and this particular accused, relief here is warranted. Moreover, while SrA Floyd's service record contained administrative actions, those cannot support the punitive separation but rather are relevant for SrA Floyd's rehabilitative potential.

Reassessment is proper given the need for uniformity and even-handedness in sentencing,

and considering SrA Floyd, the nature and seriousness of this theft, and the significant matters offered in mitigation and extenuation, including SrA Floyd's demonstrated resiliency in the face of prior personal challenges. *See United States v. Sothen*, 54 M.J. 294, 296 (2001); *Fields*, 74 M.J. at 625. Reassessing the sentence will not negate the seriousness of the offense SrA Floyd committed, but it will ensure the sentence is no more severe than warranted by the entire record of trial and consistent with justice.

WHEREFORE, SrA Floyd respectfully requests this Honorable Court reassess the sentence.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 18 October 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32784**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jaden T. FLOYD	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 18 October 2024, Appellant submitted a motion to attach the following document to the record: Sworn Declaration of Appellant with two attachments. Appellant's counsel avers that the declaration and its associated attachments is necessary to resolve the issues having to do with post-trial delay. The Government did not oppose the motion.

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

Accordingly, it is by the court on this 30th day of October 2024,

ORDERED:

Appellant's Motion to Attach is **GRANTED**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION TO ATTACH**
	)	Before Panel No. 3
v.	)	
	)	No. ACM S32784
Senior Airman (E-4) **JADEN T. FLOYD** United States Air Force	)	18 October 2024
Appellant	)	

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

Pursuant to Rules 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to attach the following document with attachments to the Record of Trial:

Declaration of Senior Airman Jaden T. Floyd, 2 pages, 4 October 2024 (Appendix A).

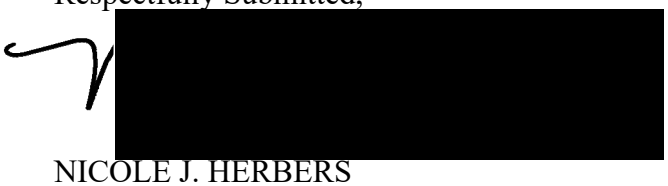
Appendix A is a sworn declaration from the SrA Floyd with two attachments, which provides details regarding the conditions of his confinement, the progression of his physical symptoms post-confinement related to multiple sclerosis, and the extent to which SrA Floyd's ability to assist in his appeal has been impacted by the Government's delay in getting his case to this Court. Because the record does not document the conditions of his confinement or how the Government's delay post-trial delay impacted SrA Floyd, this declaration is needed to resolve the issues of whether the Government's post-trial delay violated the due process rights of SrA Floyd and whether the conditions of confinement amounted to cruel and unusual punishment or should garner him other relief.

These matters may be attached for this Court's consideration pursuant to Article 66, UCMJ, as these declarations supplement matters raised in the record – that is, whether the Government's delay in getting his case to this Court resulted in prejudice, and whether the conditions of confinement amounted to cruel and unusual punishment. The facts SrA Floyd attests to are of

central importance in this Court's duty to determine if there was an 8th Amendment violation and or whether SrA Floyd's due process rights were violated based on the Government's pre-docketing delay. Because these facts are not otherwise documented, there is no other way for this Court to consider all the factors necessary to resolve the assignments of error. *See United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020).

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

Respectfully Submitted,



NICOLE J. HERBERS
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
E-Mail: nicole.herbers@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 18 October 2024.

NICOLE J. HERBERS
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
E-Mail: nicole.herbers@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 3
Senior Airman (E-4) **JADEN T. FLOYD** United States Air Force *Appellant.*	)	No. ACM S32784 18 November 2024

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

ISSUES PRESENTED

I.

WHETHER THE GOVERNMENT'S 155-DAY POST-TRIAL DELAY ENTITLES [APPELLANT] TO APPROPRIATE RELIEF.

II.[1]

WHETHER THE CONDITIONS OF [APPELLANT'S] CONFINEMENT SUBJECTED HIM TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT [TO THE UNITED STATES CONSTITUTION] AND ARTICLE 55, UCMJ, 10 U.S.C. § 855, OR RENDER HIS SENTENCE INAPPROPRIATELY SEVERE.

III.

WHETHER THE SENTENCE THAT INCLUDED A PUNITIVE SEPARATION IS INAPPROPRIATELY SEVERE.

[1]Appellant raises issues II and III pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case.

STATEMENT OF FACTS

Appellant was sentenced on 18 December 2023. One hundred fifty-five days elapsed between sentencing and docketing of the case with this Court.

Date	Action	Days Elapsed
18 December 2023	Sentencing	0
8 April	Court reporter (CR) requested additional support to complete transcript	112
11 April	CR completed transcription and sent trial counsel (TC) and trial defense counsel (DC) transcript for review	115
17 April 2024	CR sent TC and DC the review certifications to sign CR received TC Certification	121
22 April	Court Reporter reminded DC to complete certification (Appendix A)	126
23 April	DC sent certification (Appendix A) Transcript Complete	127
25 April	509 BW/JA received certified transcript (Appendix B)	129
29 April	509 BW/JA mailed original ROT and copies to 8 AF/JA for review (Appendix B)	133
2 May	8 AF/JA received ROT and copies (Appendix B)	136
6 May	8 AF/JA reviewed ROT and requested additional documents (Appendix B) 509 BW/JA sent additional documents to 8 AF/JA(Appendix B)	140
9 May	8 AF/JA sent ROT to JAJM via overnight shipping (Appendix B)	143
10 May	JAJM confirmed receipt of ROT (Appendix B)	144
21 May	ROT Docketed	155

Most of the time, 112 days, is attributable to the court-reporter's balancing of preparing transcripts for this case and others. (ROT Vol. 2, *Court Reporter's Chronology*). Twelve days of delay are attributable to trial defense counsel's delay in completing their certification of the

transcript. (Id., Appendix A, *Declaration of Ms. Lamb*). From the day the transcript was received by the legal office, 509 BW/JA, to the day it was mailed to JAJM, there was continuous work to get the record of trial (ROT) to JAJM to be docketed with this Court. There were not more than five days between each point of progress, including weekends. (Appendix B, *Declaration of Capt Miles*, Attachment 1).

Since this case was docketed on 21 May, Appellant has requested two enlargements of time to file his assignments of error. In total, he requested 90 additional days. Both requests were opposed by the Government but granted by this Court. The enlargements of time resulted in 150 days elapsing before Appellant filed his assignments of error with this Court. Prior to his assignment of error, Appellant never asserted his right to speedy post-trial processing.

ARGUMENT

I.

APPELLANT DID NOT SUFFER A DUE PROCESS VIOLATION NOR DOES HIS CASE WARRANT ARTICLE 66 RELIEF BASED ON HIS CASE BEING DOCKETED FIVE DAYS BEYOND THE 150 DAY STANDARD SET BY THIS COURT.

Standard of Review

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

Due Process

Law & Analysis

Post-trial delay of more than 150 days from sentencing to docketing is facially unreasonable, Livak, 80 M.J. at 633, and triggers review of four factors: (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, 63 M.J. at 135 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). Here, because Appellant's case was docketed five days beyond the 150-day threshold, the delay is facially unreasonable. Livak, 80 M.J. at 633. But under the Barker factors, Appellant is not entitled to relief for post-trial delay because (1) the length of the delay was slight; (2) there are reasonable explanations for the delay; (3) Appellant never asserted his right to speedy post-trial processing; and (4) Appellant suffered no prejudice.

Absence of a factor does not prevent finding a due process violation. Moreno, 63 M.J. at 136. But, in the absence of prejudice to the appellant, a court must find that the delay was "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).

1. Length of the Delay

The length of the delay must be balanced with the other factors. United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022). The slight delay of docketing Appellant's case with this Court weighs in favor of the Government. A five-day delay would not "caus[e] the public to doubt the entire military justice system's fairness and integrity" to render it an egregious delay. Id.

2. Reasons for the Delay

When evaluating the reasons for the delay, "different weights should be assigned to different reasons." Barker, 407 U.S. at 530. Neutral reasons such as "negligence or overcrowded courts" are considered but weighed less heavily than deliberate attempts to delay. Id. Here, most of the delay—112 days—is due to a neutral reason: the court reporter's need to

balance six separate transcription responsibilities around five holidays, leave, and trial. (ROT, Vol. 2, *Court Reporter's Chronology*).

The court reporter's chronology establishes valid reasons for the delay. Following Appellant's court-martial, she was either (a) in court, or (b) transcribing extensive records—while reasonably prioritizing previous courts—even on her days off. (Id.) The court reporter ultimately requesting assistance on 8 April to "attempt to meet the Moreno deadline" is evidence of her diligence, not a "deliberate attempt to delay the trial in order to hamper the defense." Barker, 407 U.S. at 531. This shows that she was not only aware of the deadline, but also took active steps to facilitate Appellant's right to timely review by requesting assistance when she became concerned about meeting it.

But the court reporter was not the sole source of delay, nor the only one that this Court can assess. It also assesses delays "attributable to an appellant." Anderson, 82 M.J. at *86 (citing Moreno, 63 M.J. at 136). And here, a portion of the delay is attributable to Appellant, whose trial defense counsel did not certify the transcript until 12 days after receiving it for review. (Appendix A, *Declaration of Ms. Lamb*). Trial defense counsel did not certify their review until the court reporter reminded them to do so. (Id.) The court reporter proactively reminding trial defense counsel to review the transcript further demonstrates the Government's commitment to timely post-trial processing.

The Government's efforts after receipt of the transcript weigh in its favor, as similar and more substantial delays have not resulted in relief where the Government otherwise demonstrated reasonable diligence in post-trial processing. United States v. Lunby, 2019 CCA LEXIS 181 (A.F. Ct. Crim. App. 23 April 2019); United States v. Cook, 2024 CCA LEXIS 276, *76-77 (A.F. Ct. Crim. App. 3 July 2024). Here, between the transcript's completion and the

forwarding of the ROT to JAJM, there were no periods of inaction longer than five days, including weekends. (Appendix B, *Declaration of Capt Miles*).

The post-trial processing in this case is a far cry from the "gross indifference" at issue in in United States v. Hennessy, 2024 CCA LEXIS 343 (A.F. Ct. Crim. App. 20 August 2024), (vacated on other grounds, Order, No. ACM 40439 (9 October 2024))[2], where it was not just the seven-month transcription timeline but also the unjustified delays and the "lack of urgency" in processing the case *after* the transcript's completion that led this Court to grant relief. Id. at *38. Here, compared to Hennessy, the Government's efforts after transcription and resultant docketing timeline demonstrate that there was no gross indifference:

Events	This Case	Hennessey
Time elapsed between transcript completion and delivery to legal office	2 days	42 days
Time elapsed between transcript receipt and mail forwarding ROT to JAJM	7 days	36 days
Time elapsed between mailing of ROT and docketing with AFCCA	12 days	3 months
Overall time elapsed between transcription and docketing	28 days	168 days
Overall time elapsed between sentencing and docketing	155 days	412 days
Days over 150-day Livak threshold	5 days	262 days

Ultimately, there is a neutral reason for most of the delay in this case—the court reporter's workload. *See also* United States v. Cook, 2024 CCA LEXIS 276 (A.F. Ct. Crim. App. 3 July 2024) ("[C]rowded dockets and busy legal offices are simply a fact of life in the modern military justice system.") But the fact that 12 days were attributable to Appellant is

[2] On 9 October 2024, this Court vacated its opinion cited above to reconsider Appellant's case in light of our superior court's decision in United States v. Mendoza, ___ M.J. ___, 2024 CAAF LEXIS 590 (C.A.A.F. 7 October 2024). While the opinion has been vacated, Mendoza does not implicate post-trial processing, and this Court should still consider the factual differences between Appellant's case and Hennessy in analyzing the lack of gross indifference in Appellant's case.

significant, given that the Government was only five days beyond the 150-day threshold. The delay directly attributable to Appellant pushed his case over the Livak threshold. Under these circumstances, this Court should find that this factor weighs in favor of the Government.

3. Appellant's Lack of Assertion of the Right to Timely Review and Appeal

Prior to filing his assignments of error, Appellant made no demands for speedy post-trial review. Because of this, this factor weighs only slightly in favor of Appellant but is not dispositive. United States v. Arindain, 65 M.J. 726, 733 (A.F. Ct. Crim. App. 2007); United States v. Lovely, 73 M.J. 658, 675 (A.F. Ct. Crim. App. 2014).

4. Prejudice

Post-trial delay may prejudice an appellant when it causes: (1) oppressive incarceration; (2) anxiety and concern; or (3) impairment of the appellant's grounds for appeal or ability to present a defense at a rehearing. Moreno, 63 M.J. at 138-139 (citations omitted). Here, Appellant claims that the post-trial delay—combined with an alleged multiple sclerosis (MS) diagnosis—impaired his ability to appeal. (App. Br. at 7). This Court should be unpersuaded because: (1) there is no evidence Appellant's participation was negatively impacted by his medical diagnosis, and (2) even if his diagnosis impacted his memory, any prejudice is more attributable to the 150 days he took to submit his assignments of error.

To start, Appellant's claim that his MS impacted his ability to participate in his appeal is "speculative and uncorroborated." United States v. Bush, 68 M.J. 96, 101 (C.A.A.F. 2009). Only a medical professional is qualified to diagnose MS, explain how it affects cognition, and opine on whether Appellant's claimed symptoms are because of the disease. *See* M.R.E. 702. And here, Appellant's declaration—in which he claims the MS impacted his memory and communication—is unsupported by either medical documentation or an affidavit from a medical

provider. (App. Br. at 8.) Thus, Appellant's speculation that he may have lost favorable memories and that his participation would have been different had the case been docketed five days earlier is unpersuasive—especially since he requested two enlargements of time after docketing, neither of which invoked his medical condition as justification for the request. Ultimately, Appellant's uncorroborated claims of impairment are insufficient to establish that he was prejudiced by the five-day delay. *See* Bush, 68 M.J. at *100 (affidavit insufficient to establish prejudice where the appellant lacked personal knowledge and therefore could not testify under M.R.E. 602 why he did not get hired); *see also* United States v. Rodriguez, 2023 CCA LEXIS 68, *22 (A.F. Ct. Crim. App. 9 February 2023).

But even if this Court believes that Appellant has a medical condition impairing his appeal, it would not have been the Government's post-trial delay, but his own extended timeline for filing his appeal that prejudiced his ability to assist in his appeal. The Government's five-day delay beyond the Livak threshold pales in comparison to the 150 days he took to file his assignments of error with this Court. If Appellant's cognitive faculties were failing him when the case was docketed, they would have only declined further over the five months he took to file his appeal. Considering the above, Appellant has failed to demonstrate that he was prejudiced by the Government's five-day delay and is unentitled to relief.

Article 66(d)

Law & Analysis

Only when post-trial delay is "unreasonable *and* unexplained," United States v. Tardif, 57 M.J. 219, 220 (C.A.A.F. 2002) (emphasis added), such that it would "adversely affect the public's perception of the fairness and integrity of the military justice system." Toohey, 63 M.J. at 362, should appellate courts provide a tailored remedy, "if any is warranted." Tardif, 57 M.J.

at 225. Relief for post-trial delay under Article 66, UCMJ, "should be viewed as the last recourse." Id. Before granting such relief, this Court considers the following non-exhaustive list of factors:

1. How long did the delay exceed the standards set forth in *Moreno?*
2. What reasons, if any, has the government set forth for the delay? Is there any evidence of bad faith or gross indifference to the overall post-trial processing of this case?
3. Is there some evidence of harm, either to the appellant or institutionally, caused by the delay?
4. Has the delay lessened the disciplinary effect of any particular aspect of the sentence and is relief consistent with the dual goals of justice and good order and discipline?
5. Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation?
6. Given the passage of time, can this court provide meaningful relief in this particular situation?

United States v. Gay, 74 M.J. 736 (A.F. Ct. Crim. App. 2015).

Here, application of the Gay factors shows that Appellant's case does not warrant relief under Article 66, UCMJ.

First, a five-day delay beyond the Livak/Moreno standard is not egregious and does not "cause the public to doubt the entire military justice system's fairness and integrity." Toohey, 63 M.J. at 362.

Second, the delay in this case has neutral reasons, is not due to bad faith, and is not the result of gross indifference to post-trial processing.

Third, Appellant was not harmed by this five-day delay (as discussed previously), nor was there institutional harm—indeed, the Government efforts to move the case swiftly despite delays evince the opposite.

Fourth, the 5-day delay did not lessen the disciplinary effect of any aspect of Appellant's sentence to 90 days of confinement, a reduction to E-1, and a bad-conduct discharge—and it certainly does not warrant set-aside of his bad-conduct discharge. *See* Hennessey, 2024 CCA LEXIS 343 at 40 (where the court did not disturb punitive discharge despite finding "gross indifference" in post-trial processing).

Fifth, the transcription timeline is not evidence of *institutional* neglect, and Appellant's citations to Valentin-Andino and Hennessey in support of his contention to the contrary miss the mark. (App. Br. at 10). In Valentin-Andino, the court found institutional neglect on the basis of *incomplete* records of trial, not mere transcription timelines. 2024 CCA LEXIS 223, at *17. In Hennessey, this Court expressly stated there was no evidence that transcription completion delays have become an institutional problem. 2024 CCA LEXIS 343 at 39. And given that the post-trial delay in this case pales in comparison to the delay in Hennessy, this Court should not find institutional neglect.

Finally, given the passage of time, this Court could not provide meaningful relief that would be consistent with justice and good order and discipline. Appellant has served his time in confinement. Appellant's reduction to the grade of E-1 is warranted for his crime and to set it aside based on a five-day processing delay would be inconsistent with justice and good order and discipline. Setting aside a punitive discharge is an extreme remedy. The "essential inquiry" of "appropriateness" weighs against Appellant. Toohey, 63 M.J. at 362.

Because the Gay factors weigh in favor of the Government, Appellant is unentitled to relief under Article 66(d).

II.[3]

APPELLANT'S POST TRIAL CONFINEMENT CONDITIONS DID NOT AMOUNT TO CRUEL AND UNUSUAL PUNISHMENT AND DID NOT RENDER HIS SENTENCE INAPPROPRIATELY SEVERE.

Additional Facts

On 18 December 2023 after 1744, Appellant was confined at the Air Force confinement facility on Whiteman AFB. (ROT Vol. 2, *Confinement Order*). Appellant did not raise concerns with his confinement conditions until he filed his assignments of error with this Court on 18 October 2024. (App. Br. at 3; Appendix C, *Declaration of SSgt Telfair,* para. 3).

In his declaration, Appellant claims that he was held in solitary confinement for four to five days and during that time he was not provided his mental health medication or given access to a phone. (Appendix, *Declaration of SrA Floyd*). Appellant claims to have kept a journal during his time in confinement that documented his concerns. (Id. at Attachment 1). The journal appears to have been written retrospectively since the dates begin on 21 December but jump back to 18-22 December on the third entry. (Id.) The journal entries contradict Appellant's declaration because the entries do not state that Appellant was ever denied his medication, just that he was given it at different times, even when in solitary confinement. (Id.)

All confinees are held in segregation, or solitary confinement, for 24 hours upon arriving at the Whiteman AFB confinement facility. (Appendix C, *Declaration of SSgt Telfair*). Appellant was held in segregation from 19 December until 20 December. (Id. at Attachment 3, *Initial Custody Classification*).

---

[3] Appellant raises issue II pursuant to Grostefon, 12 M.J. 431 (C.M.A. 1982).

Whiteman AFB's confinement facility does not have an outdoor recreational facility. (Id.) Instead, the facility has recreational activities such as books, games, television, and movies that the confinees can use. (Id.) Confinees have access to phones, and Appellant used the phones regularly. (Id. at Attachment 4). Appellant made a phone call to "legal" on 9 February 2024. (Id.) Confinees can go outdoors when escorted and Appellant was escorted out of the facility on five occasions. (Id. at Attachment 2).

Appellant never filed a complaint with the confinement facility, the convening authority, or through an Article 138 complaint.

Standard of Review

This Court reviews claims of cruel and unusual post-trial punishment de novo. United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006) (citing United States v. White, 54 M.J. 469, 471 (C.A.A.F. 2001). Sentence appropriateness is reviewed de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

This Court cannot affirm an "unlawful sentence such as one that violates the prohibition against cruel and unusual punishment in the Eighth Amendment and Article 55, UCMJ, 10 U.S.C. § 855." United States v. Jessie, 79 M.J. 437, 440 (C.A.A.F. 2020) (citing United States v. Erby, 54 M.J. 476, 478 (C.A.A.F. 2001).

The Eighth Amendment prohibits "cruel and unusual punishments" from being inflicted on prisoners. U.S. CONST. AMEND. VIII. Article 55, UCMJ, prohibits: "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter."

Absent evidence that Appellant was subjected to the specific punishments listed in Article 55, UCMJ, the Court applies Eighth Amendment jurisprudence to alleged Article 55, UCMJ violations. Lovett, 63 M.J. at 215.

To establish an Eighth Amendment claim, Appellant must demonstrate: (1) an objectively, sufficiently serious act or omission resulting in denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to Appellant's health and safety; and (3) that Appellant has exhausted the prisoner-grievance system and has petitioned for relief under Article 138, UCMJ. Lovett, 63 M.J. at 215.

The Eighth Amendment "does not mandate comfortable prisons, but neither does it permit inhumane ones." Farmer v. Brennan, 511 U.S. 825, 832 (1994) (internal quotation and citation omitted). "Denial of adequate medical attention can constitute an Eighth Amendment or Article 55 [,UCMJ], violation." White, 54 M.J. at 474 (citing United States v. Sanchez, 53 M.J. 393, 396 (C.A.A.F. 2000)). The standard does not require perfect or optimal care, but rather reasonable medical care. Id. at 475.

To support an Eighth Amendment or Article 55, UCMJ, claim of inadequate medical care, an appellant must allege both deliberate indifference and "that he suffered, or was put at risk of suffering, serious harm." United States v. Pullings, 83 M.J. 205, 213-214 (C.A.A.F. 2023)(citing Estelle v. Gamble, 429 U.S. 97, 104, 106 (1976)). To establish deliberate indifference, the responsible official must be aware of an excessive risk to an inmate's future health or safety and disregard that risk. Farmer, 511 U.S. at 837, 843.

"A [confinee] must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions." United States v. Wise, 64 M.J. 468, 471 (C.A.A.F. 2007)(citation omitted). "This generally means that the prisoner will have

exhausted the detention center's grievance system and petitioned for relief under Article 138, UCMJ." United States v. Henry, 76 M.J. 595, 610 (A.F. Ct. Crim. App. 2017). "Exhaustion requires [an] [a]ppellant to demonstrate that the two paths of redress have been attempted, each without satisfactory result." Wise, 64 M.J. 471. The exhaustion of both paths of redress must be completed "absent some unusual or egregious circumstance." Id. Where complaints of post-trial confinement conditions are raised for the first time after release, this Court "ha[s] no remedy to provide." United States v. White, 1999 CCA LEXIS 220, *4 (A.F. Ct. Crim. App. 23 July 1999), aff'd, White 54 M.J. at 475.

Analysis

Eighth Amendment/Article 55

Appellant failed to exhaust the administrative remedies available to him. Based on this alone, this Court should find it has no remedy to provide and deny his requested relief.

Even if Appellant had exhausted the administrative remedies, he was not subjected to cruel and unusual punishment because he was not denied necessities, and the confinement officials did not act with deliberate indifference to his future health or safety. Lovett, 63 M.J. at 215.

1. Failure to Exhaust Paths of Redress

Appellant did not use, let alone exhaust, the prisoner grievance system or the Article 138 complaint process. (App. Br. at 3; Appendix C, *Declaration of SSgt Telfair*). Appellant's circumstances were not unusual or egregious to justify his failure to use the paths of redress available to him.

Our Superior Court has found sufficient unusual circumstances to hear a complaint for the first time where an appellant was placed in an area cordoned off by concertina wire, placed in

double leg irons even while eating and sleeping, denied access to his attorney, and raised his concerns before entering confinement. Wise, 472-473. Despite finding these facts established unusual circumstances, the Court noted that the appellant's representation by competent defense counsel weighed against that finding. Id.

There were no such unusual or egregious circumstances to justify Appellant failure to use the complaint processes to promptly ameliorate his confinement conditions. Appellant's claim that he did not file an Article 138 complaint because he was isolated and without "real access to the outside world and ability to file the Article 138 complaint" lacks evidentiary support. (App. Br. at 3).

First, Appellant knew of his ability to use and of the importance of using the complaint processes. On 17 December, Appellant was briefed by his trial defense counsel and signed the memorandum informing him of how important it was to notify his trial defense counsel if he had concerns with confinement conditions. (ROT Vol. 2., App. Ex. II). Despite this, Appellant did not file a single written complaint with the confinement facility nor did his trial defense counsel raise the issue in clemency. (ROT Vol. 2, *Submission of Matters*; Appendix C, *Declaration of SSgt Telfair*).

Second, Appellant had unit support and was not isolated. He had access to and used the phones available to make 33 calls while in confinement. (Appendix C, *Declaration of SSgt Telfair,* Attachment 4.) Appellant called "legal" from confinement on 9 February 2024. Id. Appellant admits that he was visited by his First Sergeant three times and another sergeant twice while in confinement for 90 days. (Appendix, *Declaration of SrA Floyd*). He was escorted out of the facility five times. (Appendix C, *Declaration of SSgt Telfair*, Attachment 2).

Finally, Appellant's alleged "deteriorating mental and physical health throughout confinement" would not have impeded his ability to use the written complaint process at the confinement facility. Appellant had the ability to write and reason enough to both keep a diary and fill out his phone logs while in confinement. (Appendix, *Declaration of SrA Floyd*; Appendix C, *Declaration of SSgt Telfair,* Attachment 4).

Appellant chose to not complain about his confinement conditions through the avenues available to him prior to his assignments of error with this Court. There are no unusual or egregious circumstances to justify his decision to not file a complaint. Therefore, this Court should find it has no remedy to provide and deny appellant's requested relief. White, 1999 CCA LEXIS at *4, aff'd, White 54 M.J. at 475.

2. The Absence of Cruel and Unusual Punishment

Even if Appellant had exhausted the two avenues of redress, he was not subjected to cruel and unusual punishment. Therefore, this Court should deny his requested relief.

While Appellant's brief cites to Article 55, Appellant does not claim to have been subjected to any of the specific punishments listed in Article 55. Therefore, this Court should apply the Eighth Amendment jurisprudence to review this claimed violation.

Despite his claims, none of the conditions that Appellant described constituted a denial of necessities. Appellant's claims that (1) he received his medication at slightly different times or (2) he was only able to go outside on a limited basis for appointments or with unit escort during his 90-day confinement, evaluated individually or together, do not amount "depravations denying the *minimal civilized measure of life's necessities*." Hudson v. McMillian, 503 U.S. 1, 9 (1992) (internal quotation and citation omitted)(emphasis added).

Appellant was not denied his medication. Even while in solitary confinement on 19 December, Appellant received medications including Trazodone, a sleeping medication, and Prazosin, an anxiety medication. (Appendix C, *Declaration of SSgt Telfair,* Attachment 1). The morning of 20 December, Appellant received Quetiapine, also known as Seroquel, and Propranolol. (Id.)

Prisoners have a constitutional right to medical treatment, but not "perfect" or "optimal" medical treatment. White, 54 M.J.at 475 (C.A.A.F. 2001); Estelle, 429 U.S. at 103-04 ("[not] every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment."). Appellant's claim that these medications are so time sensitive that taking them at different times amounts to a denial of a necessity lacks any evidentiary support. There are no medical documents showing that these medications must be provided at the same time every day to be effective. Appellant's prescription information further diminishes Appellant's claim. He includes Ativan, also known as Lorazepam, in his list of medications he was supposed to take every day at the same time. (Appendix, *Declaration of SrA Floyd*.) Yet, his prescription information shows it was only to be taken if he suffered a panic attack. (Appendix C, *Declaration of SSgt Telfair*, Attachment 1).

Even where an appellant has actually been denied medication for three days, this Court has declined to find cruel and unusual punishment. United States v. King, 2021 CCA LEXIS 415, at *151 (A.F. Ct. Crim. App. Aug. 16, 2021) (unpub. op.) (*aff'd*, 83 M.J. 115 (C.A.A.F. 2023)). Appellant's case does not involve an outright denial of his medications. Therefore, this Court should decline to find an Eighth Amendment violation.

Even if Appellant was denied medication, the confinement officials did not have a culpable state of mind as required by the second Livak factor. Appellant does not claim that

confinement officials intentionally gave him his medications at different times or were ever made aware of how Appellant claims it impacted him.

His claim that the "signs and symptoms" of his condition went "unaddressed" and therefore there was a culpable state of mind is unpersuasive because it ignores key facts. (App. Br. at 2). First, there is no evidence that Appellant was suffering symptoms of his disease while in confinement. Second, Appellant attended medical appointments, and if he was suffering at that time, he could have raised those concerns then. (Appendix C, *Declaration of SSgt Telfair*, Attachment 4). Appellant's access and use of medical services supports that confinement officials were not acting with a culpable state of mind. The discomfort Appellant may have felt by receiving his medications at different times does not demonstrate a serious risk to his health to establish an Eighth Amendment violation. Pullings, 83 M.J. at 213-214; Brennan, 511 U.S. 825, 832 (1994)

Appellant's claim that not being able to go outside except for medical appointments and other appointments demonstrates a deliberate indifference to his medical needs is unpersuasive. Spending only a few days outside over a 90-day period is not a denial of the "minimal civilized measures of life's necessities." McMillian, 503 U.S. 1, 9 (1992) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). Where a confinee was allowed outside only five times during a 55-day confinement, along with other more difficult conditions such as being allowed to shower only five times, this Court has found the conditions to be "unpleasant" but not so severe as to constitute a denial of necessities. United States v. Haggart, 2020 CCA LEXIS 212, **18, *22 (A.F. Ct. Crim. App. 24 June 2020). Appellant's confinement conditions are even less severe than those in Haggart and therefore do not rise to the level of an Eighth Amendment violation.

Because Appellant has failed to establish a violation of the Eighth Amendment or Article 55, this Court should deny his requested relief.

Article 66 Relief

Appellant's post-trial confinement conditions did not unlawfully increase his sentence under Article 66, UCMJ.

This Court cannot consider Appellant's declaration in evaluating sentence appropriateness under Article 66. Extra record materials may not be considered for Article 66(d), UCMJ, sentence appropriateness review, "even when [the CCA] had already considered that evidence to resolve Appellant's Eighth Amendment and Article 55, UCMJ [] claims." United States v. Willman, 81 M.J. 355, 361 (C.A.A.F. 2021). The declaration does not become part of the "entire record." Id. Nothing in the record raises Appellant's confinement conditions. Therefore, this court does not have a basis to provide relief.

Even if this Court did have a basis for relief, Appellant did not use his paths of redress, nor has he even attempted to show a clear record demonstrating any legal deficiency in the prison policy administration. (App. Br. at 3; Appendix C, *Declaration of SSgt Telfair*). United States v. Henry, 76 M.J. 595, 610 (AF. Ct. Crim. App. 2017). Therefore, this Court should deny his requested relief.

Appellant failed to show that his confinement conditions constituted cruel and unusual punishment under the Eighth Amendment or Article 55, UCMJ. Appellant was not objectively and seriously denied necessities, he failed to demonstrate that the prison officials' state of mind amounted to deliberate indifference, and he failed to exhaust the prisoner grievance system or petition for relief under Article 138. Appellant's confinement conditions did not rise to the level of cruel and unusual punishment. The record lacks any evidence demonstrating how those

conditions amounted to a more severe sentence entitling him to relief under Article 66. Thus, no relief is warranted. This Court should deny this assignment of error.

III.[4]

APPELLANT'S SENTENCE WAS NOT INAPPROPRIATELY SEVERE.

Additional Facts

Pursuant to his successfully negotiated plea agreement, Appellant pleaded guilty one charge and specification of larceny of military property of a value more than $1,000 in violation of Article 121, UCMJ. (ROT Vol. 2, App. Ex. 1, *Offer for Plea Agreement*). The plea agreement placed no limitations on the military judge sentencing Appellant to a punitive discharge. Id. The military judge sentenced him to three months of confinement, reduction in rank to E-1, a reprimand, and a bad-conduct discharge. (ROT Vol. 1, *Entry of Judgement*).

After Appellant's unit moved buildings, some Aircrew Flight Equipment (AFE) and Survival, Evasion, Resistance, and Escape (SERE) equipment was left in the original building. Between 1 August 2022 and 15 August 2022 Appellant took more than 200 pieces of AFE and SERE equipment, totaling more than $42,000, from the building to his residence. (ROT Vol. 1, Pros. Ex. 1, *Stipulation of Fact*). A small sample of what he took included five headset microphones, four night vision image intensifiers, an oxygen mask, two Soldier Portable Chargers, a rifle scope, two hunting knives, a radio set adapter, and a training AK-47 rifle. (Id., pg. 28, 29, 31, 35 – 36, 40, 47, 56). Appellant's crime was discovered when friends found the equipment laid out in his garage. (ROT Vol. 1, Pros. Ex. 1, *Stipulation of Fact*). The volume of

[4] Appellant raises issue III pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

equipment stolen by Appellant filled five shelves and five additional plastic totes. (ROT Vol. 1, Pros. Ex. 9).

Standard of Review

This Court reviews sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

Under Article 66(d), UCMJ, this Court "may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d). The purpose of such review is "to ensure 'that justice is done and that the accused gets the punishment he deserves.'" United States v. Joyner, 39 M.J. 965, 966 (A.F.C.M.R. 1994) (quoting United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)).

In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Hamilton, 77 M.J. 579, 587 (A.F. Ct. Crim. App. 2017) (citations omitted). "The power to review the entire record includes the power to consider the allied papers, as well as the record of trial proceedings." United States v. Hutchison, 57 M.J. 231, 234 (C.A.A.F. 2002).

The Court also considers the "limits of the [plea agreement] that the appellant voluntarily entered into with the convening authority." United States v. Fields, 74 M.J. 619, 626 (A.F. Ct. Crim. App. 2015). "Absent evidence to the contrary, [an] accused's own sentence proposal is a reasonable indication of its probable fairness to him." United States v. Cron, 73 M.J. 718, 739 n.9 (A.F. Ct. Crim. App. 2014) (citation omitted).

Although this Court has discretion to determine whether a sentence is appropriate, it has "no power to 'grant mercy.'" Hamilton, 77 M.J. at 587 (citing United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)); *see also* United States v. Walters, 71 M.J. 695, 698 (A.F. Ct. Crim. App. 2012). Due to the many sentence possibilities available to any appellant, this Court has found it more fitting to find that a particular sentence is "not inappropriate" rather than "is appropriate." Joyner, 39 M.J. at 966.

Analysis

Appellant's sentence is not inappropriately severe given Appellant's negotiated plea agreement, his crime, and the lack of mitigating circumstances.

1. Plea Agreement

Appellant successfully proposed, and received, a plea agreement that left open the possibility that he would be adjudged a bad-conduct discharge. This proposal is strong evidence that a bad-conduct discharge, along with 90 days of confinement, is a fair sentence. Cron, 73 M.J. at n.9.

2. Appellant's Crime

Appellant's sentence is appropriate for his crime. Appellant was trusted to work alone. (ROT Vol. 1, Pros. Ex. 1, *Stipulation of Fact*). He violated that trust by stealing more than $42,000 of life saving training equipment. The more than 200 pieces of equipment he took were not small. (Pros. Ex. 9). The sheer size and volume of equipment taken would have taken time and effort to steal. Appellant made the choice to steal valuable equipment with every item he took. This blatant abuse of trust by an airman is contrary to good order and discipline. Appellant's actions warrant a bad-conduct discharge, 90 days of confinement, a reduction to E-1, and a reprimand.

Appellant claims that because there was no harm to the Government articulated at trial his sentence is inappropriately severe. (App. Br. at 6). This claim misconstrues the evidence. The Government was harmed by the theft but was able to mitigate that harm by thwarting Appellant's crime and recovering the items. Successful law enforcement intervention of crime is not a factor in mitigation for Appellant. His crime still would have cost the Government more than $42,000 in equipment had his theft not been identified and the items recovered. (ROT Vol. 1, Pros. Ex. 1, *Stipulation of Fact*). The amount and value of property taken by Appellant are aggravating factors warranting a punitive discharge.

Appellant's reliance on United States v. Douglas, 2024 CCA LEXIS 254 (A.F. Ct. Crim. App. 27 June 2024), is misplaced because the facts of his case are different. In Douglas, an Air Force Cadet was convicted of dereliction of duty for having a consensual relationship with a lower-class cadet and for giving a cadet under 21 years old alcohol. Id. at *7-8. Trial counsel did not argue for a punitive discharge. Id. at *9. This Court addressed that there were not aggravating factors, but also found the crime itself did not warrant a dismissal.

Appellant's case not only has aggravating factors but also is magnitudes more severe than a college age cadet dating another cadet who is a couple years behind him in school and giving alcohol to a cadet who was under 21 years old. Appellant stole more than 200 pieces of equipment totaling more than $42,000 in value, from the Air Force. He would have gotten away with permanently depriving the Air Force of that equipment had he not been caught. Because of this, his crime deserves a bad-conduct discharge.

3. Lack of Mitigation

Circumstances of the Crime.

Appellant's claim that he only stole more than 200 pieces of equipment because he needed to "feel something" is not a matter in mitigation. (App. Br. at 5-6). This makes Appellant's crime worse. He took more than 200 pieces of equipment, that by sheer number and size would have required planning and deliberate execution, because he felt like it. Wanting a thrill is not mitigation for a crime. This is exactly the type of crime that warrants serious punishment. There is a real interest in deterring both Appellant and other airmen from stealing valuable equipment such as night vision goggles and radios to cope with difficult times.

Particular Appellant

Appellant's personal resiliency does not negate the fairness of the punishment. (App. Br. at 6-7). While it is admirable that he continued to volunteer while facing charges, that does not change the facts of his crime. Appellant cites to no case where any court has found continued volunteer efforts and a declared personal resiliency to be sufficient to mitigate a crime and warrant sentence reassessment. The two cases referenced by Appellant do not address the issue but rather deal with unlawful punishment and comparative sentencing.

Appellant stole more than 200 pieces of military equipment valued at more than $42,000. He did so just to feel something. The Air Force would have been permanently deprived of that property had he not been reported by another airman. Appellant's guilty plea is a mitigating factor, but that is reflected in the 90-day sentence cap imposed by the plea agreement when his maximum punishment was otherwise twelve months of confinement. Appellant's sentence to 90 days of confinement, reduction to E-1, a bad-conduct discharge, and a reprimand is not

inappropriately severe. It reflects the nature and seriousness of the crime in consideration of the service member. For these reasons, this Court should deny Appellant's requested relief.

CONCLUSION

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

[redacted]
HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 18 November 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32784**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jaden T. FLOYD	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 18 November 2024, Appellee submitted a motion to attach the following documents to the record: (1) Declaration of Ms. Barbara Lamb, dated 30 October 2024, 7 pages (Appendix A); (2) Declaration of Capt Christine Miles, dated 7 November 2024, 17 pages (Appendix B); and (3) Declaration of SSgt Eugene Telfair, dated 4 November 2024, 42 pages (Appendix C)(SENSITIVE).* Appellant did not oppose the motion.

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

Accordingly, it is by the court on this 27th day of November 2024,

ORDERED:

Appellant's Motion to Attach is **GRANTED**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Deputy Clerk of the Court

---

* The court notes that this document is redacted, with the redacted information consisting of personal health information of the Appellant.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 3
Senior Airman (E-4) **JADEN T. FLOYD** United States Air Force *Appellant.*	)	No. ACM S32784 18 November 2024

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

Pursuant to Rule 23(b) of this Honorable Court's Rules of Practice and Procedure, the United States moves to attach the following documents to the Record of Trial:

1. Declaration of Ms. Barb Lamb, dated 30 October 2024, 7 pages (Appendix A)
2. Declaration of Capt Christine Miles, dated 7 November 2024, 17 pages (Appendix B)
3. Declaration of SSgt Eugene Telfair, dated 4 November 2024, 42 pages (Appendix C) (SENSITIVE)[1]

Appendix A is the sworn declaration of Ms. Barb Lamb. She was the court reporter for Appellant's trial. Her declaration is necessary and relevant for this Court to address Appellant's first Assignment of Error (AOE). Particularly, Appellant's claim that the post-trial processing is not attributable at all to him and that the Government was engaged in dilatory conduct is addressed by the declaration and its attachments.

Appendix B is the sworn declaration of Capt Miles. She is currently the Chief of Justice at the legal office that handled the prosecution of Appellant. Her declaration is necessary and

[1] Appendix C is marked as SENSITIVE because Attachment 1 contains Appellant's medication information. A redacted version of Appendix C has also been provided to the Court. Other irrelevant PII such as phone numbers and social security numbers have been redacted in both documents.

relevant for this Court to address Appellant's first AOE: particularly, Appellant's claim that the Government did not have reasons for the 28-day delay in docketing his case with this Court after receiving the transcript from Ms. Lamb.

The information in Appendix A and Appendix B is necessary for this Court to consider in evaluating whether Appellant is entitled to relief where his case was docketed with this Court five days beyond the established 150 threshold. Courts allow supplemental information for matters raised by materials in the record but not fully resolvable by those materials. United States v. Jessie, 79 M.J. 437, 445 (C.A.A.F. 2020). The timeliness of finalizing the post-trial processing and transcription of Appellant's case is raised by the record though the court-reporter's chronology, but this issue is not fully resolvable by those materials since they lack any information about the Government's post-trial efforts aside from transcription and the coordination the court-reporter had with Appellant's trial defense counsel in finalizing the transcript. Because the issue is raised but not fully resolvable by the materials in the record, this Court should allow the attachment of Appendix A and B.

Appendix C is the sworn declaration of SSgt Telfair. He is the NCOIC of the confinement facility where Appellant was held. His declaration is necessary and relevant for this Court to decide Appellant's second AOE: Appellant's claim that he was subjected to unusual circumstances warranting this Court to overlook his failure to file an Article 138 complaint or use of the prisoner grievance system. Appendix C also contradicts Appellant's claim that he was isolated and without unit support, that he was denied necessities, and that prison officials acted with a culpable state of mind when they provided him with his medications at different times. Because Appellant's second AOE raises an Eighth Amendment/Article 55 concern, this Court can consider extra-record information necessary to resolve that issue. Jessie, 79 M.J. at 445.

The information in Appendix C is necessary for this Court to decide whether Appellant has suffered an objectively serious act or omission and whether that act or omission was done by the prison officials with a culpable state of mind, and whether Appellant has exhausted all avenues for administrative relief. United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006).

WHEREFORE, the United States respectfully requests this motion be granted.

[redacted]
HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 18 November 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Senior Airman (E-4) **JADEN T. FLOYD,** United States Air Force, *Appellant.*	)	No. ACM S32784 25 November 2024

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

Pursuant to Rule 18(d) of this Court's Rules of Practice and Procedure, Appellant, Senior Airman (SrA) Jaden T. Floyd, hereby files this reply to the United States' Answer to Assignments of Error, filed 18 November 2024 (Answer). SrA Floyd stands on the arguments in his brief, filed 18 October 2024 (Appellant's Br.), and in reply to the Answer submits the following additional arguments on the issues outlined below.

I.

THE GOVERNMENT'S 155-DAY POST-TRIAL DELAY ENTITLES SENIOR AIRMAN FLOYD TO APPROPRIATE RELIEF.

The Government violated the aggregated 150-day timeline from sentencing to docketing with the Air Force Court, creating a presumption of unreasonable post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). A presumption of unreasonable post-trial delay triggers the four-factor analysis promulgated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely review and appeal; and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *Barker*, 407 U.S. at 530). Review of all four factors demonstrates SrA Floyd's due process rights were violated.

Length of Delay

As to the first factor, the length of the delay—155 days—is not contested. Answer at 4. Although the Government argues its inability to meet the 150-day threshold resolves in its favor because the delay was not egregious, *id*., that is not the standard. Rather, the standard set forth under *Livak*, is that any delay in excess of 150 days is facially unreasonable. *Livak*, 80 M.J. at 633-34. Then, only where an appellant has failed to show prejudice from the delay, this Court turns to whether the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *Id*. (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). As is discussed below under the fourth factor, prejudice is established. Therefore, the Court does not need to turn to whether the delay is so egregious. Using the correct standard, the 155-day delay resolves in SrA Floyd's favor given any delay past the 150-day threshold is facially unreasonable.

Reason for the Delay

The second factor, the reason for the delay, also resolves in SrA Floyd's favor. The explanation for the Government's delay in forwarding SrA Floyd's record of trial to this Court should result in relief. Even with the additional explanation of the court reporter, the Government still did not explain why the court reporter did not seek assistance for 112 days when there were known competing priorities within the legal office. United States' Mot. To Attach Documents, Declaration of BJL (Dec'l. of BJL). Nothing in either the court reporter's explanation, or in the Chief of Military Justice's explanation tells this Court why the Government, knowing its busy schedule, did nothing to move the transcription of SrA Floyd's case for four months. *See, id*., United States' Mot. To Attach Documents, Declaration of Capt CM (Dec'l. of CM). Moreover, the 12 days the Government argues turn this factor in favor of the Government, Answer at 5, shows

the Government's lack of understanding of the actual driving factor for delay—the more than four months it did nothing with this transcript. Had the Government acted on this transcript without that initial four-month delay, the Government would have had no issues forwarding this record well within the 150-day standard. *See* Answer at 2 (where once the Government finally took steps to complete the transcript, it took only 43 days to forward the completed record). The Government has yet to explain its decision to ask for transcription assistance only after 112 days had passed, and that unexplained decision directly caused this delay. The Government's failure to plan for the time to transcribe this record for 112 days does not create an emergency on SrA Floyd's part. Therefore, the 155 days that elapsed between sentence and docketing is an unjustifiable length of time to complete the limited amount of work given the small record of only three volumes, with a 175-page transcript.

Assertion of Right to Speedy Appellate Review

The third factor, the assertion of the right to speedy appellate review, does not weigh against SrA Floyd since he did not contribute to the delay, and he asserts his right to speedy appellate review. In evaluating this factor, the assertion of the right to timely review focuses the Court on the appellant's role in the delay. *Moreno*, 63 M.J. at 138. SrA Floyd did not cause the Government to exceed the 150-day threshold, as discussed *supra*, under the second factor. Moreover, the Supreme Court in *Barker* rejected the notion that an appellant who fails to demand a speedy trial forever waives his rights. *Barker*, 407 U.S. at 528. Further, the Court of Appeals for the Armed Forces has found this factor weighs only slightly against an appellant when there is no previous demand for speedy appellate review because ultimately, the Government bears the obligation for timely processing. *Moreno*, 63 M.J. at 138. This Court has found this factor neutral when an Appellant first asserted his right to speedy appellate review in his first brief. *United States*

v. Lampkins, No. ACM 40135 (f rev), 2023 CCA LEXIS 465, at *12-13 (A.F. Ct. Crim. App. 2 Nov. 2023). This factor should not weigh against SrA Floyd given the pre-docketing delay is of the Government's own making.

Prejudice

Looking at the fourth factor, prejudice is established. This Court has a sworn statement from SrA Floyd as to exactly how and in what way his ability to assist in his appeal has been impacted by the Government's pre-docketing delay, given the quick progression of his multiple sclerosis (MS) since diagnosis. Dec'l of SrA Floyd. SrA Floyd's declaration, which includes video evidence of his progression of MS, is, unlike the Government's assertions, not speculative as to the disease's effects, Answer at 7. *Compare* United States' Mot. To Attach Documents, Appendix A, B, and C (where the Government offered no contradictory statements from a doctor about the impacts of MS), *with* Answer at 7 (where the Government implies, without any proof, that SrA Floyd's symptoms and impacts thereof are not coming from his medical provider's assessments). The evidence of the disease's progression and the impact to SrA Floyd is properly before this Court through a sworn declaration. The Court, in resolving this issue, cannot rely on the Government's blanket denials and platitudes about SrA Floyd's disease, Answer at 8, but can consider the only evidence properly before it on the issue, the sworn declaration of SrA Floyd.

As SrA Floyd affirmatively declared, under penalty of perjury, his memory and ability to communicate both orally and in writing was much better in April and early May 2024. *See* Dec'l of SrA Floyd. Thus, it is the pre-docketing delay that contributed to the prejudice he suffered. SrA Floyd was diagnosed with and began treatment for MS in June 2024. *Id*. Had his case not been delayed, he would have had counsel assigned in April or early May 2024, prior to the progression of his MS. Then, SrA Floyd could have coordinated with his counsel without such

difficulty. *Id*. The rapid onset of his physical impairments and progression from May 2024 to present is also documented and corroborated by the two attachments to his declarations. *Id*. When the Government saw fit to finally forward his case in late May 2024, the progression of his disease was already escalating and, as a result, the entire period he sought to consult with counsel since the delayed docketing has been impacted by his disease. *Id*. Thus, post-docketing delay is of no consequence to the matter of prejudice, because is the *pre-docketing* delay that corresponded to the decline of SrA Floyd's condition. Additionally, the Government speculates that "if [SrA Floyd's] cognitive faculties were failing him when the case was docketed, they would have only declined further over the five months he took to file his appeal," Answer at 8. This again misplaces the import of both the Government's 112-day delay from 18 December 2023 through 8 April 2024, and the rapid onset and decline in SrA Floyd's functioning with treatment for MS in June 2024. Dec'l of SrA Floyd. Had the Government not waited 112 days to get transcription assistance, the remaining 43 days it took to transcribe, get edits from the parties—even with trial defense counsel taking 12 days—certify the transcript, assemble the record, and forward for appellate review would have meant SrA Floyd would have had counsel assigned long before the onset and rapid progression of his neurological symptoms. Thus, it is the *pre-docketing* delay that resulted in prejudice, and this factor resolves in SrA Floyd's favor.

SrA Floyd requests this Honorable Court set aside the portion of his sentence that calls for a bad-conduct discharge.

II.

THE CONDITIONS OF SENIOR AIRMAN FLOYD'S CONFINEMENT SUBJECTED HIM TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT AND ARTICLE 55, UCMJ, 10 U.S.C. § 855.

The Government's dilatory conduct did not end with the post-trial processing of SrA Floyd's case, but also extended to the medical and other care SrA Floyd received while in confinement. To support an Eighth Amendment or Article 55, Uniform Code of Military Justice (UCMJ), claim of inadequate medical care, an appellant must allege both deliberate indifference and that "he suffered, or was put at risk of suffering, serious harm." *United States v. Pullings*, 83 M.J. 205, 213-214 (C.A.A.F. 2023) (citing *Estelle v. Gamble*, 429 U.S. 97, 104, 106) (1976)). SrA Floyd was required to, but did not exhaust administrative remedies for his post-trial confinement conditions. *United States v. Wise*, 64 M.J. 468, 471 (C.A.A.F. 2007) (citation omitted). However, as detailed by SrA Floyd, he was without meaningful contact with anyone during his confinement. Dec'l of SrA Floyd. This is consistent with the evidence the Government asks this Court to consider, which documents more than 20 days where his medications were given inaccurately or not at all, only three instances where he was allowed outside in January to go to appointments, two instances he was outside within one week of February for additional appointments, being left isolated from the outside world with no phone calls with anyone from 18 December 2023 through 7 January 2024, and no calls from his unit until 31 January 2024. United States' Mot. To Attach Documents, Declaration of SSgt EMT, and attachments (Dec'l of SSgt EMT). These are the conditions which isolated SrA Floyd and contributed to his inability to exhaust administrative remedies. Moreover, the Government has not shown that SrA Floyd was ever advised by confinement personnel on how to file any such grievance, thus the lack of grievances could have

resulted from the lack of understanding of the administrative process available to him within confinement. *Id*.

Given these reasons, this Court can find there was cause for SrA Floyd not to exhaust administrative remedies and turn to the question of whether confinement personnel showed both deliberate indifference and that he suffered harm or was at risk of harm. *Pullings*, 83 M.J. at 213-14. This harm described by SrA Floyd was related to the instability of his mental health when his medications were mismanaged, either by taking his medications at irregular times, or by not getting his medications at all. Dec'l of SrA Floyd. SrA Floyd was prescribed six psychotropic medications: sertraline; prazosin, propranolol, quetiapine, lorazepam, and trazodone. Dec'l of SSgt EMT, page 4. With the exception of lorazepam, all drugs were to be taken daily. *Id*. Three pills were to be taken once per day (sertraline, trazadone, and prazosin). *Id*. Of these three medications, there were multiple days where the prazosin and trazadone doses were not given. *Id*. at 5, 12-15. Prazosin was not given at all on 20 and 29 December 2023, and then stopped altogether on 3 January 2024. *Id*. at 5. Trazadone was skipped on 18, 20, and 29 December 2023, was given twice (not once as prescribed) on 4 January 2024, was not given on 5 or 6 January 2024, was given twice on 20 January 2024, and not at all on 21 January 2024 or 11 February 2024. *Id*. at 12-15. Although sertraline was to be given daily, *id*. at 4, he was given no sertraline for the entirety of December 2023, none on 1, 2, 6, 15, or 21 January 2024, none on 5 and 6 February 2024, and twice on 10 February 2024. *Id*. at 20-21.

There are few days in the span of confinement when he was correctly given his quetiapine four times per day as prescribed. *Compare id*. at four (setting his dose to four times per day), *with id*. at 16-17 (where he was only given his medication four times correctly between 19 December 2023 and 3 January 2024). A higher dose of this medication was started on 3 January 2024, with

a missed dose on 21 January 2024, 11 February 2024, 22 February 2024, and two doses documented as given on 21 and 25 February 2024). *Id*. at 18-19. Similarly, his twice daily propranolol was incorrectly given or skipped multiple times. *Id*. at 7-11. No medications were administered on 18 or 19 December 2023, he was given only one dose on 29 December 2023 and 3 January 2024, and the times were irregular. *Id*. at 7. He was only given one dose on 6 and 7 January 2024, and all doses were skipped on 15, 20, and 21 January 2024. *Id*. at 8. Again, times were irregular. *Id*. He received one dose on 27 and 29 January 2024, none on 3 February 2024, and one dose on 4, 11, 18, 21, 24, 26, and 27 February 2024. *Id*. at 9-11. This corroborates SrA Floyd's declaration, where he described inconsistent and improper management of his mental health medications. *See* Dec'l of SrA Floyd.

This repeated gross mismanagement of SrA Floyd's medication shows the confinement officials acted with deliberate indifference given the repeated failures to give any medications, and the repeated instances of being given the wrong dosages of medication. Administration of medication is a basic part of psychiatric care, and a failure to provide basic psychiatric and mental health care can constitute deliberate indifference. *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991). Given the lack of facts to support any reason for this mismanagement provided by the Government, there is no other conclusion this Court could come to regarding the mismanagement of his medication given the frequency with which this occurred despite the existing system to track medications, with the known prescription information in-hand. The harm from the Government's mismanagement of his medications is further established by corresponding dates he needed lorazepam for anxiety and panic attacks: 19, 20, 22, and 27 January 2024, and 3 and 18 February 2024. Dec'l of SSgt EMT, p. 23. Those dates where he had increased anxiety in need of lorazepam correspond to missed doses of medication. He had missed doses of propranolol on 27 January

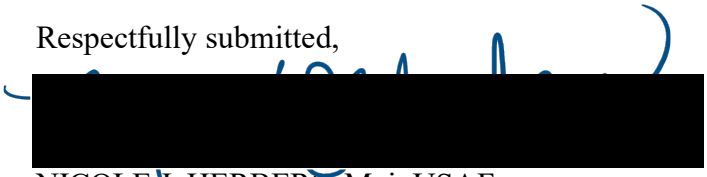
2024 and 18 February 2024, and had no propranolol at all on 20 and 21 January 2024, *id*. at 8; missed doses of quetiapine on 21 January 2024, *id*. at 18, and a missed dose of sertraline on 21 January 2024. *Id*. at 20. This correlation at least shows the harm when medications were missed, in addition to SrA Floyd's declaration documenting mental distress. The haphazard way these medications were administered shows deliberate indifference towards his well-being.

A punishment, like isolation, need not leave physical scars to be cruel and unusual. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Supreme Court, as far back as 1890, has "expressed concerns about the mental anguish caused by solitary confinement." *Apodaca v. Raemisch*, 586 U.S. 931 (2018)*, cert denied*, (J. Sotomayor, concurring). Access to the outdoors—daylight—is a basic human need, and it clear that the Constitution does not permit such a total deprivation in the absence of a particularly compelling interest. *Id*. at 934-35. While the nature of isolation here is not comparable to that described in *Apodaca*, the underlying concern about the lack of a particularly compelling interest that would not allow SrA Floyd to go outdoors, absent medical appointments, is the same. The posture of the confinement personnel at Whiteman appears to be one of acceptance of the limited exposure to the outdoors for inmates with no particularly compelling interest. *See* Dec'l of SSgt EMT (where there was mere acknowledgement that inmates were not granted access to the outdoors, absent an appointment or at the request of the parent unit leadership, due to status as a Level 1 facility). For up to one year, the maximum time someone could be held at Whiteman, inmates could be kept indoors should they find themselves without appointments or without unit support. *Id*. The Government's acquiescence to these conditions is further demonstrated by the facts of this case. From 18 December 2023, when he entered confinement, through 17 January 2024, SrA Floyd had no access to the outdoors. *See* Dec'l of SrA Floyd; *see also*, Dec'l of SSgt EMT (documenting SrA Floyd's first appointment was not until

17 January 2024). From 18 December 2023 through 1 March 2024, SrA Floyd only went outside five times, on 17, 24, and 31 January 2024 and on 14 and 21 February 2024. Dec'l of SSgt EMT, p. 24-28. The Government took no steps to justify the lack of access for inmates to the outdoors, nor why it did not arrange for alternate means for access to the basic human need for daylight. These conditions, alongside medication mismanagement, show SrA Floyd was subjected to cruel and unusual punishment.

SrA Floyd requests this Honorable Court set aside the portion of his sentence that calls for a bad-conduct discharge.

Respectfully submitted,



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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32784**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jaden T. FLOYD	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 18 November 2024, Appellee submitted a motion to attach the following documents to the record: (1) Declaration of Ms. Barbara Lamb, dated 30 October 2024, 7 pages (Appendix A); (2) Declaration of Capt Christine Miles, dated 7 November 2024, 17 pages (Appendix B); and (3) Declaration of SSgt Eugene Telfair, dated 4 November 2024, 42 pages (Appendix C) (SENSITIVE).* Appellant did not oppose the motion.

In an order dated 27 November 2024, this court intended to grant Appellee's motion, but erroneously referred to the moving party as "Appellant." Therefore, we rescind our previous order dated 27 November 2024.

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

Accordingly, it is by the court on this 3d day of December, 2024,

ORDERED:

Appellee's Motion to Attach is **GRANTED**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Deputy Clerk of the Court

---

* The court notes that this document is redacted, with the redacted information consisting of personal health information of the Appellant.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32784**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Jaden T. FLOYD	)	**PANEL CHANGE**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 6th day of December, 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
MENDELSON, JAMIE L., 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