

**DEPARTMENT OF THE AIR FORCE
TRIAL JUDICIARY**

UNITED STATES	)	NOTICE OF ARTICLE 62
	)	APPEAL
v.	)	
	)	
CAPTAIN JUAN G. GALE	)	
552d Training Support Squadron (ACC)	)	
Tinker Air Force Base, Oklahoma	)	8 January 2025

The Government respectfully files the following Notice of Appeal, pursuant to Article 62, Uniform Code of Military Justice and Rule for Courts-Martial 908(b).

1. The Government intends to appeal the military judge's 30 December 2024 ruling and his 6 January 2025 ruling denying the Government's motion for reconsideration of the 30 December 2024 ruling. These rulings resulted in the military judge dismissing all Charges and Specifications with prejudice. In doing so, the military judge found that the government's earlier withdrawal and re-preferral of those Charges and Specifications was improper. The ruling affects all four Charges and Specifications.
2. The military judge's ruling terminated the proceedings for all Charges and Specifications.
3. The Government does not make this appeal for the purposes of delay.
4. Before filing this notice, Special Trial Counsel has consulted with AF/JAJG and the Staff Judge Advocate of the Convening Authority, as required by paragraph 19.14.1. of Department of the Air Force Instruction 51-201, *Administration of Military Justice*, date 24 January 2024, as amended by Department of the Air Force Guidance Memorandum to Department of the Air Force Instruction 51-201, dated 3 October 2024. Both the Convening Authority and his Staff Judge Advocate have approved this appeal.

Respectfully submitted,

BIERLEIN.BRANDON.
MICHAEL.

BRANDON M. BIERLEIN, Maj, USAF
Special Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that the Military Judge's ruling referenced above was issued on 6 January 2025 at 1108 hours (PST). On 8 January 2025, within 72 hours of the ruling, I caused a copy of this notice of appeal to be served at 1500 hours, on the Military Judge, Colonel Matthew P. Stoffel, Victim's Counsel Capt Avery Morelock, and Defense Counsel, Mr. Aaron Meyer and Capt David Rogers

BIERLEIN.BRANDON.

MICHAEL. [REDACTED]

[REDACTED]

BRANDON M. BIERLEIN, Maj, USAF
Special Trial Counsel



**DEPARTMENT OF THE AIR FORCE
OFFICE OF THE JUDGE ADVOCATE GENERAL
MILITARY JUSTICE AND DISCIPLINE**

31 January 2025

MEMORANDUM FOR AIR FORCE COURT OF CRIMINAL APPEALS

FROM: AF/JAJG

SUBJECT: Record of Trial – Article 62 Appeal – Capt Juan G. Gale

1. On 11 August 2023, the Commander, Headquarters 15th Air Force, Shaw Air Force Base, South Carolina, referred the following charges: one Charge and one Specification of Abusive Sexual Contact, in violation of Article 120, UCMJ; one Charge and one Specification of Assault Consummated by a Battery, in violation of Article 128, UCMJ; one Charge and One Specification of Conduct Unbecoming an Officer, in violation of Article 133, UCMJ; and one Charge and one Specification of Fraternization, in violation of Article 134, UCMJ. On 28 December 2023, Defense filed a motion to dismiss for speedy trial and improper preferral/Due Process violations. (App. Ex. VI.) On 22-23 February 2024 the parties presented evidence and argument on the issue. (R. at 1-532.) A military judge denied the Defense's motion on 5 May 2024. (App. Ex. XXXIV.) On 2 September 2024, the Defense filed a written motion to reconsider the defense motion to dismiss for *inter alia* improper re-preferral. (App. Ex. LXXXI.) On 10 September 2024, the parties presented argument on the issue. (R. at 959-1025.) On 30 December 2024, the military judge upon reconsideration granted the defense motion to dismiss, finding that the charges had been improperly withdrawn at a prior court-martial and ordered the charges above be withdrawn and dismissed with prejudice. (App. Ex. LXXXVI.) On 2 January 2024 the government moved for reconsideration. (App. Ex. LXXXVIII.) On 6 January 2025 at 1408 hours Eastern Standard Time, the military judge denied the motion for reconsideration. (App. Ex. XC.)
2. On 8 January 2025 at 1802 EST, the United States filed a notice of appeal to notify the military judge that it would be appealing his ruling dismissing the charges with prejudice. (Attached.) The ruling terminated "the proceedings with respect to" all charges and specifications. 10 U.S.C. §862(a)(1)(A). Trial counsel forwarded the appeal and record to the Air Force Appellate Operations Division, and it was received on 28 January 2025.
3. Pursuant to Article 62, UCMJ, and Rule 20 of the Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States files the attached certified original record of trial and the notice of appeal in the above case and notifies this Honorable Court of the United States' intention to appeal the military judge's ruling.



MATTHEW D. TALCOTT, Colonel, USAF
Chief, Government Trial and Appellate Operations
Division



2 Attachments:

1. Record of Trial
2. Notice of Appeal

cc: AF/JAJA

**DEPARTMENT OF THE AIR FORCE
TRIAL JUDICIARY**

UNITED STATES	)	NOTICE OF ARTICLE 62
	)	APPEAL
v.	)	
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CAPTAIN JUAN G. GALE	)	
552d Training Support Squadron (ACC)	)	
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BIERLEIN.BRANDON.

MICHAEL.

BRANDON M. BIERLEIN, Maj, USAF
Special Trial Counsel

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellant,</i>	)	UNITED STATES’ APPEAL UNDER ARTICLE 62, UCMJ
	)	
v.	)	
	)	Before Panel No. 3
	)	
	)	Misc. Dkt. No. 2025-01
Captain (O-3)	)	
JUAN G. GALE, USAF,	)	20 February 2025
<i>Appellee,</i>	)	

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

Under Article 62, UCMJ, the United States respectfully requests that this Court reverse the military judge’s ruling dismissing with prejudice all charges and specifications for the government’s alleged improper withdrawal in violation of Rule for Court-Martial (R.C.M.) 604.

INTRODUCTION

R.C.M. 604 permits the Government to withdraw and dismiss charges to cure potential unlawful command influence (UCI). In fact, this mechanism is appropriate and indeed encouraged by appellate courts to prevent against the “mortal enemy” of military justice. United States v. Lewis, 63 M.J. 405, 407 (C.A.A.F. 2006). Here, Appellee’s first military judge (Judge Smith) in his first court-martial, and in response to a UCI motion, found that the defense had demonstrated “some evidence” that the special court-martial convening authority (SPCMCA) may have improperly preferred the charges and specifications at the direction of the general court-martial convening authority (GCMCA). (App. Ex. LXXXVI at para. 14.) Recognizing this finding, and in an attempt to cure this potential UCI, the GCMCA withdrew and dismissed all charges and specifications. (Id. at para. 26.; *Withdrawal and Dismissal of Charge and Specifications Memorandum*, Gale 1 ROT, Vol. 4.) Those charges and specifications were then

preferred anew using a different commander and then re-referred to a new (second) court-martial. (*Charge Sheet*, dated 11 August 2023, ROT, Vol 1.) But the military judge at Appellee's second court-martial (Judge Stoffel) concluded that (1) this corrective withdrawal by the convening authority was improper; (2) that the defense may have obtained a favorable ruling on its UCI motion but for the withdrawal; and (3) that all charges and specifications must be dismissed with prejudice.

But to hold that this action by a convening authority was improper would have a significant chilling effect on future cases, which could discourage convening authorities from proactively taking steps to remedy correctable errors. Moreover, Judge Smith's preliminary ruling on the defense's UCI motion was not sufficient to justify Judge Stoffel's determination that it constituted a "favorable trial ruling," or that Appellant lost the benefit of that ruling due to the withdrawal and dismissal of charges in this case. (App. Ex. LXXXVI at para. 4.d.) This is particularly true because, even if the defense had prevailed on its UCI motion, the probable remedy would have been—at best—a dismissal without prejudice. Accordingly, Judge Stoffel's mere speculation that Judge's Smith ruling would have been favorable to the defense, *and* would have resulted in a ruling dismissing all charges and specifications *with prejudice*, was insufficient to establish prejudice that could justify the draconian remedy here. Dismissal with prejudice is a *drastic* remedy to be used *only* where other remedies are unavailable. See United States v. Shelby, No. 24-0186, 2025 CAAF LEXIS 64, at *6 (C.A.A.F. Jan. 28, 2025) (quoting United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)).

Accordingly, Judge Stoffel's ruling that (1) the withdrawal and dismissal without prejudice were improper, and (2) that Appellee lost the benefit of a favorable trial ruling were

clearly erroneous. The military judge therefore abused his discretion, and this Court should vacate his ruling and remand the case to trial for further proceedings.

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FOUND THE CHARGES AND SPECIFICATIONS IN APPELLEE’S FIRST COURT-MARTIAL WERE IMPROPERLY WITHDRAWN IN VIOLATION OF R.C.M. 604.

STATEMENT OF THE CASE

On 1 September 2022, Colonel Keven Coyle, the SPCMCA, preferred the following charges and specifications: one charge and specification of abusive sexual contact, in violation of Article 120, UCMJ; one charge and one specification of assault consummated by a battery, in violation of Article 128, UCMJ; one charge and one specification of conduct unbecoming an officer, in violation of Article 133, UCMJ; and one charge and one specification of fraternization, in violation of Article 134, UCMJ. (*Charge Sheet*, dated 1 September 2022, Gale 1¹ ROT, Vol. 1.) On 21 February 2023, General Michael Koscheski, Commander, Headquarters 15th Air Force, Shaw Air Force Base, South Carolina, in his role as GCMCA, referred the charges to a general court-martial to be convened at Tinker AFB, Oklahoma. (Id., R. at 32-33.) On 2 May 2023, trial defense counsel filed a motion for appropriate relief requesting that Judge Smith dismiss the charges against Appellee based upon alleged UCI. (Gale 1 ROT, App. Ex. XX.) The United States timely responded on 12 May 2024. (Gale 1 ROT, App. Ex. XXI.)

On 23 May 2023, Appellee was arraigned. The next day, Judge Smith held a motions hearing, and the parties presented evidence and argument on the UCI issue. (Gale 1 ROT, R. at

¹ Two Records of Trial exist in this case. For the sake of clarity, the Record of Trial pertaining to the charges withdrawn and dismissed by the convening authority on 7 June 2023 will be referred to as “Gale 1.”

120-318.) On 1 June 2023, Judge Smith issued an informal ruling, via email, indicating that the defense had met their initial burden of demonstrating “some evidence of both apparent and actual UCI.” (App. Ex. XXVI, Exhibit QQ.) Specifically, Judge Smith found that the defense had presented “some evidence that Col Coyle [the SPCMCA], the individual who preferred the charges in this case, may have done so at the direction of Maj Gen Koscheski, the 15 AF/CC and GCMCA who...ultimately referred the charges in this case to a GCM.” (Id.) On 7 June 2023, and in response to this preliminary ruling, the GCMCA directed that the charges and specifications be withdrawn and dismissed without prejudice. (*Withdrawal and Dismissal of Charge and Specifications Memorandum*, Gale 1 ROT, Vol. 4.) That same day, trial counsel effected the withdrawal and dismissal without prejudice on the Charge Sheet. (*Charge Sheet*, Gale 1 ROT, Vol. 1.)

On 21 June 2023, Judge Smith signed the Entry of Judgment indicating that all charges and specifications had been withdrawn and dismissed without prejudice. (*Entry of Judgment*, Gale 1 ROT, Vol. 1.) On 6 July 2023, Colonel Kenneth Voigt, the new SPCMCA, preferred four charges and specifications against Appellee, identical to those previously withdrawn and dismissed by the Convening Authority. (*Charge Sheet*, ROT, Vol. 1.) On 11 August 2023, General Koscheski, again acting as GCMCA, referred the charges preferred by Colonel Voigt. (Id.) On 6 September 2023, Major Tiny Bowman was appointed as military judge. (App. Ex. LXXXVI at para. 25.)

On 28 December 2023, trial defense counsel filed a motion for appropriate relief requesting that Judge Bowman dismiss the charges against Appellee for improper preferral. (App. Ex. VI.) On 22 and 23 February 2024, the parties presented evidence and argument on the issue. (R 10-532.) On 5 May 2024, Judge Bowman issued written rulings denying Appellee’s

motions to dismiss. (App. Ex. XXXIII, App. Ex. XXXIV.) Though, on 8 May 2024, Judge Bowman granted a defense motion for her recusal. (App. Ex. LXXXVII, App. Ex. XLV.)

On 13 May 2024, Colonel Matthew Stoffel was detailed to the case as military judge. (App. Ex. LXXXVI, para. 33.) On 2 September 2024, the defense filed a motion to reconsider the Court's previous rulings on the defense's motions to dismiss. (App. Ex. LXXXI.) On 9 and 10 September 2024, the parties presented evidence and argument on the motion for reconsideration. (App. Ex. LXXXVI, para. 36.) On 30 December 2024, Judge Stoffel granted the defense's motion for reconsideration, found that the charges from Appellee's first court-martial were improperly withdrawn, and ordered all charges and specifications be dismissed with prejudice. (App. Ex. LXXXVI.)

On 2 January 2025, the United States moved for reconsideration. (App. Ex. LXXXVIII.) On 6 January 2025, at 1408 hours Eastern Standard Time (EST), Judge Stoffel denied the government's motion for reconsideration. (App. Ex. XC.) On 8 January 2025, at 1802 EST, the United States filed a notice of appeal, notifying Judge Stoffel that it would be appealing his ruling to withdraw and dismiss the charges with prejudice. (Gov. Record of Trial Docketing Memorandum, dated 31 January 2025, Attachment 2). Trial counsel forwarded the appeal and record of trial to the Air Force Appellate Operations Division, and it was received on 28 January 2025. In accordance with the Court's rules, the government filed the record of trial with the Court on Friday, 31 January 2025. The notice of appeal and record of trial were served on this Court and the Air Force appellate defense counsel, in compliance with this Court's Rules for Practice and Procedures 15 and 20(c)(1). A copy of the notice of appeal was also provided to the Victim's Counsel.

STATEMENT OF FACTS

Judge Stoffel's Findings of Fact Regarding Judge Smith's Preliminary Findings

In Judge Stoffel's ruling, he included the following findings of fact regarding Appellee's first court-martial:

On 1 September 2022, Colonel Kevin P. Coyle preferred several charges and specifications against the accused. Specifically, Colonel Coyle preferred charges alleging violations of Article 92 for negligent dereliction of duty, Article 120 for abusive sexual contact, Article 128 for assault consummated by a battery, Article 133 for conduct unbecoming an officer, and Article 134 for fraternization.

(App. Ex. LXXXVI at para. 1.)

On 21 February 2023, the 15 AF/CC, in his role as general court-martial convening authority (GCMCA), referred Charges II-V to trial by general court-martial. Charge I and its specification had been withdrawn and dismissed without prejudice on 16 February 2023, and no additional charge/specification was referred to trial.

(Id. at para. 4.) Judge Stoffel found that Judge Smith, the military judge at Appellee's first court-martial,² made the following determinations regarding the defense's motion to dismiss for UCI, after having been presented with evidence and argument from both parties:

Lt Col Smith found "the Defense has met its burden of raising some evidence of both apparent and actual UCI with regard to both the preferral and referral of the charges in this case." Lt Col Smith specifically determined "*the defense has presented some evidence that Col Coyle, the individual who preferred the charges in this case, may have done so at the direction of...the GCMCA* who initially offered the accused NJP and ultimately referred the charges in this case to a GCM after the accused turned down the NJP offer." Lt Col Smith determined it was the 15 AF/CC, in his role as GCMCA, "who determined the accused should be brought to trial upon turning down the NJP offer, and Col Coyle was just 15 AF/CC's conduit for preferring charges."

² To be clear, three separate military judges have presided over Appellee's cases. Judge Smith served as the military judge in Appellee's first court-martial. After withdrawal and dismissal of that court-martial, Judge Bowman was appointed after the charges were preferred in this case. Judge Bowman recused herself at Appellee's request and was replaced by Judge Stoffel.

(Id. at para. 7-14.) (emphasis added.)

Judge Stoffel also noted that Judge Smith found “some evidence that Col Coyle’s preferral of charges in this case was influenced by the [GCMCA]. In such cases, the charges are treated as unsigned and unsworn.” (Id. at para. 15.) Judge Stoffel further noted that Judge Smith had also found “this same evidence also raises the issue of whether 15 AF/CC, the GCMCA in this case, stepped into the role of accuser, thereby disqualifying himself from being eligible to refer the charges in this case in accordance with R.C.M. 601(c).” (Id. at para. 16.) Judge Smith concluded his email by noting:

[T]he defense has met its burden of putting forth some evidence of apparent and actual UCI, and the burden has shifted to the Government to prove beyond a reasonable doubt that “(1) the predicate facts do not exist (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence [will] not affect the findings or sentence.”

(Id. at para. 17.) After Judge Smith’s ruling finding “some evidence” of UCI, the Convening Authority directed that the charges and specifications be withdrawn and dismissed without prejudice. (*Withdrawal and Dismissal of Charge and Specifications Memorandum*, Gale 1 ROT, Vol. 4.)

Judge Stoffel’s Findings of Fact Regarding the Withdrawal and Dismissal of Appellee’s First Court-Martial

Judge Stoffel included the following findings regarding the withdrawal and dismissal of the charges at Appellee’s first court-martial: “On 7 June 2023, the GCMCA directed the charges and specifications bet [sic] withdrawn and dismissed without prejudice. The GCMCA received and considered the advice of his staff judge advocate prior to doing so.” (Id. at para. 20.) Judge Stoffel further noted that the detailed trial counsel and the GCMCA’s staff judge advocate (SJA) were aware of Judge Smith’s ruling prior to withdrawal and dismissal of the charges at

Appellee's first court-martial. (Id. at para. 21-22.) On 6 July 2023, after the withdrawal and dismissal of Appellee's first court-martial was complete, Colonel Kenneth Voigt—the new SPCMCA—preferred four charges and specifications against Appellee that were identical to those he faced in the first court-martial. (Id. at para. 23.) The 15 AF/CC, again acting in his role as GCMCA, referred the charges preferred by Colonel Voigt to trial by general court-martial. (Id. at para. 24.)

Judge Stoffel noted that on 8 September 2023, the GCMCA responded to a Congressional inquiry made by Senator Rick Scott pertaining to Appellee's case. (Id. at para. 26.) In his response, the GCMCA referred to Judge Smith's ruling from Appellee's first court-martial. Specifically, the GCMCA recognized that Judge Smith had found some evidence of UCI in the preferral of charges by Colonel Coyle, and that, to address the concerns of potential UCI, he directed all charges and specifications be withdrawn and dismissed with prejudice. (Id.) The GCMCA also indicated that prior to making the decision to withdraw and dismiss, he had consulted with his SJA. (Id.)

Judge Stoffel's Analysis Regarding the Propriety of the Withdrawal and Dismissal of Appellee's First Court-Martial

In his ruling, Judge Stoffel recognized that Judge Bowman had issued a written ruling denying the defense's motion to dismiss for improper withdrawal. (Id. at para. 37.) But due to Judge Bowman's recusal, contemporaneous with the denial of the motion to dismiss, Judge Stoffel determined that reconsideration of the motion was appropriate. (Id.)

In arriving at his decision to dismiss with prejudice, Judge Stoffel provided the following in his analysis section:

A proper reason for rereferral of withdrawn charges is defined as [*sic*] a legitimate command reason which does not unfairly prejudice an accused... Improper reasons for withdrawal include an intent to

interfere with the free exercise by the accused of constitutional rights or rights provided under the UCMJ, or with the impartiality of a court-martial... Circumstances to be considered in determining a withdrawal was improper include whether the second court-martial is the same type as the first, whether the same military judge presided over the second court-martial, whether the accused lost the benefit of a favorable trial ruling, whether the accused was in pretrial confinement during the withdrawal and rereferral process, and whether the accused moved the court for relief based on prejudicial delay.

(Id. at para. 39) (internal quotations and citations omitted.)

Prior to conducting his full analysis, Judge Stoffel found that the GCMCA was aware of Judge Smith's ruling prior to directing the original charges and specifications to be withdrawn and dismissed. (Id. at para. 40.a.) Judge Stoffel then determined that the withdrawal was improper because it was done for an improper purpose—an intent to interfere with the impartiality of a court-martial. (Id. at para. 40.) In arriving at his determination, Judge Stoffel compared it to Vanover v. Clark, 27 MJ. 345 (C.M.A. 1988.). (Id. at para. 40.b.) In drawing a corollary between this case and Vanover, Judge Stoffel found the following:

In the instant case, this court concludes that it is more likely than not that the convening authority did not have the specific intent to interfere with the impartiality of the court. However, whether the convening authority's [sic] specifically intended to interfere with a judicial proceeding or whether his actions instead created the appearance of evil, the end result is the same; interference with a ruling of the court by the convening authority after the accused had been arraigned.

(Id. at para. 40.c.)

Judge Stoffel then found that, even if the withdrawal was not done for an improper purpose, Appellee suffered prejudice because of the rereferral of the identical charges that had been previously withdrawn. (Id. at para. 41.) In finding that Appellee had been prejudiced, Judge Stoffel conducted the following analysis, using the factors described above: (1) upon re-

docketing, the case was assigned to a different military judge, weighing in Appellee's favor; (2) Appellee moved the court for relief due to the delay in trial proceedings as a result of the withdrawal and dismissal, weighing in favor of the Appellee; and (3) Appellee was not in pretrial confinement, weighing in favor of the government. (Id. at para. 41.a-c.) Importantly, Judge Stoffel "ascribe[d] the most weight" to the determination that Appellee lost the benefit of a favorable trial ruling. (Id. at para. 41.d.) Specifically, Judge Stoffel highlighted that because Judge Smith had not made a final ruling on the withdrawal and dismissal, "the accused, this court, and the general public are *left to wonder* whether the original military judge would have determined whether the prosecution had satisfied its burden on the motion beyond a reasonable doubt and, if they had not done so, what remedy the original military judge would have deemed appropriate." (Id.) (emphasis added) Judge Stoffel continued "[t]his is vitally important given the potential case-dispositive outcome of which the accused was deprived due to the post-arraignment actions of the convening authority." (Id.) He therefore found Appellee did suffer unfair prejudice as the result of the convening authority's decision to rerefer charges identical to those withdrawn to a new court-martial. (Id.)

Based on his conclusions above, Judge Stoffel was left to consider what remedy was appropriate:

The court concludes the only appropriate remedy as a result of the improper withdrawal is dismissal with prejudice of the charges the [Appellee] faces at this current court-martial. R.C.M. 604(b) authorizes no other outcome based on the facts and circumstances of this case. Having concluded the original charges and specifications were withdrawn for an improper reason and resulted in unfair prejudice to the [Appellee], those same charges and specifications cannot be referred to another court-martial.

(Id. at para. 42.)

Government Motion for Reconsideration

On 2 January 2025, trial counsel moved for reconsideration. (App. Ex. LXXXVIII.) Trial counsel argued that dismissal with prejudice was not merited by the facts as found by Judge Stoffel and requested he reconsider his conclusions of law. (Id.) Trial counsel asserted that Judge Stoffel erred in three ways: (1) that the withdrawal was not done for an improper purpose, but instead was done to cure potential UCI identified by the prior military judge; (2) that Appellee was not prejudiced because there was no final ruling issued by the prior military judge and any hypothetical possibility of a final ruling favorable to the Appellee does not constitute prejudice; and (3) that lesser remedies than the extraordinary remedy of dismissal with prejudice would have been appropriate to cure any concerns of the court. (Id.)

Judge Stoffel's Ruling—Motion to Reconsider

On 6 January 2025, Judge Stoffel denied the government's motion for reconsideration. (App. Ex. XC.) Judge Stoffel noted that the government had provided no additional evidence for the court to consider, and the government failed to demonstrate any changes in the law since the court's ruling. (Id.) He further asserted:

The court also notes that in oral argument during the 9-10 September 2024 Article 39(a) session, the court specifically highlighted the issue of the propriety of the withdrawal and dismissal of the original charges. The prosecution did not supplement its argument with any of the cases to which is now cites either at the conclusion of that hearing or at any time prior to the court issuing its written ruling and order.

...

[T]he prosecution [sought] to engage in further debate about a matter for which the parties had ample time and opportunity to address with the court prior to the court's ruling. Notably, there have been no less than three Article 39(a) sessions related to this currently convened court, each of which...lasted days.

(Id.)

Judge Stoffel ultimately concluded that there was no reason to reconsider his prior ruling and order. (Id.)

STATEMENT OF STATUTORY JURISDICTION

Judge Stoffel's ruling dismissed all charges and specifications with prejudice. (App. Ex. XXXI; *Charge Sheet*, dated 11 August 2023.) His ruling thus terminated "the proceedings with respect to" all charges and specifications. *See* 10 U.S.C. § 862(a)(1)(A). For these reasons, this Court has jurisdiction under Article 62(a)(1)(A), UCMJ.

ARGUMENT

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE MADE THE ERRONEOUS LEGAL CONCLUSION THAT (1) THE WITHDRAWAL IN THIS CASE WAS DONE FOR AN IMPROPER PURPOSE AND (2) THAT APPELLANT WAS PREJUDICED BY THE WITHDRAWAL.

Standard of Review

Appellate courts review dismissal of charges and specifications for an abuse of discretion. *See United States v. Bowser*, 73 M.J. 889, 898 (A.F. Ct. Crim. App. 2014) (citing *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010)); *United States v. Gore*, 50 M.J. 178, 187 (C.A.A.F. 2004)). "A military judge abuses his discretion when (1) the findings of fact upon which he predicate[s] his ruling are not supported by the evidence of the record, (2) if incorrect legal principles were used, or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010). "[A]ny legal ruling based on an erroneous view of the law also constitutes an abuse of discretion." *United States v. Harrington*, 83 M.J. 408, 416 (C.A.A.F. 2023). An abuse of discretion includes actions that are "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks and citations omitted).

These standards also apply to interlocutory appeals under Article 62, UCMJ. *See* United States v. Mitchell, 76 M.J. 413, 417 (C.A.A.F. 2017).

“In ruling on an appeal under Article 62, the Court of Criminal Appeals may act only with respect to matters of law.” 10 U.S.C. § 862(b). When reviewing the military judge’s findings of fact, this Court is limited to determining whether “the military judge’s factual findings are clearly erroneous or unsupported by the record.” United States v. Luteza, 76 M.J. 698, 701 (A.F. Ct. Crim. App. 2017) (citations omitted). This Court “reviews the military judge’s decision directly and reviews the evidence in the light most favorable to [Appellee].” United States v. Lewis, 78 M.J. 447, 452 (C.A.A.F. 2019) (quoting United States v. Pugh, 77 M.J. 1, 3 (C.A.A.F. 2017)). A military judge “enjoys ‘broad discretion’ under the abuse of discretion standard in selecting a remedy to correct a wrong.” Douglas, 68 M.J. at 354. But dismissal is not an appropriate remedy where less drastic alternatives would have remedied the harm. Shelby, 2025 CAAF LEXIS 64, at *6.

Law and Analysis

Judge Stoffel’s decision to dismiss the charges and specifications with prejudice constituted an abuse of discretion because he repeatedly and unreasonably applied the law to the facts, and he had a fundamental misunderstanding of the law. This is true for two reasons: (1) he incorrectly concluded that the withdrawal and dismissal in this case was done for an improper reason; and (2) he incorrectly determined that Appellee suffered prejudice because he lost the benefit of a favorable trial ruling.

1. *The military judge erred by concluding that the withdrawal and dismissal of Appellee's first court-martial was done for an improper purpose. The military judge's own findings of fact demonstrate the withdrawal was done to cure possible UCI identified by the initial military judge, which is a proper purpose.*

- a. There was a proper purpose for the withdrawal and dismissal of charges.

Proactively withdrawing and dismissing charges and specifications to cure UCI is not an improper purpose. A convening authority “may for any reason cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced.” R.C.M. 604(a)(1). “Charges which have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper purpose.” R.C.M. 604(b). The Discussion to R.C.M. 604 explains that improper purposes for withdrawal “include an intent to interfere with the free exercise by the accused of constitutional rights or rights provided under the UCMJ, or with the impartiality of a court-martial. A proper reason for withdrawal is “a legitimate command reason which does not ‘unfairly’ prejudice an accused.” United States v. Underwood, 50 M.J. 271, 276 (C.A.A.F. 1999). Here, curing potential UCI is a legitimate command reason for withdrawal.

Judge Stoffel found as fact that the 15 AF/CC “recognized that the military judge found some evidence of UCI in the preferral of charges by Col Coyle, and that to address the concerns of the UCI and based on the advice of his staff judge advocate, he directed all charges and specifications against [Appellee] be withdrawn and dismissed without prejudice.” (App. Ex. LXXXVI, at para. 26.) R.C.M. 104, Command Influence, establishes a list of actions a convening authority is prohibited from engaging in so as not to create UCI: (1) the convening authority may not censure, reprimand, or admonish a court-martial with respect to the findings or sentence adjudged by the court-martial, or with respect to any other exercise of the functions of the court-martial; and (2) the convening authority may not deter or attempt to deter a potential

witness from participating in the investigation or testifying at a court-martial. R.C.M.

104(a)(1)(A)-(B). Nothing within the text of R.C.M. 104 prohibits a convening authority from taking steps to correct potential errors made manifest during a court-martial, so long as those corrections are within the convening authority's delegated authority.

In fact, the Convening Authority had a duty, upon being alerted to the fact that there were concerns about UCI, to take proactive steps to cure potential UCI. *See United States v. Gilmet*, 83 M.J. 398, 405 (C.A.A.F. 2023) ("Here...the command failed to take the *necessary* steps to purge the effects of the UCI from the [a]ppellant's trial.") (emphasis added); *see also United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998) (viewing the command's remedial measures to cure UCI approvingly and holding that they sufficiently cured UCI). The government should not be punished for taking the necessary steps to cure potential UCI where it has come to the attention of those involved. It is axiomatic that UCI is "the mortal enemy of military justice," and taking appropriate legal actions to cure the taint of any UCI in this case was not an improper purpose for the government's withdrawal. *Lewis*, 63 M.J. at 407.

- b. Judge Stoffel's determination that the government's withdrawal was accomplished for an improper purpose was erroneous and conflicts with his own findings of fact.

Despite Judge Stoffel's finding of fact that the convening authority withdrew to cure UCI, the military judge nonetheless found that the withdrawal was done for an improper purpose—an intent to interfere with the impartiality of a court-martial. (App. Ex. LXXXVI, at para. 40.) Specifically, Judge Stoffel concluded that the convening authority's actions interfered with a ruling of the court after Appellee had been arraigned. (*Id.* at para. 40.c.) In arriving at his conclusion, he analogized this case to *Vanover*, where the Court found improper withdrawal because the government's withdrawal was an attempt to circumvent an evidentiary ruling excluding evidence. 27 M.J. at 347-348. But Judge Stoffel's analogy overlooks a crucial

distinction between this case and Vanover—that Judge Smith had not issued a final ruling in this case. Judge Smith merely found that the defense had met their burden to demonstrate *some* evidence of UCI. (App. Ex. LXXXVI, at para. 7-14.) Thus, the burden of persuasion had merely shifted to the government. (Id. at para. 17.)

Crucially, Judge Smith did not find that UCI had actually occurred, and he provided the government three options for the next trial date. To prove beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute UCI; or (3) the UCI would not affect the findings or sentence. (Id.) Unspoken was a fourth option, supported by case law from our superior court—that the convening authority could take the necessary steps at the command level to cure the concerns regarding UCI. This Court’s superior Court has chided commanders, convening authorities, and trial counsel for their lack of effort—or imperfect efforts—to correct UCI. See Gilmet, 83 M.J. at 405 (“Here...the command failed to take the necessary steps to purge the effects of the UCI from the [a]ppellant’s trial.”) Therefore, the convening authority’s actions were done not to subvert Judge Smith’s preliminary ruling, but were accomplished in recognition of that ruling and consistent with guidance from our superior Court in Gilmet and Rivers.

Judge Stoffel’s reliance on Vanover was inapt for two reasons: (1) this case is factually distinct from Vanover; and (2) Underwood is more recent precedent from our superior Court, overlooked by Judge Stoffel, that distinguishes and clarifies the Court’s holding in Vanover. In Vanover, the military judge issued a final evidentiary ruling excluding the admission of certain evidence. See *id.*, 27 M.J. at 346. After the military judge’s ruling, the convening authority withdrew the charges and initiated a second court-martial involving the same conduct, which would have involved the same evidence that was previously excluded by the military judge’s

ruling. Id. at 347. Our superior Court found that the withdrawal was improper because it was done with the intent to flout the military judge's exclusion of evidence. Id. at 347-48. But here, there was no final ruling from Judge Smith. Judge Smith found that the specter of UCI had been raised. (App. Ex. LXXXVI, at para. 17.) He made no findings that UCI had, in fact, occurred, nor did he make any findings about whether a remedy was appropriate or what that remedy would be. In withdrawing and dismissing the charges, the convening authority did not flout Judge Smith's ruling; the convening authority heeded the judge's preliminary findings and took proactive steps to remedy the potential error.

Judge Stoffel also failed to acknowledge Underwood in either his initial ruling or his ruling on the government's motion for reconsideration, despite it being brought to his attention. (App. Ex. LXXXVIII at para. 7, 20-21.) Ignoring such precedent is problematic because Underwood is a more recent case that specifically distinguishes and clarifies the Court's opinion in Vanover. In Underwood, the government moved to continue the case because of witness unavailability. 50 M.J. at 272. The government's motion for continuance was repeatedly denied by the military judge. Id. at 275. To ensure witness availability at trial, the convening authority withdrew and later rereferred the charges. Id. at 273. The arguable effect of the withdrawal was to frustrate and obviate the ruling by the court on the continuance—facially, “interference with a ruling of the court by the convening authority after the accused had been arraigned.” (App. Ex. LXXXVI at para. 40.c.) Yet, our superior Court found that Underwood was not similar to Vanover because the trial judge's ruling was not clearly flouted. CAAF found that the convening authority's actions did not constitute “illegal interference with the exercise of the judicial function.” Id. at 275-76. Rather, the Underwood Court cited to a long list of cases

generally standing for the proposition that a legitimate command reason is proper absent some vindictiveness, malice, or arbitrariness exhibited by the convening authority. Id. at 276.

Judge Smith's preliminary ruling raised concerns that Colonel Coyle's preferral of charges may have been influenced by UCI. (Id. at para. 7-14.) If true, those charges are merely treated as "unsigned and unsworn." (Id. at para. 15.) At best, the remedy for such an error would be dismissal *without prejudice*. The withdrawal and dismissal here allowed for an independent commander, Colonel Voigt, to decide to re-prefer the charges against Appellee, thus, remedying the alleged defective preferral and ensuring that the charges were signed and sworn by someone free from any potential of UCI. Thus, this case is not like Vanover because there was no final ruling, nor was there an attempt to evade a final ruling.

Simply because a convening authority's withdrawal of charges frustrates or obviates a military judge's ruling does not constitute a *per se* improper purpose. Underwood, 50 M.J. at 274-75. Rather, the operative concern is whether the convening authority acted with malice in a proceeding, for example, whether "an evidentiary ruling...was flouted," Id. at 275 (distinguishing Vanover, 27 M.J. 345), or whether the convening authority acted with "vindictiveness" against the accused. United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983)). Here, there is no evidence of vindictiveness or retaliation. In fact, Judge Stoffel found "the convening authority did not have the specific intent to interfere with the impartiality of the court." (App. Ex. LXXXVI, at para. 40.c.)

Here, there was no "vindictiveness, malice, or arbitrariness," and Judge Stoffel's failure to acknowledge the key distinctions between Vanover and Underwood was erroneous. His findings of fact demonstrate that the convening authority was alerted to potential UCI in this case, believed it was in his power to cure it, and attempted to do so. This case is therefore

analogous to Underwood, but not Vanover. As discussed in the introduction, Judge Stoffel's determination that the convening authority's attempt to cure UCI in a case "created the appearance of evil" is a dangerous precedent that would have chilling effects on other convening authorities attempting to rectify procedural errors. "[C]onvening authorities must not fear being penalized for discharging their...[responsibilities] diligently and conscientiously." United States v. Underwood, 47 M.J. 805, 813 (A.F. Ct. Crim. App. 1997.) Here, the convening authority's actions were a logical choice intended to *prevent* the appearance of impropriety by proactively addressing potential UCI. Thus, the dismissal and re-referral of the charges in this case did not violate R.C.M. 604(d), and it was error for Judge Stoffel to find otherwise.

2. *The military judge erred by concluding that the Appellee had been prejudiced because he did not lose the benefit of a favorable trial ruling.*

Judge Stoffel's conclusion that Appellee was prejudiced by the withdrawal and dismissal of his original court-martial was clearly erroneous. Judge Stoffel premised this finding heavily on his determination that Appellee lost the benefit of a favorable trial ruling. (App. Ex. LXXXVI, at para. 41.d.) But he misapprehended the import of Judge Smith's preliminary ruling. Appellee did not lose the benefit of a favorable ruling, because no favorable ruling had been made, nor did Judge Smith ever indicate that dismissal with prejudice would have been the appropriate remedy.

In assessing whether an appellant has been prejudiced by withdrawal and dismissal, our superior Court considers a number of factors: (1) whether the second court-martial was the same type as the first; (2) whether the same military judge presided over the second trial; (3) whether the appellant lost the benefit of a favorable trial ruling; (4) whether the appellant was in pretrial confinement during the withdrawal and rereferral process; and (5) whether the appellant made a motion at the second court-martial based on prejudicial delay. See United States v. Lear, 73 M.J.

364, 370 (C.A.A.F. 2014) (citing Underwood, 50 M.J. at 276). At the outset, the government acknowledges that Judge Stoffel is indeed different than Judge Smith—the military judge in Appellee’s first court-martial—and that Appellee has moved for relief based upon alleged speedy trial issues. Thus, those two factors do favor Appellee. But this court-martial is the same type and includes the very same charges as those in Appellee’s first court-martial. (App. Ex. LXXXVI, at para. 41.a.) Moreover, Appellee was not confined during the withdrawal and rereferral process. (Id. at 41.c.) Thus, those factors weigh in favor of the government. Accordingly, the crucial question before this Court then is whether Judge Stoffel’s determination that Appellee lost the benefit of a favorable trial ruling due to the withdrawal and rereferral of charges was clearly erroneous. (Id. at 41.d.) It was.

As Judge Stoffel explained in his ruling, the loss of a favorable ruling was the factor to which he ascribed the “most weight.” (Id.) In his analysis, Judge Stoffel highlighted that Judge Smith had found some evidence of UCI, and the burden had shifted to the prosecution to prove beyond a reasonable doubt (1) the predicate facts did not exist; (2) the facts did not constitute UCI; or (3) the UCI would not affect the findings or sentence. (Id.) But Judge Stoffel appears to have misapprehended the distinction between a preliminary burden ruling and a final one. Judge Smith had not ordered the government to do or not do anything, nor had he excluded any evidence, or articulated any remedy. More importantly, he had not found that UCI had been committed—merely that the Appellee had met his initial burden of persuasion to demonstrate some evidence of UCI. (Id. at para. 17.) Thus, there was simply no final ruling present here.

Further, Judge Stoffel appears to have based his analysis on speculation regarding what the final ruling *would have been* had Judge Smith actually issued one:

Because the convening authority chose to withdraw and dismiss the charges at this crucial stage, the accused, this court, and the general

public are *left to wonder* whether the original military judge would have determined *whether* the prosecution had satisfied its burden on the motion beyond a reasonable doubt and if they had not done so, *what remedy* the original military judge *would have deemed appropriate*.

(Id. at para. 41.d) (emphasis added). He continued “[t]his is vitally important given the *potential* case-dispositive outcome of which the accused was deprived due to the post-arraignment actions of the convening authority.” (Id.) (emphasis added). But the relevant factors justifying relief in Lear do not contemplate the *potentiality* of a favorable ruling. Further, courts must avoid speculation when assessing whether prejudice has been demonstrated. See United States v. Hudson, 46 M.J. 226 (C.A.A.F. 1997) (finding that speculation was not sufficient to show real harm or legal prejudice). The relevant analysis addresses only whether Appellee was deprived of a concrete and actual favorable trial ruling. Here, Appellee was not.

Judge Stoffel seemed to assume without justification that the government would have failed to meet its burden, *and* that Judge Smith would have determined that a remedy would have been appropriate, *and* that the remedy would have been dismissal *with prejudice*. Yet there is no indication in the record that Judge Smith had any of those intentions, nor do the facts support such a finding or remedy.

In fact, had Judge Smith dismissed with prejudice for a defective preferral, it would have been a clear abuse of discretion. As our superior Court recently reaffirmed in Shelby, “when an error can be rendered harmless, dismissal is not an appropriate remedy.” 2025 CAAF LEXIS 64 at *4 (citing Gore, 60 M.J. at 187). In Shelby, our superior Court addressed whether a military judge’s dismissal with prejudice for UCI was an abuse of discretion. Id. at *3. In determining that it was, the Court noted that “because less drastic alternatives remedied the concerns raised by the military judge, his decision to dismiss the charge and specification with prejudice

constituted an abuse of discretion.” Id. at *6 (quoting Gore, 60 M.J. at 187). Here, there were less drastic remedies available to Judge Smith to remedy the potential UCI identified in his ruling.

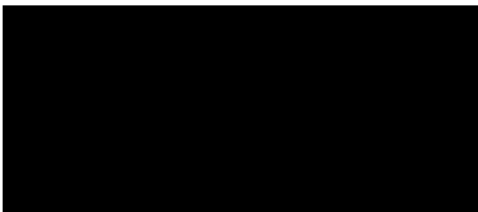
Judge Smith’s ruling identified UCI at the preferral stage because the SPCMCA at Appellee’s first court-martial “may have preferred charges at the direction of the GCMCA.” (App. Ex. LXXXVI at para. 14.) As Judge Smith noted, if these facts were true the charges are treated as “unsigned and unsworn.” In that event, the preferral would be defective. But defective preferral does not necessitate dismissal with prejudice. A dismissal without prejudice to remove the tainted preferral authority would have, and did indeed, remedy the alleged defective preferral. Moreover, if Judge Smith had found that the GCMCA had engaged in UCI and was thereby disqualified under R.C.M. 601, a dismissal without prejudice would have allowed the case to be transferred to another convening authority for potential action. Where the alleged UCI stems from the accusatory process, the appropriate remedy would have been—at best—dismissal without prejudice, which is effectively what happened here: withdrawal and dismissal without prejudice to allow an untainted party to review the evidence and determine whether preferral of charges was appropriate. The GCMCA’s action therefore put Appellee in the exact same position he would have been had he prevailed on his UCI motion.

If Appellee believed the convening authority’s actions were not sufficient to remedy the alleged UCI at his first court-martial, he was also free to raise that issue at the second court-martial, which he, in fact, did. (App. Ex. VIII.) And if Judge Stoffel’s withdrawal and dismissal is overturned here, Appellee is still free to move forward on a motion to dismiss for UCI in the referral process. If he were to meet his burden that any alleged UCI was not sufficiently cured by the convening authority’s actions, then dismissal with prejudice would still be an available

remedy to the trial judge. But Judge Stoffel seemed to take for granted that Judge Smith would have used the most severe remedy, where Judge Smith was required by law to use the least drastic, but still effective, remedy. Therefore, Judge Stoffel's speculative conclusion that the convening authority's actions deprived Appellee of a concrete favorable trial ruling and his subsequent determination that the factors supported the legal conclusion that Appellee was unfairly prejudiced by the withdrawal and rereferral of charges was an abuse of discretion. (Id. at 41.d.)

CONCLUSION

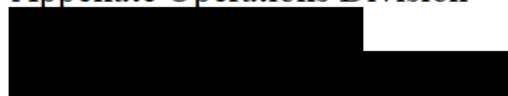
Judge Stoffel abused his discretion when he repeatedly and unreasonably applied incorrect legal principles to the facts and demonstrated a fundamental misunderstanding of the remedies available to cure the alleged harm. As a result of his erroneous application of law to the facts of this case, he dismissed all charges and specifications with prejudice. It was contrary to both logic and the law to conclude that (1) withdrawing and dismissing without prejudice to cure the taint of UCI was an improper purpose for withdrawal; and (2) that speculation as to what ruling may have been forthcoming was sufficient to establish that Appellee lost the benefit of a favorable trial ruling.



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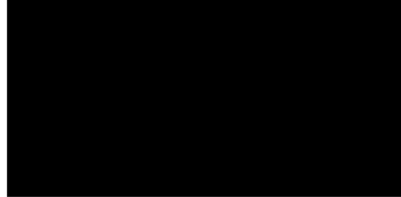


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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 20 February 2025 via electronic filing.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division



UNITED STATES,	)	APPELLEE’S ANSWER TO
<i>Appellant,</i>	)	UNITED STATES’ APPEAL
	)	UNDER ARTICLE 62, UCMJ
v.	)	
	)	Before Panel No. 3
Captain (O-3)	)	
JUAN G. GALE,	)	Misc. Dkt. No. 2025-01
United States Air Force,	)	
<i>Appellee.</i>	)	13 March 2025

INTRODUCTION

STATEMENT OF THE CASE

On 22 March 2022, Colonel (Col) Kevin Coyle, Commander of the 552d Air Control Wing, offered nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 815, to Captain (Capt) Juan G. Gale, on behalf of then-Major General Michael Koscheski, the Commander of Fifteenth Air Force (15 AF). Appellate Ex. XXVI at 9, 406. Capt Gale turned down the offer of nonjudicial punishment and demanded a trial by court-martial. *Id.*

On 1 September 2022, Col Coyle, acting as the Special Court-Martial Convening Authority (SPCMCA), preferred the following charges and specifications on Capt Gale, Appellee: one

charge and one specification of abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920; one charge and one specification of assault consummated by battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928; one charge and one specification of conduct unbecoming of an officer, in violation of Article 133, UCMJ, 10 U.S.C. § 933; and one charge and one specification of fraternization, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Charge Sheet, 1 September 2022, Gale 1 Record of Trial (ROT),¹ Vol. 1; *Manual for Courts-Martial (MCM)*, Part IV, ¶68b.b.(1), (3) (2016 ed.); *MCM*, Part IV, ¶95.b.(1), (3) (2019 ed.).² On 21 February 2023, General Koscheski, acting as the General Court-Martial Convening Authority (GCMCA), referred the charges to a general court-martial (GCM). Charge Sheet, Gale 1 ROT, Vol. 1.

C. The defense moves to dismiss the charges.

From 23 through 24 May 2023, Lieutenant Colonel Thomas Smith presided as military judge over arraignment and motion practice in the case. Gale 1 ROT, R. at 120-318. Among the motions taken up at this Article 39(a) session was a defense motion to dismiss the referred charges and specifications on the basis of unlawful influence, vindictive prosecution, and prosecutorial misconduct. Gale 1 ROT, Appellate Ex. XX. As part of its presentation of evidence on this motion, the defense presented sworn testimony from Col Coyle, the SPCMCA. Gale 1 ROT, R. at 127-152. In response to the defense's motion, the prosecution submitted several pieces of documentary evidence for the court's consideration. Gale 1 ROT, Appellate Exs. XXI – XXIII, XXVII – XXXIII; R. at 256.

¹ Two records of trial exist in this case. For the sake of clarity and consistent with Appellant's Brief, the ROT pertaining to the charges improperly withdrawn and dismissed by the convening authority on 7 June 2023 will be referred to as "Gale 1 ROT."

D. Judge Smith emails initial findings on the defense’s motion to the parties.

On 24 May 2023, Judge Smith indicated that the court would be next in session on 12 June 2023 to take up the remaining outstanding motions. *Id.* at 318. On 1 June 2023, Judge Smith emailed the parties. Appellate Ex. XXVI, Ex. QQ. The subject line of the email was “US v. Gale (Tinker) – Notice of Ruling re [Unlawful Command Influence] (Burden Shift to Govt).” *Id.* In the email, Judge Smith found “the Defense has met its burden of raising some evidence of both apparent and actual [unlawful command influence (UCI)] with regard to both the preferral and referral of the charges in this case.” *Id.* Judge Smith specifically determined, “[T]he Defense has presented some evidence that Col Coyle, the individual who preferred the charges in this case, may have done so at the direction of . . . the GCMCA who initially offered the accused [nonjudicial punishment (NJP)] and ultimately referred the charges in this case to a GCM after the accused turned down the NJP offer.” *Id.* He further found that it was General Koscheski, in his role as the GCMCA, “who determined the accused should be brought to trial upon turning down the NJP offer, and Col Coyle was just [the GCMCA]’s conduit for preferring charges.” *Id.* Based on this evidence, Judge Smith determined that these facts 1) were “some evidence that Col Coyle’s preferral of charges in this case was influenced by the [GCMCA],” and 2) “raise[d] the issue of whether [the GCMCA] stepped into the role of the accuser, thereby disqualifying himself from being eligible to refer the charges in this case in accordance with R.C.M. 601(c).” *Id.*

Based on these findings, Judge Smith determined that “the burden has shifted to the Government to prove beyond a reasonable doubt that ‘(1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence [will] not affect the findings or sentence.’” *Id.* In addition, the government would be required to “prove beyond a reasonable doubt that the apparent UCI did not place ‘an intolerable strain on public perception of the military justice system.’” *Id.* Judge Smith informed the parties they should be

prepared to address the issue at the scheduled 12 June 2023 Article 39(a) session. On 5 June 2023, defense counsel responded to the email, including trial counsel, and objected to the prosecution being provided “an opportunity to cure without good cause,” because it had been provided opportunities at the prior motions hearing to call witnesses, recall Col Coyle, and present any other additional evidence it needed to overcome its burden. Appellate Ex. XXVI, Ex. RR. The detailed trial counsel made the GCMCA’s servicing legal office, including the GCMCA’s staff judge advocate (SJA), aware of the court’s findings. R. at 328-29.

E. The GCMCA withdraws and dismisses the charges.

On 7 June 2023, the GCMCA, after receiving and considering the advice of his SJA, directed the charges and specifications be withdrawn and dismissed without prejudice. Withdrawal and Dismissal of Charge and Specifications Memorandum, Gale 1 ROT, Vol. 4. On 6 July 2023, Col Kenneth Voigt, Col Coyle’s replacement, preferred four charges and specifications against Capt Gale. Charge Sheet, Gale 1 ROT, Vol. 1. The preferred charges and specifications were identical in all respects to those that the GCMCA previously withdrew and dismissed. *Id.* On 11 August 2023, the same GCMCA, again, referred the same charges to trial by general court-martial. *Id.* On 6 September 2023, Major Tiny Bowman was detailed as the military judge for that court-martial. Appellate Ex. LXXXVI, at ¶ 25.

On 8 September 2023, General Koscheski sent a written response to a Congressional inquiry made by Senator Rick Scott pertaining to Capt Gale’s case. Appellate Ex. XXVI, Ex. TT. In his response, General Koscheski referred to Judge Smith’s ruling on the defense motion for UCI. *Id.* He recognized that Judge Smith found some evidence of UCI in the preferral of charges by Col Coyle, and that to address those concerns of UCI and based on the advice of his SJA, he directed all charges and specifications against the accused be withdrawn and dismissed without prejudice. *Id.*

F. The defense files a motion to dismiss for improper withdrawal of charges.

On 28 December 2023, the defense filed motions to dismiss on the basis of unlawful influence, selective prosecution, and violation of Capt Gale's speedy trial rights. Appellate Exs. VI, VIII. Encompassed within the defense's speedy trial motion was also a claim that relief was warranted based on the improper withdrawal of the original charges and specifications. Appellate Ex. VI. From 22 through 23 February 2024, Judge Bowman presided over the arraignment and motion practice for Capt Gale's subsequent court-martial. R. at 10-532. Several witnesses testified at this session, including General Koscheski, the former 15 AF Commander. R. at 32-116. His sworn testimony conflicted with his earlier written response to Senator Scott some five months earlier, particularly in that he testified under oath that he was unaware of Judge Smith's ruling at the time he decided to withdraw and dismiss the charges and specifications. *Compare* Appellate Ex. XXVI, Ex. TT, *with* R. at 45.

From 26 through 28 March 2024, Judge Bowman presided over a subsequent Article 39(a) session in which the defense raised a motion to recuse the military judge. R. at 533-718, Appellate Ex. XLV. During this Article 39(a) session, Judge Bowman indicated she had informed the parties informally of her intent to deny the defense's motions to dismiss litigated at the earlier Article 39(a) session. R. at 535.

On 8 May 2024, Judge Bowman granted the defense motion for recusal.³ Appellate Ex. LXXXVI at ¶ 32, Appellate Ex. XLV. The written ruling on the defense motion for recusal was filed and distributed to the parties that same day. *Id.* She also filed and distributed her written rulings denying the defense's motions to dismiss on that day. Appellate Exs. XXXIII, XXXIV.

³ Judge Bowman granted a defense motion to recuse herself as the military judge based on an appearance of impartiality. Appellate Ex. LXXXI at 3. Judge Bowman was later formally investigated by the Judicial Inquiry Commission as a result of her actions taken with respect to Capt Gale's case. *Id.* at 22.

G. Judge Stoffel reconsiders Judge Bowman's ruling and grants the defense's motion to dismiss.

On 13 May 2024, a third military judge, Col Matthew Stoffel, was detailed as the military judge to Capt Gale's case. Appellate Ex. LXXXVI, ¶ 33. On 2 September 2024, the defense filed a motion to reconsider the court's previous rulings on the defense's motions to dismiss. Appellate Ex. LXXXI. From 9 through 10 September 2024, Judge Stoffel presided over an Article 39(a) session, hearing argument on the motion to reconsider as well as other outstanding motions. Appellate Ex. LXXXVI, ¶ 36. On 30 December 2024, Judge Stoffel granted the defense's motion for reconsideration, found that the charges from Appellee's first court-martial were improperly withdrawn, and ordered all charges and specifications be dismissed with prejudice. Appellate Ex. LXXXVI.

On 2 January 2025, the United States moved for reconsideration. Appellate Ex. LXXXVIII. On 6 January 2025, at 1408 hours Eastern Standard Time (EST), Judge Stoffel denied the government's motion for reconsideration. Appellate Ex. XC. On 8 January 2025, at 1802 EST, the United States filed a notice of appeal, notifying Judge Stoffel that it would be appealing his ruling to withdraw and dismiss the charges with prejudice. Gov. Record of Trial Docketing Memorandum, 31 January 2025, Attachment 2. Trial counsel forwarded the appeal and record of trial to the Air Force Appellate Operations Division, and it was received on 28 January 2025. Appellant (App.) Br. at 5. The government filed the record of trial with this Court on 31 January 2025. *Id.* The government filed its Brief with this Court on 21 February 2025. *Id.* at 1.

STATEMENT OF FACTS

A. Judge Stoffel's findings of fact.

Judge Stoffel made extensive findings of fact in this case. Appellate Ex. LXXXVI. The government does not dispute these findings of fact. App. Br. at 13 (alleging Judge Stoffel abused his discretion by “repeatedly and unreasonably” applying the law to the facts and misunderstanding . . . the law). Judge Stoffel compared the GCMCA’s written response to a congressional inquiry with the GCMCA’s in-court testimony on the Defense’s motion to dismiss and determined that the GCMCA was aware “that the military judge found some evidence of UCI in the preferral of charges by Col Coyle” and withdrew and dismissed the charges and specifications against Capt Gale to “address the concerns of UCI and based on the advice of his staff judge advocate.” Appellate Ex. LXXXVI at ¶¶ 26, 29. This improper withdrawal was accomplished after Judge Smith informed the parties in an email that “the Defense has met its burden of raising some evidence of both apparent and actual UCI with regard to both the preferral and referral of the charges in this case.” *Id.* at ¶ 14. Specifically, Judge Smith determined the following regarding the initial preferral: 1) there was some evidence that Col Coyle preferred charges in the case at the direction of the GCMCA; 2) the GCMCA who initially offered Capt Gale nonjudicial punishment is the same GCMCA who ultimately referred charges against Capt Gale after Capt Gale turned down NJP; and 3) the GCMCA had determined that Capt Gale should be brought to trial after he turned down NJP and Col Coyle “was just [the GCMCA’s] conduit for preferring charges.” *Id.* Finally, this evidence “raise[d] the issue of whether [the GCMCA] in this case, stepped into the role of accuser, thereby disqualifying him from being eligible to refer the charges in this case in accordance with R.C.M. 601(c).”⁴ *Id.* at ¶ 16.

⁴ An “accuser” is defined in Article 1, UCMJ, subparagraph (9) as “a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by

Judge Smith instructed the parties to be prepared to address the issue at the next Article 39(a) session, and specifically found that “the burden ha[d] shifted to the Government to prove beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence [will] not affect the findings or sentence.” *Id.* at ¶ 17. At the next Article 39(a) session, the government would be required to “prove beyond a reasonable doubt that the apparent UCI did not place an intolerable strain on public perception of the military justice system.” *Id.* The defense objected to the prosecution being provided an additional opportunity to present evidence, as it had already been provided opportunities to do so at the prior motions hearing. *Id.* at ¶ 19.

After Judge Smith’s email, and prior to the next scheduled Article 39(a) session, the GCMCA directed the withdrawal and dismissal of the charges without prejudice. *Id.* at ¶ 20. Approximately one month later, Col Voight preferred the exact same charges, and the same GCMCA, once again, referred them to a general court-martial. *Id.* at ¶¶ 23-24.

Judge Bowman was detailed as military judge for this second court-martial. *Id.* at ¶ 25. The defense filed motions to dismiss based on “unlawful influence, selective prosecution, and violation of [Capt Gale’s] speedy trial rights.” The speedy trial motion contained a claim of improper withdrawal of the original charges and specifications. *Id.* at ¶ 28. Motion practice on these motions occurred from 22 through 23 February 2024. *Id.* At this session, the GCMCA provided sworn testimony that conflicted with his response to an earlier congressional inquiry. *Id.* at ¶ 29. From 26 through 27 March 2024, Judge Bowman presided over a subsequent Article 39(a) session, wherein the defense raised a motion to recuse her as the military judge. *Id.* at ¶ 30. Judge

another, and any person who has an interest other than an official interest in the prosecution of the accused.”

Bowman later granted the defense motion for recusal and filed and distributed her written ruling denying the defense's motions to dismiss on the same day. *Id.* at ¶ 32.

B. Judge Stoffel's conclusions of law regarding improper withdrawal.

Judge Stoffel granted the defense's motion for reconsideration of Judge Bowman's denial of its motion to dismiss for improper withdrawal. *Id.* at ¶ 37. He found reconsideration of the motion was appropriate because Judge Bowman's recusal was contemporaneous with the denial of the motion to dismiss, and this timing "would cause an objective member of the public to harbor doubt about the impartiality of those rulings and how latter events shaped the way in which [Judge Bowman's] formal ruling was crafted." *Id.*

In analyzing the withdrawal of charges, Judge Stoffel applied R.C.M. 604(a)(1) and R.C.M. 604(b), recognizing that a convening authority can withdraw any charge or specification from a court-martial at any time before findings are announced. *Id.* at ¶ 38. "This would include reasons deemed proper and those deemed improper." *Id.* However, charges withdrawn for an improper purpose "may not be referred to another court-martial." *Id.*; R.C.M. 604(b). Withdrawn charges are properly re-referred when done for "a legitimate reason which does not unfairly prejudice an accused." *Id.* at ¶ 39 (quoting *United States v. Leahr*, 73 M.J. 364, 367 (C.A.A.F. 2014)). Judge Stoffel went on to discuss potential proper and improper reasons for withdrawal. *Id.* at ¶¶ 38-39 (citing *United States v. Mann*, 32 M.J. 883, 889 (N.M.C.M.R. 1991), *Discussion*, R.C.M. 604(b)). Judge Stoffel noted that "under some circumstances" charges withdrawn after arraignment may be referred to another court-martial, "such as when an accused fails to fulfill the terms of a plea agreement." Appellate Ex. LXXXVI at ¶ 39 (citing *Discussion*, R.C.M. 604(b)). An improper purpose includes "an intent to interfere with the free exercise by the accused of constitutional rights or rights provided under the UCMJ, or with the impartiality of a court-martial." *Discussion*, R.C.M. 604(b).

In holding that the withdrawal in Capt Gale’s case was improper, Judge Stoffel analyzed the following factors discussed in *Leahr*, 73 M.J. at 371: 1) whether the second court-martial is the same type as the first, 2) whether the same military judge presided over the second court-martial; 3) whether [Capt Gale] lost the benefit of a favorable trial ruling; 4) whether Capt Gale was in pretrial confinement during the withdrawal and referral process, and 5) whether Capt Gale moved the court for relief based on prejudicial delay. Appellate Ex. LXXXVI at ¶ 39. Ultimately, Judge Stoffel found that the withdrawal that occurred after the GCMCA was made aware of Judge Smith’s findings on the question of UCI raised by the defense, and before the government was required to overcome the burden shift, at the very least “created the appearance of evil.” *Id.* at ¶ 40. Judge Stoffel found that even if the withdrawal was not done with the intent to interfere with the impartiality of the court-martial, Capt Gale suffered unfair prejudice because 1) a new military judge was assigned when the case was re-docketed; 2) Capt Gale had moved the court for relief as a result of the improper withdrawal, dismissal, and re-referral; and 3) Capt Gale lost the benefit of a favorable trial ruling. *Id.* at ¶ 41.

C. Judge Stoffel’s conclusions of law regarding Capt Gale’s loss of a favorable trial ruling.

Judge Stoffel found that at the time the GCMCA withdrew and dismissed the charges, the prosecution was aware that Judge Smith had found “multiple bases to support his conclusion that the defense had satisfied its burden to demonstrate some evidence of both actual and apparent unlawful influence as applied to the original charges.” *Id.* at ¶ 41d. At the next Article 39(a) session, in order to avoid a favorable defense ruling, the government would be required to disprove beyond a reasonable doubt that there was no actual UCI *and* no apparent UCI. *Id.* The defense “clearly indicated that it objected and desired to be heard on whether the military judge should permit the prosecution to provide additional evidence” on this issue. *Id.* Due to the improper

withdrawal prior to the scheduled Article 39(a) session, “[Capt Gale], this court, and the general public are left to wonder whether the original military judge would have determined whether the prosecution had satisfied its burden on the motion beyond a reasonable doubt and if they had not done so, what remedy the original military judge would have deemed appropriate.” *Id.* Judge Stoffel found that while “dismissal with prejudice is an extraordinary outcome” any other remedy “would not cure the unfair prejudice suffered by [Capt Gale]” because re-referral was prohibited by R.C.M. 604(b) where the original charges and specifications were improperly withdrawn and resulted in unfair prejudice to Capt Gale *Id.* at ¶ 42.

ARGUMENT

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BECAUSE HIS DECISION WAS NOT ARBITRARY OR FANCIFUL, CLEARLY UNREASONABLE, OR CLEARLY ERRONEOUS.

Standard of Review

Appellate courts review dismissal of charges and specifications for an abuse of discretion. *See United States v. Bowser*, 73 M.J. 889, 898 (A.F. Ct. Crim. App. 2014) (citing *United States v. Douglas*, 68 M.J. 349, 354 (C.A.A.F. 2010)); *United States v. Gore*, 50 M.J. 178, 187 (C.A.A.F. 2004)). “The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be ‘arbitrary, fanciful, clearly unreasonable, or clearly erroneous.’” *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (internal citation omitted).

When reviewing matters under Article 62(b), UCMJ, this Court may act only with respect to matters of law. 10 U.S.C. §862(b); *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011) (internal citation omitted). When limited to reviewing matters of law, “the question is not whether [this Court] might disagree with the [military judge’s] findings, but whether those findings are fairly supported by the record.” *Baker*, 70 M.J. at 288 (internal citation and quotations omitted). This Court “may not find its own facts or substitute its own interpretation of the facts.” *Becker*,

81 M.J. 483, 489 (C.A.A.F. 2021) (internal citation and quotations omitted). Rather, this Court is “bound by the military judge’s factual determinations unless they are unsupported by the record or clearly erroneous.” *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017) (internal citation omitted). Finally, this Court “reviews the evidence in the light most favorable to the party which prevailed at trial,” which in this case is Capt Gale. *Id.* (internal citation omitted).

Law and Analysis

The government’s challenge in this interlocutory appeal is narrow, disputing none of military judge’s the facts, App. Br. at 2-3, 13, and only two alleged abuses of discretion: that Judge Stoffel “repeatedly and unreasonably applied the law to the facts” and “had a fundamental misunderstanding of the law” when he found that 1) the withdrawal was done for an improper purpose; and 2) Capt Gale was prejudiced by the withdrawal. *Id.* at 13. But, burdened with the obligation to show that Judge Stoffel’s conclusions were not “fairly supported by the record,” *Baker*, 70 M.J. at 288, the government’s arguments instead rest largely on conjecture about what Judge Stoffel “seemed” or “appear[ed]” to do. App. Br. at 20-21, 23. This is not sufficient for the government to overcome the firm evidentiary and legal footings on which Judge Stoffel’s ruling relies. Judge Stoffel relied on and correctly applied binding precedent and R.C.M. 604 in his thorough written ruling when determining that the government’s withdrawal of charges after Judge Smith made findings favorable to the defense prejudiced Capt Gale and specifically deprived him of a favorable trial ruling. Appellate Ex. LXXXVI. Dismissal with prejudice was the appropriate result and that outcome should persist in this interlocutory appeal.

A. The military judge did not abuse his discretion when he determined that the withdrawal was done with the intent to interfere with the impartiality of the court-martial.

Here, the procedural step was at the precipice of resolution of a case-dispositive motion dangling unfavorably over the prosecution. Judge Stoffel accurately concluded that the withdrawal

in Capt Gale’s case interfered with the impartiality of a court-martial, an improper purpose under R.C.M. 604(b). Appellate Ex. LXXXVI, at ¶¶ 39-40. In doing so, Judge Stoffel correctly recognized that the procedural step in a court-martial at which the withdrawal occurs is critical in determining whether a withdrawal is proper. *Id.* at ¶ 39 (citing *United States v. Leahr*, 73 M.J. 364, 367 (C.A.A.F. 2014)).

Judge Stoffel recognized that by applying the correct law to the facts of Capt Gale’s case. Contrary to the government’s assertion that Judge Stoffel “overlooked” *United States v. Underwood*, 50 M.J. 271 (C.A.A.F. 1999),⁵ Judge Stoffel understood that the following circumstances are to be considered in determining whether a withdrawal was improper: 1) whether the second court-martial is the same type as the first; 2) whether the same military judge presided over the second court-martial; 3) whether the accused lost the benefit of a favorable trial ruling; 4) whether the accused was in pretrial confinement during the withdrawal and re-referral process; and 5) whether the accused moved the court for relief based on prejudicial delay. Appellate Ex. LXXXVI at ¶ 39 (citing *Leahr*, 73 M.J. at 371 (quoting *Underwood*, 50 M.J. at 271)).

Armed with the correct governing law, Judge Stoffel then correctly analogized Capt Gale’s case to the circumstances in *Vanover v. Clark*, 27 M.J. 345 (C.M.A. 1988). While the government *would have preferred* Judge Stoffel to more fully discuss *Underwood*, the fact that he found *Vanover* to be more factually similar to Capt Gale’s case does not mean that his legal analysis is incorrect, or even that his analysis does not comport with the holding in *Underwood*. This is especially true given that the standard of review for this Court is abuse of discretion, *Bowser*, 73 M.J. at 898, with a focus on whether Judge Stoffel’s conclusions were fairly supported by the record. *Baker*, 70 M.J. at 288.

⁵ App. Br. at 16.

The solid basis for Judge Stoffel’s reliance on *Vanover*—and its analogous nature to Capt Gale’s case—arises from its similar procedural posture: an adverse pretrial decision against the government. In *Vanover*, the convening authority withdrew and dismissed charges after the military judge ruled in the defense’s favor to exclude evidence under Military Rule of Evidence (M.R.E.) 403. *Vanover*, 27 M.J. at 346. In finding that “the Government has not shown [the withdrawal and re-referral] complied with R.C.M. 604(b),” the Court of Military Appeals found “the practical effect of the convening authority’s withdrawal and re-referral action was that the first military judge’s ruling. . . was overturned.” *Id.* at 347. Thus, the “extraordinary action” of dismissal with prejudice was warranted to “adequately dispel appearances of evil” regardless of whether the Convening Authority’s actions in that case were “mere ‘coincidence’ resulting from lawful command action.” *Id.*

The government’s attempt to distinguish *Vanover* from Capt Gale’s case falls flat. The government focuses on the wrong part of *Vanover* in arguing for its distinction from Capt Gale’s case on the basis that *Vanover* involved a military judge’s “final ruling,” whereas in this case, Judge Smith’s findings did not constitute a “final ruling.” App. Br. at 18. But the Court in *Vanover* did not focus its analysis on the fact that the military judge’s ruling was final, instead emphasizing that the “practical effect” of the convening authority’s actions was to overturn the judge’s ruling, which created an “appearance of evil.” *Vanover*, 27 M.J. at 347-48. In Capt Gale’s case, despite the fact that Judge Smith had not issued a final ruling (because that was thwarted by the Convening Authority’s action), the government was on notice that Judge Smith had made findings that would require it to overcome a significant burden to avoid a negative outcome at the next Article 39(a) session. Appellate Ex. LXXXVI at ¶¶ 13-18. Here, the practical effect of the government’s withdrawal and dismissal at such a critical juncture was either an attempt to sidestep a ruling beneficial to the defense, as in *Vanover*, or at the very least, had the practical effect of avoiding

whatever favorable remedy Judge Smith might order, up to dismissal. Judge Stoffel's finding to that effect, rather than a finding that the GCMCA acted out of a benevolent desire to proactively cure the case of UCI (as the government claims) is well-reasoned, supported by precedent, and certainly not an abuse of his discretion.

The government in this case attempts to raise a similar argument as the government did in *Vanover*; that the Convening Authority was simply attempting to cure the UCI, and any practical effect on the military judge's findings was a "logical choice" to proactively address UCI. App. Br. at 19; *Vanover*, 27 M.J. at 347-48 (noting "[T]he Government argues that these referral actions are not subterfuge for judicial interference, but instead, are a mere 'coincidence' resulting from lawful command action.") Whether the GCMCA here possessed the intent to interfere with the impartiality of the court-martial, or whether (as the government argues) he was simply being "proactive" when he withdrew charges, Judge Stoffel correctly analyzed that given the "appearance of evil" resulting from the withdrawal, the end result was an interference with the ruling of the court *after* Capt Gale had been arraigned. Appellate Ex. LXXXVI, at 6; *Vanover* 27 M.J. at 347; App. Br. at 15. Instead of waiting on Judge Smith's ruling, which might have cleared the government of UCI, allowed the prosecution to start over by dismissing without prejudice, or been subject to contest in an interlocutory appeal such as this one, the GCMCA took matters into his own hands, cut off Judge Smith's authority over the case, and kept himself in the driver's seat, resulting in the present re-referred charges now-dismissed by Judge Stoffel. The government's *intent*, therefore, is immaterial, since the GCMCA's choice to withdraw at such a critical time after arraignment resulted in prejudice to Capt Gale. *See Vanover*, 27 M.J. at 347.

The government argues that Judge Stoffel ignored the precedent set by *Underwood*, which it claims, "specifically distinguishes and clarifies the Court's opinion in *Vanover*." App. Br. at 17. The government's argument ignores that in *Underwood*, the military judge specifically stated that

“his earlier rulings did not implicitly preclude, nor did he intend to preclude” the convening authority’s choice to withdraw and re-refer charges. *Underwood*, 50 M.J. at 275. Contrary to the government’s argument that *Underwood* “is a more recent case that specifically distinguishes and clarifies the Court’s opinion in *Vanover*,” the C.A.A.F. found that the circumstances in *Vanover* and *Underwood* were dissimilar, such that the government’s claim that Judge Stoffel erred by not acknowledging *Underwood* (though this, too, is inaccurate) fails. Rather, Judge Stoffel appropriately found that the facts in Capt Gale’s case were more like *Vanover*, where the convening authority’s actions overturned the military judge’s ruling, than in *Underwood*, where the convening authority’s actions did not flout the military judge’s ruling. *Compare Vanover*, 27 M.J. at 347 with *Underwood*, 50 M.J. at 275. The Court of Appeals for the Armed Forces (C.A.A.F.) distinguished *Underwood* from *Vanover* because in *Underwood*, the government did not “frustrate or obviate a military judge’s ruling” at all. *Underwood*, 50 M.J. at 275. But that is exactly what the GCMCA did in Capt Gale’s case – the government precluded Judge Smith from reaching a final ruling when it withdrew the charges before he could do so. So, while the government argues that Judge Stoffel’s ruling would have a “chilling effect” on the exercise of legitimate command authority, [App. Br. at 2], such an argument only knocks down a different one than Judge Stoffel addressed, with Judge Stoffel focused instead on the *illegitimate* exercise of command authority to wipe away disfavored court rulings.

If anything, allowing the GCMCA’s actions in this case to stand would set a troubling precedent. It would effectively permit a convening authority to sidestep a negative ruling simply by withdrawing and re-referring charges in the middle of an Article 39(a) session, thereby undermining the integrity of the judicial process and granting an unfair advantage to the government in anticipation of a favorable ruling for the defense. This undermines the very foundation of the military justice system and, Judge Stoffel recognized, contravenes R.C.M.

604(b). [add citation]. Further, such a precedent would incentivize convening authorities to “forum shop” for judges when it becomes clear that a particular judge is inclined to rule against the government during motions practice.

Even if Judge Stoffel had been more specific in his analysis of Capt Gale’s case using *Underwood*, the government fails to show how his use of legal principles was incorrect or “his application of the correct legal principles to the facts is clearly unreasonable.” *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010). The government argues that Judge Stoffel’s ruling fails to acknowledge *Underwood*, App. Br. at 16. However, Judge Stoffel correctly analyzed Capt Gale’s case by the factors articulated in *Underwood*. Appellate Ex. LXXXVI, at ¶ 41(a) through (d). The government simply disagrees with Judge Stoffel’s ultimate conclusion that, after applying the factors articulated in *Underwood*, the convening authority’s decision in Capt Gale’s case had the practical effect of interfering with a ruling of the court to the detriment of Capt Gale. Judge Stoffel correctly analyzed and applied the law to Capt Gale’s case, and thus he did not abuse his discretion in finding that the GCMCA’s withdrawal of charges was improper where it interfered with the impartiality of the court-martial.

B. The military judge did not abuse his discretion when he found that Capt Gale lost the benefit of a favorable trial ruling.

Judge Stoffel did not abuse his discretion in finding that the GCMCA’s actions deprived Capt Gale of a favorable trial ruling because Judge Smith’s initial finding that the defense met the first prong in the *Biagese* framework, was sufficient to establish a favorable defense ruling that Capt Gale then lost as a result of the GCMCA’s actions. *United States v. Biagese*, 50 M.J. 143 (C.A.A.F. 1999); Appellate Ex. XXVI, Ex. QQ. Even if this Court determines that the loss of this initial finding alone is not sufficient to establish the loss of a favorable trial ruling, Judge Stoffel’s determination that Capt Gale lost the benefit of a favorable trial ruling when the GCMCA withdrew

and dismissed charges after he had been informed of Judge Smith's findings regarding UCI, and before the generously afforded Article 39(a) session where the government would have a second opportunity to overcome the burden shift, is supported by Judge Stoffel's analysis of *Underwood*. The C.A.A.F. held in *Biagese* that while the defense has the initial burden of producing sufficient evidence to raise UCI, once it is raised, "the appearance or existence of [UCI] creates a rebuttable presumption of prejudice." *Biagese*, 50 M.J. at 149 (citing *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)). Judge Smith articulated to the parties, as the C.A.A.F. did in *Biagese*, that this burden shift was enacted prior to the GCMCA's withdrawal of charges- that the Government was now required to overcome this rebuttable presumption beyond a reasonable doubt. Appellate Ex. XXVI, Ex. QQ. This finding, alone, was favorable to the defense, and the government's decision to extinguish it resulted in prejudice to Capt Gale.

Further, unlike the appellant in *Underwood*, Capt Gale lost the benefit of a favorable trial ruling at the next Article 39(a) session that would have occurred if not for the GCMCA's actions. The C.A.A.F. found that the appellant in *Underwood* did not lose the benefit of a favorable trial ruling as a result of the command's actions, however here, Judge Stoffel correctly found that Capt Gale lost the benefit of a favorable trial ruling. Appellate Ex. LXXXVI, at ¶ 41(d). At the time the convening authority withdrew and dismissed the charges, the GCMCA was aware of Judge Smith's email, wherein he informed the parties that the defense had satisfied its burden to demonstrate some evidence of both actual and apparent unlawful influence. *Id.* Judge Smith had informed the parties that the burden had shifted to the Government to prove *beyond a reasonable doubt* that "1) the predicate facts do not exist; 2) the facts do not constitute unlawful command influence; or 3) the unlawful command influence [will] not affect the findings or sentence" and "that the apparent UCI did not place 'an intolerable strain on public perception of the military justice system.'" *Id.* The government does not dispute this fact.

The timing of the GCMCA's decision to withdraw and dismiss the charges raises significant concerns, particularly as it occurred before the government got its second bite at justifying its action in line with Judge Smith's ruling. This withdrawal and dismissal denied Judge Smith the opportunity to address the defense's objections regarding the government's opportunity to present additional evidence. Consequentially, as stated by Judge Stoffel, "the accused, this court, and the general public are left to wonder whether the original military judge would have determined whether the prosecution had satisfied its burden . . . and if they had not done so, what remedy [Judge Smith] would have deemed appropriate." *Id.* The C.A.A.F. has made clear that a convening authority may withdraw and dismiss charges based on witness availability – this is not an improper purpose. *See Underwood*, 50 M.J. 271. In *Underwood*, the C.A.A.F. specifically held that withdrawal and re-referral to "accommodate the alleged victim's schedule and avoid the issuance of a subpoena" was a "legitimate command objective or reason within the meaning of R.C.M. 604(b)." *Id.* at 276. Additionally, the appellant in *Underwood* was not prejudiced where the same military judge presided over both trials and the appellant did not lose the benefit of a favorable trial ruling because he had no "legally cognizable right to a trial without the prosecution witness." *Id.* However, the circumstances surrounding this case are markedly different. Judge Stoffel correctly found that the withdrawal in Capt Gale's case lacked a legitimate command purpose, which, unlike the appellant in *Underwood*, ultimately resulted in undue prejudice against Capt Gale because a new military judge was assigned, his right to a speedy trial was implicated, and he lost the benefit of a favorable trial ruling. Appellate Ex. LXXXVI at ¶ 41. This conclusion is firmly supported by the precedent set in *United States v. Leahr*, which states that a proper reason for re-referral of withdrawn charges is "a legitimate command reason which does not unfairly prejudice an accused." 73 M.J. at 369. Put simply, as in *Underwood*, re-referral of withdrawn charges to secure the alleged victim's availability was a legitimate command reason and did not

result in prejudice to the appellant, but referral of withdrawn charges to obviate a military judge's defense-favorable trial ruling, as the GCMCA did here, resulted in prejudice to Capt Gale and was not a legitimate command reason.

The critical point is that the government was trying to avoid the full spectrum of potential outcomes arising from the GCMCA's interference in the case, to include the possibility of dismissal with prejudice, and the GCMCA chose to step in yet again and stop that ruling before it ever happened. One potential negative outcome for the government at the Article 39(a) session posited by Judge Smith would have been for the charges to be dismissed with prejudice. To be sure, the C.A.A.F. has held that while dismissal as a remedy for UCI is a "drastic remedy," it may be considered as a "last resort" when it is "necessary to avoid prejudice against the accused." *United States v. Douglas*, 68 M.J. 349, 354-55 (C.A.A.F. 2010) (citing *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)). Dismissal is "appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings." *Gore*, 60 M.J. at 187.

But the GCMCA's decision to withdraw and dismiss without prejudice after Judge Smith's email heightened the possibility of an adverse ruling moved the cart before the proverbial horse even had a chance to act, with the effect of swapping in a new military judge that might pull the court-martial in a different direction. The government now denies this with circular reasoning, arguing that Judge Stoffel incorrectly found that Capt Gale lost the benefit of a favorable ruling "because no favorable ruling had been made, nor did Judge Smith ever indicate that dismissal with prejudice would have been the appropriate remedy." App. Br. at 19. This correct assertion that Judge Smith never made a final ruling ignores the elephant in the room – that Judge Smith was robbed of the opportunity to finalize that ruling because the government thwarted it. App. Br. at 19. Further, it is reasonable that Judge Stoffel did not require that Judge Smith gave the parties some prior written notice that dismissal with prejudice was a potential remedy when 1) he was

under no requirement to do so; and 2) case law supports the fact that dismissal is “appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings.” *Gore*, 60 M.J. at 187. In addition to being supported by precedent, Judge Stoffel’s conclusions of law satisfy common sense- Judge Smith never had his planned opportunity to fully develop the record to articulate findings of fact related to his initial findings of some evidence of both actual and apparent UCI raised by the defense, *because the government ensured he could not do so when it withdrew the charges*, preventing Capt Gale from receiving a complete and fair examination of the issue.

The government now seeks to benefit from this attempt to sidestep a ruling that, based on Judge Smith’s email, offered a real likelihood to be adverse to the government because the government pulled procedural levers to preclude a final finding that UCI had been committed in the first instance. App. Br. at 20. The government argues that Judge Smith “had not ordered the government to do or not do anything,” but Judge Smith plainly articulated in his email that the government would be required at the next Article 39(a) session to overcome the burden shift he articulated. *Id.* at 20, App. Ex. LXXXVI, at ¶¶ 14-17. Yet rather than litigating its case then taking appropriate responsive action in light of the court’s findings, the government pulled the plug altogether and effectively knocked Judge Smith off the case.

Despite the government’s claims that “there is no indication in the record” to suggest that it would have failed to meet this burden on the UCI, the propriety of Judge Stoffel’s ruling rests on the broader proposition that whatever would have ultimately happened in Judge Smith’s would-be second Article 39(a) is not the be-all-end-all of the analysis. The reality is that the government should not benefit from its choice to prevent Judge Smith from fully developing the facts through a ruling, hearing from the government regarding its response to the initial findings of apparent and actual UCI, or issuing a final ruling. App. Br. at 21. This argument in and of itself is simply

additional evidence that Capt Gale suffered prejudice, as the government’s actions 1) extinguished Judge Smith’s initial favorable finding to the defense that it had met its burden of showing some evidence of UCI; and 2) prevented a ruling from the military judge that, far from being speculation (as the government claims), would have likely been favorable to the defense based on Judge Smith’s initial findings. *See Biagese*, 50 M.J. at 151 (holding that once the issue of UCI is raised, “the government must persuade the military judge . . . beyond a reasonable doubt that there was no [UCI] or that [UCI] did not affect the findings and sentence.”); *Douglas*, 68 M.J. at 354-55 (holding that dismissal is appropriate where “necessary to avoid prejudice against the accused.”); *and R.C.M. 604(b)* (prohibiting rereferral where charges are improperly withdrawn).

Critically, when arguing that dismissal with prejudice was not a potential outcome of Judge Smith’s ruling, the government ignores that Judge Smith made the initial finding that the defense had raised some evidence of UCI. Appellate Ex. XXVI, Ex. QQ. The government, if it had not withdrawn and dismissed the charges prior to the next Article 39(a) session, would have had to overcome the burden shift beyond a reasonable doubt. Appellate Ex. LXXXVI at ¶ 17. It is reasonable, based on Judge Smith’s email, for Judge Stoffel to conclude that one likely outcome of the next Article 39(a) session would have been that the government failed to overcome a finding of UCI. In analyzing whether Capt Gale suffered unfair prejudice as a result of the withdrawal, Judge Stoffel also found in Capt Gale’s favor that when the charges were withdrawn and re-referred, a new military judge was assigned and that Capt Gale moved the trial court for relief arguing his right to speedy trial were violated procedurally and constitutionally because of the GCMCA’s actions. Appellate Ex. LXXXVI at ¶ 41. Specifically, Judge Stoffel found that “the practical effect of the improper withdrawal resulted in a delay of over 18 months from his original court to his currently scheduled trial date.” *Id.* at ¶ 41 n. 1. As the government correctly points out, “UCI is the mortal enemy of military justice” App. Br. at 1, 15 (quoting *United States v. Lewis*,

63 M.J. 405, 407 (C.A.A.F. 2006)), and the C.A.A.F. has held that dismissal with prejudice was the required remedy in cases where “an accused would be prejudiced or no useful purpose would be served by continuing the proceedings.” *Gore*, 60 M.J. at 187; *See also* R.C.M. 604(b).

This Court is required to review the facts in this case in the light most favorable to Capt Gale. In that light, it is clear that Judge Stoffel’s findings of law were not an abuse of discretion when he found that Capt Gale lost the benefit of a favorable trial ruling. The government, instead, suggests that Judge Stoffel inaccurately presumed that dismissal with prejudice would have been the remedy adjudged by Judge Smith, and prays that this Court will conduct “speculation” in its favor. This argument ignores the reality that 1) Judge Smith’s initial finding that the defense had raised UCI was a favorable trial ruling that was lost by Capt Gale; and 2) *the only reason* there was not a “concrete” or final ruling from Judge Smith is directly attributed to the government’s improper withdrawal of the charges. The government should now bear the consequences of its own unforced and highly prejudicial error: dismissal with prejudice.

CONCLUSION

Judge Stoffel did not abuse his discretion when he found that 1) the withdrawal was improper; and 2) Capt Gale suffered prejudice as a result of the withdrawal. He did not clearly or unreasonably err when he determined that the timing of the withdrawal, after the GCMCA was aware of Judge Smith’s initial findings regarding UCI, and before the government would be forced to overcome the burden shift caused Capt Gale to lose the benefit of a favorable trial ruling. This Court must review the facts in the light most favorable to Capt Gale, and here, the military judge’s ruling is not arbitrary or fanciful, erroneous, or unreasonable.

WHEREFORE, Captain Gale respectfully requests this Honorable Court affirm the military judge’s ruling.

Respectfully submitted,

[REDACTED]

JORDAN L. GRANDE, Capt, USAF
Appellate Defense Counsel

[REDACTED]

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

A large black rectangular redaction box covering the signature of the undersigned.

JORDAN L. GRANDE, Capt, USAF
Appellate Defense Counsel

A large black rectangular redaction box covering the contact information of the undersigned.

UNITED STATES,	)	REPLY BRIEF FOR THE
<i>Appellant,</i>	)	UNITED STATES UNDER
	)	ARTICLE 62, UCMJ
v.	)	
	)	Before Panel No. 3
	)	
	)	Misc. Dkt. No. 2025-01
Captain (O-3)	)	
JUAN G. GALE , USAF,	)	20 March 2025
<i>Appellee,</i>	)	

Under Article 62, UCMJ, and Rule 20(c)(1)(C) of this Court’s Rules of Practice and Procedure, the United States files this reply to Appellee’s Answer to United States’ Appeal Under Article 62, UCMJ, filed on 13 March 2025. The United States maintains the arguments submitted in its initial brief, United States’ Appeal Under Article 62, UCMJ, filed on 21 February 2025. In response to Appellee’s answer, the United States submits the following reply.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE MADE THE ERRONEOUS LEGAL CONCLUSION THAT (1) THE WITHDRAWAL IN THIS CASE WAS DONE FOR AN IMPROPER PURPOSE AND (2) THAT APPELLEE WAS PREJUDICED BY THE WITHDRAWAL.

Appellee was not deprived of the benefit of a favorable trial ruling because Judge Smith's preliminary burden shift ruling did not create a legally cognizable right. See United States v. Underwood, 50 M.J. 271, 276 (C.A.A.F. 1999). While Appellee asserts that Judge Stoffel did

not overlook our superior Court's opinion in Underwood (App. Br. at 13.), he *did* overlook a pivotal part of the opinion. In Underwood, as part of the Court's prejudice analysis, the Court analyzed whether the appellant had lost the benefit of a favorable trial ruling as a result of the command's withdrawal of charges in that case. 50 M.J. at 276. In determining that the appellant had not lost the benefit of a favorable trial ruling, the Court narrowed the aperture of what constitutes a favorable trial ruling. Specifically, the Court determined that the military judge's continuance denials did not create a "legally cognizable right," and thus did not constitute favorable trial rulings. Id. The Court then cited Vanover v. Clark, 27 M.J. 345 (C.M.A. 1988), to demonstrate that this was a distinguishing factor between Underwood and Vanover. Id.

In Vanover,¹ the military judge's ruling excluding evidence from the appellant's court-martial did create a legally cognizable right for the appellant to not have the excluded evidence used against him at trial. 27 M.J. at 347. The practical effect of the government's withdrawal and re-referral of charges deprived the appellant of the legally cognizable right to have that evidence excluded in his trial. Id.

Here, like the continuance denials in Underwood, Judge Smith's preliminary burden shift on the defense's motion to dismiss for unlawful command influence created no legally cognizable right of which Appellee could be deprived. While Appellee points out that the government was perhaps inartful in asserting that Judge Smith "had not ordered the government to do anything," the point is Judge Smith had neither precluded the government from taking any actions, nor ordered the government to take any affirmative actions that would have created a legally cognizable right for Appellee. (App. Br. at 21.) Some examples of legally cognizable

¹ It is also worth noting that Appellee's assertion that the "extraordinary action of dismissal with prejudice" was applied in Vanover is erroneous. The Court in Vanover ruled the additional charges must be "dismissed without prejudice." 27 M.J. at 348.

rights of which an appellant could be deprived would be exclusion of evidence, the production of a witness or expert, or an order to merge specifications for findings. Put more simply, a useful lens for identifying whether a legally cognizable right has been created is to look at whether the military judge has granted the appellee any relief. Here, Judge Smith had not granted any relief, he merely made a preliminary decision on the burden of persuasion.

Given the preliminary nature of Judge Smith's ruling, Appellee did not have a legally cognizable right to dismissal with prejudice. That is the only legally cognizable right that would have prejudiced Appellee had a right been lost after the convening authority's withdrawal of charges. A dismissal without prejudice would have placed Appellee in the same position as he is here. But as our superior Court has repeatedly noted, dismissal with prejudice is a remedy of last resort. *See United States v. Shelby*, __ M.J. ___, 2025 CAAF LEXIS 64 at *6 (C.A.A.F. Jan. 28, 2025) ("because less drastic alternatives remedied the concerns raised by the military judge, his decision to dismiss the charge and specification with prejudice constituted an abuse of discretion.") Appellee has not demonstrated any justification for why lesser remedies would not have been sufficient here, even if Judge Smith had ultimately found unlawful command influence. At worst, this was a case involving an improper preferral and referral. There is no indication in the record that such errors could not have been cured with re-preferral and/or re-referral by different authorities but would instead have required the drastic remedy of dismissal with prejudice. Since dismissal with prejudice was a speculative remedy that is disfavored by case law and only appropriate in drastic circumstances, it was a very unlikely outcome of Judge Smith's preliminary ruling. As a result, Appellee did not have a "legally cognizable right" to that ruling. And further, if the alleged UCI had been so egregious as to infect any future court-martial, then Appellee could have made that argument at his second court-martial and still

potentially gained the favorable ruling of dismissal with prejudice. Since Appellee was not deprived of a “legally cognizable right,” this Court should find that Judge Stoffel’s determination that Appellee lost the benefit of a favorable trial ruling was erroneous because it did not comport with the law as defined in Underwood.

Contrary to Appellee’s argument that the government simply “would have preferred Judge Stoffel to more fully discuss Underwood,” the government asserts that Judge Stoffel did not properly apply the legal principle defining a “favorable trial ruling” enunciated in Underwood. (App. Br. at 13.) Judge Stoffel never defined what legally cognizable right Appellee was deprived of, nor what legally cognizable right was created by Judge Smith’s preliminary burden shift ruling. That is because Judge Smith’s ruling created no such right. Judge Stoffel’s error was in finding that a potential ruling that had not occurred would have created a legally cognizable right. (App. Ex. LXXXVI, at para. 41.d.) But that is not the standard because speculation about the potential creation of a legally cognizable right is not sufficient to establish prejudice. *See United States v. Brown*, 54 M.J. 289, 293 (C.A.A.F. 2000) (finding that “sheer speculation” was not sufficient to constitute a colorable showing of possible prejudice). Appellee, without directly conceding the issue, demonstrates the speculative nature upon which Judge Stoffel based his decision: (1) “[Judge Smith’s ruling] offered a real *likelihood* to be adverse to the government” (App. Br. at 21) (emphasis added) ; (2) “[the government’s withdrawal] had the practical effect of avoiding *whatever* favorable ruling Judge Smith *might* [have ordered]” (App. Br. at 14-15) (emphasis added) ; and “[Judge Smith’s e-mail ruling] heightened the *possibility* of an adverse ruling.” (App. Br. at 20) (emphasis added). The government is not asking this Court to “conduct ‘speculation’ in its favor,” (App. Br. at 23) it is asking this Court to adhere to the logic of our superior Court in Brown and find that speculation

about the potential for the creation of a legally cognizable right is not sufficient to constitute the loss of a favorable trial ruling. Therefore, Judge Stoffel’s error was not in finding that Vanover was more factually similar than Underwood. (App. Br. at 13). It was his failure to properly apply the legal standards of what defines a “favorable trial ruling” as defined in Underwood. In sum, since the withdrawal of charges did not cause Appellee to lose a “favorable trial ruling,” Judge Stoffel erred in finding that the withdrawal was for an improper purpose.

B. Appellee had a legally cognizable right to a court-martial free of the specter of potential unlawful command influence. Taking action to protect that right is not an improper purpose for withdrawal.

While Judge Stoffel erred by failing to identify a legally cognizable right that the government’s withdrawal deprived Appellee of, the Convening Authority’s action was taken to protect a legitimate legally cognizable right held by Appellee. Specifically, Appellee had the right to a court-martial free of the “mortal enemy” of military justice—unlawful command influence. United States v. Lewis, 63 M.J. 405, 407 (C.A.A.F. 2006). Taking action to protect Appellee from even the appearance of unlawful command influence is not an improper purpose—it is a “legitimate command reason” that prevented potential prejudice to Appellee. Underwood, 50 M.J. at 276.

Despite this, Appellee tries to paint the Convening Authorities actions with a nefarious brush. (App. Br. at 16) (“Judge Stoffel focused instead on the *illegitimate* exercise of command authority to wipe away disfavored court rulings”) (emphasis in original). Yet, Appellee’s contention is not supported by the record, nor Judge Stoffel’s findings. Judge Stoffel explicitly found that it was “more likely than not that the convening authority did not have the specific intent to interfere with the impartiality of the court.” (App. Ex. LXXXVI, at para. 40.c.) This

Court should be unpersuaded by Appellee's attempts to inject malicious intent where none was found by the military judge.

Moreover, this Court should be unpersuaded by Appellee's "parade of horrors" in the event this Court were to permit the Convening Authority's actions here. (App. Br. 16-17.) Where no malicious intent has been found, and the action was taken with the intent and effect of protecting the integrity of Appellee's court-martial, there would be no "undermining [of] the integrity of the judicial process." (App. Br. at 16.) Instead, if this Court were to rule in the government's favor, this Court would be ensuring convening authorities have the discretion to take proactive steps to root out potential unlawful command influence where the specter of unlawful command influence has been identified. More importantly, it would send a message to convening authorities that they are permitted to take proactive steps to remedy error where it comes to their attention. A hypothetical example is helpful to this analysis.

For example, a defense team files a motion to suppress a crucial piece of evidence based on an erroneous search authorization. After an initial hearing the military judge emails the parties indicating she believes the search violated the Fourth Amendment, and she wants the parties to be prepared to discuss inevitable discovery and the R.C.M. 311(a)(3) balancing test at the next motions date. Prior to the military judge issuing a ruling, the government should be free to confer with their convening authority to notify him or her of the potential error. The convening authority, having been notified that he or she has charged someone with a crime whose rights were potentially violated by the government, should be free to take corrective measures to remedy the rights violation. Specifically, the convening authority should be free to withdraw and dismiss the charges and to permit the government to attempt to re-accomplish the search in a legal manner. After all, such action would protect the accused while simultaneously

satisfying the “truth-seeking function” of a court-martial. United States v. Jasper, 72 M.J. 276, 280 (C.A.A.F. 2013).

In this hypothetical, there would be no undermining of the judicial process or seeking of an “unfair advantage to the government in anticipation of a favorable ruling for the defense.” (App. Br. at 16.) Instead, the accused’s rights would have been protected by the command, while the interests of justice are satisfied by permitting the government to correct error. Here, that is exactly what happened. The Convening Authority was notified of potential unlawful command influence prejudicial to the rights of Appellee, and he withdrew and dismissed the charges and took steps to re-refer the case free of unlawful command influence. That is not an unfair advantage, that is how the system should work. This Court’s decision should not punish the government for taking proactive steps to remedy an error, especially whereas here, those steps were taken without any malicious intent, but to protect a legitimate cognizable right of Appellee. This Court should find that it is not improper for a convening authority to withdraw charges to correct a perceived error – even if a motion is pending concerning that error.

Moreover, Judge Stoffel’s concerns about the “appearance of evil” misapprehends the concern of the Court in Vanover. (App. Ex. LXXXVI, at para. 40.c.) An “appearance of evil” is not sufficient to find an improper purpose in the withdrawal in Appellee’s case. This is particularly true where Judge Stoffel found by a preponderance of the evidence that the Convening Authority did not have the intent to interfere with the impartiality of the court-martial. (Id.) Judge Stoffel’s error was in misreading Vanover. In Vanover, the Court found that extraordinary action was warranted because the second military judge had failed “to adequately dispel appearances of evil.” 27 M.J. at 348. In arriving at their conclusion the Court explained that the appellant had alleged that (1) “trial counsel alone or in conjunction with the convening

authority accomplished these referral actions for an improper purpose of circumventing a ruling” by the first military judge; and (2) that trial counsel “unfairly influenced a defense character witness, interfered with [the appellant’s] relationship with his attorney, and attempted to secure a trial judge more favorable to the government’s case.” Id. The Court noted with concern that the military judge “repeatedly refused defense’s request for” trial counsel to testify on the motion to dismiss but allowed that same trial counsel to “essentially testify without cross-examination during his final argument” on the motion. Id. It was the military judge’s refusal to permit the trial counsel’s testimony that would have provided necessary context and explanations that resulted in the failure to dispel the “appearances of evil.”

The facts here are inapposite to Vanover. Here, the appearances of evil *were* dispelled. Unlike the trial counsel in Vanover, the Convening Authority and the servicing legal office’s Staff Judge Advocate testified extensively as defense witnesses on the motion to dismiss. (R. at 32-115, 320-440.) During his testimony, the Convening Authority explained the reasoning behind the withdrawal and dismissal: “Well [unlawful command influence] was alleged. So, yeah, that’s what we touched on with the [JAG], in terms of why and part of why we cleansed, is because of that perception.” (R. at 47.) He further testified that his intent was to restart the process and “push [the case] back down to the lowest level, who knows the facts of the case and the individuals involved, and oh by the way, with a new look, with a new wing commander.” (R. at 48.) Based on the Convening Authority’s testimony, Judge Stoffel determined by a preponderance of the evidence that the Convening Authority’s actions were done without the intent to interfere with the impartiality of the court-martial. (App. Ex. LXXXVI, at para. 40.c.) Thus, the “appearances of evil” had been dispelled by the Convening Authority’s testimony, and Judge Stoffel should have found that the withdrawal was not done for an *improper* purpose.

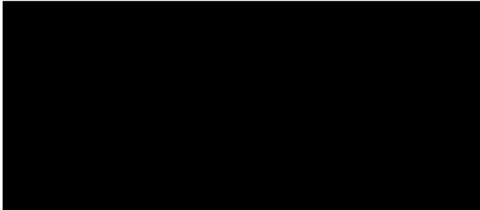
Judge Stoffel misapprehended Vanover in failing to grasp that it was the lack of testimony to clarify the reasons for the withdrawal in that case that failed to dispel the appearance of evil. 27 M.J. at 348 (“The relevance of trial counsel’s testimony with respect to these averments simply cannot be gainsaid...it was wrong for the trial judge to refuse to permit the defense to call trial counsel as a witness on these matters.”)

Due to the lack of context in Vanover, our superior Court was left with concerns that the government had engaged in forum shopping to obtain a better ruling without remedying the reasons for the initial judge’s ruling. Id. Here, there is no evidence the government was engaging in forum shopping to get a better ruling on the same evidence. Rather, the government was starting over to cure a potential error recognized by the military judge. Judge Stoffel’s misunderstanding of Vanover resulted in error when he determined the government in this case had withdrawn for an improper purpose despite his own findings indicating that the Convening Authority had no intent to interfere with the impartiality of the court. This Court should find Judge Stoffel erred as a result of his fundamental misunderstanding of the applicable case law.

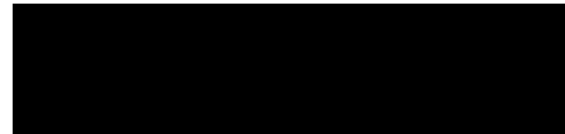
CONCLUSION

Judge Stoffel abused his discretion when he repeatedly misapplied legal principles. As a result of his erroneous understanding of the law, he dismissed all charges and specifications with prejudice. Judge Stoffel erroneously found Appellee had been deprived of a favorable trial ruling, without identifying the legally cognizable right Appellee was supposedly deprived of. Moreover, Judge Smith’s ruling did not create one, and Judge Stoffel’s speculation as to what cognizable right might have been forthcoming is not sufficient to sustain a finding of prejudice. Brown, 54 M.J. at 293. Since the military judge abused his discretion, the United States respectfully requests that this Honorable Court reverse the military judge’s ruling to dismiss all

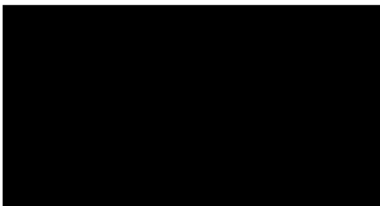
charges and specifications with prejudice and remand this case to the trial court for further proceedings.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division



MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division

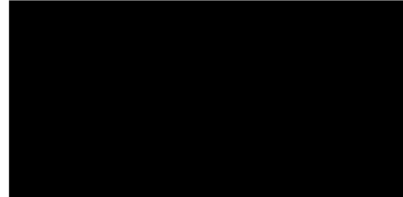


MATTHEW D. TALCOTT, Col, USAF
Director
Government Trial and
Appellate Operations Division



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 20 March 2025 via electronic filing.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division



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

UNITED STATES	)	Misc. Dkt. No. 2025-01
<i>Appellant</i>	)	
	)	
v.	)	
	)	ORDER
Juan G. GALE	)	
Captain (O-3)	)	
U.S. Air Force	)	
<i>Appellee</i>	)	

On 31 January 2025, Appellant timely filed the record of trial and a notice of an intent to appeal pursuant to Article 62, UCMJ, 10 U.S.C. § 862, in the above-styled case with this court. On 3 February 2025, the court docketed the Appellant’s appeal.

On 21 February 2025 at 0855, Appellant filed a supporting brief with this court with a date of 20 February 2025. Appellant’s brief did not explain the reason for the date discrepancy.

On 26 February 2025, Appellee filed three motions with the court. Appellee first moved this court to file a motion to dismiss, combined with the motion to dismiss. Appellee moved this court to dismiss Appellant’s case because its filing was “untimely, in defiance of Rule for Courts-Martial (R.C.M.) 908(b)(7), [and] Rule 20(c)(1)(A) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals [(JRAP)]” (Footnotes omitted).¹ This same date, Appellee filed a motion to strike Appellant’s brief for the same reasons as in its motion to dismiss: noncompliance with R.C.M. 908(b)(7) and JRAP Rule 20(c)(1)(A), and that Appellant’s motion “was not captioned as an out-of-time filing” and contained “no explanation of good cause for its untimeliness.” Accompanying these motions was Appellee’s Motion to Attach two documents: (1) a Certificate of Service email, reflecting the date and time when Appellant’s supporting brief was released to the parties; and (2) a declaration by Appellee’s noncommissioned officer who “confirms that the [e]mail was, in fact, received by the Air Force Appellate Defense Divisions’ organizational inbox on 21 February 2025 (not 20 February 2025 as the [e]mail’s Certificate of Service

¹ Rule 20(c)(1)(A) states that “[a]ppellate government counsel shall have 20 days from the date the appeal is filed with the Court to file a supporting brief.” JT. CT. CRIM. APP. R. 20(c)(1)(A). Appellee also cites a Rule 20(c)(1)(A) with this court’s Rules of Practice and Procedure, but there is no such cite in our Rules.

purports).”

On 5 March 2025, Appellant opposed Appellee’s motion to dismiss and motion to strike. Appellant asks this court to deny Appellee’s motion to dismiss because the 20-day requirement “is not a jurisdictional requirement, and there is good cause for this Court to permit the [G]overnment to file out of time.” Appellant states two reasons for the delayed filing of its supporting brief. First, Appellant avers that it “attempted to file the [G]overnment’s brief on 20 February 2025,” but discovered the next day, due to a “technological error,” the filing of its brief was delayed and therefore went out the next day. Appellant immediately notified Appellee and the court. Second, when notifying the court, Appellant was informed that the court’s filing due date for Appellant’s supporting brief was recorded as 23 February 2025, 20 days from the date of docketing. Appellant did not file opposition to Appellee’s motion to attach.

On 5 March 2025, Appellant filed a motion to amend its pleading to reflect the filing date of 21 February 2025, accompanied by a motion to attach declarations by Captain (Capt) TW, the appellate government counsel assigned to the above-styled case, and Major KL, another appellate government counsel. Both declarations aver that the Government’s brief was prepared for filing to the court via a Certificate of Service email to all appropriate recipients on 20 February 2025, and that Capt TW then pressed “Send” just before leaving for the end of the duty day. According Capt TW, “due to a technological issue” the document did not go out until the next morning when Capt TW returned to his office and attempted to log into his computer, and became aware that the filing did not go out on 20 February 2025 but instead transmitted when Capt TW logged back into his computer the next morning. Appellee did not file opposition to Appellant’s motion to amend pleading nor motion to attach.

On 6 March 2025, Appellee moved for leave to file a reply to Appellant’s opposition to Appellee’s motion to dismiss and motion to strike, combined with his reply. Appellee asserts that “docketed” and “filed” are “distinct concepts,” and that “the Government was plainly and clearly obligated to file its brief by twenty days from 31 January 2025, ‘the date the appeal [was] *filed with* the Court . . . not *docketed by* the Court.” (Alterations in original). Appellant did not file opposition to the motion.

In its motions, Appellant went on the premise that the filing due date for its supporting brief was 20 days from the date it filed its supporting brief on 31 January 2025 with the court. Both appellate government counsel attest that on 20 February 2025, Capt TW prepared the brief for filing, pressed “Send,” and believed that the brief had been transmitted to all “appropriate recipients” just before departing the duty day. It was not until he returned to work the next morning that Capt TW realized that the electronic filing via email had not escaped his outbox. According to government counsel’s declarations, what

prevented the filing from successful submission was an additional dialog box that popped up after this action, which unbeknownst to government counsel prompted the inputting of that filing counsel's CAC password once more before Outlook would send the email.

Appellee filed his answer on 13 March 2025, 20 days from 21 February 2025.

Government interlocutory appeals challenging, *inter alia*, the ruling of a military judge which terminates the proceeding with respect to a charge or specification are governed by Article 62(a), UCMJ, 10 U.S.C. § 862(a). An appeal filed under Article 62, UCMJ, shall "be forwarded by means prescribed under regulations of the President directly to the Court of Criminal Appeals." Article 62(b), UCMJ. "The provisions of this article shall be liberally construed to effect its purposes." Article 62(e), UCMJ.

The filing deadlines for government interlocutory appeals filed pursuant to Article 62, UCMJ, are not themselves explicitly prescribed in either statute or the Rules for Courts-Martial (*i.e.*, R.C.M. 908). Rather, exercising his delegated authority under Article 68(b), UCMJ, the President's rules for Article 62, UCMJ, appeals speak only to a process for "expeditious" forwarding of the record for such appeals to a representative of the Government designated by the respective Judge Advocate General (R.C.M. 908(b)(5) and (6)), and "prompt[]" decision by that government representative as to whether to file an appeal. R.C.M. 908(b)(7)(B). When the Government chooses to file an appeal, the President directs that "it shall be filed directly with the Court of Criminal Appeals" without establishing a particular filing deadline. R.C.M. 908(b)(7)(C).

All of which is to say, it is only the JRAP, promulgated under statutory authority granted in Article 66(h), UCMJ, 10 U.S.C. § 866(h), which establishes filing deadlines for Article 62, UCMJ, appeals, designating three respective filing requirements: (1) 20 days for the Government to *forward* the record of trial to the government appellate division concerned; (2) five days for the government appellate division to forward the original record to the Court of Criminal Appeals (CCA) concerned and a copy to opposing counsel, and; (3) 20 days to file the Government's brief with the CCA after the Government *filed* the record with the court. JRAP Rule 20(c)(1)(A). Crucially, Rule 20(c)(1)(A) speaks to the date upon which the record was *filed*, not the day it was docketed with the court. Filing is complete upon the Government's delivery of the record. Docketing is complete upon the court's formal acknowledgement and

acceptance of receipt of that record.²

While these rules are not “jurisdictional” in the sense that a failure to timely file a record or brief deprives this court of statutory jurisdiction to hear the case, our precedents have strictly enforced the JRAP filing deadlines and dismissed government Article 62, UCMJ, appeals with untimely filings. *See United States v. Harding*, Misc. Dkt. No. 2005-02, at *3 (29 Jul. 2005) (order) (dismissing an Article 62, UCMJ, appeal when the Government filed the record of appeal five days after the deadline), *aff’d on other grounds*, 63 M.J. 65 (C.A.A.F. 2006); *United States v. Combs*, 38 M.J. 741, 743 (A.F.C.M.R. 1993) (dismissing Article 62, UCMJ, appeal where the Government failed to forward the record of appeal until seven days after the deadline); *United States v. Snyder*, 30 M.J. 662, 664 (A.F.C.M.R. 1990) (strictly construing the JRAP and finding noncompliance where the Government forwarded an unauthenticated record of appeal and dismissing the Article 62, UCMJ, appeal where the delay was prejudicial to the accused because he was in pretrial confinement).

Here, Appellee asserts that the Government failed to comply with Rule 21 because the Government’s brief was filed 8 hours and 55 minutes beyond the 20-day filing deadline. Factually, that is true. However, as the Government established in two sworn declarations (including one declaration filed by the primary author of the Government’s Article 62, UCMJ, appeal brief), that the Government did undertake substantial compliance with the filing deadline on the evening of 20 February 2025, the final day of the 20-day filing period, by attempting to electronically file their brief via email. Accordingly, while here the Government’s attempt was unsuccessful, consistent with our authority under JRAP Rule 24, we find good cause to retroactively extend the Government’s filing deadline in this case by 8 hours and 55 minutes so as to ensure a “full, fair, and expeditious consideration of [this] case.”³

In so doing we distinguish our prior precedents in *Harding*, *Combs*, and *Snyder*. First, the timeframe is considerably more abbreviated in this case than the others, with ultimate compliance achieved only 8 hours and 55 minutes

² Thus, where, as in this case, the Government filed the record of appeal with this court on Friday, 31 January 2025, but the Court did not issue a docketing notice until Monday, 3 February 2025, the Government’s 20-day filing deadline for their brief commenced on 1 February 2025, with that brief coming due on 20 February 2025.

³ We also note that Rule 32 of the JRAP would also permit us to suspend our rules, for good cause shown, to accept the Government’s appeal as timely under these unique circumstances. However, given the specific authority granted the CCAs in Rule 24 to “extend any time limits prescribed and [] dispose of any interlocutory or other appropriate matter not specifically covered by these rules, in such manner as may appear to be required for a full, fair, and expeditious consideration of the case,” we find it unnecessary to do so.

beyond the applicable 20-day brief filing deadline. Moreover, whereas in those cases the Government failed to attempt compliance prior to the expiration of the filing deadline or request an enlargement of time prior to expiration of the filing deadlines, here the Government did attempt compliance in good faith, and would have succeeded, but for want of an additional pop-up dialog box in government counsel's Outlook email.

Accordingly, it is by the court on this 20th day of March, 2025,

ORDERED:

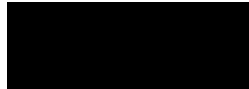
Appellee's Motion for Leave to File Motion to Dismiss, dated 26 February 2025, is **GRANTED**. Appellee's Motion to Dismiss, dated 26 February 2025, is **DENIED**.

Appellee's Motion to Strike, dated 26 February 2025, is **DENIED**.

Appellant's Motion to Amend Pleading, dated 5 March 2025, is **GRANTED**.⁴



FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

⁴ The following other motions, mentioned *supra*, have been granted by the court this same date: Appellee's Motion to Attach, dated 26 February 2025; Appellant's Motion to Attach, dated 5 March 2025; and Appellee's Motion for Leave to File Reply and Reply to Appellant's Opposition to Appellee's Motion to Dismiss and Appellant's Opposition to Appellee's Motion to Strike, dated 6 March 2025.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' MOTION
<i>Appellant</i>	)	TO AMEND PLEADING
	)	
v.	)	
	)	
Captain (O-3)	)	Before Panel No. 3
JUAN G. GALE	)	
United States Air Force,	)	Misc. Dkt. No. 2025-01
<i>Appellee.</i>	)	

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

Pursuant to Rule 23.3(n) of this Court's Rules of Practice and Procedure, the United States respectfully moves to amend the United States' Appeal Under Article 62.

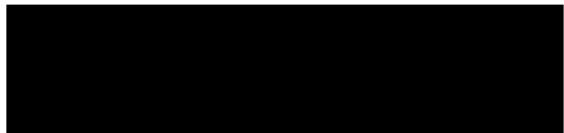
As described in the government's motion to attach that will be filed contemporaneous with this motion, undersigned counsel attempted to file the United States' Appeal Brief on 20 February 2025. Due to an unidentified technical issue, the email sent by undersigned counsel on 20 February 2025 was not delivered until the morning of 21 February 2025. The government seeks to amend the date in the case header on page one of its brief, as well as the certificate of service as they both incorrectly identify the date of the document and service as 20 February 2025, the date when undersigned counsel attempted to file the United States' Appeal Brief. This amendment is necessary to correct an unintentional error in the original filing.

A proposed corrected copy of page one of the brief and the corrected certificate of service are attached in an appendix to this motion.

The United States respectfully requests that this Honorable Court grant this motion and accept the amended version of page one and the certificate of service of the United States' Appeal Under Article 62.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division



MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division



CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate
Defense Division on 5 March 2025.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellant,

v.

Captain (O-3)

JUAN G. GALE,

United States Air Force,

Appellee.

) **MOTION FOR LEAVE TO FILE**
) **MOTION TO DISMISS AND**
) **MOTION TO DISMISS FOR**
) **FAILURE TO COMPLY WITH**
) **RULE FOR COURTS-MARTIAL**
) **908(b)(7), JOINT RULE OF**
) **APPELLATE PROCEDURE FOR**
) **COURTS OF CRIMINAL APPEALS**
) **RULE 20(c)(1)(A), AND THE**
) **UNITED STATES AIR FORCE**
) **COURT OF CRIMINAL APPEALS**
) **RULE OF PRACTICE AND**
) **PROCEDURE 20(c)(1)(A)**
)
) Before Panel No. 3
)
) Misc. Dkt. No. 2025-01
)
) 26 February 2025

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

Pursuant to Rule 23(d) and 23.3 of this Honorable Court's Rules of Practice and Procedure,¹ Captain (Capt) Juan G. Gale, Appellee, hereby moves this Honorable Court for leave to file a motion to dismiss and moves to dismiss the above-styled case which was filed untimely, in defiance of Rule for Courts-Martial (R.C.M) 908(b)(7),² Rule 20(c)(1)(A) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (Joint Rules),³ and AFCCA Rule of Practice and Procedure (AFCCA Rules) 20(c)(1)(A). Pursuant to AFCCA Rule 23(d), the motion for leave to file the pleading and the pleading are combined herein.

¹ References to the United States Air Force Court of Criminal Appeals (AFCCA) Rules of Practice and Procedure are to the rules made effective 23 December 2020.

² References to the Joint Rules of Appellate Procedure for Courts of Criminal Appeals are to the rules made effective 17 May 2024.

³ References to articles of the Uniform Code of Military Justice and Rules for Courts-Martial are to the 2024 *Manual for Courts-Martial, United States*.

Appellant served the Record of Trial (ROT) on this Court on 31 January 2025. Government Brief at 5. In accordance with R.C.M 908(b)(7), Rule 20(c)(1)(A) of the Joint Rules, and AFCCA Rule 20(c)(1)(A), the Government was required to file its brief with this Court within twenty days of 31 January 2025 - by 20 February 2025. Instead, it filed its brief on the twenty-first day after that date, violating the aforementioned rules. This Court may grant relief in accordance with AFCCA Rule 13.4, which provides that any filing that does not comply with this Court's rules may be rejected.

Capt Gale requests this Honorable Court grant his motion for leave to file and consider the motion below.

MOTION

Facts

On 1 September 2022, the following charges and specifications were preferred on Capt Gale: one charge and specification of abusive sexual contact, in violation of Article 120, UCMJ; one charge and one specification of assault consummated by a battery, in violation of Article 128, UCMJ; one charge and one specification of conduct unbecoming an officer, in violation of Article 133, UCMJ; and one charge and one specification of fraternization, in violation of Article 134, UCMJ. *Charge Sheet*, dated 1 September 2022, Gale 1 ROT,⁴ Vol. 1.

On 28 December 2023, trial defense counsel filed a motion for appropriate relief requesting that the military judge dismiss the charges against Capt Gale for improper referral.⁵ The military judge denied the defense's motion, but three days later, granted a defense motion for her recusal.

⁴ Two Records of Trial exist in this case. The Record of Trial pertaining to the charges withdrawn and dismissed by the convening authority on 7 June 2023 will be referred to as "Gale 1."

⁵ The specific facts regarding the initial improper withdrawal and dismissal, and second referral of the same charges in this case are not specifically discussed herein, as they are not relevant to determining the present issue.

Appellate Ex. LXXXVII, App. Ex. XLV. A new military judge was detailed to the case. Appellate. Ex. LXXXVI, para. 33. On 2 September 2024, the defense filed a motion to reconsider the Court’s previous rulings on the defense’s motions to dismiss for improper referral. Appellate Ex. LXXXI. On 30 December 2024, the military judge granted the defense’s motion for reconsideration, found that the charges from Capt Gale’s first court-martial were improperly withdrawn, and ordered all charges and specifications be dismissed with prejudice. App. Ex. LXXXVI. On 6 January 2025, at 1408 hours Eastern Standard Time (EST), the military judge denied the Government’s motion to reconsider the ruling on the defense’s motion to dismiss. Appellate. Ex. XC.

On 8 January 2025, at 1802 EST, the United States filed a notice of appeal, notifying the military judge of its intent to appeal his ruling to withdraw and dismiss the charges with prejudice. Gov. Record of Trial Docketing Memorandum, dated 31 January 2025, Attachment 2. Trial counsel forwarded the appeal and record of trial to the “Air Force Appellate Operations Division,” and it was received on 28 January 2025.⁶ Government Brief at 5. The Government filed the record of trial with this Court on Friday, 31 January 2025. *Id.* On 21 February 2025 at 0855 hours EST, the Government electronically filed its Brief with this Court and simultaneously served it upon the Air Force Appellate Defense Division (JAJA). Email from Capt Washburn, 21 February 2025, “Sent” line; Declaration of MSgt Stroud, 26 February 2025, para. 3; *see also* AFCCA Rule of Practice and Procedure 13.2, 13.3 (discussing electronic filing via email as the only accepted form of filing absent express permission and electronic service upon JAJA by email to the approved organizational electronic workflow inbox). The caption of the email providing certificate of service is erroneously dated “4 June 24,” and the date in the certification contained in the body of

⁶ Presumably, this refers to the Government Trial and Appellate Operations Division.

the email erroneously states “(20 February 25).” Email from Capt. Washburn, Declaration of MSgt Stroud. The Brief is erroneously dated 20 February 2025, and the Certificate of Service found on page 25 of the Brief states, “I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 20 February 2025 via electronic filing.” *Id.*; Government Brief at 1, 25.

Law

The authority to review a Government appeal is provided by Article 62, UCMJ, which subjects certain decisions made by a military judge to an interlocutory Government appeal. Art. 62, UCMJ, 10 U.S.C. § 862. Article 62 authorizes the Government to appeal, *inter alia*, “[a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.” Art. 62(a)(1)(A), UCMJ. “An appeal under this section shall be diligently prosecuted by appellate Government counsel.” Art. 62(a)(3), UCMJ. R.C.M 908(b)(6) provides: “Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall promptly and by expeditious means forward the appeal to a representative of the Government designated by the Judge Advocate General.”

“Government appeals in criminal cases are disfavored and may only be brought pursuant to statutory authorization.” *United States v. Jacobsen*, 77 M.J. 81, 84 (C.A.A.F. 2017). “Because [prosecution appeals] statutes compete with speedy trial and double jeopardy protection as well as judicial impartiality and piecemeal appeal policies, prosecution appeals are not particularly favored in the courts. . . . The statutes authorizing such appeals are construed strictly against the right of the prosecution to appeal.” *United States v. Combs*, 38 M.J. 741, 743 (A.F.C.M.R. 1993) (citing *United States v. Pearson*, 33. M.J. 777, 779 (N.M.C.M.R. 1991)).

This Court’s rules specify how filings must be served, when service is completed, and

establishing an artifact to denote completed service. This is specified in three rules. AFCCA Rule 13(c) provides, “Service by electronic means is complete upon transmission,” and Rule 13.2(a) provides, “The method for filing documents with the Court is electronic filing at the following e-mail address: usaf.pentagon.af-ja.mbx.af-jah-filing-workflow@mail.mil. No other method of electronic filing will be accepted absent permission from the Clerk of the Court.” AFCCA Rule 13.3 states, “Pleadings filed with the Court shall be served on all counsel of record . . . and will be evidenced in the document by use of the certificate format below.”

The Joint Rules set out three timelines the Government must meet in order for an interlocutory appeal to be considered timely. First, the Government has twenty days from the date of the Notice of Appeal, to forward the record of trial. Once that is received, the Government has five days to file the record with the Court and opposing counsel. Most importantly for this motion, the third clock started ticking “from the date the appeal is filed.” From that date, the Government has twenty days to file its brief. The rule is silent as to extensions. Joint Rule 20(c)(1)(A). Rule 20(c)(1)(A) of the AFCCA Rules is identical to the Joint Rule.

Analysis

The plain text of both Art. 62, UCMJ and RCM 908(b)(6) require that the Government act with diligence in executing an Art. 62 appeal. Prosecution appeals are not favored because they compete with important rights of the accused, namely the right to a speedy trial, protection against double jeopardy, and judicial impartiality. *Jacobsen*, 77 M.J. at 84; *Combs* 38 M.J. at 743. As such, the Government should be strictly held to the clearly established rules and procedures regarding Art. 62 appeals.

There is no question that the Government in this case failed to comply with clear rules establishing a strict timeline governing the Government’s interlocutory appeal. Central to that

conclusion are Rule 20(c)(1)(A) of the Joint Rules and Rule 20(c)(1)(A) of the AFCCA Rules. Those rules require the Government to file its brief for this appeal within twenty days of the date it served the ROT upon this Court. The Government served the ROT upon this Court on 31 January 2025, therefore, it was required to file its brief by 20 February 2025. Government Brief at 5, *Id.* The Government, instead, failed to comply with this basic requirement when it filed its brief on 21 February 2025, one day after the deadline. Despite that the Government erroneously dated its brief and the certificate of service contained within the body of the email for 20 February 2025, the service *actually* occurred on 21 February 2025, according to the timestamp on the email from Capt Washburn and MSgt Stroud’s Declaration, in which she states that the JAJA organization inbox received the email on 21 February 2025.⁷ See AFCCA Rule 13(c) (stating that service is complete upon transmission of the email.)

This Court’s predecessor declined to afford the Government leniency for its administrative failures as it relates to the procedural requirements of Art. 62 appeals. In *Combs*, this Court’s predecessor dealt with an Art. 62 appeal in which the trial counsel attempted to mail a ROT to appellate government counsel within the twenty days required by that Court’s version of what is now Rule 20(c)(1)(A) of this Court’s Rules of Practice and Procedure. 38 M.J. 741. The Court held that where the Government attempted to mail the ROT within the twenty-day deadline, but failed to properly secure the package, resulting in its delivery seven days past the twenty-day deadline, the Government failed to “promptly” forward the appeal by “expeditious means.” *Combs*, 38 M.J. at 742-43; *see also Pearson*, 33. M.J. at 780 (holding that “[t]he word ‘promptly’ as used in R.C.M. 908(b)(6) . . . equates with the notion as soon as practicable”). In *Combs*, this “attempted delivery” of the ROT, though it began within the twenty-day deadline, failed to meet

⁷ Capt Gale has moved to strike the Brief based, in part, on the faulty Certificate of Service in a separate Motion.

the regulatory requirements. *Combs*, 38 M.J. at 742-43. The Court dismissed the appeal, finding that the Government “failed miserably” and there was “simply no excuse for the easily avoidable administrative fumbles which occurred.” *Id.*

So here, too, should this Court find that the Government failed to meet the basic requirement to deliver the email with the brief within the twenty-day deadline. The Government failed to provide any reason, or even address, why it filed an untimely brief, nor did it even bother to correct the defective date of filing or certificate of service on its brief. Email from Capt. Washburn. Days later, it still has not. From delivery of the ROT to this Court, and for each of the twenty permitted days thereafter, the Government chose not to file its brief until, as *Combs* instructs, it was quite literally too late.

Even if there was some attempt by the Government to deliver the brief on 20 February 2025 (though there is no evidence in the record that this is the case), in accordance with *Combs*, an “attempted delivery” in the context of an Art. 62 appeal does not satisfy the deadline plainly laid out in Rule 20(c)(1)(A) of the Joint Rules and the AFCCA Rules. *See also Pearson*, 33 M.J. at 779 (wherein the N.M.C.M.R. dismissed a government appeal because of the Government’s dilatory handling of the case); *United States v. Snyder*, 30 M.J. 662, 664 (A.F.C.M.R. 1990) (finding that where the government filed unauthenticated records with the Court more than twenty days after trial counsel’s written notice of appeal, the Court declined to find that “almost good enough” was worthy of compliance with the deadline, and dismissed its appeal). The Government’s transmittal of its brief was “almost good enough” in that it was one day past the required deadline, but “almost good enough,” especially in the context of an Art. 62 appeal where Capt Gale has been awaiting resolution of his case since at least the first preferral in 2022, should be deemed not good enough for compliance. *See Snyder*, 30 M.J. at 664.

There is nothing within this Court's rules that allows for good cause for an untimely filing of a Government appeal, and case law supports a strict adherence to the regulations governing Government appeals. *See Combs* 38 M.J. at 743. If this Court disagrees, it should require the Government to demonstrate good cause for its out of time filing.

Capt Gale requests this Honorable Court grant his motion for leave to file and dismiss the above-styled case.

Respectfully submitted,

A large black rectangular redaction box covering the signature of the appellant.

JORDAN L. GRANDE, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

A large black rectangular redaction box covering the contact information of the appellant.

CERTIFICATE OF FILING AND SERVICE

I certify 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 26 February 2025.

[REDACTED]

JORDAN L. GRANDE, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
<i>Appellant</i>	)	TO APPELLEE'S MOTION TO
	)	DISMISS
v.	)	
	)	
Captain (O-3)	)	
JUAN G. GALE	)	Before Panel No. 3
United States Air Force,	)	
<i>Appellee.</i>	)	Misc. Dkt. No. 2025-01

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

Pursuant to Rule 23(c) of this Court's Rules of Practice and Procedure, the United States enters its opposition to Appellee's Motion to Dismiss, dated 26 February 2025. Appellee asserts the government untimely filed its Appeal Brief, in violation of R.C.M. 908(b)(7), Rule 20(c)(1)(A) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (Joint Rules), and the Air Force Court of Criminal Appeals Rules of Practice and Procedure 20(c)(1)(A) (AFCCA Rule). (*Motion to Dismiss*, dated 26 February 2025, at 1.) Appellant's motion should be denied because the government's filing was timely, and even if this Court decides it was not, the 20 day requirement is not a jurisdictional requirement, and there is good cause for this Court to permit the government to file out of time.

The Government's Filing Was Timely

Per the representatives of this Court, the government's Appeal Brief was timely filed. (*See Motion to Attach*, dated 5 March 2025, Appx. B.) R.C.M. 908(b)(7) states that if the United States elects to pursue an appeal, "it shall be filed directly with the Court of Criminal Appeals, in accordance with the rules of that court." AFCCA Rule 20(c)(1)(A) states "Appellate government counsel shall have 20 days from the date the appeal is filed with the Court to file a supporting

brief.” The record of trial and notice of an intent to appeal were timely filed on 31 January 2025. (*Notice of Docketing*, dated 3 February 2025.)

Based on the government’s initial reading of this Court’s rule, undersigned counsel attempted to file the government’s brief on 20 February 2025. (*Motion to Attach*, dated 5 March 2025, Appx. A-B.) For an unknown reason, the email that was sent by undersigned counsel on 20 February 2025, was not delivered until undersigned counsel attempted to log in to his computer the morning of 21 February 2025. (*Id.* at Appx. B.) Upon realizing this, undersigned counsel immediately notified the Appellate Defense Division and this Court of the issue. (*Id.*) Undersigned counsel specifically asked this Court whether, given the technological error, the government should file a motion for leave to file out of time documenting the technological issue and asserting good cause for the delayed email filing. (*Id.*) After discussion with representatives of this Court, undersigned counsel was informed that the Court’s suspense date for the government’s Appeal Brief was 23 February 2025, and the government’s filing was not late, but in fact, early. (*Id.*) Undersigned counsel was informed by the Clerk of Court that this Court assesses the 20 day window for filing from the date of docketing. (*Id.*) This Court docketed this case on 3 February 2025. (*Notice of Docketing*, dated 3 February 2025.) Representatives of this Court asserted that the government’s filing was timely and in compliance with this Court’s rules. (*Motion to Attach*, dated 5 March 2025, Appx. B.) At the suggestion of the Clerk of Court, undersigned counsel emailed this Court to confirm the Court’s suspense date for documentation purposes. (*Id.*) Once again, this Court confirmed the Court’s suspense date for the government’s brief was 23 February 2025. (*Id.*)

Based on the representations of representatives of this Court the, government justifiably believes its filing of its Appeal Brief was timely. The government elected not to file a motion for

leave to file out of time or to provide an explanation of good cause to this Court because it believes that its filing was timely based on this Court's interpretation of its own rules. Thus, there is no grounds to dismiss the government's appeal.

Even if the Government's filing was not timely, there is good cause to permit the government to file out of time

If this Court determines that the representations of this Court's representatives interpretation of this Court's own rules were error, this Court should not punish the government for its reliance on the Court. First, if the filing on 21 February 2025 was untimely, there is good cause to permit the government to file its Appeal Brief less than 9 hours late. As explained in undersigned counsel's declaration and the declaration of Maj Lee, undersigned counsel attempted to file the Appeal Brief in the afternoon on 20 February 2025. (Id. at Appx. A-B.) Due to an unidentified technical issue, the email was not delivered until 21 February 2025 when undersigned counsel signed on to his computer after arriving for duty. (Id. at Appx. B.) As soon as this error was identified, undersigned counsel notified all parties and took proactive steps to determine whether remedial actions were necessary. (Id.) Based on the representations of this Court, undersigned counsel did not believe remedial actions were necessary, and he relied on this Court's interpretations of its own rules. (Id.) Even if this reliance was error, it was reliance based in good faith after undersigned counsel had taken steps to ensure that the government had complied with this Court's rules.

R.C.M 908(c)(1) states "Appellate Government Counsel shall diligently prosecute an appeal under this rule." Here, undersigned counsel attempted to timely file the government Appeal Brief on 20 February 2025. (*Motion to Attach*, dated 5 March 2025, Appx. B.) Upon realizing that the electronic filing had not gone through successfully on 20 February 2025, undersigned counsel immediately took steps to attempt to rectify the issue by reaching out to

Appellate Defense and representatives of this Court. (Id.) Undersigned counsel's attempt to timely file and his actions thereafter demonstrate he has complied with his duty to prosecute the government's appeal diligently. Given there was no lack of diligence, dismissal would not be appropriate.

Further, there is good cause to permit any delay in filing the government's Appeal Brief. The only timing requirement present in R.C.M. 908 is the jurisdictional requirement that the notice of appeal be filed "within 72 hours of the ruling or order to be appealed." R.C.M. 908(b)(2-3). Here, the government met that requirement. (*Notice of Appeal*, dated 8 January 2025.) In pertinent part, R.C.M. 908 provides that any appeal must be promptly and expeditiously forwarded to the government representative responsible for the appeal, and, if an appeal is to be filed, the appeal must be filed in accordance with the Rules of the court. R.C.M. 908(b)(6-7).

Pivotaly, this Court's rules contemplate the possibility for out-of-time appeals. (AFCCA Rule 20.1(c)(1)(D)). Specifically, this Court requires the appeal brief contain "a statement showing good cause why the appeal was not timely filed, if applicable." (Id.) This Court's rules demonstrates that the 20-day window for filing the government's appeal brief established by this Court's rules and the Joint Rules is not jurisdictional, since it can be suspended for good cause. The previous version of this Court's rules contained the same 20-day requirement (AFCCA Rule 21(d)(1)), dated 13 August 2014), as well as the same requirement that untimely filings be accompanied with a statement demonstrating good cause. (AFCCA Rule 21.1(b)(1)(D), dated 13 August 2014). Other Courts of Criminal Appeals have previously interpreted the old joint Rule to permit "a delay in filing the appeal [based on] a good cause shown basis." United States v. Pearson, 33 M.J. 777, 780 (N-M.C.M.R. 1991). Courts have also found that the late filing of the

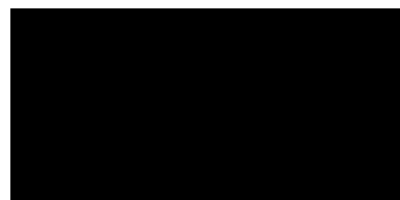
record with the court is not a jurisdictional defect. United States v. Sullivan, No. 001-62-17, 2016 CCA LEXIS 767 (C.G. Ct. Crim. App. Nov. 29, 2016). It would logically follow that untimely filing of the government's appeal brief is not a jurisdictional defect as the requirements are derived from the CCAs' own rules, rather than from Article 62 or even R.C.M. 908. While the rules have been updated since those cases were decided, the 20-day requirement for filing the government's brief and the allowance for untimely filing have not changed. Thus, there is no reason to doubt the prior decisions of our sister services. If the United States' brief was untimely, it is not a jurisdictional issue, and this Court can accept an untimely brief for good cause shown.

This situation is not like United States v. Combs or United States v. Snyder cited to by Appellee. (*Motion to Dismiss*, dated 26 February 2025 at 6-7.) Here, there are three important distinctions between the cases cited by Appellee and the situation before this Court: (1) in those cases, the court was assessing whether the government had complied with the courts rules pertaining to forwarding of the record of trial, not *filing* of the government's brief; and (2) the government complied with the requirement to timely file the record of trial with this Court; and (3) there is good cause in this case to permit the government's potentially late filing. 38 M.J. 741 (A.F.C.M.R. 1993); 30 M.J. 662 (A.F.C.M.R. 1990)

In Combs, the Court looked to the language of R.C.M. 908(b)(7). Combs, 38 M.J. at 743. Importantly, in Combs the Court did not treat potential non-compliance with R.C.M. 908(b)(7) as a jurisdictional matter but instead assessed whether there was good cause for the government's non-compliance with the court's rules. In Combs the court found the government had failed to "give [the court] *any valid* reason why [the court] should not hold it to the [requirement of the court's rules]." Here, the unidentified technical error, coupled with the

government's potential detrimental reliance on this Court's interpretation of its own rules, is good cause for an untimely filing of the government Appeal Brief. Crucially, this Court's rules indicate that any delay in filing the government's appeal is authorized with a showing of good cause. (AFCCA Rule 20.1(c)(1)(D)). Moreover, in Snyder and Combs the delay was far more significant than any delay in this case. Here, the government's filing—if it was untimely—was less than 9 hours late. In Combs and Snyder, the delay amounted to seven days, significantly more egregious than the delay here. 38 M.J. at 742; 30 M.J. at 664. Finally, in Snyder the court determined that it must strictly construe its own rules because the Appellee was being held in confinement during the delay. 30 M.J. at 664. Here, Appellee is not currently being held in confinement, and the concerns in Snyder relating to the Appellee's right to liberty being impacted by the delay are not present in this case. Thus, the cases relied on by Appellee are unpersuasive, and this Court should find that even if the government's filing was untimely there was good cause for the minor delay under AFCCA Rule 20.1(c)(1)(D).

For these reasons, the United States respectfully requests the Court deny Appellant's motion to dismiss and accept the government's Appeal Brief as timely filed. Alternatively, should this Court determine that its interpretation of its own rules was error, this Court should find that there is good cause to permit the government's untimely filing in this case.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division





MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division



CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 5 March 2025.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division



UNITED STATES,) **MOTION TO STRIKE**
Appellant,)
) Before Panel No. 3
)
v.) Misc. Dkt. No. 2025-01
)
) 26 February 2025
Captain (O-3))
JUAN G. GALE,)
United States Air Force,)
Appellee.)

Pursuant to Rule 23.3(p) of this Honorable Court's Rules of Practice and Procedure,¹ Captain (Capt) Juan G. Gale, Appellee, hereby moves this Honorable Court to strike the Government's brief in the above-styled case. The Government's brief is noncompliant with Rule for Courts-Martial (R.C.M.) 908(b)(7),² the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (Joint Rules),³ and AFCCA Rule of Practice and Procedure (AFCCA Rules) in the following ways: 1) It contains an erroneous certificate of filing and service;⁴ 2) It was untimely but was not captioned as an out-of-time filing;⁵ and 3) It contained no explanation of good cause for its untimeliness.⁶

⁶ This violates AFCCA Rule 18.5.

Appellant served the Record of Trial (ROT) on this Court on 31 January 2025. Government Brief at 5. In accordance with R.C.M 908(b)(7), Rule 20(c)(1)(A) of the Joint Rules, and Rule 20(c)(1)(A) of the AFCCA Rules, the Government was required to file its brief with this Court within twenty days of 31 January 2025 - by 20 February 2025. Instead, it filed its brief, containing a faulty certificate of service and incorrect date, on the twenty-first day after that date, violating Rule 20(c)(1)(A). The incorrect certificate and date do not save the Government's pleading from being untimely.

This Court may grant relief in accordance with AFCCA Rule 13.4, which provides that any filing that does not comply with this Court's rules may be rejected, and AFCCA Rule 23.3(p), which provides that counsel may file a motion to strike for any portion of a filing if counsel discovers a violation of Rule 17.3 (word count limit) or for good cause shown.

Capt Gale requests this Honorable Court grant his motion and strike the Government's brief for failure to comply with this Court's rules regarding filing requirements and timeliness.

MOTION

Facts

On 1 September 2022, the following charges and specifications were preferred against Capt Gale: one charge and specification of abusive sexual contact, in violation of Article 120, UCMJ; one charge and one specification of assault consummated by a battery, in violation of Article 128, UCMJ; one charge and one specification of conduct unbecoming an officer, in violation of Article 133, UCMJ; and one charge and one specification of fraternization, in violation of Article 134, UCMJ. *Charge Sheet*, dated 1 September 2022, Gale 1 ROT,⁷ Vol. 1.

⁷ Two Records of Trial exist in this case. The Record of Trial pertaining to the charges withdrawn and dismissed by the convening authority on 7 June 2023 will be referred to as "Gale 1."

On 28 December 2023, trial defense counsel filed a motion for appropriate relief requesting that the military judge dismiss the charges against Capt Gale for improper referral.⁸ The military judge denied the defense's motion, but three days later, granted a defense motion for her recusal. Appellate Ex. LXXXVII, Appellate Ex. XLV. A new military judge was detailed to the case. Appellate Ex. LXXXVI, para. 33. On 2 September 2024, the defense filed a motion to reconsider the Court's previous rulings on the defense's motions to dismiss for improper referral. Appellate Ex. LXXXI. On 30 December 2024, the military judge granted the defense's motion for reconsideration, found that the charges from Capt Gale's first court-martial were improperly withdrawn, and ordered all charges and specifications be dismissed with prejudice. Appellate Ex. LXXXVI. On 6 January 2025, at 1408 hours Eastern Standard Time (EST), the military judge denied the Government's motion to reconsider the ruling on the defense's motion to dismiss. Appellate Ex. XC.

On 8 January 2025, at 1802 EST, the United States filed a notice of appeal, notifying the military judge of its intent to appeal his ruling to withdraw and dismiss the charges with prejudice. Gov. Record of Trial Docketing Memorandum, dated 31 January 2025, Attachment 2. Trial counsel forwarded the appeal and record of trial to the "Air Force Appellate Operations Division," and it was received on 28 January 2025.⁹ Government Brief at 5. The Government filed the record of trial with this Court on Friday, 31 January 2025. *Id.* On 21 February 2025 at 0855 hours EST, the Government electronically filed its Brief with this Court and simultaneously served it upon the Air Force Appellate Defense Division (JAJA). Email from Capt Washburn, 21 February 2025, "Sent" line; Declaration of MSgt Stroud, 26 February 2025, para. 3; *see also* AFCCA Rules 13.2,

⁸ The specific facts regarding the initial improper withdrawal and dismissal and second referral of the same charges in this case are not specifically discussed herein, as they are not relevant to determining the present issue.

⁹ Presumably, this refers to the Government Trial and Appellate Operations Division.

13.3 (discussing electronic filing via email as the only accepted form of filing absent express permission and electronic service upon JAJA by email to the approved organizational electronic workflow inbox). The email and the pleading were faulty in a number of ways. 1) The caption of the email providing certificate of service is erroneously dated “4 June 24.” Email from Capt. Washburn, Declaration of MSgt Stroud. 2) The date in the certification contained in the body of the email erroneously states “(20 February 25).” *Id.* 3) The Brief is erroneously dated 20 February 2025. 4) The Certificate of Service found on page 25 of the Brief states, “I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 20 February 2025 via electronic filing.” *Id.*; Government Brief at 1, 25.

The Government, as of the date of this filing, has not corrected these errors nor provided good cause for its untimely filing.

Law

The authority to review a Government appeal is provided by Article 62, UCMJ, which subjects certain decisions made by a military judge to an interlocutory Government appeal. Art. 62, UCMJ, 10 U.S.C. § 862. Article 62 authorizes the Government to appeal, *inter alia*, “[a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.” Art. 62(a)(1)(A), UCMJ. “An appeal under this section shall be diligently prosecuted by appellate Government counsel.” Art. 62(a)(3), UCMJ. R.C.M 908(b)(6) provides: “Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall promptly and by expeditious means forward the appeal to a representative of the Government designated by the Judge Advocate General.”

AFCCA Rule of Practice and Procedure Rule 23.3(p) provides, “A motion to strike any

portion of a filing may be filed if counsel discovers a violation of Rule 17.3¹⁰ or for other good cause shown.”

This Court’s rules specify how filings must be served, when service is completed, and establishing an artifact to denote completed service. This is specified in three rules. AFCCA Rule 13(c) provides, “Service by electronic means is complete upon transmission,” and Rule 13.2(a) provides, “The method for filing documents with the Court is electronic filing at the following e-mail address: usaf.pentagon.af-ja.mbx.af-jah-filing-workflow@mail.mil. No other method of electronic filing will be accepted absent permission from the Clerk of the Court.” AFCCA Rule 13.3 states, “Pleadings filed with the Court shall be served on all counsel of record . . . and will be evidenced in the document by use of the certificate format below.”

The Joint Rules set out three timelines the Government must meet in order for an interlocutory appeal to be considered timely. First, the Government has twenty days from the date of the Notice of Appeal, to forward the record of trial. Once that is received, the Government has five days to file the record with the Court and opposing counsel. Most importantly for this motion, the third clock started ticking “from the date the appeal is filed.” From that date, the Government has twenty days to file its brief. The rule is silent as to extensions. Joint Rule 20(c)(1)(A). AFCCA Rule 20(c)(1)(A) is identical to the Joint Rule.

Analysis

The Government’s brief is non-compliant with R.C.M. 908(b)(7), the Joint Rules, and the AFCCA Rules in a number of ways. Some warrant striking parts of the Government’s brief, while other—and all of the errors taken together—warrant striking the whole thing. The Government’s brief was submitted on 21 February 2025, a day after the deadline imposed by R.C.M. 908(b)(7),

¹⁰ Rule 17.3 sets forth limitations on the length of filings.

and Rule 20(c)(1)(A) of both the Joint Rules and the AFCCA Rules. Though the date of the Government's brief (20 February 2025) and its certificate of service claimed the brief was filed on the last possible date under the Court's rules, the truth is that it was not. *See* Email from Capt Washburn, Declaration of MSgt Stroud. Both of these errors merit striking the pleading. This is especially true where the Government has allowed its untimely brief to stagnate for days now without any effort to articulate any good cause for its untimely filing.

First, the Government's brief contains an incorrect certificate of service. Even though the Government erroneously dated its brief and the certificate of service contained within the body of the email as 20 February 2025, the filing and service *actually* occurred on 21 February 2025, according to the timestamp on the email from Capt Washburn and the Declaration from MSgt Stroud. *See* Joint Rule 13(c) (stating that service is complete upon transmission of the email); Email from Capt Washburn, Declaration of MSgt Stroud. This incorrectly dated certificate of service and date stamp on its brief does not save the Government from the plain fact that its brief was untimely. This Court should, therefore, strike the Government's Brief because 1) it is untimely, without any explanation of good cause for why it was filed late, and 2) it contains both an incorrect filing date and incorrect certificate of service.

Second, there is no question that the Government in this case failed to comply with Rule 20(c)(1)(A) of the Joint Rules and the AFCCA Rules. Those rules, which are identical, required the Government to file its brief in support of its appeal within twenty days of the date it served the ROT upon this Court. The Government served the ROT upon this Court on 31 January 2025; therefore, it was required to file its brief by 20 February 2025. Government Brief at 5; Joint Rule 20(c)(1)(A); AFCCA Rule 20(c)(1)(A). The Government, instead, failed to comply with this requirement when it filed its brief on 21 February 2025, one day after the deadline.

Third, the Government's 21 February 2025 submission failed to provide any reason, or even address, why it filed an untimely brief, nor did it even bother to correct the defective date of filing or certificate of service in its brief. Email from Capt Washburn; Declaration of MSgt Stroud. It is noncompliant with Rule 18.5 of this Court's Rules of Practice and Procedure, which provides, "Any filing that is submitted out of time shall so indicate in the caption and shall articulate good cause for why the filing is out-of-time. A filing is out of time when it is submitted after the deadline for filing."¹¹ The brief the Government filed on 21 February 2025 neither included "out of time" in its caption nor articulated any cause for why it was filed out of time, nor has it made any attempt to do so since its original late filing. Even if this Court were inclined to accept an out of time filing for a Government appeal for good cause, the Government has provided no reason why it should do so.

Granting a motion to strike is an appropriate response to a non-compliant appellate filing and one this Court and other military appellate courts have employed when appropriate. *E.g.*, *United States v. Swanson*, No. ACM 38827, 2016 CCA LEXIS 648, at *17 (A.F. Ct. Crim. App. Oct. 27, 2016) (referring to this Court granting a government motion to strike); *United States v. Merritt*, 72 M.J. 499 (C.A.A.F. 2013) (mem.) (granting government motion to strike); *United States v. Abadia*, 72 M.J. 92 (C.A.A.F. 2013) (mem.) (granting government motion to strike); *United States v. Cote*, 69 M.J. 186 (C.A.A.F. 2010) (mem.) (granting appellant's motion to strike noncompliant government filing). Accordingly, the appropriate remedy for the Government's multiple failures to comply with the filing and timeliness requirements set forth by this Court is to strike the Government's brief.

Capt Gale requests this Honorable Court grant his motion to strike.

¹¹ See *supra* Note 5.

Respectfully submitted,

[REDACTED]

JORDAN L. GRANDE, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[REDACTED]

CERTIFICATE OF FILING AND SERVICE

I certify 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 26 February 2025.

[REDACTED]

JORDAN L. GRANDE, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
<i>Appellant</i>	)	TO DEFENSE MOTION TO STRIKE
	)	
v.	)	
	)	
Captain (O-3)	)	Before Panel No. 3
JUAN G. GALE	)	
United States Air Force,	)	Misc. Dkt. No. 2025-01
<i>Appellee.</i>	)	

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

Pursuant to Rule 23(c) of this Court's Rules of Practice and Procedure, the United States enters its opposition to Appellee's Motion to Strike, dated 26 February 2025. Appellee asserts the Government's Appeal Brief filed on 21 February 2025 is noncompliant with Rule for Courts-Martial (R.C.M.) 908(b)(7), the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (Joint Rules), and the Air Force Court of Criminal Appeals Rules for Practice and Procedure (AFCCA Rules) in the following ways: (1) it contains an erroneous certificate of filing and service; (2) it was untimely but was not captioned as an out-of-time filing; and (3) it contained no explanation of good cause for its untimeliness. Appellant's motion should be denied because the government's filing was timely, and the error on the certificate of service amounts to a minor error that can be remedied by granting the government's motion to amend that will be filed contemporaneous with this motion.

Error in the Certificate of Service

First, the government acknowledges that the certificate of service contained within the government's filing contains an error in that it reflects the filing was served on 20 February 2025. As explained in undersigned counsel's declaration, dated 4 March 2025, the government attempted to file its brief on 20 February 2025, but due to an unknown technical issue, the

government's brief was not distributed and thus was not filed until the morning of 21 February 2025. (*Motion to Attach*, dated 5 March 2025, Appx. B.) If this Court were to grant the government's motion to amend what amounts to a scrivener's error, the error would be rectified.

The Government timely filed the Appeal Brief

Per the representatives of this Court, the government's Appeal brief was timely filed. (*See Motion to Attach*, dated 5 March 2025, Appx. B.) R.C.M. 908(b)(7) states that if the United States elect to pursue an appeal, "it shall be filed directly with the Court of Criminal Appeals, in accordance with the rules of that court." AFCCA Rule 20(c)(1)(A) states "Appellate government counsel shall have 20 days from the date the appeal is filed with the Court to file a supporting brief." The government filed the record of trial and notice of an intent to appeal with this Court on 31 January 2025. (*Notice of Docketing*, dated 3 February 2025.) Representatives of this Court informed the government that this Court interprets the trigger date for the 20 day clock to be the date of docketing. (*Motion to Attach*, dated 5 March 2025, Appx. B.) This Court docketed the case on 3 February 2025. (*Notice of Docketing*, dated 3 February 2025.) Based upon this Court's interpretation of its own rules, the government's Appeal Brief was due to this Court on 23 February 2025. (*Id.*) The government successfully filed the Appeal Brief on 21 February 2025, two days before the suspense date reflected by this Court's own records. (*Motion to Attach*, dated 5 March 2025, Appx. B.)

Moreover, the government specifically asked representatives of this Court whether a motion for leave to file out of time would be necessary. (*Id.*) This Court indicated that based on its identified suspense date a motion for leave to file out of time was not required as the government's filing was timely. (*Id.*) The government has conducted itself in good faith reliance upon the representations of this Court. If those representations were erroneous, the

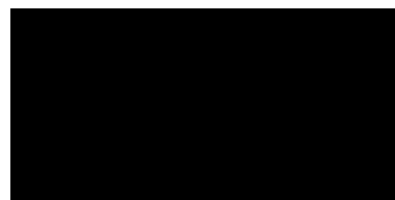
government should not be punished for its good faith reliance on this Court's interpretation of its own rules, especially where undersigned counsel brought the issue to the attention of this Court and took significant efforts to ensure an accurate understanding of this Court's interpretation.

(Id.)

Given the government's timely filing of the Appeal Brief, Appellant's Third Allegation of Error Lacks Merit.

In light of this Court's representations that the government timely filed its Appeal Brief, the government was not required to provide good cause for filing its brief. Despite Appellee's assertion that the government has "allowed its untimely brief to stagnate...without any effort to articulate any good cause for its untimely filing" (*Motion to Strike*, dated 26 February 2025, at 6,) the reality is the government immediately took extensive steps to rectify any error and specifically sought out the guidance of this Court to ensure that the government had complied with the letter of the law and this Court's rules. (*Motion to Attach*, dated 27 February 2025, Appx. B.) If this Court determines its interpretation of its rules was erroneous, it should consider the contents of undersigned counsel's declaration and the good faith reliance on this Court's interpretation of its own rules as good cause and permit the government to refile its Appeal Brief.

For these reasons, the United States respectfully requests the Court deny Appellant's motion to strike and accept the government's Appeal Brief as timely filed.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division





MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division



CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 5 March 2025.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	MOTION TO ATTACH
<i>Appellee,</i>	)	
	)	
	)	
v.	)	Before Panel 3
	)	
Captain (O-3)	)	Misc. Dkt. No. 2025-01
JUAN G. GALE,	)	
United States Air Force.	)	26 February 2025

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

Pursuant to Rule 23.3(b) of this Honorable Court’s Rules of Practice and Procedure,
Appellant moves to attach following documents to the record:

- (1) Appendix A – Electronic mail (Email) from Captain (Capt) Tyler Washburn with Subject: “Certificate of Service- Misc. Dkt. No. 2025-01- 4 June 24” containing one attachment¹ titled “Gale- Misc. Dkt. No. 2025-01- United States Appeal Under Article 62 (20 February 25),” dated 21 February 2025 (1 page).
- (2) Appendix B – Declaration of Master Sergeant (MSgt) Michele Stroud, dated 26 February 2025 (1 page).

The 21 February 2025 Email from Capt Tyler Washburn, Appellate Government Counsel, found at Appendix A and the Declaration of MSgt Michele Stroud, Noncommissioned Officer in Charge, Appellate Defense Division, found at Appendix B, are relevant to this Court’s consideration of Appellant’s Motion to Dismiss dated 26 February 2025 and Motion to Strike dated 26 February 2025. The Email at Appendix A presents the factual basis for the issue in both motions, namely that the Government’s brief was filed late, in violation of Rule 20(c)(1)(A) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals and Rule 20(c)(1)(A) of the Air Force Court of Criminal Appeal (AFCCA) Rules of Appellate Practice and Procedure.

¹ The attachment itself is not included in this Appendix because it is already in the record as the United States’ Appeal Under Article 62, 20 February 2025.

The Email is relevant and necessary for two reasons: (1) to prove that the Government's Brief (attached to the Email) was electronically filed via this Email on 21 February 2025²; and (2) to demonstrate that the Certificate of Service (dated 20 February 2025) contained in the body of the email does not match the date the Government's Brief was filed (21 February 2025).

The Declaration of MSgt Stroud is relevant and necessary because it authenticates the Email at Appendix A and confirms that the Email was, in fact, received by the Air Force Appellate Defense Division's organizational inbox on 21 February 2025 (not 20 February 2025 as the Email's Certificate of Service purports).

Both documents are relevant and necessary for resolving the issues raised by the Government's late Article 62 filing and addressed by Appellant's 26 February 2025 Motion to Dismiss and 26 February 2025 Motion to Strike.

Appellant requests this Court grant this motion to attach.

Respectfully submitted,



JORDAN L. GRANDE, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



² This email served as an electronic filing of the Government's Article 62 Brief in accordance with AFCCA Rule 13(c) and Rule 13.2(a).

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 26 February 2025.

Respectfully submitted,

[REDACTED]

JORDAN L. GRANDE, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[REDACTED]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellant,</i>	)	UNITED STATES’ MOTION TO ATTACH DOCUMENTS
	)	
	)	
v.	)	Before Panel No. 3
	)	
Captain (O-3)	)	
JUAN G. GALE	)	Misc. Dkt. No. 2025-01
United States Air Force	)	
<i>Appellee.</i>	)	5 March 2025

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court’s Rules of Practice and Procedure, the United States respectfully requests to attach the following appendices to this motion:

Appendix A – Declaration of Major Kate E. Lee, dated 21 February 2025, (2 pages)

Appendix B – Declaration of Captain Tyler L. Washburn, dated 4 March 2025, (9 pages with attachments)

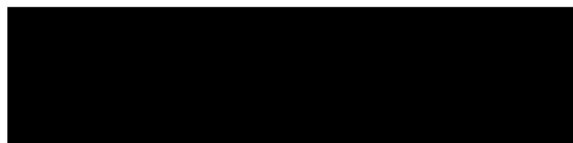
The attached declaration is responsive to Appellee’s Motion to Strike, dated 26 February 2025, and Motion to Dismiss, dated 26 February 2025. In Appendix B, undersigned counsel explains the circumstances surrounding the filing of the government’s Appeal Brief and explaining the government’s reasoning for not filing a motion for leave to file out of time. Moreover, in Appendix A another member of the Appellate Government office explains the events they observed on 20 February 2025 when undersigned counsel attempted to file the government’s Appeal Brief. The attachments’ inclusion in the record would be beneficial to this Court for resolution of Appellee’s Motion to Strike and Motion to Dismiss, both filed on 26 February 2025.

Our Superior Court has held that matters outside the record may be considered “when doing so is necessary for resolving issues raised by materials in the record.” United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that “based on experience... ‘extra-record fact determinations’ may be ‘necessary to resolving appellate questions.’” Id. at 442. (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 19993)). Accordingly, the attached appendices are relevant and necessary to address the events surrounding the government’s filing of the Appeal Brief in this case and the reasons why the government believed in good faith that its filing was timely and a motion for leave to file out of time was unnecessary.

WHEREFORE, the United States respectfully requests that this Honorable Court grant the motion to attach the documents.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division



MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division



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 5 March 2025.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division



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

UNITED STATES	)	Misc. Dkt. No. 2025-01
<i>Appellant</i>	)	
	)	
v.	)	
	)	
Juan G. GALE	)	NOTICE OF
Captain (O-3)	)	PANEL CHANGE
U.S. Air Force	)	
<i>Appellee</i>	)	

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

ORDERED:

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

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.



FOR THE COURT



TANICA S. BAGMON
Appellate Court Paralegal

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

UNITED STATES	)	Misc. Dkt. No. 2025-01
<i>Appellant</i>	)	
	)	
v.	)	
	)	ORDER
Juan G. GALE	)	
Captain (O-3)	)	
U.S. Air Force	)	
<i>Appellee</i>	)	Special Panel

On 20 March 2025, Appellant moved this court to hear oral argument in the above-captioned case. Appellee opposes the motion.

Upon Appellant’s motion, oral argument is hereby granted on the following issue:

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FOUND THE CHARGES AND SPECIFICATIONS IN APPELLEE’S FIRST COURT-MARTIAL WERE IMPROPERLY WITHDRAWN IN VIOLATION OF RULE FOR COURTS-MARTIAL 604.

Accordingly, it is by the court on this 27th day of March, 2025,

ORDERED:

Appellant’s Motion for Oral Argument is **GRANTED** as specified above.

Oral argument on this issue will be heard in the courtroom of the United States Air Force Court of Criminal Appeals, located at 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, at a time and date to be set by future order of this court.



FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellant,</i>	)	UNITED STATES’ MOTION FOR ORAL ARGUMENT
	)	
	)	
v.	)	
	)	Before Panel No. 3
	)	
	)	Misc. Dkt. No. 2025-01
Captain (O-3)	)	
JUAN G. GALE, USAF,	)	20 March 2025
<i>Appellee,</i>	)	

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

Pursuant to Rule 25 of this Court’s Rules of Practice and Procedure, the United States requests oral argument on the issue presented in this case. The subject of this appeal requires detailed analysis of a nuanced ruling that involved the dismissal with prejudice of all charges and specifications. Moreover, this is a matter of substantial importance to the military justice system. This Court’s decision will ultimately define the scope of a convening authorities remedial options when unlawful command influence is identified in an ongoing case. Given the potential impact of this Court’s decision, oral argument is appropriate in this case. Oral argument will assist this Court in understanding the extensive facts related to the rulings in this case, identifying where the parties disagree, what principles of law the military judge misapplied, and how the military judge abused his discretion. For these reasons, the United States respectfully requests that this Honorable Court grant this motion for oral argument.

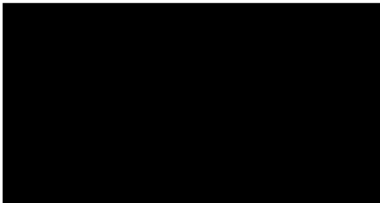
Oral argument will permit a robust exploration of an issue with implications for many cases in the Air Force and our sister services.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division



MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division



MATTHEW D. TALCOTT, Col,
USAF
Director
Government Trial and
Appellate Operations Division



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 20 March 2025 via electronic filing.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	APPELLEE’S OPPOSITION TO
<i>Appellant,</i>	)	UNITED STATES’ MOTION FOR
	)	ORAL ARGUMENT
v.	)	
	)	Before Panel No. 3
Captain (O-3)	)	
JUAN G. GALE,	)	Misc. Dkt. No. 2025-01
United States Air Force,	)	
<i>Appellee.</i>	)	21 March 2025

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

Pursuant to Rule 23.2 of this Honorable Court’s Rules of Practice and Procedure, Captain Juan G. Gale, Appellee, hereby opposes the Appellant’s Motion for Oral Argument (App. Motion) dated 20 March 2025, as the issues have been thoroughly briefed, and this Court does not need oral argument to decide this issue, which is well-defined by precedent.

The statute authorizing interlocutory government appeals in courts-martial requires diligence by appellate government counsel: “An appeal under this section shall be diligently prosecuted by appellate Government counsel.” Art. 62(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862(a)(3). The President reemphasized that requirement in Rule for Courts-Martial (RCM) 908(c): “Appellate Government counsel shall diligently prosecute an appeal under this rule.” Government appeals are disfavored in courts because they “compete with speedy trial and double jeopardy protection as well as judicial impartiality and piecemeal appeal policies.” *United States v. Combs*, 38 M.J. 741, 743 (A.F.C.M.R. 1993) (quoting *United States v. Pearson*, 33 M.J. 777, 779 (N.M.C.M.R. 1991)).

Oral argument will only serve to delay this Court’s decision on this case. The Government now moves this Court for oral argument but ignores its statutory obligation to prosecute appeals under Article 62 with diligence. This is especially problematic in a case where the Government

already failed to adhere to this mandate when it filed its initial brief late but was retroactively granted an extension of time to file by this Court. Order dated 20 March 2025 at 4. Further, in its request, the Government provides no basis as to why its brief *and reply brief* together are not sufficient for this Court to rule in this case. Instead, the Government avers only that oral argument “will assist this Court” in understanding the case facts, the disagreement between the parties, the principles of law involved, and “how the military judge abused his discretion,” while failing to explain how this is not achieved in the already-filed pleadings. App. Motion at 1.

The Government failed to comply with Rule 25 of the Joint Rules of Appellate Procedure (JRAP) and Rule 25 of this Court’s Rules of Practice and Procedure (AFCCA Rules), both of which require that the party moving for oral argument “shall identify the issue(s) on which counsel seek argument.” The Government states only that it “requests oral argument on the issue presented in this case,” but does not actually state the issue on which it now asks the court to grant oral argument. App. Motion at 1. The Government’s motion gives no consideration as to whether it wants to narrow the issue for oral argument or have oral argument on the appeal as a whole. Despite insisting that oral argument is important for this case, the Government has not even clearly identified the issue it wants to discuss at oral argument, which only further proves the point that oral argument is unnecessary in Capt Gale’s case.

Capt Gale’s case does not require a novel interpretation of case law, as the Government seems to now urge this Court as a reason to delay this case further by permitting oral argument. The law regarding improper withdrawal is well-established in *United States v. Underwood*, 50 M.J. 271 (C.A.A.F. 1999) and *Vanover v. Clark*, 27 M.J. 345 (C.M.A. 1988), and the Government acknowledges this in its original brief. United States’ Appeal Under Article 62, UCMJ dated 20 February 2025 at 18-19. Now, for the first time, the Government contends that oral argument is

necessary here because Capt Gale’s case will “ultimately define the scope of a convening authorities[sic] remedial options when unlawful command influence is identified in an ongoing case.” App. Motion at 1. However, in the Government’s original brief, one of its main grievances with the military judge’s ruling is that he failed to “acknowledge the key distinctions between *Vanover* and *Underwood*” and Capt Gale’s case is “analogous to *Underwood*, but not *Vanover*.” United States’ Appeal Under Article 62, UCMJ dated 20 February 2025 at 18-19. The Government cannot have it both ways; either this case is one that should be decided based on clear precedent, or it is one that addresses a unique issue that will have “implications for many cases in the Air Force and our sister services.” App. Motion at 1.

The Government has now had two opportunities to plead its case to this Court, first by filing a twenty-five-page brief on 21 February 2025, and second by filing an eleven-page reply brief on 20 March 2025. Its motion now for a third opportunity to address this Court is unnecessary, especially considering the Government’s statutory requirement to prosecute this appeal with diligence. Underscoring the potential for oral argument to further unnecessary delays in this case, Capt Gale’s case has been languishing in pre-trial motions since charges were first preferred more than two and a half years ago. Charge Sheet, 1 September 2022, Gale 1 Record of Trial (ROT),¹ Vol. 1. Contrary to the Government’s new contention, the law involved in this case is well-established and the issue has been clearly briefed. This Court should not delay in upholding the military judge’s decision.

¹ Two records of trial exist in this case. For the sake of clarity and consistent with Appellant’s Brief, the ROT pertaining to the charges improperly withdrawn and dismissed by the convening authority on 7 June 2023 will be referred to as “Gale 1 ROT.”

WHEREFORE, this Court should deny the Government's request for oral argument.

Respectfully submitted,

[REDACTED]

Appellate Defense Counsel
Air Force Appellate Defense Division

[REDACTED]

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 21 March 2025.

Respectfully submitted,

A large black rectangular redaction box covering the signature of the Appellate Defense Counsel.

Appellate Defense Counsel
Air Force Appellate Defense Division

A black rectangular redaction box covering the contact information of the Appellate Defense Counsel, with a small rectangular cutout on the right side.

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

UNITED STATES	)	Misc. Dkt. No. 2025-01
<i>Appellant</i>	)	
	)	
v.	)	
	)	ORDER
Juan G. GALE	)	
Captain (O-3)	)	
U.S. Air Force	)	
<i>Appellee</i>	)	Special Panel

On 27 March 2025, the court ordered oral argument on the following issue:

**WHETHER THE MILITARY JUDGE ABUSED HIS DIS-
CRETION WHEN HE FOUND THE CHARGES AND SPEC-
IFICATIONS IN APPELLEE’S FIRST COURT-MARTIAL
WERE IMPROPERLY WITHDRAWN IN VIOLATION OF
RULE FOR COURTS-MARTIAL 604.**

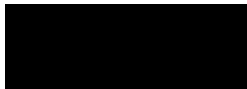
Accordingly, it is by the court on this 31st day of March, 2025,

ORDERED:

Oral argument in the above-captioned case will be heard at **1000 hours on Thursday, the 24th day of April 2025**, in the courtroom of the United States Air Force Court of Criminal Appeals, located at 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland 20762.



FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	NOTICE OF APPEARANCE
<i>Appellant,</i>	)	
	)	
	)	
v.	)	Before Panel No. 3
	)	
	)	Misc. Dkt. No. 2025-01
	)	
Captain (O-3)	)	
JUAN G. GALE,	)	
United States Air Force,	)	
<i>Appellee.</i>	)	17 April 2025

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

Pursuant to Rule 12 of this Court's Rules of Practice and Procedure, undersigned counsel files this written notice of appearance in the above-captioned case. Undersigned counsel will sit second chair at Appellee's table at oral argument as supervisory counsel.

[REDACTED]

ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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 17 April 2025.



ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	MOTION TO CITE
	)	SUPPLEMENTAL AUTHORITY
	)	
v.	)	Special Panel
	)	
Captain (O-3)	)	Misc. Dkt. No. 2025-01
JUAN G. GALE,	)	
United States Air Force	)	22 April 2025
<i>Appellee.</i>	)	

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

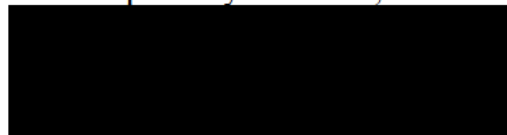
Pursuant to Rule 23.3(d) of this Court’s Rules of Practice and Procedure, Appellant, Captain (Capt) Juan G. Gale, moves to cite as supplemental authority the following cases: 1) *United States v. Leonard*, No. ACM 38484, 2015 CCA LEXIS 197 (A.F. Ct. Crim. App. 7 May 2015); 2) *United States v. Lister*, No. ACM 38543, 2015 CCA LEXIS 246 (A.F. Ct. Crim. App. 17 June 2015); and 3) *United States v. Jiles*, No. NMCCA 201200062, 2014 CCA LEXIS 151 (N-M. Ct. Crim. App. 6 March 2014). These cases are relevant to the issues because they show that Judge Smith’s 1 June 2023 notice to the parties shifting the burden on the issue of unlawful command influence (UCI) was a ruling. Appellate Ex. XXVI, Ex. QQ.

The Government disputes that Capt Gale was deprived of the benefit of a favorable trial ruling because, according to the Government, “Judge Smith’s preliminary burden shift ruling did not create a legally cognizable right.” United States’ Reply at 1. To the contrary, this Court and the Navy-Marine Corps Court of Criminal Appeals have deemed such decisions as a “ruling.” *Leonard*, 2015 CCA LEXIS 197 at *7; *Lister*, 2015 CCA LEXIS 246 at *6; *Jiles*, 2014 CCA LEXIS 151 at *5. Specifically, these decisions show that when a military judge finds the defense met its initial burden — and shifts the burden to the Government under the test set forth in *United States v. Biagese*, 50 M.J. 143 (C.A.A.F. 1999) — such findings are a “ruling.” *Id.*

In holding that the withdrawal in Capt Gale’s case was improper, Judge Stoffel correctly analyzed Capt Gale’s case by the factors articulated in *United States v. Underwood*, 50 M.J. 271 (C.A.A.F 1999). Specific to the third factor, he found that Capt Gale lost the benefit of a favorable trial ruling. Appellate Ex. LXXXVI, at ¶ 41(a) through (d). Judge Stoffel reasoned that Judge Smith’s initial finding—that the defense met the first prong in the *Biagese* framework—was sufficient to establish a favorable defense ruling. *Id.*; *Biagese*, 50 M.J. at 143; Appellate Ex. XXVI, Ex. QQ. Capt Gale lost this benefit as a result of the convening authority’s decision to withdraw and dismiss the charges. Appellate Ex. LXXXVI, at ¶ 40. This Court and the Navy-Marine Corps Court of Criminal Appeals, in each of the three cases referenced, identify this same initial finding as a ruling. So, too, should this Court find that Judge Stoffel did not abuse his discretion in holding that Capt Gale lost the benefit of a favorable *ruling* when the Convening Authority circumvented Judge Smith’s initial finding under the *Biagese* framework.

WHEREFORE, this Court should grant this Motion.

Respectfully submitted,



JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



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 22 April 2025.



JORDAN L. GRANDE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellant,</i>	)	UNITED STATES' MOTION TO SUBMIT SUPPLEMENTAL CITATION OF AUTHORITY
	)	
	)	
	)	
v.	)	
	)	Before Special Panel
	)	
Captain (O-3)	)	Misc. Dkt. No. 2025-01
JUAN G. GALE,	)	
United States Air Force	)	30 April 2025
<i>Appellee.</i>	)	

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

Pursuant to Rules 23.3(d) and 25.2(e) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to submit a supplemental citation of authority that was presented in oral argument. Rule 25.2(e) specifically allows that "[c]ounsel may also submit a supplemental citation of authority within 7 days following oral argument to cite any legal authority presented in oral argument that was not previously cited."

During oral argument on 24 April 2025, in response to a question from the Court, undersigned counsel cited United States v. Hendrix, 77 M.J. 454 (C.A.A.F. 2018), and stated he would provide a supplemental citation to this Court. This motion is responsive to that promise. In Hendrix, the Court of Appeals for the Armed Forces examined the government's actions after a withdrawal and dismissal in determining whether the withdrawal was improper. Id. at 457. Specifically, the Court noted that the government's actions post-withdrawal were consistent with their stated reason for the withdrawal, which indicated that the withdrawal and dismissal were done for a proper purpose and not as a subterfuge. Id.

Further, in Hendrix the Court addressed the prospect of the ability to withdraw and

dismiss being abused to keep an accused in a state of “perpetual jeopardy.” Id. at 458. The Court determined that the procedural safeguards such as a Sixth Amendment right to speedy trial, as well as the R.C.M. 707 speedy trial rights, provide a meaningful protection against such “perpetual jeopardy.” Id.

In accordance with Rule 25.5(e), the United States respectfully requests that this Court grant its motion to submit this supplemental citation of authority.

[REDACTED]

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division

[REDACTED]

[REDACTED]

MATTHEW D. TALCOTT, Colonel, USAF
Chief
Government Trial and Appellate Operations Division

[REDACTED]

[REDACTED]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division

[REDACTED]



CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and Petitioner's counsel on 30 April 2025.



TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel

