UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40478 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Brian D. HOWARD	)	**DOCKETING**
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

The record of trial in the above-styled case was returned to this court on 12 June 2024 by the Military Appellate Records Branch (JAJM) for re-docketing with the court.

Accordingly, it is by the court on this 13th day of June, 2024,

ORDERED:

That the Record of Trial in the above styled matter is referred to Panel 1 for appellate review.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40478 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Brian D. HOWARD	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 2 August 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 6th day of August, 2024,

ORDERED:

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

Each request for an enlargement of time will be considered on its merits. Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Acting Deputy Clerk of Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman (E-2) **BRIAN D. HOWARD,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 1 No. ACM 40478 (f rev) 2 August 2024

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **11 October 2024**. The record of trial was docketed with this Court on 13 June 2024. From the date of docketing to the present date, 50 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time. Appellant also demands speedy appellate review.

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 August 2024.

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

5 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) BRIAN D. HOWARD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40478 (f rev) Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 August 2024.

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

29 September 2024

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee,

v.

BRIAN D. HOWARD,
Airman, USAF
Appellant

Before Panel No. 1

No. ACM 40478 (f rev)

BRIEF ON BEHALF OF APPELLANT

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
matthew.blyth.1@us.af.mil

Counsel for Appellant

Table of Contents

Table of Authorities

Statutes and Legislation

Cases

Court of Appeals for the Armed Forces and Court of Military Appeals

Air Force Court of Criminal Appeals

Sister Service Courts of Criminal Appeals

Manual for Courts-Martial, United States

Rules for Courts-Martial

Other References

Assignments of Error

I.

WHETHER AIRMAN HOWARD'S DISOBEYING ORDERS AND DERELICTION OF DUTY CONVICTIONS ARE FACTUALLY INSUFFICIENT AND TWO OF HIS DERELICTION OF DUTY CONVICTIONS ARE LEGALLY INSUFFICIENT.

II.

WHETHER THE MILITARY JUDGE ERRED WHEN SHE REFUSED TO INSTRUCT ON LACK OF MENTAL RESPONSIBILITY.

III.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE DENIED CHALLENGES FOR CAUSE AGAINST TWO PANEL MEMBERS WHO QUESTIONED THE CENTRAL DEFENSE OF LACK OF MENTAL RESPONSIBILITY.

IV.

WHETHER THE RECORD OF TRIAL'S OMISSION OF COURT MEMBER SELECTION SHEETS REQUIRES RELIEF OR, AT A MINIMUM, REMAND FOR CORRECTION.

V.

WHETHER AIRMAN HOWARD IS ENTITLED TO SENTENCE RELIEF BECAUSE OF THE 223-DAY DELAY BETWEEN ANNOUNCEMENT OF THE SENTENCE AND DOCKETING WITH THIS COURT.

VI.[1]

WHETHER, AS APPLIED TO AIRMAN HOWARD, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION

[1] Assignments of Error (AOEs) VI and VII are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."

VII.

WHETHER AIRMAN HOWARD'S ASSAULT AND INSUBORDINATE CONDUCT CONVICTIONS ARE LEGALLY SUFFICIENT.

Statement of the Case

On 7 September and 24-28 October 2022, at Misawa Air Base (AB), Japan, a panel of officer and enlisted members sitting as a general court-martial found Airman (Amn) Brian D. Howard guilty, contrary to his pleas, of: (1) one specification of assault of a superior commissioned officer, in violation of Article 89, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 889 (2018)[2]; (2) one specification of willfully disobeying a superior commissioned officer, in violation of Article 90, UCMJ, 10 U.S.C. § 890 (2018); (3) one specification of insubordinate conduct toward a noncommissioned officer, in violation of Article 91, UCMJ, 10 U.S.C. § 891 (2018); and (4) three specifications of dereliction of duty (one negligent and two willful), in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2018). (R. at 57, 858–59; Entry of Judgment (EOJ).) The panel members sentenced Amn Howard to 6 years' confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. (R. at 932; EOJ.) The convening authority took no action on the findings and the sentence. (Convening Authority Decision on Action.)

[2] All references to the punitive articles are provided by year. Unless noted otherwise, all references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the versions in the *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*].

On 9 April 2024, this Court remanded the case due to missing portions of the verbatim transcript and missing Preliminary Hearing Officer (PHO) exhibits. *United States v. Howard*, No. ACM 40478, 2024 CCA LEXIS 137 (A.F. Ct. Crim. App. 9 Apr. 2024) (unpublished).

Statement of Facts

Background

Amn Howard grew up with the Air Force. (Def. Ex. E at 1.) Both his parents were Airmen, and thus he lived the experience of the military child: moving to New Jersey, Lajes Field, Panama, and Germany. (*Id.* at 1–2.) He joined the Air Force later than most, after a career in medical services and patient care. (*Id.* at 2.) He was excited that his first assignment was overseas at Misawa AB, and that he was stationed with his friend from basic training and technical school, Senior Airman (SrA) DC. (*Id.*)

Yet Amn Howard experienced significant mental health issues while at Misawa AB. Several members of Amn Howard's unit brought their concerns about his mental health to CT, his squadron commander. (R. at 432–33.) Amn Howard's reported behavior, such as speaking to himself when nobody else was around, led CT to order two command-directed evaluations (CDEs). (R. at 433.)

Lt Col EG, a clinical psychologist then at Misawa AB, evaluated Amn Howard in early 2021. (*See* R. at 708, 723.) She explained that, for the military, Amn Howard's "grooming was not what [she] would've expected." (R. at 718.) When he arrived, "he's like jumping down the hallway, running and speeding in after me, and super excited, and super pleasant, and super happy, and talking very fast and

pressured, and so, there you see that obviously the pressured speech, the psychomotor agitation, and the high energy." (*Id.*) Lt Col EG said Amn Howard's demeanor "did not coincide with what you would expect" in a CDE, which was "not a happy situation." (*Id.*) He displayed a "flight of ideas," where he would lead the conversation in "different tangents" and require redirection. (R. at 719.) He even answered his cell phone at one point and proceeded to talk for ten minutes during the session, "[n]ot understanding that . . . wasn't appropriate." (*Id.*) Amn Howard was also getting limited sleep because he would have long conversations about religion with people from the United States at various times during the night. (*Id.*) She explained that he exhibited "hyperreligiosity," which is a form of delusional behavior. (R. at 720.)

Lt Col EG diagnosed Amn Howard with "bipolar disorder manic severe, with psychotic features," although she modified the diagnosis to the vaguer "unspecified" after consultation with other providers. (R. at 716.) Bipolar disorder does not always include psychotic features, but it did for Amn Howard. (R. at 721.) The manic state that could manifest as part of his condition was not "constant," but instead would "wax and wane" over time. (R. at 722.) Given this "pretty severe diagnosis," Lt Col EG had him see two other psychiatrists for their assessment because "we rarely want to do that just on our own." (R. at 723.) Both psychiatrists generally concurred with her findings. One of them, Dr. SF, provided further description of the features of mania he observed: a "pressured speech," where the patient would talk very rapidly and frequently over the other person talking in a conversation." (R. at

695–96.) Dr. SF explained that, if left untreated, "you would expect there to be further episodes, possible course of waxing and waning, which would lead to severe impairment and difficulties." (R. at 697.) Dr. SF explained the types of bipolar disorder as follows:

> So, when you stratify bipolar disorder into severity – mild, moderate, severe, and severe with psychotic features – when psychotic features occur, people have unusual beliefs, they may experience things like seeing things that are not there, hearing stuff that is not there, voices, they have unusual thoughts. People out to get them, God is giving them commands, the smoke detectors watching them, those kind of things.

(*Id.*) He explained that talking to someone who is not there is an example of psychotic features. (R. at 699.)

Because of this diagnosis, a medical board process began, with mental health providers recommending Amn Howard's discharge from the military due to this "unfitting" condition. (R. at 435.) In the fall of 2021, the mental health team told CT that Amn Howard's condition was "exceeding our ability here at Misawa for the Med[ical] Group Team," and they recommended a high-level treatment program at Laurel Ridge, a facility in San Antonio, Texas. (R. at 450.) Amn Howard accepted and ultimately spent five months in the program. (*Id.*) At the facility, the diagnosis changed to a "behavioral disorder" with a recommendation to return to duty. (R. at 451.) This stopped the medical board process, and CT chose instead to base his

discharge recommendation on disciplinary issues, rather than mental health, because a mental health discharge "sort of perpetuates a stigma."[3] (R. at 452.)

In this context, CT recommended Amn Howard's discharge because of these "minor disciplinary infractions"—with a general service characterization—instead of the medically unfitting conditions discharge that yielded an honorable service characterization. (R. at 434–35.)

Amn Howard's Out-Processing

In March 2022, Amn Howard was moved to the command section, where he had regular interactions with CT and the new First Sergeant, AM. (R. at 397, 599–600.) AM took responsibility for Amn Howard's discharge processing, starting with formal notification in April 2022. (R. at 601–02.) AM explained that they made a "game plan" for how to handle the discharge but did not describe what that meant. (R. at 606.) AM testified that he could not get a definitive answer from Amn Howard on the location of Amn Howard's chemical gear, but SrA DC assisted him. (R. at 607.) AM also stated that Amn Howard missed finance appointments that AM made for him, though he did not provide details. (R. at 608.) AM described Amn Howard

[3] The parties generally tried to avoid discussion of the specific minor disciplinary infractions (*see, e.g.*, R. at 452), but the sentencing evidence showed Amn Howard received: (1) a letter of reprimand (LOR) for disrespect to a senior airman in July 2020 (Pros. Ex. 13); (2) an LOR for disrespect to a staff sergeant and damaging a government-owned vehicle, issued on 17 August 2020 (Pros. Ex. 12); (3) an LOR for disrespect to a technical sergeant, issued on 2 September 2020 (Pros. Ex. 11); (4) an LOR (from CT) for failing to receive a COVID-19 vaccine, issued on 17 September 2021 (Pros. Ex. 10); (5) nonjudicial punishment (NJP) (from CT) for touching another airman, with a decision date of 7 May 2021 (Pros. Ex. 9); and (6) NJP (from CT) for failing to receive his COVID-19 vaccine, with a decision date of 21 March 2022. (Pros Ex. 8.)

missing a pre-final out appointment and that AM had to help create Memoranda for Record (MFRs) to describe the missing out-processing steps. (R. at 615–17.) AM acknowledged that Amn Howard was generally someone who kept his appointments and did what he was supposed to do. (R. at 627.) Furthermore, some of the out-processing occurred during an exercise week, and AM acknowledged that agencies were difficult to contact, requiring AM to enlist the help of other first sergeants. (R. at 627–28.)

Amn Howard was scheduled to depart on 12 May 2022 on Japan Airlines (JL) flight number 156. (Pros. Ex. 4.) At the time, the flight required a negative COVID test. (R. at 611.) AM asserted that he spoke with the COVID cell and that there were no labs for Amn Howard,[4] thus he could not fly. Of note, the eventual charge sheet would state that Amn Howard willfully failed to board flight JL *154*. (Charge Sheet (emphasis added).) Amn Howard did get a COVID test before his next scheduled flight, set for 17 May 2022. (R. at 630.)

The Incident

On 17 May 2022, at command's urging, SrA DC went to breakfast with Amn Howard to help him along with leaving that day. (R. at 618.) SrA DC hoped to get Amn Howard's belongings to the airport after breakfast, but Amn Howard was not fully packed. (R. at 578–79.) When they returned to the dorm, Amn Howard

[4] This comment from the COVID cell was admitted only for the effect on the listener. (R. at 614.) In addition, it appears that the Government improperly obtained and introduced this evidence. (*See* R. at 551–63; App. Ex. XX.) However, Amn Howard does not raise this error because he was acquitted of the relevant specification, and the related failure to board flight JL 154 has a more fundamental flaw. *See infra* at 15–16.

declined further help, telling SrA DC that he had to pack. (R. at 581.) At that point, SrA DC let AM know Amn Howard was not ready, and AM told SrA DC that he would take care of it. (R. at 581, 618.) SrA DC left Amn Howard's dorm around 0900. (R. at 589.)

AM and MSgt MH went to Amn Howard's dorm to tell him it was time to pack and that he had a report time. (R. at 592, 619.) CT, AM, and MSgt MH all believed that Amn Howard was required to be at the passenger terminal at 1100, which was 6 hours and 35 minutes before departure. (R. at 410, 440, 594, 631.) The actual travel sheet contained contradictory reporting information. There was a written strike through of the NET (no earlier than) time from 1135 to 0800 and the NLT (no later than) time from 1515 to 1100. (*See* Pros. Ex. 5.) In the typed "About Your Reservation" section, the travel sheet says the NLT time was 2 hours and 20 minutes before departure, which would make the NLT time 1515. (*Id.*) In addition, the military judge took judicial notice of this 2 hour and 20-minute standard from the relevant instruction—Air Force Instruction 24-605, Volume 2, *Air Transportation Operations*, ¶ 2.13 (2 Jul. 2020). (App. Ex. XXIII.)

CT and AM went to Amn Howard's room shortly after 1100. (R. at 412.) Amn Howard opened the door and gave fist bumps to his commander and first sergeant, greeting his commander with "hey [T]," using only his last name. (R. at 621.) CT and AM both testified that they told him it was time for him to go. (R. at 416–17, 621.) In CT's telling, Amn Howard responded, "Hey, yeah, that's no problem. I can get over the terminal on my own. I've got a car. You know, I'll be a foreigner

tomorrow." (R. at 415.) AM admitted he got a bit more "stern and pointed" with Amn Howard. (R. at 621.) The conversation ended with Amn Howard slamming the door in a "forceful" manner. (R. at 417.)

What happened next is relayed on six video clips (with no sound) admitted as Prosecution Exhibit 6: Amn Howard ran after CT and AM with an object in his hand. CT thought he could hear Amn Howard making a yelling or grunting noise as he chased them, and he was brandishing "something," though CT could not see precisely what. (R. at 419–21.) Upon exiting the building, CT and AM ran in different directions. CT jumped into an idling vehicle and told the occupants, two majors, to begin driving. (R. at 425.) The majors believed it was an exercise and were unhelpful. (R. at 461–63.) One of the occupants, Maj PT, actually stepped out and had a conversation with Amn Howard, who had just arrived. (R. at 464.) Amn Howard told Maj PT he did not have a problem, they exchanged a fist bump, and Amn Howard left. (*Id.*) CT reported the incident to Security Forces. (R. at 430.)

RW, a Security Forces patrolman, responded to a call that someone was being chased with a knife. (R. at 474.) While RW was in the dorm hallway, Amn Howard arrived with the dorm manager because he was locked out of his room. (R. at 476.) RW detained Amn Howard. (R. at 477.) He was asked if there was anything that would harm the patrolman and he said, "I don't know," and then "no." (R. at 479.) A tactical knife was found in Amn Howard's pocket. (R. at 478.) Amn Howard complied the entire time and let law enforcement into his room. (R. at 481.) When he was in

the police car later, he was "jittery," and "would repeatedly laugh every few minutes, like kind of like a nervous tick." (R. at 480.)

KG, a Security Forces investigator, interviewed CT, AM, and Amn Howard that day. (R. at 508.) TSgt KG relayed that during his interview, Amn Howard was talking "[m]aybe to himself" and was pulling his hair. (R. at 511.) He was jittery, blinking rapidly. (R at 511.) Amn Howard's actual interview was "hard to follow" and "unique," for KG, who had "done lots of interviews." (R. at 512.)

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

Argument

I.

AIRMAN HOWARD'S DISOBEYING ORDERS AND DERELICTION OF DUTY CONVICTIONS ARE FACTUALLY INSUFFICIENT AND TWO OF HIS DERELICTION OF DUTY CONVICTIONS ARE LEGALLY INSUFFICIENT.

Standard of Review

In *United States v. Harvey*, No. 23-0329, 2024 CAAF LEXIS 502, at *7–8 (C.A.A.F. 6 Sep. 2024), the Court of Appeals for the Armed Forces (CAAF) did not precisely state the new standard of review for this Court's factual sufficiency review. But it held that, when reviewing for factual sufficiency, the requirement for appropriate deference means that a Court of Criminal Appeals (CCA) will "'weigh the evidence and determine controverted questions of fact to imply that the degree of deference will depend on the nature of the evidence at issue," with the degree of deference at the discretion of the CCA. *Id.* (cleaned up) (citing Art. 66, UCMJ, 10 U.S.C. § 866 (Supp. III 2019-2022)). This Court reviews legal sufficiency de novo.

United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law and Analysis

1. This Court maintains robust factual sufficiency review despite changes to Article 66, UCMJ.

Harvey made clear that this Court's power of review for factual sufficiency remains formidable. Upon showing of a specific deficiency, this Court applies appropriate deference depending on the nature of the evidence. *Id.* at *8. For this case, this means less or no deference to video evidence, which provides the exact same information to this Court as it did to the court-martial. *See id.* As for the quantum of proof necessary to sustain the finding of guilt, it remains 'proof beyond a reasonable doubt,' the same as the quantum of proof necessary to find an accused guilty at trial. *Id.* at *10.

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

2. Amn Howard did not willfully disobey CT's order because compliance was impossible.

As charged, the elements of the offense of willfully disobeying an order are as follows: (1) Amn Howard received a lawful command from CT to "pack his bags and go to the Misawa Air Base Passenger Terminal"; (2) CT was Amn Howard's superior commissioned officer; (3) Amn Howard then knew that CT was his superior

commissioned officer; and (4) Amn Howard willfully disobeyed the lawful command on 17 May 2022. *MCM*, pt. IV, ¶16.b; Charge Sheet. Willful disobedience "is an intentional defiance of authority." *MCM*, pt. IV, ¶16.c.(2)(f).

The fundamental problem with the specification is that Amn Howard's compliance was impossible. He was detained and could not pack his bags and go to the terminal. The Court of Military Appeals (CMA) has held that "impossibility of performance" may constitute a defense to a willful disobedience charge under Article 91, UCMJ. *United States v. Pinkston*, 21 C.M.R. 22, 25 (C.M.A. 1956) (citing *United States v Heims*, 12 CMR 174 (C.M.A. 1953); *United States v King*, 17 C.M.R. 3 (C.M.A. 1954)). Although factually distinguishable, the underlying rationale should apply in this case as well. Even if his own conduct contributed to his confinement, compliance was still impossible. Could the Government have charged him with dereliction for failing to board his second flight the next day? Of course not. This Court should set aside the Specification of Charge III as factually insufficient.

3. Amn Howard was not willfully derelict in his duties.

The members convicted Amn Howard of two specifications of willful dereliction of duty: failure to complete out-processing requirements and failure to board Flight V272. Neither conviction is factually sufficient.

The elements of the first specification, as charged, are as follows: (1) Amn Howard had a duty to complete the requirements to out-process from the United States Air Force between 4 April 2022 and 11 May 2022; (2) Amn Howard knew or reasonably should have known of these duties; and (3) Amn Howard was willfully derelict in the performance of those duties. *MCM*, pt. IV, ¶ 18.b.(3); Charge

Sheet. "'Willfully'" means intentionally. *Id.* ¶ 18.c.(3)(c). "It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act." *Id.* An order must "be a specific mandate to do or not to do a specific act." *Id.* ¶ 16.c.(2)(d).

There are several evidentiary deficiencies here. One is the lack of clarity. When someone is pending discharge, out-processing is required. Borrowing from Article 90, UCMJ, on orders, specificity is crucial, and this case lacked it. *Cf. United States v. Womack*, 29 M.J. 88, 90 (C.M.A. 1989) ("In considering the validity of this military order, we note that an order must be a clear and specific mandate.") (citing *United States v. Beattie*, 17 M.J. 537 (A.C.M.R. 1983)). The Circuit Trial Counsel (CTC) acknowledged as much when she argued, "you use your common sense and your knowledge in the ways of the world, when you move bases or leave the Air Force you gotta out-process." (R. at 795.) But what was the duty? The Government could have proven knowledge with evidence of the out-processing requirements, such as a checklist. It failed to do so. If "common sense" and "knowledge in the ways of the world" are our only guideposts, this becomes even more confusing. *See United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014) ("One person's perception of the ways of the world might vary dramatically from another's, based on education, experience, and personal bias.") Out-processing is a flurry of checklists with items of negligible value with sign-off required from agencies who can be difficult to contact. AM acknowledged such difficulty. (R. at 627.) Does it rise to the level of willful

disobedience if the member cannot, for example, get the base library to sign off in time?

The testimony from AM spoke of some missed finance appointments, MFRs required to complete certain items, and the failure to provide chemical gear (his training chemical gear was never found). (R. at 607–09, 615–17.) This falls short of the level of willful dereliction. As AM stated, Amn Howard *did* make efforts and completed items, including his COVID test. (R. at 630.) Even if a duty can flow from multiple sources, *see MCM*, pt. IV, ¶ 18.c.(3)(a), the evidence has to establish the nature of the duty. Without a precise understanding of that duty, and with the weak evidence of specific willful acts, the evidence is factually insufficient for Specification 1 of Charge V.

Regarding the second specification, the elements, as charged, required proof as follows: (1) Amn Howard had a duty to board Flight V272 on 17 May 2022; (2) Amn Howard knew or reasonably should have known of this duty; and (3) Amn Howard was willfully derelict in the performance of this duty. *MCM*, pt. IV, ¶ 18.b.(3); Charge Sheet.

Like the impossibility defense raised for willful disobedience of CT's order to go to the passenger terminal, Amn Howard was not willfully derelict in the performance of this duty—he could not go to the passenger terminal because he was detained. Another fundamental flaw is the charge itself. Amn Howard's supposed duty was to board Flight V272. This flight number appears nowhere in the evidence in the case. Prosecution Exhibit 5 describes the flight details for the rotator. Maybe

this was Flight V272, maybe it was not. We cannot know because the Government failed to put on evidence of this fact. According to a travel office employee, the travel sheet is all the member is given. (R. at 526.) The Government bears the risk of its chosen charging mechanism. *See United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021) (noting the Government's complete discretion over the charge sheet and that, consequently, the Government bears the risk of its decisions); *see also United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (when the Government made the charging decision to allege a particular type of force was used, "i.e., that Appellant committed [the] offense 'by grabbing her head with his hands,'" it was required to prove the facts it alleged). Its decision to add Flight V272 to the charge sheet, but then not prove it, is a fatal flaw. *Cf. United States v. Treat*, 73 M.J. 331, 336 (C.A.A.F. 2014) (finding that, in the material variance context for a missing movement offense, the military judge's exceptions and substitutions in finding appellant guilty of the correct flight number, vice the charged number, was a material variance, though it ultimately found no prejudice). As such, the evidence is both legally and factually insufficient for Specification 3 of Charge V.

4. Amn Howard was not, through neglect, derelict in his duties.

The elements of negligent dereliction of duty, which the members convicted Amn Howard of as a lesser included offense of willful dereliction of duty, are as follows: (1) Amn Howard had a duty to board Flight JL 154 on 12 May 2022; (2) Amn Howard knew or reasonably should have known of these duties; and (3) Amn Howard was through neglect derelict in the performance of those duties. *MCM*, pt. IV, ¶ 18.b.(3); Charge Sheet. "'Negligently' means an act or omission of a person who

is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances." *MCM*, pt. IV, ¶ 18.c.(3)(c).

Similar to the previous offense, the Government failed to prove the flight number. The Government charged him with dereliction for failing to board JL 154. The only admitted evidence on point shows that Amn Howard was booked on JL 156. Close enough is not good enough; the Government is bound by its charging decisions, and by its charging mistakes. Curiously, the members even noticed this error and asked a question about the mismatch. (App. Ex. XXIX.) The military judge's unhelpful instruction—"You are expected to use your common sense and your knowledge of human nature and the ways of the world. The final determination as to the weight or significance of the evidence and the credibility of witnesses in this case rests solely upon you"—left the question unresolved and perhaps worsened the members' confusion. (R. at 838.) The military judge could have, but failed to, direct the members to the elements of the offense. But this Court need not make the same mistake. The evidence is factually and legally insufficient on Specification 2 of Charge V.

WHEREFORE, Amn Howard respectfully requests this Honorable Court set aside the findings for the Specification of Charge III and Specifications 1-3 of Charge V, and the sentence.

II.

THE MILITARY JUDGE ERRED WHEN SHE REFUSED TO INSTRUCT ON LACK OF MENTAL RESPONSIBILITY.

Additional Facts

The matter of Amn Howard's mental responsibility for every offense, but especially the assault specifications (assault upon CT and insubordinate conduct by assaulting AM), was central to the trial. A "sanity board" under R.C.M. 706 found that at the time of the misconduct, Amn Howard did not have a severe mental disease or defect and was able to appreciate the nature and quality or wrongfulness of his conduct. (Sanity Board, 27 Jun. 2022, PHO Exhibit 29, Record of Trial Volume 4.) But since an R.C.M. 706 evaluation cannot answer the ultimate question of mental responsibility, the Defense raised this theory early through voir dire. Numerous members were asked about their experience with mental illness and their willingness to accept lack of mental responsibility as a defense. (*See* R. at 140, 161, 170–71, 180–81, 191–92, 198–200, 216–20, 229, 239–40, 249–50, 256, 265–67, 273–74, 299–300.) It also featured prominently in the Defense's opening statement. (R. at 384–88.)

The Defense asked the military judge to instruct on lack of mental responsibility. (R. at 746.) In arguing for the instruction, the Defense told the military judge, "This is a large part of defense's case, it has been this entire time." (R. at 750.) It highlighted the testimony from Amn Howard's psychiatrists already provided above. *See supra* at 3–6; R. at 747–48. It also noted that KG—who observed Amn Howard in the interview room on 17 May 2022 speaking to himself and found an interview with Amn Howard hard to follow—described behavior matching a

psychotic episode or manic state. (R. at 749.) Additionally, the Defense argued the assault offenses themselves showed traits of a psychotic episode. (*Id.*)

Of note, it emphasized Lt Col EG's conclusion that certain traits can mark a manic state. (R. at 747.) For instance, Lt Col EG had responded that the following could be a sign of a manic state: "someone talking to people who aren't there, buying a car the . . . week they were supposed to leave, barking, disjointed thoughts, and rapid speech." (R. at 729.)

The Government opposed the instruction, resting its argument primarily on the lack of evidence that Amn Howard, at the time of the act, was unable "to appreciate the nature and quality of wrongfulness of the act." (R. at 751–52.) It emphasized *United States v. Roman*, an unpublished case that found no error in denying a lack of mental responsibility instruction. (R. at 752 (citing No. ACM 39381, 2019 CCA LEXIS 45 (A.F. Ct. Crim. App. 7 Feb. 2019).) The military judge initially said she did not believe the defense was raised by the evidence but took the evening to think about it. (R. at 753.)

The military judge declined to give the requested instruction, stating that the evidence did not "reasonably raise that at the time of the offenses, the accused was unable to appreciate the nature and quality or the wrongfulness of the acts, as a result of a severe mental disease or defect." (R. at 758.)

Standard of Review

"The question of whether the members were properly instructed is a question of law and thus review is de novo." *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014).

Law and Analysis

Refusing to instruct the members on a lack of mental responsibility stymied Amn Howard's defense, rendering almost moot the central question of the court-martial. This was error, and this Court should reverse.

1. The military judge must instruct when a defense is "in issue."

R.C.M. 920(e) lists "*Required instructions*" which the military judge "shall" give, to include "[a] description of any special defense under R.C.M. 916 in issue." RCM 920(e)(3) (emphasis in original). The defense of lack of mental responsibility provides an affirmative defense if "at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts." R.C.M. 916(k)(1); *see also* Article 50a, UCMJ, 10 U.S.C. § 850a.

A matter is "'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which the members might rely if they choose." R.C.M. 920(e), Discussion. "'[T]he military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law.'" *United States v. Prather*, 69 M.J. 338, 344 n.8 (C.A.A.F. 2011) (alteration in original) (quoting *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975)). "Any doubt

whether an instruction should be given should be resolved in favor of the accused." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (citing *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981)).

2. The Defense provided ample evidence to place the defense of lack of mental responsibility "in issue."

Here, the Defense presented abundant evidence on Amn Howard's lack of mental responsibility for the offense. Whether that evidence was clear and convincing was up to the members to decide. While the military judge may have stated that "[t]he judge is not the gatekeeper [of] this evidence," she did just that by cutting off what was clearly Amn Howard's central defense to the assault charges. (R. at 758.)

Though review of this issue is de novo, it is worth addressing the military judge's rationale. Her focus was on the lack of evidence at the time of the offense and the inability to appreciate the nature and quality or wrongfulness of the acts. (R. at 758.) But the Defense provided evidence before, during, and after the assault offenses—from both medical providers and lay witnesses—that supported the conclusion that Amn Howard was in a manic state at the time of the offenses.

To review, Amn Howard purchased a new vehicle shortly before he was shipping back to the United States. (R. at 402.) This led CT to comment: "So, that was, that was just probably a unique thing to see. As to, you know, why would, why would anybody be buying a car, you know, less than 10 days out from PCS'ing out of here, and separated from the Air Force?" (R. at 403.) Around 13 May 2022, four days before the incident, Amn Howard got in AM's face at the travel office over the

innocuous question of his home of record. (R. at 531, 611.) On the day of the incident, he greeted his commander by saying "Hey, [T]," calling him only by his last name. (R. at 621.) He told CT and AM that he would be a "foreigner" the next day. (R. at 415.) That, CT thought, was "unique and different." (R. at 416.) When he pursued CT and AM, he sounded as though he was "barking." (R. at 624.)

Taken together, these behaviors align with what Amn Howard's mental health providers described as indicative of a manic episode. Lt Col EG was asked directly if these behaviors—"someone talking to people who aren't there, buying a car the . . . week they were supposed to leave, barking, disjointed thoughts, and rapid speech"—could indicate a manic state, and she agreed. (R. at 729.) Dr. SF explained that speaking to oneself or to someone who is not present is an example of a psychotic feature. (R. at 698–99.) He also mentioned impulsivity as one of the behaviors, and when asked if Amn Howard's car purchase was such an example, he replied "Definitely, car buying is actually quite common in bipolar disorder." (R. at 699.) In short, Amn Howard displayed numerous traits indicative of a manic state on and around 17 May 2022.

The aftermath confirmed that his manic state might again be at play. KG observed Amn Howard during the breaks of his interview with law enforcement, he was "talking, maybe to himself. Seemed like he was maybe having a conversation and then he was pulling his hair a little bit." (R. at 511.) KG, who had "done lots of interview," found the interview "unique," as it was "hard to follow," "lacked syntax," and was "pretty disjointed." (R. at 512.)

While Dr. SF (who saw Amn Howard by video) did not diagnose Amn Howard with psychotic features (R. at 699, 706), Lt Col EG (who saw him in person) did. And Dr. SF explained how psychotic features could play into the mental responsibility defense. (R. at 697.) "[W]when psychotic features occur, people have unusual beliefs, they may experience things like seeing things that are not there, hearing stuff that is not there, voices, they have unusual thoughts. People out to get them, God is giving them commands, the smoke detectors watching them, those kind of things." (*Id.*) That gets to the heart of the issue: whether Amn Howard was in a state at the time of the offense where, because of a severe mental health issue or defect, he could not appreciate the wrongfulness of his actions. The combination of medical provider and lay testimony met the threshold to put the defense "in issue."

The Government and military judge's reliance on *Roman* is misplaced. The appellant in *Roman* never raised mental responsibility at trial, failed to object to the lack of an instruction, and instead used a mental health condition to argue he knew he was interacting with law enforcement (rather than a 14-year-old girl) to get apprehended and get help. 2019 CCA LEXIS 45, at *8–9. The issue was the military judge's failure to *sua sponte* instruct on mental responsibility. *Id.* at *9. An expert only testified to the appellant's tendency for self-defeating behaviors, not anything that would approach a lack of mental responsibility. *Id.* at *12–13. The comparison is inapt.

Instead, the military judge in this case should have reviewed the potent evidence and resolved any doubt in favor of Amn Howard. *See Davis*, 53 M.J. at 205.

An example of what should have happened comes from *United States v. Martin*, 56 M.J. 97 (C.A.A.F. 2001). Although the case ultimately turned on the question of whether the defense met its burden by clear and convincing evidence to prove lack of mental responsibility, the case contained a similar mix of lay and expert testimony that provided an indication of how the appellant's bipolar disorder might have affected his responsibility. *Id.* at 100–03. And in such a parallel situation, the military judge gave the appropriate instruction. *See id.* at 111 (indicating the members were left to make the decision on mental responsibility).

3. The refusal to instruct was prejudicial because it denied Amn Howard his primary defense.

Amn Howard's defense, at least for the two assault offenses, hinged on lack of mental responsibility. From voir dire to opening statement to each witness, the Defense sought to draw the picture of Amn Howard's background struggles with mental health and the specific manifestations on and around 17 May 2022. The military judge's denial of the required lack of mental responsibility instruction fatally undermined this strategy and took the key question of mental responsibility away from the members.

What remained was the "evidence negating mens rea" instruction, which is but a shell of the "lack of mental responsibility" instruction. *Compare Military Judges' Benchbook,* Dept. of the Army Pamphlet 27-9 at 1714–17 (29 Feb. 2020) (describing the "evidence negating mens rea" instruction) *with id.* at 1733–36 (describing the instruction on "mental responsibility at time of offense"). The military judge allowed the members to consider Amn Howard's mental health condition only to the degree it

affected his ability to: (1) know CT was his superior commissioned officer (R. at 773); (2) know AM was his superior noncommissioned officer (R. at 773–74); (3) act willfully in disobeying CT's order to pack and go to the terminal and AM's order to get a COVID-19 test (R. at 774); (4) understand his duty for the dereliction of duty specifications (R. at 775); and (5) act willfully, or instead only negligently, with regard to the dereliction of duty specifications. (*Id.*) Note that nothing here meaningfully addresses the assault specifications.

The instruction stated, "The evidence as to the accused's condition before and after the alleged offenses was admitted for the purpose of assisting you to determine the accused's condition on the date of the alleged offenses." (R. at 776.) It is curious the military judge gave this instruction when she had just concluded somewhat the opposite when denying the lack of mental responsibility instruction, finding there was no evidence of inability to understand the wrongfulness of his action. In essence, through this instruction, she conceded that there *was* evidence bearing on the mental state at the time of the offense; the members were free to disbelieve that evidence, but it should have been their decision.

As a consequence, the Defense's closing argument leaned heavily on the theme of mental health, yet never got traction because of the limited purposes for which the members could consider mental health. The military judge hamstrung the Defense, and this Court should find prejudice and reverse. *See Davis*, 53 M.J. at 205–06 (finding prejudice because the denial of an instruction prevented the members from considering the affirmative defense of accident).

WHEREFORE, Amn Howard respectfully requests this Honorable Court set aside the findings and the sentence.

III.

THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE DENIED CHALLENGES FOR CAUSE AGAINST TWO PANEL MEMBERS WHO QUESTIONED THE CENTRAL DEFENSE OF LACK OF MENTAL RESPONSIBILITY.

Additional Facts

Captain JT

During voir dire, Captain (Capt) JT, a member of the medical group, stated that he knew of AM, who had just become the First Sergeant of his unit. (R. at 204.) He was on email chains with CT. (*Id.*) He knew and interacted with TSgt JE, a witness from the medical group regarding the COVID cell, approximately ten times in the previous two years. (R. at 205–06, 541.) And he worked monthly with Lt Col EG on inspections. (R. at 207–08.) When asked if he would weigh their credibility any differently, he responded that he would not. (*Id.*) When the Circuit Defense Counsel (CDC) later asked him to clarify, he responded:

> Because, because I feel like the right, because I feel like the right, that comes from, I think how you know oneself, and for me — I think, for me, fairness I suppose, fairness is one trait that I adhere to. Especially in a court setting as a court-martial jury. So, so based on evaluating myself, how I went through life, fairness is a thing that I try to keep, you know, as best as possible.

(R. at 215–16.)

The CDC also repeated the question from group voir dire: "Do you believe that someone who has a mental condition, illness, or diagnosis, can never be held

criminally responsible for their actions?" (R. at 216.) Although he responded "no," he then continued:

> [Capt JT]. The key is, held accountable for. So, even if it was, I suppose the, the state of the person is in, the action has been performed, so there is, I suppose, accountability or consequences of that action still exists.
>
> [CDC]. Okay, so regardless of the mental condition of the person at the time if they did those actions, they should be held responsible?
>
> [Capt JT]. Yes, according to how I, how I, yes according to —
>
> [CDC]. Your perspective?
>
> [Capt JT]. Yes, thank you.
>
> MJ: And if your perspective contradicted something that I, as the military judge would instruct, do you agree that you could set aside your own perspective and follow the instructions as I give you?
>
> [Capt JT]: Yes, because that is, I'm sorry, can you clarify that question?
>
> MJ: Absolutely. I know sometimes during voir dire counsel ask questions kind of, in a vacuum, and because they want to talk about different concepts that will likely come into the court itself, but you don't have the instruction from the judge yet, right?
>
> [Capt JT]: Right.
>
> MJ: So, if your personal beliefs, in this moment, contradict in any way with how [I] instruct you, on how to apply the law to the facts, would you be able to set aside your personal views and follow the instructions that I give?
>
> [Capt JT]: Yes, yes, in this setting, yes.
>
> [MJ]: Why do you think you'd be able to do that?
>
> [Capt JT]. Because, because perspective is one thing; however, instructions from the, as far as the authority setting, is still required in this environment. So, setting aside perspective, I think is a, it doesn't mean that it doesn't exist within myself, but it just means that in this

setting, it needs to be set aside to continue. I suppose you're saying, if need be.

[MJ]. If you were instructed that there could be some circumstances in which someone's mental condition actually did, or could negate their criminal responsibility could, and you got to decide whether it did or not, would you be able to entertain the idea that it did, or would you feel that you needed to kind of stand firm in your perspective, conviction that someone ultimately has to be held responsible for their actions?

[Capt JT]. I'm sorry, hang on. I'm just trying to remember the beginning part of the question.

[MJ]. It's kind of convoluted, but it's a little bit of a process, so let's say you're instructed that there could be a situation in which someone's mental condition could negate their criminal responsibility, and if that was for you to decide, if you are instructed in that fashion, would you be able to consider whether their mental condition did indeed impact their criminal responsibility, or would you kind of fall back on your personal beliefs or convictions that ultimately, someone has to be held responsible for their actions?

[Capt JT]. So, I think that applies to, I guess, beyond a reasonable doubt. So, if that potentially could be a doubt then yes, then I should listen to, or you used the word "entertain"?

[MJ]. Consider.

[Capt JT]. Consider, yes, if it's beyond.

(R. at 216–18.) The CDC then tried to clarify with Capt JT what he meant:

[CDC]. Do you just, sitting here, kind of blocking everything else out, feel what you think, do you think there could be a situation in which someone's mental condition could make them not responsible for their actions?

[Capt JT]. Potentially, potentially.

Q. Potentially?

A. Yes, I think that would be my response, potentially.

Q. And what would that be based on?

> A. That would be based on, that would be based on inaccurate diagnosis. Inaccurate, medical diagnosis, and how it — there's actually a lot of variables and so it's hard to say.
>
> Q. So, I heard you say, was that — that would [be] based on an accurate medical diagnosis, and other variables, is there anything else that, that you'd like to add to the answer? And I recognize we're all asking questions that are causing you to think, so take all the time that you need.
>
> A. An inaccurate medical diagnosis and depending on what the diagnosis is, I guess, is backed by data of how that, how that could alter the, I guess, mental status?
>
> Q. An inaccurate diagnosis, medical diagnosis backed by data about how that diagnosis could affect their mental state?
>
> A. Yes.
>
> Q. Is that [a] fair summary of what you said?
>
> A. Yes, that would be a potential and depending on if the individual follows-up, I suppose, this is an if scenario, if it was conveyed to them, the individual and how they follow-up with the treatment plan, I suppose.

(R. at 219.) DC sought further clarification, but the military judge cut off the line of inquiry. (R. at 220.) The Defense then challenged Capt JT for implied bias. As a basis, it highlighted his familiarity with various witnesses and his answer to whether he could evaluate credibility neutrally, to which he responded beginning with "I think." (R. at 207, 347–48.) It also emphasized Capt JT's confusion with basic legal principles, which "are cause for concern for the defense." (R. at 348.) The military judge denied the implied bias challenge as follows:

> Based on my observations of his response, he was thoughtful and deliberate when he answered the party's questions and he – his response was consistent with how the court had previously instructed. He didn't

> respond verbatim, but he recognized the need and the importance of evaluating the witness the same way. Combining that approach to how he responded to defense counsel's questions during individual voir dire, particularly with the trial counsel question from group voir dire, in talking about the level of accountability for someone with a mental health condition or diagnosis, Captain [JT] physically took more time to deliberate on the questions, which demonstrated his thoughtfulness. At times, you could tell from his face he was a little bit confused; some of the questions were long, and I don't know if that was partly due to a language barrier or just some of the – some of the broad questions. However, when combining all the bases for — for challenge, this court still does not find it to be a — a close case. The court finds that based on the totality of circumstances, an objective observer would not have substantial doubt about the fairness of the accused's court-martial panel if Captain [JT] was on the panel. Therefore, the challenge is denied.

(R. at 351.)

Capt KB

In responding to the same question about whether someone can be held criminally responsible despite a mental health condition, Capt KB stated:

> A. I don't believe that with a mental diagnosis, mental health diagnoses, that people just get a free pass on their actions.
>
> Q. Do you believe that there could be a situation in which someone's mental health diagnosis is so severe that it negates their responsibility or do you believe that there is always a level of responsibility?
>
> A. I believe there is always some level of responsibility, yes.

(R. at 240.) Defense counsel challenged Capt KB for both implied and actual bias. (R. at 343.) The Government responded that Capt KB had said he would follow the military judge's instructions. (R. at 344.) However, Capt KB never said this about mental responsibility; he only said it in response to a question about remembering and disregarding legal standards for failure to follow an order from his experience in a prior case. (R. at 237–38.)

The military judge denied the challenge. (R. at 345–46.) Regarding actual bias, the military judge recognized the basis was the "question of whether a person with a mental health condition, illness, diagnosis could never be criminally liable, followed up with some additional dialogue that at times, based on his nonverbal, may have been a little bit confusing requiring some follow up questions." (R. at 345.) He concluded that Capt KB did not have the benefit of instructions and that there was no evidence he would fail to yield to instructions. (*Id.*) On implied bias, the military judge reached the "same" conclusions. (*Id.*) Although he acknowledged that Capt KB "doesn't believe a person with a mental diagnosis has a free pass for their actions," the military judge stated that Capt KB "said repeatedly he would keep an open mind during all the evidence." (R. at 346.) The military judge decided it was not a close call. (*Id.*)

Standard of Review

Claims of actual bias against panel members are reviewed for abuse of discretion. *United States v. Hennis*, 79 M.J. 370, 384 (C.A.A.F. 2020) (citing *United States v. Nash*, 71 M.J. 83, 88–89 (C.A.A.F. 2012)). Claims of implied bias are reviewed "'pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo review.'" *Id.* (quoting *United States v. Dockery*, 76 M.J. 91, 96 (C.A.A.F. 2017)).

Law and Analysis

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172,

174 (C.A.A.F. 2001) (citing *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994); R.C.M. 912(f)(1)(N)). This issue is about the right to trial by an impartial panel: a right that "lies at the very heart of due process." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (quoting *Smith v. Phillips*, 455 U.S. 209, 224–25 (1982) (Marshall, J., dissenting)). The military judge erred in denying the defense's implied bias challenge of Capt JT and implied and actual bias challenges of Capt KB, and this Honorable Court should reverse.

R.C.M. 912(f)(1)(N) provides that "[a] member shall be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." "Implied bias addresses the perception or appearance of fairness of the military justice system." *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002) (citing *Wiesen*, 56 M.J. at 174). In testing for implied bias, appellate courts look at "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high." *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008) (citing *Wiesen*, 56 M.J. at 176). Courts find implied bias when, "regardless of an individual member's disclaimer of bias, 'most people in the same position would be prejudiced.'" *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004) (quoting *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)).

Military judges must follow the "liberal grant mandate" when considering challenges for cause made by the defense to ensure service members are tried "'by a

jury composed of individuals with a fair and open mind.'" *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005) (quoting *United States v. Smart*, 21 M.J. 15, 18 (C.M.A. 1985)).

Capt JT

The heart of the challenge was Capt JT's ability to understand the crucial legal concepts that, at least at the time of voir dire, appeared to be the centerpiece of the trial: mental responsibility. His answers were, quite frankly, baffling. In response to questions about following instructions, Capt JT initially answered that he could. (R. at 217.) But then his follow-up explanations only muddied the waters. For instance, he seemed to say there must be accountability even if there was a mental condition. (R. at 216.) On setting this belief aside, he said, "[I]t doesn't mean that it doesn't exist within myself, but it just means that in this setting, it needs to be set aside to continue. I suppose you're saying, if need be." (R. at 217.) When asked more pointed questions about someone lacking responsibility due to a mental condition, Capt JT provided an incomprehensible answer based on inaccurate medical diagnosis. (R. at 219.) In sum, his answers both raise significant questions about his willingness to entertain the central defense, and even his ability to understand the underlying legal concepts.

The fact that Capt JT seemingly said he could follow instructions does not resolve the case. *United States v. Rogers* is instructive on this point. 75 M.J. 270 (C.A.A.F. 2016). There, a panel member held a strong opinion that a person who could not remember could not consent to sexual activity. *Id.* at 271–72. The CAAF ultimately held the military judge abused her discretion by denying an implied bias

challenge despite the potential member's statement that she could follow the law. *Id.* at 274–75. Similarly, Capt JT's personal belief that some kind of accountability must exist would create a substantial doubt about the fairness of the proceeding, even if he gave some version of a commitment to follow the law.

United States v. Keago also provides guidance. 2024 CAAF LEXIS 256 (C.A.A.F. 9 May 2024). In *Keago*, one panel member believed that *something* must have happened for a case to make it to a court-martial, and that he wanted to hear from the defense. *Id.* at *14–15. The CAAF stated, "A reasonable member of the public might wonder how Appellant could receive a fair trial from LCDR Charlie, who appeared to be confused about Appellant's presumption of innocence and right to remain silent." *Id.* at *15. Likewise, Capt JT's confusion about the main thrust of the defense in Amn Howard's case might cause a reasonable member of the public to wonder how Amn Howard would receive a fair trial.

A second panel member in *Keago* made comments that mistake of fact was not a viable offense in a sexual assault case. *Id.* at *16–17. This led CAAF to comment that: "Given the facts of this case, a reasonable member of the public might be concerned that Appellant—who asserted a mistake of fact defense—may not receive a fair trial from a member who repeatedly expressed doubt about the legitimacy of such a defense." *Id.* at *17. The echoes with this case are evident.

On these facts, the military judge should have granted the challenge. The abuse of discretion becomes even more apparent in light of the liberal grant mandate. Military judges are "mandated to err on the side of granting a

challenge." *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015). "Because 'the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings . . . . in close cases military judges are enjoined to liberally grant challenges for cause.'" *Id.* (alteration in original) (quoting *United States v. Clay,* 64 M.J. 274, 277 (C.A.A.F. 2007)). "[I]f after weighing the arguments for the implied bias challenge the military judge finds it a close question, the challenge should be granted." *Id.* "This mandate stems from a long-standing recognition of certain unique elements in the military justice system including limited peremptory rights and the manner of appointment of court-martial members that presents perils that are not encountered elsewhere." *Id.* (cleaned up) (quoting *James*, 61 M.J. at 139.). This was at least a close call, and the liberal grant mandate should have led the military judge to grant the challenge. And the fact that Capt JT had connections to so many witnesses only strengthened the case for the challenge.

The military judge abused her discretion in denying this challenge. Indeed, her analysis was extremely short regarding Capt JT's understanding of legal concepts and should receive limited deference. *See Keago*, 2024 CAAF LEXIS 256, at *11–12 (explaining a sliding standard on implied bias review based on the military judge citing the correct law and providing implied bias reasoning on the record).

Capt KB

Similar concerns underlie both the actual and implied bias challenge for Capt KB. A starting point is the military judge's mistaken determination that Capt KB "said repeatedly he would keep an open mind during all the evidence." (R. at 346.) But the time Capt KB mentioned considering the evidence in *this* case only

related to his prior experience as a member in another court-martial. (R. at 235–36.) The military judge cannot transplant Capt KB's answer in one part of individual voir dire to answer the question not asked in another part. In fact, Capt KB had no "rehabilitation" on the crucial point here: whether he would accept the military judge's instruction that a mental health condition can, in fact, mean there is no "responsibility." (R. at 240.)

Capt KB expressed an unrebutted belief that a person is always responsible, despite a mental health condition. This meets the standard for actual bias. But even if it falls short, it meets the implied bias standard because a reasonable member of the public would have doubts about whether he would receive a fair trial. And this certainly is a close call. The same rationale supporting the challenge to Capt JT—that concerns for a fair trial are paramount when a member is unreceptive to a central defense—supports the challenge here. *See Keago*, 2024 CAAF LEXIS 256, at *14–17.

As part of her ruling, the military judge stated that Capt KB's answers were "broad conclusions without any follow-up." (R. at 346.) If so, denying the challenge based on a lack of necessary information was error when the necessary information could have been easily obtained by conducting further inquiry. In *United States v. Richardson*, the CAAF held that a military judge erred when a potential ground for challenge was raised by voir dire, but not sufficiently developed to make an informed ruling. 61 M.J. 113, 119 (C.A.A.F. 2005) ("[T]he military judge had a responsibility to further examine the nature of relationships in the context of implied bias review, particularly when asked to do so by defense counsel."). The CAAF found that the

failure to develop the record was error independent of the denial of the challenge, and that the failure to develop the record precluded review of the merits of the challenge due to insufficient information. *Id.*

So too here. If the military judge believed more information was required, she could have easily obtained that information. Under *Robinson,* this Court should not follow the military judge's lead and reject the challenge because more information *could* have followed from further inquiry. As noted above, the ground for an implied bias challenge were ample. Given the ability to ask follow-up questions to the venire, the lack of information cannot justify the military judge's decision here.

Conclusion

When a military judge fails to grant a meritorious challenge for cause, the findings must be set aside, and no prejudice analysis is required.[5] If this Court agrees the military judge erred, a set aside is required.

WHEREFORE, Amn Howard respectfully requests this Honorable Court set aside the finding and sentence.

---

[5] *See Rogers*, 75 M.J. at 275 (reversing without a prejudice analysis); *United States v. Woods*, 74 M.J. 238, 245 (C.A.A.F. 2015) (reversing without a prejudice analysis); *Peters*, 74 M.J. at 36 (reversing without prejudice analysis); *see also United States v. Witt*, 73 M.J. 738, 757 (A.F. Ct. Crim. App. 2014) (en banc) ("If the public perceives that an accused received less than a court composed of fair, impartial, and equal members, our superior court has not hesitated to set aside the affected findings and/or sentence." (citations omitted)), *vacated on other grounds*, 75 M.J. 380 (C.A.A.F. 2016); *United States v. Pyron*, 81 M.J. 637, 642–43 (N.M. Ct. Crim. App. 2021) (discussing at length the absence of a prejudice requirement), *aff'd*, 83 M.J. 59 (C.A.A.F. 2023).

IV.

THE RECORD OF TRIAL'S OMISSION OF COURT MEMBER SELECTION SHEETS REQUIRES RELIEF OR, AT A MINIMUM, REMAND FOR CORRECTION.

Additional Facts

There are two convening orders in this case: Special Order A-15, dated 19 July 2022, and Special Order A-3, dated 20 October 2022. The first indorsement to the pretrial advice contains the convening authority's selection of members for Special Order A-15. (1st Indorsement to Pretrial Advice, 19 Jul. 2022, ROT Vol. 3.) The second convening order relieved eight officer members and added ten enlisted members to the venire. (Special Order A-3, 20 Oct. 2022.) An indorsement is absent for the second pool of members; instead, all that is present is the Special Court-Martial Convening Authority's *recommendation* for members to select. (Replacement and Selection of Court Members, *United States v. Airman Brian D. Howard*, 19 Oct. 2022, ROT Vol. 3.) Notably, these recommendations differ from the members in the convening order.

The excusal memoranda are present in the record, but many of them (for 1st Lt JM, Lt Col NH, Maj JR, Capt BD, Capt EB) do not contain all the signatures. (Excusal Memoranda, Various Dates, ROT Vol. 3.)

Standard of Review

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

Law and Analysis

The record of trial is "the very heart of the criminal proceedings and the single essential element to meaningful appellate review." *United States v. Credit*, 4 M.J. 118, 119 (C.M.A. 1977). A complete record of proceedings is required for every court-martial in which the sentence adjudged includes "a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months." Article 54(c)(2), 10 U.S.C. § 854(c)(2). A substantial omission in a record of trial raises a presumption of prejudice to an appellant, which the Government must rebut. *Henry*, 53 M.J. at 111 (citations omitted). "Moreover, since in military criminal law administration the Government bears responsibility for preparing the record of trial, it is fitting that every inference be drawn against the Government with respect to the existence of prejudice because of an omission." *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981) (citation omitted).

A record of trial must include pretrial court member replacement requests and excusals. AF/JAJM, *Article 65/66 Review ROT and Attachments Assembly Checklist*, February 2024.[6] While the convening orders themselves list the selected members, they do not document the convening authority's selection process. The omission of such documentation is substantial because it prevents an assessment of the convening authority's selection of court members which, in turn, can affect whether the court-martial was properly convened. *See United States v. King*, 83 M.J. 115,

[6] Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial*, (21 Apr. 2021), ¶ 1.3.3.1. and 2.1.1. mandate the use of this checklist when preparing ROTs.

121–23 (C.A.A.F. 2023) (assessing documentation about the propriety of a panel's constitution); *United States v. Jeter*, 84 M.J. 68, 73 (C.A.A.F. 2023) (discussing questionnaires considered by the convening authority and the original convening order in assessing the consideration of race in selecting members). Additionally, the incomplete excusal memoranda raise the question of whether the members were properly excused at all.

This Court should use its broad authority under Article 66, UCMJ, to provide any sentence relief appropriate for (once again in this case), failing to provide a complete record of trial. The Government's chronic failure to docket complete records of trial shows no signs of abating.[7] As this Court has recognized, this is institutional

[7] *See United States v. Kershaw*, No. ACM 40455, 2024 CCA LEXIS 354 (A.F. Ct. Crim. App. 26 Aug. 2024); *United States v. Boren*, No. ACM 40296, 2024 CCA LEXIS 246 (A.F. Ct. Crim. App. 24 Jun. 2024) (remand order); *United States v. Howard*, No. ACM 40478, 2024 CCA LEXIS 137 (A.F. Ct. Crim. App. 9 Apr. 2024) (remand order); *United States v. Moore*, No. ACM 40442, 2024 CCA LEXIS 118 (A.F. Ct. Crim. App. 21 Mar. 2024) (remand order); *United States v. Donley*, No. ACM 40350, 2024 CCA LEXIS 115 (A.F. Ct. Crim. App. 19 Mar. 2024) (remanding due to record of trial issues); *United States v. Smith*, No. ACM 40437, 2024 CCA LEXIS 109 (A.F Ct. Crim. App. 11 Mar. 2024) (remand order); *United States v. Harnar*, No. ACM 40559, 2024 CCA LEXIS 39 (A.F. Ct. Crim. App. 31 Jan. 2024) (remand order); *United States v. Wells*, No. ACM S32762, 2024 CCA LEXIS 15 (A.F. Ct. Crim. App. 18 Jan. 2024) (remand order); *United States v. Conway*, No. ACM 40372, 2023 CCA LEXIS 501 (A.F. Ct. Crim. App. 5 Dec. 2023); *United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. 11 Sep. 2023) (remand order); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. 1 Aug. 2023) (remand order); *United States v. Manzano Tarin*, No. ACM S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. 27 Jun. 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. 15 Jun. 2023) (remand order); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Gammage*, No. ACM S32731, 2023 CCA LEXIS 240 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Goodwater*, No. ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. 31 May 2023) (remand order); *United States v. Irvin*, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim.

neglect. *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. 7 Jun. 2024) (unpublished) (finding institutional neglect in Air Force post-trial processing). Perhaps real consequences for this continued behavior will correct the issue. All the more so in this case because Amn Howard has already experienced delay due to the first Government-caused remand in this case. *Howard*, 2024 CCA LEXIS 137.

If this Court disagrees that sentencing relief is warranted, a remand is required to determine whether documents related to the panel composition exist. The absence of these documents impedes appellate review for Amn Howard and this Court.

WHEREFORE, Amn Howard respectfully requests this Honorable Court provide sentencing relief or remand to correct the record.

App. 12 May 2023) (remand order); *United States v. Valentin-Andino*, 83 M.J. 537, 544 (A.F. Ct. Crim. App. 2023) (remanding because of audio issue); *United States v. Lake*, No. ACM 40168, 2022 CCA LEXIS 706 (A.F. Ct. Crim. App. 7 Dec. 2022) (remand order); *United States v. Fernandez*, No. ACM 40290, 2022 CCA LEXIS 668 (A.F. Ct. Crim. App. 17 Nov. 2022) (remand order); *United States v. Stafford*, No. ACM 40131, 2022 CCA LEXIS 654 (A.F. Ct. Crim. App. 8 Nov. 2022) (remand order); *United States v. Lampkins*, No. ACM 40135, 2020 CCA LEXIS 500 (A.F. Ct. Crim. App. 25 Oct. 2022) (remand order); *United States v. Romero-Alegria*, No. ACM 40199, 2022 CCA LEXIS 558 (A.F. Ct. Crim. App. 22 Sep. 2022) (remand order); *United States v. Payan*, No. ACM 40132, 2022 CCA LEXIS 242 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Cooper*, No. ACM 40092, 2022 CCA LEXIS 243 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. 17 Mar. 2022) (unpublished); *United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43 (A.F. Ct. Crim. App. 20 Jan. 2022) (requiring second remand for noncompliance with initial remand order), *United States v. Goldman*, No. ACM 39939 (f rev), 2022 CCA LEXIS 511 (A.F. Ct. Crim. App. 30 Aug. 2022) (remand order); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10 (A.F. Ct. Crim. App. 6 Jan. 2022); *United States v. Daley*, No. ACM 40012, 2022 CCA LEXIS 7 (A.F. Ct. Crim. App. 5 Jan. 2022).

V.

AIRMAN HOWARD IS ENTITLED TO SENTENCE RELIEF BECAUSE OF THE 223-DAY DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT.

Additional Facts

Amn Howard's court-martial ended on 28 October 2022. (R. at 934.) The court reporter did not begin transcription until 7 December 2022, 40 days later. (Court Reporter's Chronology, ROT Vol. 3.) However, on 1 March 2023, the court reporter notified counsel that she "forgot to include a portion of the recording after the transcript had been certified by all parties." (*Id.*) In response, "[defense counsel] stated she has serious concerns about [the court reporter's] competence and will need to review entire transcript against the audio recording." (*Id.*) The record of trial was not mailed until 5 May 2023, 189 days after the sentence. (*Id.*) This Court docketed this case on 8 June 2023, 223 days after sentence.

On 9 April 2024, this Court remanded this case because of omissions from the verbatim transcript and missing PHO exhibits. *Howard*, 2024 CCA LEXIS 137.

Standard of Review

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

Law and Analysis

Amn Howard is entitled to sentence relief from this Court because the Government's dilatory processing violated *Moreno*. Even if this Court were to find no

prejudice from the due process violation, he is nevertheless entitled to relief under *Gay*, *Toohey*, and *Tardif*.[8]

Convicted servicemembers have a due process right to timely review of courts-martial convictions. *Moreno*, 63 M.J. at 135. Presumptive prejudicial delay occurs in three scenarios: (1) the action of the convening authority is not taken within 120 days of the completion of trial; (2) the record of trial is not docketed by the service Court of Criminal Appeals (CCAs) within 30 days of the convening authority's action; or (3) appellate review is not completed and a decision is not rendered by a CCA 18 months after docketing. 63 M.J. at 142. This Court adapted *Moreno*'s benchmark standards for the new post-trial processing scheme. *See United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (applying the aggregate *Moreno* standard of 150 days from the day an appellant was sentenced to the docketing of the case with the CCA to determine presumptively unreasonable delay).

The initial inquiry starts with the presumption of unreasonable post-trial delay. The 223-day delay between the 28 October 2022 announcement of sentence and the 8 June 2023 docketing with this Court exceeds the 150-day standard from *Livak*.[9]

---

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

[9] Amn Howard maintains that the docketing of an incomplete record of trial (which required this Court to remand) does not serve to toll the clock for the purpose of the *Moreno* and *Livak* analysis. Thus, the true count should continue to run until the Government dockets a complete record. Amn Howard recognizes this Court has repeatedly ruled against this position. *See*, *e.g.*, *United States v. Donley*, No. ACM

A presumption of unreasonable post-trial delay triggers a four-part analysis. *Moreno*, 63 M.J. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). It includes: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id*. Prejudice considers "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Id*. at 138–39 (citations omitted). The CAAF "expect[s]" the CCAs to "document the reasons for delay" and "exercise . . . institutional vigilance." *Id*. at 143. Once a presumptive delay or facially unreasonable delay triggers the analysis, the factors are balanced with no single factor being required and none being dispositive. *Id*. at 136 (citations omitted).

The total length of delay and the reasons for the delay weigh in favor of Amn Howard. While a lengthy record, it still did not come close to the 150-day standard. The reasons for the delay are troubling, as it seems the court reporter knew in March of 2023 that there were omissions from the verbatim record. (Court Reporter's Chronology.) Whatever fix occurred still did not create a verbatim record, as this Court had to remand to correct the issue, noting "that over the past year a number of incomplete records have been submitted to this court; therefore, we

---

40350 (f rev), 2024 CCA LEXIS 228, at *37–38 (A.F. Ct. Crim. App. 11 Jun. 2024 (unpublished). Amn Howard preserves his position but nonetheless provides the argument based on the 223-day docketing of *a* record.

encourage a complete and thorough review of the full record before returning it to this court." *Howard*, 2024 CCA LEXIS 137, at *4.

Amn Howard demanded speedy appellate review on 2 August 2024. (Appellant's Motion for Enlargement of Time (First), 2 Aug. 2024.) As to prejudice, the lengthy delays necessitated the addition of undersigned counsel who had to complete a review of the record due to prior counsel's unavailability. He has shown sufficient prejudice to warrant relief under *Moreno*.

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

> (1) How long did the delay exceed the standards set forth in [*Moreno*]? (2) What reasons, if any, has the [G]overnment set forth for the delay? Is there any evidence of bad faith or gross indifference to the overall post-trial processing of this case? (3) Keeping in mind that our goal under *Tardif* is not to analyze for prejudice, is there nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay? (4) Has the delay lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline? (5) Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation? (6) Given the passage of time, can this court provide meaningful relief in this particular situation?

Gay, 74 M.J. at 744. These factors also favor Amn Howard. First, the 223 days exceeded the 150 days authorized from the announcement of sentence to docketing a complete record of trial. Second, there is no discernable reason why the Government could not make the deadline here, and only confusion in the transcript's preparation. As articulated above, the reasons for delay also weigh in Amn Howard's favor. To the extent the prejudice analysis above did not persuade the Court, at the very least,

there is still "some evidence of harm." Next, providing sentencing relief will have no impact on good order and discipline and will not lessen the disciplinary effect of the sentence. A modest reduction in his lengthy sentence will provide remedy for the repeated errors in post-trial processing without undercutting good order and discipline.

On the issue of institutional neglect, this Court is well aware of the trend of untimely docketing and incomplete records of trial. Indeed, the frequency of such incomplete records is disturbing and disconcerting—dozens of cases over the past few years. *See supra* at 39–40 n.7. This untimely docketing still fits within the broader pattern of institutional neglect. At a certain point, which has now been surpassed, an appellant should get relief—in part—to motivate the Government to do its job correctly in preparing and docketing a correct record of trial within 150 days of announcement of sentence.

WHEREFORE, Amn Howard respectfully requests this Court grant sentence relief in the form of reduced confinement. Amn Howard also renews his demand for speedy post-trial processing.

Respectfully submitted,

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

APPENDIX

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

VI.

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

Additional Facts

After his conviction, the Government determined that Amn Howard's conviction qualified for a firearms prohibition 18 U.S.C. § 922. (EOJ; Statement of Trial Results (STR), 28 Oct. 2023.)

Standard of Review

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

Law and Analysis

1. Section 922 is unconstitutional as applied to Amn Howard.

The test for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.

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

> Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

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

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

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

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

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

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

The Third Circuit recently adopted this logic to conclude that Section 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years' confinement. *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. 2023), *vacated*, 2024 U.S. LEXIS 2917 (2 Jul. 2024) (remanding for further consideration in light of *United States v. Rahimi*, 144 S. Ct. 1889 (2024)). Evaluating Section 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to violent criminals." *Id.* at 104 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05. The real question is whether they meet the historical tradition of regulating firearms based on a more limited framing of

"violent."

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

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

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

The recent case of *United States v. Rahimi* does not change the analysis. In *Rahimi*, the Supreme Court addressed the validity of Section 922(g)(8)(C)(i), which applies once a court has found that a defendant "represents a credible threat to the physical safety of another" and issued a restraining order. 144 S. Ct. at 1901–02. The Court concluded that the historical analysis supported the proposition that when

"an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 1901.

But the historical analogue breaks down when applied here. In *Rahimi*, the Court noted that the "surety" and "going armed laws" which supported a restriction involved "whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* at 1901–02. The Court also noted that surety bonds were of limited duration, and that Section 922(g)(8) only applied while a restraining order was in place. *Id.* By contrast, the firearms ban here will last forever. Ultimately, the Court itself noted the limited nature of its holding: "we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be *temporarily* disarmed consistent with the Second Amendment." *Id.* at 1903 (emphasis added). Such a narrow holding cannot support the broad restriction encompassed here.

2. This Court should have the power to correct such errors.

Amn Howard acknowledges that the CAAF in *United States v. Williams* held it was ultra vires for a CCA to modify the statement of trial results to change sex offender registry using its power under Article 66, UCMJ, 10 U.S.C. § 866 (Supp. III 2019–2022). 2024 CAAF LEXIS 501, at *14–15 (C.A.A.F. 5 Sep. 2024). Amn Howard maintains this was error and preserves the argument that this Court can and should correct the EOJ and STR to eliminate the error.

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

VII.

AMN HOWARD'S ASSAULT AND INSUBORDINATE CONDUCT CONVICTIONS ARE LEGALLY INSUFFICIENT.

Standard of Review

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

Law and Analysis

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

For the reasons discussed in the main brief in Assignment of Error I, the convictions for disobeying orders and dereliction of duty challenged as factually insufficient are also legally insufficient. No reasonable factfinder could conclude that the Government met its burden to prove beyond a reasonable doubt. Additionally, his convictions for assaulting his superior commissioned officer and insubordinate conduct towards a noncommissioned officer are legally insufficient because of lack of mental responsibility.

WHEREFORE, Amn Howard respectfully requests this Honorable Court set aside the finding and the sentence.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 29 September 2024.

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

29 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO EXCEED PAGE LIMIT
v.	)	
	)	ACM 40478 (f rev)
Airman (E-3) BRIAN D. HOWARD, USAF *Appellant*.	)	Panel No. 1

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

Pursuant to Rules 17.3 and 23.3(q) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States moves to file its Answer to Appellant's Assignments of Error in excess of Rule 17.3's length limitations. This Answer requires exceeding this Honorable Court's length and word limitations due to the nature and number of issues raised by Appellant in his Assignments of Error brief. Appellant raises a total of seven issues that require in-depth discussion of the facts, motion rulings and witness testimonies.

WHEREFORE, the United States respectfully requests this Court grant this motion to exceed length limitations in its Answer.

[redacted]

G. MATT OSBORN, Lt Col, USAF
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 29 October 2024 via electronic filing.

[redacted]
G. MATT OSBORN, Lt Col, USAF
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

29 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40478 (f rev)
Airman (E-3) BRIAN D. HOWARD, USAF *Appellant*.	)	Panel No. 1

ANSWER TO ASSIGNMENTS OF ERROR

G. MATT OSBORN, Lt Col, USAF
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

MATTHEW D. TALCOTT, Colonel, USAF
Chief, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

INDEX

TABLE OF AUTHORITIES

CASES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

STATUTES

OTHER AUTHORITIES

29 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40478 (f rev)
Airman (E-3) BRIAN D . HOWARD, USAF *Appellant*.	)	Panel No. 1

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

ISSUES PRESENTED

I.

WHETHER [APPELLANT' S] DISOBEYING ORDERS AND DERELICTION OF DUTY CONVICTIONS ARE FACTUALLY INSUFFICIENT AND TWO OF HIS DERELICTION OF DUTY CONVICTIONS ARE LEGALLY INSUFFICIENT?

II.

WHETHER THE MILITARY JUDGE ERRED WHEN SHE REFUSED TO INSTRUCT ON LACK OF MENTAL RESPONSIBILITY?

III.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE DENIED CHALLENGES FOR CAUSE AGAINST TWO PANEL MEMBERS WHO QUESTIONED THE CENTRAL DEFENSE OF LACK OF MENTAL RESPONSIBILITY?

IV.

WHETHER THE RECORD OF TRIAL'S OMISSION OF COURT MEMBER SELECTION SHEETS REQUIRES RELIEF OR, AT A MINIMUM, REMAND FOR CORRECTION?

V.

WHETHER [APPELLANT] IS ENTITLED TO SENTENCE RELIEF BECAUSE OF THE 223-DAY DELAY BETWEEN ANNOUNCEMENT OF THE SENTENCE AND DOCKETING WITH THIS COURT.

VI.[1]

WHETHER, AS APPLIED TO [APPELLANT], 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION

VII.[2]

WHETHER [APPELLANT'S] ASSAULT AND INSUBORDINATE CONDUCT CONVICTIONS ARE LEGALLY SUFFICIENT.

STATEMENT OF THE CASE

The United States generally accepts Appellant's Statement of the Case. Additionally, Appellant faced the following charges and specifications at trial:

- *Article 89*

The specification for Article 89 alleged that, on or about 17 May 2022, at or near Misawa Air Base, Japan, Appellant lifted up a knife against Lt Col CT, his superior commissioned officer in command, who was then in execution of this office. (ROT, Vol. I, Charge Sheet). The member panel convicted Appellant of this offense. (R. at 858.)

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

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

- *Article 90*

The specification for Article 90 alleged that, on or about 17 May 2022, at or near Misawa Air Base, Japan, Appellant, having received a lawful command from Lt Col CT to pack his belongings and go to the Misawa Air Base Passenger Terminal, willfully disobeyed that command. (ROT, Vol. I, Charge Sheet). The member panel convicted Appellant of this offense. (R. at 859.)

- *Article 91*

The Article 91 charge had two specifications. The first alleged that, on or about 17 May 2022, at or near Misawa Air Base, Japan, Appellant, assaulted MSgt AM, a non-commissioned officer who was in the execution of his office, by chasing him with a knife. (ROT, Vol. I, Charge Sheet). The member panel convicted Appellant of this offense. (R. at 859.)

The second specification alleged that, on or about 11 May 2022, at or near Misawa Air Base, Japan, Appellant, willfully disobeyed a lawful order from MSgt AM to be tested for COVID-19. The member panel acquitted Appellant of this offense. (R. at 859.)

- *Article 92*

The Article 92 charge had three specifications. The first alleged that, between on or about 4 April 2022 and on or about 11 May 2022, at or near Misawa Air Base, Japan, Appellant was derelict in the performance of his duties in that he willfully failed to complete out-processing requirements as it was his duty to do. (ROT, Vol. I, Charge Sheet). The member panel convicted Appellant of this offense. (R. at 859.)

The second specification alleged that, on or about 12 May 2022, at or near Misawa Air Base, Japan, Appellant was derelict in the performance of his duties in that he willfully failed to

board Flight JL154 as it was his duty to do. The member panel found Appellant not guilty of the offense, but guilty of the lesser included offense of negligent dereliction of duty. (R. at 859.)

The third specification alleged that, on or about 17 May 2022, at or near Misawa Air Base, Japan, Appellant was derelict in the performance of his duties in that he willfully failed to board Flight V272 as it was his duty to do. The member panel found Appellant guilty of the offense. (R. at 859.)

STATEMENT OF FACTS

Lt Col CT, the 35th Civil Engineer Squadron commander, took command in July 2020. (R. at 391.) In Fall 2021, MSgt AM became the first sergeant of the unit. (Id.) Lt Col CT first met Appellant, a member of his command, in July 2020. Lt Col CT said he began to have more consistent and recurring interactions with Appellant in late February to March 2021, stating that over the course of his two years of interactions with Appellant, Appellant reported to his office at least five times. (R. at 395.)

By the Spring of 2022, Appellant had been reassigned from the heavy equipment shop to the front command section office where Lt Col CT saw Appellant on a daily basis. (R. at 397.) In April 2022, Lt Col CT recommended that Appellant be discharged. The separation authority agreed with that recommendation and approved Appellant's discharge on 12 April 2022. (R. at 398.) Appellant's separation date was set for 13 May 2022. (R. at 399.)

Lt Col CT testified about the "follow-through" process once someone has been approved for discharge, including Appellant's need to attend pre-separation appointments. (Id.) For Appellant's discharge, Lt Col CT said Appellant's out-processing was "happening slowly," as there were "some failed appointments, or rescheduling of some appointments." (R. at 400.) Lt Col CT also said there were increased engagements with Appellant, explaining that at first, he

would "afford anybody to carry out actions on their own," but would then become more involved when actions would not be taken. Lt Col CT said "that kind of increasing involvement was definitely necessary for [Appellant] . . . all the way up to, really in the end, when even some of those efforts failed, in the last days, and you know, really days, leading up to that separation date, was kind of those forceful separation actions that could be done on behalf of the command team; as it was alluded that Master Sergeant [AM] had to take care of a lot of stuff, or at least document that things that were not happening." (R. at 400-01.) Lt Col CT explained a multitude of last-minute out-processing actions that "needed significant engagement" to ensure the actions occurred prior to Appellant's separation. (R. at 401.)

One of these issues was the commander finding out that Appellant not only had a car in disrepair on base but had also bought a new car less than 10 days from when he was departing Misawa and separating. (R. at 402.) Lt Col CT said this was at odds with what most people do when they were out-processing – he said "most people's due diligence is to get rid of assets, sell things, ship things, household goods, etcetera." (Id.)

Lt Col CT said Appellant's separation orders were approved for Friday, 13 May 2022, though Lt Col CT said Appellant may have actually been flying out of Japan on Thursday, 12 May 2022. (R. at 404.) However, Appellant did not make that 12 May 2022 flight because Appellant did not complete a required pre-departure COVID test. (R. at 405.)

Once Appellant missed the flight, Lt Col CT said the command team gathered to determine the next steps, which included extending Appellant's separation orders and determining if Appellant could take a rotator flight out of Japan without Appellant taking the COVID test. (R. at 406.) However, command was told there was no waiver authority and that the only way to get on a plane out of Japan at that time was with a pre-departure COVID test.

Command then determined the next PAX rotator flight would occur on the following Tuesday, 17 May 2022. (R. at 408.) Lt Col CT said Appellant's orders were extended and that the final thing to accomplish by that Tuesday was the COVID test. Lt Col CT said he believed Appellant failed to show up for the test on Sunday but that Appellant voluntarily took the test on Monday. (Id.)

Lt Col CT stated that Appellant's flight likely would not leave on that Tuesday until 1700, but that the cut-off time to check in was 1100 hours. (R. at 410.) Lt Col CT said "anybody on that flight that day, was supposed to be checked-in between 0800 and 1100 hours," adding, "I knew that was why [sic] they advertised, because we had other folks, members of the squadron that day flying. All of them got checked in during that time." (R. at 445.)

Lt Col CT then explained the plans the unit went through to ensure Appellant arrived to the PAX terminal on time, including having one of Appellant's friends, SrA DC, help out. (R. at 410-11.) When asked what was left for Appellant to leave Misawa, Lt Col CT said, "It was really, just physically, getting the member over to the PAX terminal." (R. at 412.)

On the morning of 17 May 2022, however, MSgt AM approached Lt Col CT at approximately 1050 hours and said that Appellant was still in his dorm and not packed. Lt Col CT and MSgt AM decided to go to the dorm to talk to Appellant. They left the squadron at around 1108 hours and arrived at Appellant's dorm room around 1115 hours. (R. at 446.) When they arrived at Appellant's dorm, Appellant opened the door in a "very cordial" manner, and the three talked about getting Appellant to the terminal. (R. at 414.) When asked about Appellant's tone, Lt Col CT said, "Very much like today, you know, just in the courtroom here, just a soft, friendly tone, very kind of, encouraging in nature, and yeah, I mean really at that point it was, I think we just, just trying to get him out of there, encouraging him, 'Hey, are your bags packed

yet? Yeah, you know, today's the day.'" (R. at 414.) Lt Col JT said Appellant responded, "very, very nonchalantly, very friendly responses back, and with you know, 'Yeah, yeah no, I got it, I got it. I'm good. I'll get over there. I've got a car, I can get to the terminal on my own.'" (Id.) Lt Col JT said the conversation took place in Appellant's doorway to his room.

Looking into Appellant's room, Lt Col CT could see that Appellant had "no bags packed and ready" and that it looked like "the member was still living in their dorm room, full-time." (R. at 415.) Lt Col JT said Appellant then muttered, "Oh, yeah, don't worry about it. I'll be a foreigner tomorrow." (R. at 416.)

When asked how he took that comment, Lt Col CT said, "Internally, inside, I thought, well that's, that's unique and different. You know, knowing the member is supposed be on a plane back to the United States, headed to his home of record. Foreigner to me means he could be strolling out of the gate with, with a car, a new car, not to be seen again. Which, again, does not solve the issue of separation overseas. You know, so obviously, I was concerned that maybe a flight risk, or something there. Other than departing into Japan versus getting on the flight." (R. at 416.)

Lt Col CT also stated that Appellant began to get more agitated. Lt Col CT again told Appellant, "Hey, like, you do know that today is the day. You need to get your bags packed. It's time to go to the terminal. Like it's time." (R. at 417.) When asked on cross-examination if he and MSgt AM "were persistent" in asking Appellant about him going to the airport, Lt Col CT said, "Yeah, I mean obviously, we had one missed show time for the flight the previous, the previous week and a pattern, or history where it was, we knew there was a very high potential

he wouldn't show, so that is correct." (R. at 441.) Lt Col JT also stated he would "rephrase[] questions to make sure [Appellant] understood that it was time, or past time, that he should get over there to be checked in." (Id.)

Lt Col CT said both his and MSgt AM's demeanor did not change throughout the conversation, adding, "I was probably more forceful in the nature of the wording of the question as we asked it, but certainly, not an aggressive form or manner, anything to incite anger or anything like that. We purely wanted, wanted the member to obviously, to get packed up and get to the terminal." (R. at 417.)

In response to Lt Col CT, Appellant slammed the door "very, very forceful[ly]" in their faces. (Id.) Lt Col CT said that, as the down was shutting, he could see Appellant "turning again and lunging for something in the room, and you know, either on the bed, kind of on a table, towards the back by the window. Definitely see that [Appellant] was going for something in the room, which made me very nervous at that point." (R. at 418.) Fearing the worst and seeing potential harm for him and MSgt AM in the future, the two turned back to where they had come from and "it was a full sprint down the hallway of the dorm room." (R. at 418.)

As this was happening, Lt Col CT heard a door "open behind us and slam shut again." (R. at 419.) Going down the stairway of the building, Lt Col CT said MSgt AM fell. Lt Col CT could hear Appellant coming down the stairway. When Lt Col CT looked up the stairwell, he saw Appellant "brandishing something in his hand . . . in an aggressive manner." (R. at 420.) Lt Col CT felt Appellant was "coming to stab, stab us at that point." (Id.) Lt Col CT said he "[d]efinitely could not see the blade or anything at that point but could see that [Appellant] was holding something." (R. at 421.)

Lt Col CT and MSgt AM continued running out of the stairwell to the main floor and then eventually outside. (R. at 422.) Lt Col CT said, "I knew [Appellant] was in pursuit of us." (Id.) Lt Col CT said it was "[p]ure survival at that point." (R. at 424.) Lt Col CT said he saw a running truck in the lodging parking lot that had two people sitting inside. Lt Col CT said he jumped into the truck and told the driver, "I need you to drive. I need you to drive now." (R. at 425.) He told the driver, "A member is coming, probably with the intent to harm me and probably with the intent to kill me. I need you to get me out of here now." (Id.) On cross-examination, Lt Col CT said that when he was in the truck, "that is definitely when I made initial eye contact with [Appellant], he was still coming up behind us." (R. at 444.)

When the driver hesitated, Lt Col CT said he reached into the front of the truck, grabbed the gearshift, and again told the driver to move. He said Appellant at this point was "very close to the back of the truck." (R. at 428.) The passenger of the truck got out and went to the back of the truck and began speaking with Appellant. (Id.) At one point, Appellant turned and began walking back towards the dorms. Lt Col CT took the opportunity to exit the trunk and run towards the wing headquarters. (R. at 429.) On the way there, Lt Col CT called Security Forces.

Maj PT, a National Guard pilot, was the passenger of the truck Lt Col CT jumped into. (R. at 461.) Maj PT said he immediately noticed Lt Col CT's command badge on his uniform and that Lt Col CT jumped into the truck and told them to "drive, drive, drive" and "go, go, go." (R. at 462.) Maj PT said Lt Col CT was "fairly frantic" and "it seem[ed] like he was nervous/scared of whatever was going on." (R. at 462.) Maj PT got out of the truck and saw a person standing about five yards behind the truck. From the witness stand, Maj PT identified Appellant as the person he saw. (R. at 465.)

Maj PT said the person told him "something along the lines of 'I'm trying to rotate out, trying to leave. I'm leaving soon.'" (R. at 464.) When Maj PT asked if there was a problem, the person responded, "I don't have a problem, do you have a problem." (Id.) When Maj PT said, "Are we good," the person responded, "Yeah, I'm good." (Id.) Maj PT described Appellant as "pretty calm," "very, very calm," and exchanged fist bumps with Appellant before Maj PT walking into the lodging building. (R. at 463-64.) Maj PT said he could not see the person's hands, adding, "I think the right hand was behind the back, just down by the waist, and kind of turned sideways, so we weren't facing each other square." (R. at 464.)

Maj PB was the driver of the truck. (R. at 467.) Maj PB said Lt Col CT was yelling, "He's after me," "He has a knife," "Get me out of here," and "He's trying to kill me." (R. at 469.)

SSgt RW, a member of Security Forces, responded to the incident outside of the Misawa Inn. (R. at 473.) Based on information she received at the scene, SSgt RW went to Appellant's dorm room. SSgt RW knocked but no one answered. (R. at 476.) Appellant then walked up with a dorm master key and told SSgt RW that "he didn't know what was going on, he just locked himself out of his dorm room." (Id.) Appellant was detained and searched. When asked if he had anything on him that would harm the searching airman, Appellant said, "No." (R. at 477-78.) However, while searching Appellant, A1C JJ, another Security Forces member, found a pocketknife in Appellant's back, right pocket. (R. at 478.) SSgt RW said the knife was a "tactical knife that you would carry on duty." (R. at 479.) During this interaction, SSgt RW said Appellant was "[v]ery calm, little jittery, would repeatedly laugh every few minutes, like kind of a nervous tick." (R. at 480.)

A1C JJ agreed that Appellant was "very calm" and remembered Appellant "saying something along the lines of that there was – that this was a misunderstanding." (R. at 489.) A1C JJ also recounted finding the four-inch folded knife in Appellant's pocket. (R. at 491.) A1C JJ said the knife folded into itself, so it "be may be about 6-7 inches unfolded." (R. at 493.) The knife found on Appellant is at Prosecution Exhibit 1 and pictures of the knife are at Prosecution Exhibit 2. (R. at 494-95, 505.) On cross-examination, A1C JJ agreed that Appellant was respectful, compliant, showed no signs of aggression, and was extremely calm. (R. at 498.)

TSgt KG, a Security Forces investigator, interviewed Appellant following the incident. During a break in the interview, TSgt KG watched Appellant from the camera while in another room. (R. at 511.) TSgt KG said Appellant was "was looking around inside the room, he was talking, maybe to himself, I'm not sure. Seemed like he was maybe having a conversation and then he was pulling his hair a little bit, but yeah." (Id.) TSgt KG agreed that Appellant was blinking rapidly and very jittery during the interview, and also agreed that the interview was disjointed and lacked syntax "[a]t times." (Id.) When asked if the interview was hard to follow, TSgt KG responded, "Yes, ma'am, at the beginning. So, once — when I asked [Appellant] to explain to me the situation, basically what had happened, it was kind of all over the place, his story. When I asked direct questions he was able to respond to direct questions, but yeah." (R. at 512.) TSgt KG described the interview as "unique" and agreed it was hard to follow and scattered. (Id.)

Ms. MT, a civilian who worked at the passenger travel office, assisted Appellant with his travel. (R. at 515.) Ms. MT identified Prosecution Exhibit 3 as a request form that her office has customers fill out. (R. at 517.) The form shows Appellant was originally booked on a flight

from Misawa to Charlotte on 12 May 2022. (R. at 517, 519.) Prosecution Exhibit 4 is Appellant's flight itinerary for the 12 May 2022 flight that he did not board. (R. at 522.)

Prosecution Exhibit 5 is Appellant's rotator flight itinerary. (R. at 527.) Ms. MT explained that the hand-written markings in the right-hand corner was the check-in time for the rotator. (Id.) The hand-written markings show the report no earlier than time as 0800 hours and the report no later than time as 1100 hours. (*See* Pros. Ex. 5.) Ms. MT stated that she provided this document to Appellant's first sergeant. (R. at 529.)

SrA DC, Appellant's friend who was assisting with Appellant's out-processing, took Appellant to breakfast on the morning of 17 May 2022. (R. at 578.) SrA DC said the plan after breakfast was "[t]o try to get his belongings to the airport, him and his belongings to the airport." (Id.) During breakfast, SrA DC said Appellant was very relaxed and in a good mood. (R. at 579.) At some point, Appellant told SrA DC that "he had some more belongings and that we would be coming back, most likely to his dorm to get that situated." (Id.) SrA DC offered to help Appellant pack and get his bags to his car. (Id.) Once back at the dorm, SrA DC asked if Appellant needed help, but Appellant said no because he still had to pack. (R. at 581.)

MSgt AM testified about the various tasks Appellant had to complete so that he could transition out of Misawa. (R. at 600.) MSgt AM said these tasks included "a whole lot of base out-processing, the entire checklist from FSS," as well as "squadron items and different memorandums." (R. at 601.) MSgt AM said that he assisted Appellant in making a game plan for Appellant to accomplish all of his out-processing tasks. (R. at 606.)

However, Appellant failed to accomplish these tasks. For example, even though MSgt AM told Appellant to either provide MSgt AM his chemical gear or turn it in himself, Appellant never did. MSgt AM said he eventually got Appellant's real-world chemical gear from SrA DC,

but that he had never been able to find Appellant's training gear. (R. at 607.) MSgt AM also made a finance appointment for Appellant. However, Appellant never showed for the appointment and MSgt AM had to out-process finance for Appellant. (R. at 608-09.)

At one point, MSgt AM went with Appellant to a pre-final out appointment at the personnel flight. (R. at 615.) Because there "were still a lot of things that needed done," a second appointment was scheduled with the personnel flight. However, Appellant did not show for the appointment. (Id.)

Additionally, MSgt AM told Appellant on multiple occasions that he needed to get a COVID test to be able to take a commercial flight back to the United States. (R. at 611-12.) However, Appellant never took the test and, as a result, was not able to make his 12 May 2022 flight because "he didn't meet the travel requirements." (R. at 614.)

Since Appellant missed his flight, MSgt AM explained how he had to work with FSS to extend Appellant's separation date and then schedule a rotator flight for Appellant the following Tuesday. (Id.)

MSgt AM then detailed how he requested SrA DC's help on the morning of 17 May 202 to take Appellant "out to breakfast, with his bags, and just get him over to the AMC terminal." (R. at 618.) MSgt AM said the first indication of an issue that morning was SrA DC sending him a message that Appellant did not have his bags when they went to breakfast and that Appellant "still needed to pack." (Id.) MSgt AM and MSgt MH then went to the dorm to talk to Appellant and "give a friendly reminder to let him know I had seen the sluggish delays on the out-processing." (R. at 618.) MSgt AM said Appellant was friendly and that he offered to give Appellant a ride, which Appellant declined. (R. at 619.)

MSgt AM said he returned to the squadron building so he could "inform the commander that [Appellant] still was not getting over to the terminal, and by that time it was getting really close or past the check-in time." (R. at 620.) MSgt AM and Lt Col CT then went to Appellant's dorm.

When Appellant answered the door, Appellant called Lt Col CT only by his last name. MSgt AM said Appellant did not call Lt Col CT by "sir, or rank or anything like that, which kind of stood out to me." (R. at 621.) MSgt AM said that he and Lt Col CT took the friendly approach in terms of giving reminders to Appellant that he needed to get to the terminal. (Id.) MSgt AM said that Appellant told them that he had a car and was good, but mentioned that "he was a foreigner now." (Id.) MSgt AM said, "At the end of the conversation, pretty much the last thing I had said do to him was you know, 'You need to get your stuff, let's go.'" (R. at 622.) Appellant then slammed the door in their faces.

MSgt AM said he could hear "metal banging around" the Appellant's room and testified, "I didn't think what was coming next was going to be a good thing if I stayed there." (R. at 623.) He and Lt Col CT ran down the hallway and down the stairs. MSgt AM said he fell about halfway down the stairs and looked up to see Appellant at the top of the stairs. (Id.) MSgt AM said he began running again and "heard what sounded like [Appellant] was barking at us." (R. at 624.)

Once outside, Lt Col CT went left toward the Misawa Inn, and MSgt AM decided to split up from him and went right. MSgt AM ended up at the Wing Youth Center where he yelled for someone to call 911. (Id.) MSgt AM said he only ever saw Appellant at the top of the stairwell.

Prosecution Exhibit 6 contains videos from the dorms. (R. at 643-46; Pros. Ex. 6.) The first video in Prosecution Exhibit 6 begins by showing Lt Col CT and MSgt AM walking down

the hallway of Appellant's dorm, knocking on his door, and conversating with Appellant. (Pros. Ex. 6.) At the 1:45 mark of the video, Lt Col AM and MSgt AM begin running down the hallway away from Appellant's room and into the stairway. Just four seconds later, at the 1:49 mark, Appellant emerges from his dorm room running and holding a knife in his hand. Appellant follows Lt Col CT and MSgt AM into the stairway.

The second video begins by showing Lt Col CT and MSgt AM turning into the stairway from the hallway and MSgt AM stumbling down the stairs. At the :05 mark of the video, Appellant enters the stairway from the hallway, again holding a knife in this hand. The video shows Appellant continuing to chase Lt Col CT and MSgt AM down the stairs. (Id.)

The third video shows Lt Col CT and MSgt AM coming down the stairs and then entering and running down another hallway. The video shows Appellant continuing to chase Lt Col CT and MSgt AM down the stairs and into the hallway while still holding a knife in his hand. (Id.)

The fourth video shows Lt Col CT and MSgt AM entering the hallway from the stairway and running down the hallway. The video shows Appellant continuing to chase Lt Col CT and MSgt AM into the hallway while still holding a knife in his hand. (Id.) Lt Col CT and MSgt AM exit the camera shot at the :07 mark of the video. Appellant exits the camera shot at the :09 mark, showing the running Appellant is only two seconds behind them. (Id.)

The fifth video shows Lt Col CT and MSgt AM exiting the building through a stairway door. The two exit the door at the :03 mark of the video. The video shows Appellant continuing to chase Lt Col CT and MSgt AM through the exit doorway while still holding a knife in his hand. (Id.) Appellant goes through the doorway at the :05 mark, again showing Appellant is just two seconds behind Lt Col CT and MSgt AM.

The sixth video shows Lt Col CT and MSgt AM splitting up once they exit the building. The video shows Appellant walking out of the doorway to the street while looking around. Appellant looks in the direction in which Lt Col CT ran and, after a few seconds, begins running in that direction.

Additional facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

I.

APPELLANT'S CONVICTIONS ARE FACTUALLY AND LEGALLY SUFFICIENT.

Standard of Review

While this Court has not yet determined a clear standard of review for issues of factual sufficiency under the amended Article 66(d)(1), UCMJ, this Court has agreed that Congress intended this new statutory standard to "make [] it more difficult to [an appellant] to prevail on appeal."[3] *See* United States v. Csiti, ACM 40386, 2024 CCA LEXIS 160 (A.F. Ct. Crim. App. 29 April 2024) (*quoting* United States v. Scott, 83 M.J. 778, 780 (A. Ct. Crim. App. 27 Oct. 2023). This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). Applying this test, this Court draws every reasonable inference from the evidence in the

[3] All specifications in this case occurred after 1 January 2021.

record of trial in favor of the prosecution. United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993).

The test of factual sufficiency is governed by the following amendment to Article 66(d)(1), UCMJ:

> (B) Factual sufficiency review
>
> > (i) [T]he Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
> >
> > (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
> >
> > > (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> > >
> > > (II) appropriate deference to findings of fact entered into the record by the military judge.
> >
> > (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Section 542(b), 134 Stat. 3611-12.

The requirement of 'appropriate deference" when a Court of Criminal Appeals weighs the evidence and determines controverted questions of fact "depend[s] on the nature of the evidence at issue." United States v. Harvey, __ M.J. __, No. 23-0239, 2024 CAAF LEXIS 502, at *8 (C.A.A.F. 6 September 2024). This Court has discretion to determine what level of deference is appropriate. Id. "[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." Id. at *10. For this Court "to be clearly

convinced that the finding of guilty was against the weight of the evidence, two requirements must be met." Id. at *12. First, this Court must decide that the evidence, as it weighs it, "does not prove that the appellant is guilty beyond a reasonable doubt." Id. Second, this Court "must be clearly convinced of the correctness of this decision." Id.

Finally, conflicts between the pleadings and proof raise the issue of variance rather than one of sufficiency of the evidence. United States v. Mann, 50 M.J. 689, 699 (A.F. Ct. Crim. App. 1999) (*citing* United States v. Miller, 34 M.J. 598 (A.C.M.R. 1992)). It is well established that in order "to prevail on a fatal variance claim, an appellant must show both that the variance was material and that he was substantially prejudiced thereby." United States v. Treat, 73 M.J. 331, 336 (C.A.A.F. 2014) (*quoting* United States v. Marshall, 67 M.J. 418, 420 (C.A.A.F. 2009) (emphasis added). "A variance can prejudice an appellant by (1) putting 'him at risk of another prosecution for the same conduct,' (2) misleading him 'to the extent that he has been unable adequately to prepare for trial,' or (3) denying him 'the opportunity to defend against the charge.'" Treat, 73 M.J. at 336 (*citing* Marshall, 67 M.J. at 420) (*quoting* United States v. Teffeau, 58 M.J. 62, 67 (C.A.A.F. 2003)).

Analysis

The panel at Appellant's court-martial correctly found Appellant guilty of the convicted offenses, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's convictions.

- ***Article 90 and its Specification***

Elements of the Offense

The military judge instructed the members as to the elements of this offense, pursuant to Article 90, UCMJ, are as follows:

> (1) that [Appellant] received a certain lawful command to pack his belongings and go to the Misawa Air Base Passenger Terminal, or words to that effect, from [Lt Col CT];
>
> (2) that [Lt Col CT] was the superior commissioned officer of [Appellant's];
>
> (3) that [Appellant] then knew that [Lt Col CT] was his superior commissioned officer; and
>
> (4) that on or about 17 May 2022, at or near Misawa Air Base, Japan, [Appellant] willfully disobeyed the lawful command.

(R. at 763.)

Analysis

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

Notably, Appellant does not claim that he did not receive Lt Col CT's lawful command, that Lt Col CT was Appellant's superior commissioned officer or that he knew Lt Col CT was his superior commissioned officer. Instead, Appellant only claims fault in his conviction because he believes his "compliance was impossible" because he was "detained and could not pack his bags and go to the terminal." (App. Br. at 12.)

Appellant is wrong. To start, Appellant completed his act of willfully disobeying Lt Col CT's lawful command well before he was detained. Evidence showed Appellant knew he was supposed to be at the terminal by 1100 hours that morning. However, by the time Lt Col CT and MSgt AM arrived, which was after 1100 hours, Appellant had still not packed and, obviously, was not at the terminal. Add in that Appellant had already been scheduled for a flight the previous week, which he did not board, and he was *still* not packed to leave Misawa, his willful intent to not pack his belongings or go to the terminal that morning was clear even before Lt Col CT and MSgt AM arrived at his door.

Yet then, once Lt Col CT and MSgt AM did come to his dorm (again after Appellant was already supposed to be at the terminal), Appellant again showed his willful intent to disobey Lt Col CT. Lt Col CT testified that he told Appellant that it was "past time" for him to get packed up and go to the terminal. (R. at 441.) Appellant responded by slamming the door in Lt Col CT's face "very, very forceful[ly]" while turning and "lunging for something in the room." (R. at 417.) That something, as evidenced later, was a knife.

Again, all of this occurred prior to Appellant being detained. Moreover, Lt Col CT's lawful command was to pack and go to the terminal immediately. At that point in time, standing in his doorway, Appellant had an easy opportunity to comply. He simply could have turned around, packed his belongings, and gone to the terminal. If he had done that, there would have been no issue. Instead, Appellant chose to slam his door in Lt Col CT's face, grab a knife, and chase both Lt Col CT and MSgt AM through his dorm with the knife. Appellant's claim of "impossibility" is not supported by the facts.

Appellant's reliance on United States v. Pinkston, 21 C.M.R. 22, 25 (C.M.A. 1956), United States v Heims, 12 C.M.R 174 (C.M.A. 1953), and United States v King, 17 C.M.R. 3

(C.M.A. 1954) is similarly misguided. Pinkston involved an appellant who was financially unable to remedy a uniform deficiency. Pinkston, 21 C.M.R. at 25. Heims involved an appellant who received an order to tie sandbags even though the appellant had an injured hand and was physically unable to perform the order. Heims, 12 C.M.R. at 177. King involved an appellant who received an order to rejoin his squad even though the appellant had just returned from being treated for frostbitten feet and was physically unable to perform the order. King, 17 C.M.R. at 5.

Here, Appellant faced no such physically disability standing at the door with Lt Col CT and MSgt AM. In contrast to Pinkston, Heims, and King, Appellant's compliance with Lt Col CT's command was entirely, and easily, possible well before Appellant was detained. Further, his detainment occurred only as a result of Appellant chasing his commander and first sergeant through the dorm with a knife. There is no "impossibility of performance" here as Appellant alleges. (*See* App. Br. at 12.) As such, his claim must fail.

- ***Article 92, Specification 1***

Elements of the Offense

The military judge instructed the members as to the elements of this offense, pursuant to Article 92, UCMJ, are as follows:

> (1) that [Appellant] had certain duties, that is: complete the requirements to out-process from the United States Air Force;
>
> (2) that [Appellant] knew of the duties; and
>
> (3) that from on or about 4 April 2022 to on or about 11 May 2022, at or near Misawa Air Base, Japan, [Appellant] was willfully derelict in the performance of those duties, by willfully failing to complete the requirements to out-process from the United States Air Force.

(R. at 767.)

Analysis

Again, under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

Here, Appellant does not contest the fact that he did not complete out-processing requirements. Instead, for the first time on appeal, Appellant claims the specification "lack[s] of clarity" and asks, "what was the duty." (App. Br. at 13.) He also claims the Government failed to prove Appellant's knowledge "with evidence of the out-processing requirements, such as a checklist." (Id.)

Yet, MSgt AM testified both broadly and specifically about the tasks Appellant was required to accomplish while out-processing. First, MSgt AM stated that the tasks included "a whole lot of base out-processing, the entire checklist from FSS," as well as "squadron items and different memorandums." (R. at 601.) Here, these documents and checklists put Appellant on notice of his requirements. MSgt AM then specifically testified about tasks from those documents that Appellant failed to perform, including (1) turning in chemical gear; (2) attending and out-processing with finance; (3) completing items to final-out with personnel; and (4) attending a final-out appointment with personnel.

Appellant, who knew of all of these requirements, failed to do any of them. Instead, MSgt AM had to get a portion of Appellant's chemical gear from Appellant's friend, while the remaining pieces of Appellant's chemical gear still remained unaccounted for at the time of Appellant's trial. (R. at 608-09.) When Appellant did not show up for his finance appointment, MSgt had to out-process Appellant himself. (Id.)

Notably, Appellant's counsel never argued at trial about any "lack of clarity" as to what duties this specification entailed and also never filed a Bill of Particulars regarding this specification. In fact, in closing arguments, Appellant's counsel argued that Appellant "was actively working to complete out-processing." (R. at 810.) Here, the record is clear on what Appellant's duties were and they did not involve a "lack of clarity."

Next, Appellant, who just one paragraph before claimed that a checklist would prove Appellant's knowledge, then in the next paragraph of his brief attempts to downplay the importance of checklists by stating, "Out-processing is a flurry of checklists with items of negligible value," while also arguing that some agencies were "difficult to contact." (App. Br. at 13.) Yet, MSgt AM's testimony showed that he was able to navigate Appellant's out-processing essentially in Appellant's place since Appellant repeatedly failed to show up for appointments or complete his tasks. Here, MSgt AM's ability to out-process for Appellant shows (1) there were no agencies that were "difficult to contact" and (2) that Appellant had the ability to complete these tasks on his own. Instead, he willfully chose not to complete them.

Next, Appellant rhetorically asks if a member can be convicted of willful disobedience if that member "cannot, for example get the base library to sign off in time?" (App. Br. at 14.) Of course, Appellant's non sequitur is not what occurred in this case. Indeed, this is not a case where Appellant was banging on the door of the finance or personnel office begging to finish his out-processing but was turned away by those offices emptyhanded. Instead, Appellant was never at their door at all as he missed appointments with both offices and failed to complete items required from those offices. Again, MSgt AM was able to complete these tasks on Appellant's

behalf once Appellant failed to show up himself to complete them. This showed that the personnel and finance offices were the not problem here – the problem was Appellant.

Here, Appellant has failed to make a specific showing of a deficiency of proof for this specification. Yet, even if he did, the evidence shows Appellant was well aware of his duties to out-process and willfully chose not to complete them. While Appellant may claim that he did not have a "precise understanding" of his out-processing duties and that there was "weak evidence of specific willful acts," the evidence at trial showed otherwise. When providing the panel members the required and appropriate deference for having seen all the witnesses and evidence at trial, including MSgt AM's sworn testimony, this Court should *not* be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt. Accordingly, Appellant's factual sufficiency claim must fail.

- ***Article 92, Specification 3***

Elements of the Offense

The military judge instructed the members as to the elements of this offense, pursuant to Article 92, UCMJ, are as follows:

> (1) that [Appellant] had certain duties, that is: board Flight V272;
>
> (2) that the accused knew of these duties; and
>
> (3) that on or about 17 May 2022, at or near Misawa Air Base, Japan, [Appellant] was willfully derelict in the performance of those duties, by willfully failing to board Flight V272.

(R. at 769.)

Analysis

Again, under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to

the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Further, Appellant has failed to show his conviction is legally insufficient.

Here, Appellant does not dispute any of the underlying facts about the elements of this offense. Appellant does not dispute he had a duty to board a flight, does not dispute he knew of that duty, and does not dispute that he did not board a flight on 17 May 2022. Instead, Appellant renews his impossibility defense by claiming he was not willfully derelict in performing his duty since "he could not go the passenger terminal because he was detained." (App. Br. at 14.) Yet, as previously discussed, Appellant had plenty of opportunity to get to the terminal and board the plane. Before Lt Col CT and MSgt AM even went to his dorm, Appellant knew he was supposed to have already been at the terminal and checked in for his flight. But yet, he remained in his dorm room with his personal belongings still looking as if he "was still living in the[] dorm room, full-time." (R. at 415.) The circumstances of this situation make it quite clear Appellant had no intention of going anywhere.

But even after Lt Col CT and MSgt AM arrived and spoke to him, Appellant still had ample opportunity to simply pack his bags and go to the terminal. Instead, Appellant chose to slam his door in his commander's and first sergeant's face, grab a knife, and chase his two leaders out of the dorm building. Just as with his Article 90 conviction, Appellant's "impossibility" claim here is meritless and should be denied.

Next, Appellant claims the flight number "V272" listed in the specification "appears nowhere in the evidence in the case." (App. Br. at 14.) Appellant states Prosecution Exhibit 5 "describes the flight details for the rotator," but then seemingly believes the exhibit does not speak to the flight number, stating, "Maybe this was Flight V272, maybe it was not." (Id. at 14-

15.) Appellant claims the Government's decision to "add Flight V272 to the charge sheet, but then not prove it, is a fatal flaw." (Id. at 15.)

Appellant is again wrong. A cursory examination of Prosecution Exhibit 5 shows the "Mission" number for the flight, which is "TKCV2720A137." In particular, that entry includes the flight number listed in the specification – V272. Here, there is no fatal flaw in the specification's language and it was perfectly clear to all parties, the military judge, and the panel that the flight Appellant failed to board on 17 May 2022 was the flight booked for Appellant and referenced in Prosecution Exhibit 5.

Here again, Appellant has failed to make a specific showing of a deficiency of proof as to this specification. The evidence shows Appellant's newfound claim of "impossibility" lacks merit and that the Government proved Appellant failed to get on Flight V272. When providing the panel members the required and appropriate deference for having seen all the witnesses and evidence at trial, this Court should *not* be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt. Accordingly, Appellant's factual sufficiency claim must fail.

The same holds true for his legal sufficiency claim. Here, the record shows the specification is legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

- ***Article 92, Specification 2***

Elements of the Offense

The military judge instruction the members as to the elements of negligent dereliction of duty (the lesser included offense), pursuant to Article 92, UCMJ, are as follows:

> (1) that [Appellant] had certain duties, that is board Flight JL154;
>
> (2) that [Appellant] knew of the duties; and
>
> (3) that on or about 12 May 2022, at or near Misawa Air Base, [Appellant] was through neglect derelict in the performance of those duties failing to board Flight JL154.

(R. at 769.)

Analysis

Again, under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Further, Appellant has failed to show his conviction is legally insufficient.

Here, Appellant does not dispute any of the underlying facts about the elements of this offense. Appellant does not dispute he had a duty to board a flight, does not dispute he knew of that duty, and does not dispute that he did not board a flight on 12 May 2022. Instead, Appellant's only complaint is regarding the flight number listed in the specification, stating that the "Government charged him with dereliction for failing to board JL154," but "only admitted evidence . . . that [Appellant] was booked on JL156." (App. Br. at 16.)

However, Appellant's concern here is an issue of variance, not legal or factual sufficiency. *See* Mann, 50 M.J. at 699; *see also* Treat, 73 M.J. at 331 (C.A.A.F. 2014). This

Court, as well as the Army Court of Criminal Appeals (ACCA) and our superior Court, has dealt with similar issues such as Appellant's claim multiple times, with each being reviewed as a claim of variance.

In United States v. Packrone, ACM 36389, 2006 CCA LEXIS 271 (A.F. Ct. Crim. App. 19 October 2006), this Court dealt with an appellant who had pled and was found guilty of wrongfully appropriating money from his wife using her government travel card. However, on appeal, the appellant asserted in a legal and factual sufficiency claim that the evidence showed the money was not the property of the appellant's wife, but of the financial institution holding the wife's account. Jumping right to a prejudice analysis, this Court found the appellant faced no prejudice because he made no claim that he was misled or surprised by the variance, or that he was open to a future criminal sanction for his conduct. Id., at *3.

In Mann, an appellant was convicted of violating an order by one officer when the written order stated the order was "directed" by a second officer. Mann, 50 M.J. at 698. Though this Court also found no variance, the Court further found no prejudice because the appellant "presented no evidence of prejudice," was "not misled to the extent that he was unable to prepare[,] and he is protected against another prosecution for the same offense." Id. at 699.

In United States v. Williams, ARMY 20140604, 2017 CCA LEXIS 178 (A. Ct. Crim. App. 21 March 2017), an appellant filed a legal and factual sufficiency claim because the assault offense in that case did not occur at the location alleged. Seeing the issue as an issue of material variance, ACCA found no prejudice and affirmed the conviction. Id. at *1. As an initial matter, ACCA found the evidence was legally and factually sufficient to establish that appellant assaulted the victim in the case, but agreed with the appellate government counsel that the real issue in the case involved a variance as to the location of the assault since the appellant was

found guilty of assaulting the victim at a location that was a significant distance away from where the assault actually occurred. Id. at *3-4.

Though ACCA found the difference in location was a material variance, the court found "no possible prejudice to the appellant" because (1) the variance did not "put appellant at risk for another prosecution for the same conduct" as the evidence clearly established the appellant was convicted for an assault perpetrated at the correct location; (2) the appellant was not "misled or left flat-footed in the preparation of his defense against this assault specification;[4] and (3) the variance did not deny appellant the opportunity to defend against the charge. Id. at *5-6.

Finally, in Treat (a case cited by Appellant in his brief), our superior court dealt with a guilty verdict by exceptions and substitutions that changed the charged language "Flight TA4B702" to "the flight dedicated to . . . transport Main Body 1 of 54th Engineer Battalion from Ramstein Air Base, Germany, to Manas Air Base, Kyrgyzstan." Treat, 73 M.J. at 335. The appellant in that case claimed the change was a fatal variance that "denied him the right to prepare and defend against the specification as convicted." Id. Our superior court disagreed.

First, CAAF found a material variance occurred because "the Government chose to describe the specific aircraft as Flight TA4B702, and thus the specific flight number became an integral part of an element of the offense." Id. at 336. However, CAAF found no prejudice. The Court stated that the defense did not claim in any manner that the appellant "was unaware of the specific aircraft he was supposed to be on." Id. at 337. Additionally, the Court stated, "While trial defense counsel did mention the lack of evidence of the flight number in her closing

[4] The Court noted the appellant's defense counsel did not move for a bill of particulars or discovery regarding events that occurred at the charged location (versus the actual location) and did not make a motion for a finding of not guilty as to the specification. Id. at *5-6.

argument, she did not channel her efforts into disproving the Flight TA4B702 element," adding, "Furthermore, despite citing the lack of proof that it was specifically Flight TA4B702 that Appellant missed, trial defense counsel did not move pursuant to R.C.M. 917 for a finding of not guilty on that particular charge." Id.

Finally, CAAF highlighted that the defense had not identified "any different trial strategy it might have employed," and that "[a]ll indications are that appellant's defense . . . would have remained precisely the same whether or not he was charged per the original specification or per the exceptions and substitutions." Id. Finding "no reasonable possibility that the verdict in this case would have been any different," CAAF found the appellant "was not denied the opportunity to defend against the charge on which he was convicted," and that the variance was not fatal since it did not prejudice the appellant.

For Appellant's case, as noted above, there is no question that Appellant negligently failed to board a flight on 12 May 2022. Thus, the evidence is legally and factually sufficient to support the conviction. *See* Williams at *3-4. The real issue is a conflict between the pleadings and the proof raised – which is an issue of variance rather than one of evidence sufficiency. *See* Mann, 50 M.J. at 699; Packrone at *3; Williams at *3-4. Here, like in Treat, the variance involves a flight number, namely the flight number stated in the charge – JL154 – and the flight number listed in Prosecution Exhibit 4 – JL156.

Here, even assuming, based on the reasoning in Treat, that the variance between "JL154" and "JL156" is material, Appellant has failed to show any prejudice in this variance. Thus, the variance is not fatal and Appellant's claim must fail.

Notably, in his brief, Appellant does not address the issue of variance and offers no argument related to prejudice. However, a review of prejudice similar to the analysis conducted

in Treat, Mann, Packrone, and Williams shows there is no prejudice in this case. To start, Appellant's counsel never raised this issue at trial and never argued that Appellant was unaware of the specific flight he was supposed to board on 12 May 2022. Further, as opposed to the defense counsel in Williams, Appellant's trial defense counsel never mentioned the flight number issue in their closing argument. Instead, the defense's closing argument on this specification centered on whether Appellant's failure to board the flight was willful. (R. at 811-12.) There was never an argument about a lack of evidence as to the flight itself or whether Appellant was confused or unaware about which flight to board.

Moreover, even once the issue was specifically raised by the panel during deliberations, Appellant's counsel did not move for an R.C.M. 917 finding of not guilty. Appellant's counsel also did not object to the military judge's instruction to the members on the matter and never raised the issue again. (R. at 835-36, 838.) Further, Appellant has never argued, either at that point in the trial, at any other time during the trial, or now before this Court, that either Appellant or the defense team had been misled, surprised, or left flat-footed by the variance or that they were unable to prepare Appellant's defense or defend against the charge. *See* Mann, 50 M.J. at 698-99; Packrone at *3; Williams at *5-6.

Whether at his trial or now before this Court, Appellant has failed to identify "any different trial strategy it might have employed," and all indications are that Appellant's defense strategy for this specification – namely that he did not willfully miss the flight – would have remained his defense for this specification no matter what flight number was listed in the specification.[5] *See* Treat, 73 M.J. at 337. The evidence clearly shows Appellant was well aware

[5] Notably, this defense strategy worked as Appellant was only found guilty of negligent dereliction of duty, not willful.

of what flight he was supposed to board and has never argued or claimed, either at trial or now to this Court, that he was confused or unaware about which flight to board.

Finally, due to the clear testimony and documentary evidence presented at trial showing the flight number and date of the flight Appellant missed, the variance does not put Appellant at risk for another prosecution for the same conduct.

In sum, the variance in this case did not put Appellant at risk for another prosecution for the same conduct, did not mislead Appellant in any way, and did not deny Appellant the ability to defend against the charge. Accordingly, there is no possible prejudice to Appellant. Thus, as Appellant has failed to show any prejudice in this variance, and there is "no reasonable possibility that the verdict in this case would have been any different,"[6] the variance in this case is not fatal, and Appellant's claim must fail.

Considering all of these facts and circumstances, the Government provided the panel ample evidence of Appellant's guilt beyond a reasonable doubt. Here, Appellant has failed to make a specific showing of a deficiency of proof as to his dereliction of duty conviction. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Accordingly, Appellant's factual sufficiency claim must fail.

The same holds true for his legal sufficiency claim. Here, the record shows the specification is legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the

[6] *See* Treat, 73 M.J. at 337.

evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

II.

THE MILITARY JUDGE DID NOT ERR IN NOT GIVING A LACK OF MENTAL RESPONSIBILITY INSTRUCTION TO THE PANEL.

Additional Facts

During his trial testimony, Lt Col CT agreed that several members of his units raised concerns about Appellant's mental health. (R. at 432.) Lt Col CT agreed that he ordered two command-directed evaluations, both of which occurred in 2021. Lt Col CT said the first evaluation "did not g[ive] any concrete diagnosis," but instead "Basically, returned [Appellant] to duty, back to us. No restrictions, and you know, really just to continue to monitor, and encourage him to seek help, and treatment voluntarily on his own accord at that point." (R. at 448.)

After Lt Col CT received additional concerns about Appellant's behavior, the second evaluation was ordered. (Id.) The second evaluation resulted in the mental health provider telling Lt Col CT that Appellant had unspecified bipolar disorder with severe psychotic episodes. (R. at 433-34.) Lt Col CT explained this diagnosis "was an unfitting condition," and the provider recommended that going through the "evaluation for discharge through the medical board process." (R. at 435.)

After the second evaluation, Appellant began receiving treatment at Misawa. However, by September 2021, the Misawa medical team stated the requirements for Appellant's treatment exceeded their abilities and recommended he be sent to a high-level treatment program in San Antonio, Texas. (R. at 450.)

The unit supported and Appellant voluntarily accepted the treatment. After completing the five-month treatment, Appellant returned to Misawa. During the course of this treatment, Lt Col CT stated that "the folks that had been working with him during those five months determined that bipolar was not the correct diagnosis, and that's when they adjusted diagnosis to basically, a behavioral disorder and essentially was returned back to duty." (R. at 451.) Lt Col CT also stated this diagnosis correction "stopped the clock and ceased the med board process for a medical discharge, at that point, and was returned to us with the new condition." (Id.)

Dr. SF, a psychiatrist called by the defense, interacted with Appellant three times in the summer of 2021 timeframe. (R. at 700.) None of those interactions were in person. (R. at 699.) Dr. SF said he did not interact with Appellant in the spring of 2022 or in May 2022. (R. at 700.)

Dr. SF agreed that someone talking to themselves or talking to someone who was not there was an example of a psychotic feature. (R. at 698-99.) However, on cross-examination, Dr. SF also agreed that regular people talk to themselves. (R. at 702.)

Lt Col DA, a forensic psychiatrist, provided a second opinion of Appellant's diagnosis in April 2021. (R. at 708.) At that time, Lt Col DA determined Appellant "was not in a fully manic state." (Id.)

Lt Col EG, a clinical psychologist, provided Appellant's initial diagnosis from his first command directed evaluation. (R. at 716.) During her evaluation, which consisted of seeing Appellant four to six times, Lt Col EG "did not see [Appellant] as an imminent risk to himself or others." (R. at 726.) Lt Col EG PCS'd from Misawa in July 2021 and did not interact with Appellant at all after her PCS. (R. at 727.) She did not interact with him in spring 2022, in May 2022, or on 17 May 2022. (Id.)

When asked, "You have no idea what his mental state was on 17 May 2022," Lt Col EG replied, "Yeah, I can only speak to the time period for what I saw [Appellant], correct." (Id.) When asked, "You have no idea if he was exhibiting psychotic features on that particular day," Lt Col EG responded, "Correct. I cannot speak to that particular day, I can only speak to that timeframe from which I saw [Appellant]." (Id.)

Lt Col EG was also asked if she typically put something in her command-directed evaluation reports that someone who has a mental health disorder can still be held accountable for their actions. Lt Col EG stated, "Yes, when I do my CDE reports I state that this person has this diagnosis, they have a mental health issue, but usually I will also add that, just because they have the mental health issue, doesn't mean that the commander cannot continue to be holding them accountable . . . ." (R. at 728.) When asked further why she included this language, Lt Col EG stated, "From a psychology point of view and from both, so CDEs are interesting. So, you have — both are your clients, you have the commander and your patient, and so, they may be unfitting, but sometimes they, they may also have some other disciplinary issues that are going on, and so in which case the government, the commander, can still pursue like an admin sep for example or something along those lines." (R. at 730.)

At the close of findings, Appellant's counsel requested the lack of mental responsibility instruction. (R. at 742, 746.) Appellant's counsel referenced the testimonies of Lt Col EG, Dr. SF, and Lt Col DA, as well as other testimony from Government witnesses about Appellant's actions during the charged timeframe. Appellant's counsel argued Appellant was in a "manic state at the time of the charged offenses." (R. at 746-51.) The Government countering by arguing that the court had no testimony showing Appellant could not appreciate the wrongfulness of his actions or the nature and quality of his acts. (R. at 751-52.)

The military judge initially stated that she did not find the defense "was reasonably raised by the evidence," but stated she would take the evening to read cases cited by the parties and apply those to the facts raised to the court. (R. at 753.) The following morning, the military judge ruled as follows:

> In ruling on the defense's request for the instruction on lack of responsibility and trial counsel's objection, this court considered Article 50a, the UCMJ, the applicable R.C.M.s and the case cited by the parties including the unpublished Air Force Court of Criminal Appeals decision, United States v. Roman, from 2019. As stated in Article 50a, for the affirmative defense of lack of mental responsibility to apply, the test is whether the evidence, that there must be some evidence that at the time of the commission of the acts, constituting the offenses the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. The judge is not the gatekeeper in this evidence. Based on the evidence presented at trial, this court finds the evidence presented at trial does not reasonably raise that at the time of the offenses, the accused was unable to appreciate the nature and quality or the wrongfulness of the acts, as a result of a severe mental disease or defect. The medical provider testimony defense counsel highlights in its request for this specific instruction last evening during the Article 39(a) was not evidence at the time of the commission of the acts constituting the offense.
>
> Consistent with the Electronic Benchbook guidance that if there is evidence that the accused may have lacked the necessary mens rea, but the Article 50a defense of lack of mental responsibility has not been raised, then the appropriate instruction is 5-17, Evidence Negating Mens Rea, which this court has included in its final findings instruction.

(R. at 758.)

Additionally, prior to trial, from 24 June 2022 until 27 June 2022, the Government completed a sanity board on Appellant. Appellant was diagnosed with an "Adjustment Disorder with disturbance of conduct," "Other Specified Personality Disorder, with Narcissistic traits," and "Problems Related to Other Legal Circumstances." (Sanity Board, ROT, Vol. 4, PHO

Exhibit 29.) However, the sanity board found that Appellant was not, at the time of the alleged criminal conduct, suffering from a severe mental disease or defect and was not unable to appreciate the nature and quality or wrongfulness of his conduct. (Id.) The board also found Appellant had sufficient mental capacity to understand the nature of the proceedings and to cooperate intelligently in his own defense. (Id.)

Standard of Review

The adequacy of a military judge's instructions is reviewed de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). Whether the evidence reasonably raises a required findings instruction under R.C.M. 920(e) is also a question of law reviewed de novo. United States v. Davis, 76 M.J. 224, 229 (C.A.A.F. 2017) (citations omitted).

Law

"The military judge bears the primary responsibility for ensuring that mandatory instructions . . . are given and given accurately." United States v. Miller, 58 M.J. 266, 270 (C.A.A.F. 2003). Instructions on findings shall include "[a] description of any special defense under R.C.M. 916 in issue." R.C.M. 920(e)(3). Lack of mental responsibility is an affirmative defense under R.C.M. 916(k)(1). Special defenses are often called affirmative defenses. R.C.M. 916(a), Discussion.

The military judge must instruct the members "on the availability and legal requirements of an affirmative defense if 'the record contains some evidence to which the military jury may attach credit if it so desires.'" United States v. Hibbard, 58 M.J. 71, 72 (C.A.A.F. 2003) (*quoting* United States v. Brown, 43 M.J. 187, 189 (C.A.A.F. 1995)) (additional citations omitted). An affirmative defense is "in issue" when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose." United States v. Stanley, 71

M.J. 60, 61 (C.A.A.F. 2012) (*quoting* United States v. Lewis, 65 M.J. 85, 87 (C.A.A.F. 2007)). "Any doubt whether an instruction should be given should be resolved in favor of the accused." United States v. Davis, 53 M.J. 202, 205 (C.A.A.F. 2000) (*citing* United States v. Steinruck, 11 M.J. 322, 324 (C.M.A. 1981)). "Where an instructional error raises constitutional implications, [we have] traditionally tested the error for prejudice using a 'harmless beyond a reasonable doubt' standard." United States v. Davis, 73 M.J. 268, 271 (C.A.A.F. 2014) (footnote omitted) (*quoting* Dearing, 63 M.J. at 482).

Article 50a(a), UCMJ, 10 U.S.C. § 850a(a) describes the defense of lack of mental responsibility as follows:

> It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

R.C.M. 916(k)(1) contains almost identical language to Article 50a(a). R.C.M. 916(k)(3) states "[t]he accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense." Generally, once a defense "is placed in issue by some evidence, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist." United States v. Berri, 33 M.J. 337, 343 (C.M.A. 1991) (*quoting* R.C.M. 916(b)). Lack of mental responsibility is an exception to that general rule. R.C.M. 916(b)(2).

Analysis

While Appellant's counsel attempted to place the lack of mental responsibility "at issue" through their voir dire questions and opening statement, the actual evidence presented at

Appellant's trial never placed Appellant's supposed lack of mental responsibility "at issue" and the military judge did not err in not giving the lack of mental responsibility instruction.

To start, there is no question that Appellant received an initial diagnosis for bipolar disorder in 2021, began receiving treatment for the disorder, and completed a five-month treatment program in early 2022. Notably, coming out of that treatment program, Appellant's initial bipolar diagnosis was found to be incorrect, and the adjusted diagnosis of a behavior disorder allowed Appellant to return to duty.

However, per Article 50a, UCMJ, having a mental disease or defect does not constitute the defense of lack of mental responsibility *unless* "at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts." *See* Article 50a, UCMJ. Here, there is no evidence showing Appellant failed to appreciate the nature and quality or the wrongfulness of his acts.

From an initial standpoint, as noted above, a sanity board determined prior to Appellant's trial that Appellant was not, at the time of the alleged criminal conduct, suffering from a severe mental disease or defect and was not unable to appreciate the nature and quality or wrongfulness of his conduct. (Sanity Board, ROT, Vol. 4, PHO Exhibit 29.)

Further, at trial, there was no expert testimony regarding Appellant's mental state at the time of his acts. Indeed, Dr. SF had not interacted with Appellant since the summer of 2021, nearly a year prior to Appellant's acts. The same holds true for Lt Col EG, who said she had not interacted with Appellant since her PCS from Misawa in July 2021, 10 months before Appellant's acts. Finally, Lt Col DA's stipulation stated he had only interacted with Appellant in April 2021, over a year prior to Appellant's acts. Moreover, even at that time, when Appellant

was initially diagnosed with bipolar disorder, Lt Col DA's stipulation stated he "was not in a fully manic state." (R. at 708.)

Appellant seemingly recognizes the record is hollow of any expert testimony regarding Appellant's state of mind *at the time of the offenses*. So instead, Appellant takes highly-selected testimony from lay witnesses about specific instances of Appellant's behavior over the course of the week prior to 17 May 2022, and then attempts to connect that testimony with expert testimony that says those behaviors "*could* indicate a manic state." (App. Br. at 21.) (emphasis added.) However, as stated above, these mental health providers had not seen Appellant in over a year and had no idea what Appellant's *actual* mental state was at the time of his offenses.

Moreover, the specific behaviors Appellant cites show no indication that Appellant did not appreciate the nature and quality or the wrongfulness of his acts. Appellant first cites testimony about Appellant purchasing a car before leaving Misawa and calling himself a "foreigner" as evidence of his mental instability. (App. Br. at 20-21.) However, Appellant fails to note SrA DC's testimony that Appellant's prior car had been "junked" in the winter or early spring of that year, that SrA DC had been giving him rides, and that SrA DC was "aware he was trying to get a new car." (R. at 576.) Further, based on Appellant's statement to Lt Col CT and MSgt AM that he would be a "foreigner" the next day, Lt Col CT took that to mean Appellant "could be strolling out of the gate with, with a car, a new car, not to be seen again." (R. at 416.) Thus, the actual testimony at Appellant's trial, versus pure conjecture from medical providers who had not seen Appellant in over a year, showed Appellant bought the car for transportation purposes and, potentially, to stay in Japan following his separation.[7] In any case, Appellant's

[7] SrA DC, Appellant's friend, testified that Appellant had previously talked to him about his feelings towards Japan. When asked how Appellant felt about Japan, SrA DC said, "[Appellant]

purchase of a vehicle or calling himself a "foreigner" is no indication about whether or not he appreciated the nature and quality or the wrongfulness of his acts.

Next, Appellant states that Appellant "got in MSgt AM's face at the travel office over the innocuous question of his home of record." (App. Br. at 21.) However, Appellant fails to note this occurred on 9 May 2022, a full week prior to the events of 17 May 2022, and occurred as MSgt AM was having to physically walk Appellant through the out-processing process because Appellant would not go to his appointments. Considering Appellant was being involuntarily discharged and was not completing his out-processing appointments, it should come as no surprise that MSgt AM accompanying Appellant to the travel office to make travel plans for his involuntary departure from Misawa, a place Appellant liked, would be tense.

Further, while Appellant did get near MSgt AM's face on this occasion, MSgt AM's testimony downplays the incident. MSgt AM testified as follows:

> There was a point in time where the SATO rep had tried to ask and verify what his home of record address was, and he just kind of vocalized, I guess, "It depends on who's pushing the buttons," and looked out over at me in an uncomfortable way, if I can put it that way.
>
> . . .
>
> So, I had kind of backed up a little bit away from him to kind of see the change in demeanor, and he had gotten up out of his seat and come over to me and kind of really close to my face, and asking me if there's a problem, is there a problem, are you okay.

---

felt the culture was very honorable, good place to be, very safe place, nice environment. So, many great things about the people there." (R. at 575.) SrA DC also stated Appellant had established connections off-base at a church and required a vehicle to get off-base to the church. (Id.)

(R. at 611.) SSgt CK, who worked at the travel office and witness the interaction, testified that Appellant "did get into [MSgt AM's] face like kind of like leaned over and got into his face, and was asking him like, 'Is that okay with you? Would that work for you?' Things like that." (R. at 539.)

Considering these circumstances, it appears Appellant was simply frustrated with having to schedule his travel itinerary for his involuntary discharge. But yet again, frustration or angst about being involuntarily discharged and forced to leave Japan does not equate to "some evidence" that Appellant failed to understand the nature and quality or the wrongfulness of his acts, especially for those acts that would not occur for days or a week later.

Finally, Appellant claims that Appellant "talking, maybe to himself" and pulling his hair equates to a showing of Appellant's inability to appreciate the nature of his actions. Yet, TSgt KG testified that she only observed this behavior via a camera in another room and that she was not even sure what Appellant was doing, stating, "[Appellant] was looking around inside the room, he was talking, maybe to himself, *I'm not sure*. Seemed like he was maybe having a conversation and then he was pulling his hair a little bit, but yeah." (R. at 511.) Further, while Appellant was initially hard to follow at the beginning of the interview, TSgt KG stated that Appellant was able to answer her direct questions. (R. at 512.) Here again, Appellant *maybe* talking to himself after he had just chased his commander and first sergeant is no indication of his inability to not appreciate his actions.

Importantly, Appellant fails to cite the litany of evidence showing Appellant was *not* in a manic or unstable state during the charged timeframe. For instance, on the morning of 17 May 2022, SrA DC said Appellant was "[v]ery relaxed," "seemed refreshed," and was "in a good mood." (R. at 579.) MSgt MH, who accompanied MSgt AM the first time MSgt AM went to

Appellant's room on the morning of 17 May 2022, described Appellant as "[v]ery calm." (R. at 593.) MSgt AM said Appellant "greeted us with first bumps" and had a friendly demeanor. (R. at 619.)

Lt Col CT testified that Appellant was "very friendly" when he and MSgt AM began speaking with Appellant at his dorm room and was "very, very nonchatlant[]." (R. at 414.) MSgt AM agreed, stating Appellant was "very calm, friendly." (R. at 621.) Maj PT, who interacted with Appellant behind the truck in the middle of the incident, described Appellant as "pretty calm," "very, very calm," and exchanged fist bumps with Appellant. (R. at 463-64.) SSgt RW, the responding Security Forces member, described Appellant after the incident as "[v]ery calm." (R. at 480.) SrA JJ, the other Security Forces member, said Appellant was "very calm," and told them the incident "was a misunderstanding." (R. at 489.) SrA JJ agreed that Appellant was compliant, showed no signs of aggression and was extremely calm. (R. at 498,)

This evidence shows Appellant was not in a manic state or having any sort of "episode." In other words, Appellant showed no signs, and the military judge was provided no actual evidence, that Appellant was unable to appreciate the nature and quality or the wrongfulness of his acts. Thus, the military judge correctly denied Appellant's request for a lack of mental responsibility instruction.

Though Appellant tried to distance his case from this Court's opinion in United States v. Roman, ACM 39381, 2019 CCA LEXIS 45 (A.F. Ct. Crim. App. 7 February 2019), the facts and holding of that case are instructive. There, on appeal, the appellant argued testimony, including testimony from a medical expert, raised the lack of mental responsibility defense. Id. at *9. This Court found the military judge at that trial "had conclusive evidence that Appellant suffered from a severe mental disease or defect, persistent depressive disorder, at the time of the offenses," and

that a "sanity board, which was ordered by the convening authority, found as much." Id. at *12. However, this Court determined "there was not 'some evidence' presented during the trial that Appellant was 'unable to appreciate the nature and quality or the wrongfulness of the acts," noting that the medical expert's testimony "fell well short of being 'some evidence' that Appellant was unable to appreciate the nature and quality or the wrongfulness of the acts themselves at the time of the offenses." Id., at *13.

Similarly here, the sanity board found Appellant had an adjustment and personality disorder and evidence of Appellant's condition was before the military judge. Also like in Roman, the sanity board also found Appellant was not, at the time of the alleged criminal conduct, suffering from a severe mental disease or defect and was not unable to appreciate the nature and quality or wrongfulness of his conduct.

In somewhat of a difference from Roman, the medical experts at Appellant's trial provided *no evidence at all* that Appellant was unable to appreciate the nature and quality or the wrongfulness of the acts themselves at the time of the offenses. As noted above, none of the three witnesses had seen Appellant for over a year before his acts and had not interacted with him since the offenses. Moreover, none of these witnesses had interacted or examined Appellant since he returned from a five-week, in-person treatment in early 2022 and had received a new diagnosis. In short, they had no idea what was actually going on with Appellant at the time of the offense. Just as in Roman, this Court should find the evidence in this case falls "well short of being 'some evidence' that Appellant was unable to appreciate the nature and quality or the wrongfulness of the acts themselves at the time of the offenses." Roman, at *13.

Finally, Appellant claims the facts of his case are similar to that of United States v. Martin, 56 M.J. 97 (C.A.A.F. 2001). They are not. To start, the appellant in that case was

diagnosed at a sanity board re-evaluation with bipolar disorder and the board determined that the appellant was unable to appreciate the nature and quality or wrongfulness of his conduct while experiencing the manic episodes. The sanity board also had concerns of whether the appellant could participate in his defense because of "concerns that the clinical course of the bipolar disorder is variable even with treatment." Id. at 100.

Additionally, a psychologist who performed "extensive psychological testing" on the appellant prior to and after the offenses, testified at trial about bipolar disorder and "testified that the link between appellant's grandiose self-image and his ability to appreciate the nature, quality and wrongfulness of his behavior was direct." Id. The appellant's treating psychiatrist who diagnosed Appellant with bipolar disorder prior to trial, testified that the appellant "had recurrent hypomanic episodes." Id.

The differences in these cases are obvious. There, a sanity board found the appellant was unable to appreciate the nature of his acts. There, two medical experts examined the appellant *after* his offenses, diagnosed him with bipolar disorder, and then testified about the links between the appellant's medical condition and his offenses, including one expert saying the appellant had recurrent hypomanic episodes.

The complete opposite is true in this case. Here, a sanity board found the appellant was able to appreciate the nature of his acts. Here, there was no diagnosis of bipolar disorder by the sanity board. Further, the in-person treatment center found Appellant's initial diagnosis of bipolar disorder in 2021 was in error and re-diagnosed him. Most importantly, no medical experts testified about any links between Appellant's medical condition and his acts. In fact, the medical experts who testified had not seen Appellant in over a year and had no idea about his current diagnosis or his mental state at the time of the offenses. Worse still for Appellant, one

expert, Lt Col DA, said that even in April 2021, Appellant was "not in a fully manic state." The differences in these cases are profound. Thus, Appellant's attempt to compare these cases should be easily dismissed.

Finally, even if the military judge did err, Appellant has failed to show prejudice. Noticeably in his prejudice argument, Appellant fails to note that had the instruction been given, he would have had to prove "by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense." *See* R.C.M. 916(k)(3).[8] For the same reasons noted above, Appellant's case falls woefully short of this high standard. Here, no medical personnel who testified had actually interacted, treated, or examined Appellant in over a year. Moreover, the diagnosis provided by these medical personnel was later found to be a misdiagnosis after Appellant completed a five-week treatment program in early 2022. Each of these medical personal openly admitted they had no idea about Appellant's mental condition during the charged timeframe.

Instead, Appellant's whole case was to take a few isolated incidents, some of which occurred a week before 17 May 2022, and have the medical experts, who again had not interacted with Appellant in over a year, attempt to extrapolate how those few incidents *could* or *might* be indicative of a manic episode or state. Yet, "could" or "might" is not the standard.[9] Instead, Appellant's burden of proof, again by clear and convincing evidence, was to show the members that he was *actually* not mentally responsible at the time of the alleged offense. No

[8] To reiterate, while Appellant had to show "some evidence" to the military judge to have the instruction read to the members, Appellant would then have to prove the defense to the members by clear and convincing evidence.

[9] *See* App. Br. at 21 ("could indicate a manic state," "his manic state might again be at play.")

witness, whether the three medical experts or any other lay witness, provided any evidence showing this required tie between Appellant's acts and his mental state. Pure conjecture, especially from medical personnel who had no interaction with Appellant for over a year prior to his acts, does not meet that standard necessary to prove his defense.

Furthermore, as shown above, the few isolated incidents highlighted by Appellant did not relate to his mental condition at all. Moreover, Appellant's case failed to recognize the litany of evidence before the members that showed Appellant was "very calm," "friendly," "very relaxed," "refreshed," "in a good mood," and "very nonchalant" before, during, and after the events that occurred on 17 May 2022. Simply put, there was no manic episodes at play during the charge timeframe and Appellant wholly failed to show any evidence, let alone clear and convincing evidence, tying any mental condition to his ability to completely understand the nature and quality or the wrongfulness of his criminal acts at the time of the offenses.

Just as the military judge correctly found that Appellant failed to raise "some evidence" of the defense, this Court, for the reasons listed above, should be convinced beyond a reasonable doubt that if the military judge had given the instruction, Appellant would have still failed to prove the lack of mental responsibility defense to the members by clear and convincing evidence. Accordingly, this Court should deny Appellant's claim.

III.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY DENYING THE CHALLENGE FOR CAUSE AGAINST CAPT JT AND CAPT KB.

Standard of Review

The standard of review for a military judge's decision whether to grant a challenge for cause is whether he clearly abused his broad discretion in not applying the liberal-grant mandate.

United States v. Napoleon, 46 M.J. 279, 283 (C.A.A.F. 1997); United States v. Dinatale, 44 M.J. 325, 327 (C.A.A.F. 1996); United States v. McLaren, 38 M.J. 112, 119 (C.M.A. 1993); United States v. Ruiz, 46 M.J. 503, 509 (A.F. Ct. Crim. App. 1997). In United States v. Tippit, 9 M.J. 106 (C.M.A. 1980), our superior Court stated:

> The reviewing court need not engage in minute dissection of responses by members to artful, sometimes ambiguous, inquiries from counsel. Unless it is apparent to [the court] from the record of the *voir dire* that a court member has a closed mind about the case he is to try, denial by the military judge of a challenge for cause should not be reversed.

Tippit, 9 M.J. at 108. The abuse of discretion standard is a strict one. It involves more than a difference of opinion. The challenged action must be found to be "arbitrary," "clearly unreasonable," or "clearly erroneous" to be invalidated on appeal. United States v. Travers, 25 M.J. 61 (C.M.A. 1987).

This Court reviews rulings on challenges for actual bias for an abuse of discretion. United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F. 2020) (*citing* United States v. Nash, 71 M.J. 83, 88–89 (C.A.A.F. 2012)). Indeed, this Court must give the "military judge great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member." United States v. Napolitano, 53 M.J. 162, 166 (C.A.A.F. 2000).

This Court reviews rulings on challenges for implied bias "pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo review." United States v. Peters, 74 M.J. 31, 33 (C.A.A.F. 2015) (*quoting* United States v. Moreno, 63 M.J. 129, 134 (C.A.A.F. 2006); Napoleon, 46 M.J. at 283) (internal quotation marks omitted). "The focus is on the perception or appearance of fairness of the military justice system." United States v.

Dale, 42 M.J. 384, 386 (C.A.A.F. 1995). Therefore, implied bias is reviewed under an objective standard. United States v. Daulton, 45 M.J. 212, 219 (C.A.A.F. 1996). Even so, "[t]he burden of maintaining the challenge belongs to the challenging party." Dinatale, 44 M.J. at 328; R.C.M. 912(f)(3). Although it is not required for a military judge to place his or her implied bias analysis on the record, doing so is highly favored and warrants increased deference from appellate courts. United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017).

Law

"An accused enjoys the right to an impartial and unbiased panel." Nash, 71 M.J. at 88. A court member "shall be excused" when that member "should not sit … in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). "A military judge's determinations on the issue of member bias, actual or implied, are based on the 'totality of the circumstances.'" United States v. Terry, 64 M.J. 295, 302 (C.A.A.F. 2007) (*citing* United States v. Strand, 59 M.J. 455, 456 (C.A.A.F. 2004)). Courts generally recognize two forms of bias that subject a juror to a challenge for cause: actual bias and implied bias. United States v. Wood, 299 U.S. 123, 133 (1936).

Actual bias is defined as "bias in fact." Hennis, 79 M.J. at 384 (*quoting* Wood, 299 U.S. at 133. "Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial." Hennis, 79 M.J. at 384 (*citing* Nash, 71 M.J. at 88). "Because a challenge based on actual bias involves judgements regarding credibility, and because 'the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire,' a military judge's ruling on actual bias is afforded great discretion. United States v. Clay, 64 M.J. 274, 276 (C.A.A.F. 2007) (*quoting* Daulton, 45 M.J. at 217).

Implied bias, on the other hand, is "bias conclusively presumed as [a] matter of law."

Hennis, 79 M.J. at 385 (*citing* Wood, 299 U.S. at 133). "Implied bias exists when most people in the same position as the court member would be prejudiced." United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008). It is evaluated objectively under the totality of the circumstances and "'through the eyes of the public,' reviewing 'the perception or appearance of fairness of the military justice system.'" Id. (*quoting* United States v. Townsend, 65 M.J. 460, 463 (C.A.A.F. 2008)). Where a military judge "recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of discretion will be reversed will indeed be rare." Clay, 64 M.J. at 277.

". . . [I]f after weighing the arguments for the implied bias challenge the military judge finds it is a close question, the challenge should be granted." Peters, 74 M.J. at 34. Although a military judge is not expected to provide dissertations on his or her decision on implied bias, the military judge does have to apply the right law. Id. "Incantation of the legal test without analysis is rarely sufficient in a close case." Id. A military judge will be afforded less deference if an analysis of the implied bias challenge on the record is not provided." Id.

Additional Facts

During the Government's general voir dire questioning, the members were asked, "Now, just knowing someone has a mental condition, illness, or diagnosis, would anyone be unable to find that person, who had either that mental condition, illness or diagnosis; would you be unable to find that person guilty of a crime?," and "Do any of you believe that because someone has a mental condition, illness, or diagnosis that they can never be held criminally responsible for their actions?" (R. at 96.) The members provided negative responses to both questions.

- *Capt JT*

During individual voir dire of Capt JT, the Government asked if Capt JT knew MSgt AM, Lt Col CT, TSgt JE, or Lt Col EG. (R. at 204-07.) Capt JT said MSgt AM had just become the new first sergeant for the medical group but said he had never interacted with him and, when asked if he could identify MSgt AM in civilian clothes, responded, "Most likely not." (R. at 204.) For Lt Col CT, Capt JT said he was only email chains with Lt Col BT but did not think he had ever seen him face to face. (R. at 205.)

Capt JT said he had interacted with TSgt JE approximately 10 times within the last two years, saying the interactions involved COVID "since he usually runs the COVID Ops in the Med Group." (R. at 206.) When asked if he would give TSgt JE's testimony more weight than other people's testimony, Capt JT said, "Since the oath is given, then it should be neutral. So it would not matter if I knew him or not." (Id.) Finally, as to Lt Col EG, Capt JT said they used to work together in the medical group wing inspection team approximately a year and a half ago before Lt Col EG PCS'd. (R. at 207-08.) When asked if he would give Lt Col EG's testimony more weight than other people's testimony, Capt JT said, "No." (Id.)

During the Defense's individual voir dire, Appellant's trial defense counsel, the military judge, and Capt JT had the following interaction:

> CDC: And I'm going to repeat a question that the government asked during the initial group *voir dire,* quite a few hours ago, and that question was: "Do you believe that someone who has a mental condition, illness, or diagnosis, can never be held criminally responsible for their actions?"
>
> Capt JT: Can never be held?
>
> CDC: Do you, oh I'm sorry, I thought you'd ask if you want me to repeat it, and so what would be your answer to that question?

Capt JT: That would be no.

CDC: And why, why did you answer it that way, kind of talk me through your thought process?

Capt JT: The key is, held accountable for. So, even if it was, I suppose the, the state of the person is in, the action has been performed, so there is, I suppose, accountability or consequences of that action still exists.

CDC: Okay, so regardless of the mental condition of the person at the time if they did those actions, they should be held responsible?

Capt JT: Yes, according to how I, how I, yes according to —

CDC: Your perspective?

Capt JT: Yes, thank you.

MJ: And if your perspective contradicted something that I, as the military judge would instruct, do you agree that you could set aside your own perspective and follow the instructions as I give you?

Capt JT: Yes, because that is, I'm sorry, can you clarify that question?

MJ: Absolutely. I know sometimes during voir dire counsel ask questions kind of, in a vacuum, and because they want to talk about different concepts that will likely come into the court itself, but you don't have the instruction from the judge yet, right?

Capt JT: Right.

MJ: So, if your personal beliefs, in this moment, contradict in any way with how I instruct you, on how to apply the law to the facts, would you be able to set aside your personal views and follow the instructions that I give?

Capt JT: Yes, yes, in this setting, yes.

CDC: Why do you think you'd be able to do that?

Capt JT: Because, because perspective is one thing; however, instructions from the, as far as the authority setting, is still required in this environment. So, setting aside perspective, I think is a, it

doesn't mean that it doesn't exist within myself, but it just means that in this setting, it needs to be set aside to continue. I suppose you're saying, if need be.

CDC: If you were instructed that there could be some circumstances in which someone's mental condition actually did, or could negate their criminal responsibility could, and you got to decide whether it did or not, would you be able to entertain the idea that it did, or would you feel that you needed to kind of stand firm in your perspective, conviction that someone ultimately has to be held responsible for their actions?

Capt JT: I'm sorry, hang on. I'm just trying to remember the beginning part of the question.

CDC: It's kind of convoluted, but it's a little bit of a process, so let's say you're instructed that there could be a situation in which someone's mental condition could negate their criminal responsibility, and if that was for you to decide, if you are instructed in that fashion, would you be able to consider whether their mental condition did indeed impact their criminal responsibility, or would you kind of fall back on your personal beliefs or convictions that ultimately, someone has to be held responsible for their actions?

Capt JT: So, I think that applies to, I guess, beyond a reasonable doubt. So, if that potentially could be a doubt then yes, then I should listen to, or you used the word "entertain"?

CDC: Consider.

Capt JT: Consider, yes, if it's beyond.

CDC: May I have a moment, Your Honor.

MJ: You may.

CDC: All right, I think this is my last question, let's move past instructions, or anything like that, just you, Captain [JT], do you think that there is a situation in which someone's mental condition could cause them to not be responsible for their actions?

Capt JT: Could not be responsible for their actions. Could you say the question one more time?

CDC: Do you just, sitting here, kind of blocking everything e 1 lse out, feel what you think, do you think there could be a situation in which someone's mental condition could make them not responsible for their actions?

Capt JT: Potentially, potentially.

CDC: Potentially?

Capt JT: Yes, I think that would be my response, potentially.

CDC: And what would that be based on?

Capt JT: That would be based on, that would be based on inaccurate diagnosis. Inaccurate, medical diagnosis, and how it — there's actually a lot of variables and so it's hard to say.

CDC: So, I heard you say, was that — that would based on an accurate medical diagnosis, and other variables, is there anything else that, that you'd like to add to the answer? And I recognize we're all asking questions that are causing you to think, so take all the time that you need.

Capt JT: An inaccurate medical diagnosis and depending on what the diagnosis is, I guess, is backed by data of how that, how that could alter the, I guess, mental status?

CDC: An inaccurate diagnosis, medical diagnosis backed by data about how that diagnosis could affect their mental state?

Capt JT: Yes.

CDC: Is that fair summary of what you said?

Capt JT: Yes, that would be a potential and depending on if the individual follows-up, I suppose, this is an if scenario, if it was conveyed to them, the individual and how they follow-up with the treatment plan, I suppose.

CDC: If an individual didn't 1 follow-up with treatment plan?

MJ: Counsel, how is this relevant for your basis of this case?

CDC: Ma'am, would you like me to proffer with the member sitting here?

> MJ: I'd like you to get to the — because we're kind of getting far beyond, so if you could just ask one or two more questions, and then we're going to move on to the next member.
>
> CDC: I guess —
>
> MJ: Because you're asking questions based on instructions, that he doesn't have, and we don't have evidence presented yet.
>
> CDC: Yes, ma'am, what I'm trying to get at is whether — whether [Capt JT], if you think that follow up is like a necessary, would be necessary in order to — I'll withdraw the question.

(R. at 216-20.)

- *Capt KB*

During the Government's individual voir dire, Capt KB answered "Not at all," when asked if he had any concern about setting aside his experiences in a prior court-martial and following the military judge's instructions in this case. (R. at 236.

During the Defense's individual voir dire, Appellant's trial defense counsel and Capt KB had the following interaction:

> CDC: And the same vein, kind of speaking about mental health, the government asked the question in their general voir dire and I'll repeat the question, it was, "Do you believe that someone who has a mental condition, illness, or diagnosis can never be held criminally responsible for their actions?"
>
> Capt KB: Do I think that they could never be held responsible? No.
>
> CDC: And talk me through your thought process in that question?
>
> Capt KB: I don't believe that with a mental diagnosis, mental health diagnoses, that people just get a free pass on their actions.
>
> CDC: Do you believe that there could be a situation in which someone's mental health diagnosis is so severe that it negates their responsibility or do you believe that there is always a level of responsibility?

Capt KB: I believe there is always some level of responsibility, yes.

(R. at 239-40.)

- *Member Challenges*

Appellant's panel had 26 members. The Government and Appellant's defense team jointed agreed to challenge 11 of those members. (R. at 323-24.) The military judge granted all 11 challenges. (R. at 335.) The defense had seven additional challenges. (R. at 335, 346.) The Government did not oppose two of those challenges. (R. at 335.) Of the remaining five challenges, the military judge denied four and granted one. (R. at 339, 343, 346, 351, 356.)

Two of the denied challenges involved Capt JT and Capt KB. For Capt KB, the Defense challenged because in "his answer to the government's question about holding someone accountable with mental health issues, he indicated, 'I don't believe people get a free pass in their actions.'" (R. at 343.) Appellant's counsel argued this and Capt KB's later answer that "there is always some level of responsibility on the member," indicated an inelastic predisposition to consider a defense, perhaps a lack of mental responsibility, or partial mental responsibility. (Id.)

The military judge denied the challenged, holding as follows:

> In ruling on the defense's challenge of [Capt KB], I considered the challenge for cause on the basis of both actual and implied bias and the mandate to liberally grant defense challenges in close cases. Watching [Capt KB's] demeanor while he answered questions during voir dire and during instructions themselves, I found him to be deliberate in his responses, honest, and credible when providing answers. Recognizing that the basis for defense's challenge is on the basis of actual bias on their interaction with [Capt KB], surrounding the question of whether a person with a mental health condition, illness, diagnosis could never be criminally liable, followed up with some additional dialogue that at times, based on

> his nonverbal, may have been a little bit confusing requiring some follow up questions.
>
> Regarding broad terms and theories regarding negating the responsibility, [Capt KB]did not have the luxury of having the court's instructions yet. This court disagrees with the characterization that [Capt KB] has an inelastic predisposition. This court finds that there is no evidence of any inflexibility as required for that. Rather, the court finds that the trial counsel's characterization of the questions being asked in a vacuum to be more appropriate.
>
> Based on [Capt KB's] answers, the court finds that there is no evidence that he would not yield to the evidence presented at trial and the military judge's instructions once they're given. Therefore, the court finds no actual bias. In analyzing the defense's challenge under the implied bias standard, I looked at the totality of the circumstances viewing it objectively through the eyes of the public.
>
> When reviewing the questions and responses, focused on this area of questioning, and the basis for the challenge, the court's conclusions under the implied bias analysis are the same. During that interaction counsel had asked the member to make broad conclusions trying to – trying to get a clarification on the level of responsibility based on the potential evidence for mental health conditions, diagnoses, etcetera. Never choosing to clarify answers, recognizing he didn't – recognizing that one of the answers was, he doesn't believe a person with a mental diagnosis has a free pass for their actions; however, he said repeatedly he would keep an open mind during all the evidence. The member did not have the luxury of having the court instructions or hearing any of the evidence. Some of these things were just broad conclusions without any follow-up.
>
> Based on — based on the evidence before this court, the court does not find this to be a close call, does not find that an objective observer would have a substantial doubt about the fairness of the accused's court-martial panel or that a person in the same position would be prejudice. Therefore, the defense's challenge of [Capt KB] is denied.

(R. at 346.)

For Capt JT, Appellant's counsel challenged for implied bias, arguing that Capt JT knew several witnesses and because Capt JT "seem[ed] to struggle with either understanding the

questions that were being asked or – or understanding some of the basic legal concepts." (R. at 348.) Appellant's counsel added, "Understanding he has not had the luxury of hearing the military judge's instructions, just things like beyond a reasonable doubt which had been referenced multiple times during group voir dire, he seemed to be wavering and confused on during individual voir dire, and so that that confusion on these basic legal principles that we asked the members to understand, even in the initial kind of questions and instructions, are cause for concern for the defense . . . ." (R. at 348.)

The military judge denied the challenged, holding as follows:

> In ruling on the defense's challenge of [Capt JT], I considered the challenge for cause on the basis of both actual and implied bias and the mandate to liberally grant defense challenges in close cases. Watching [Capt JT]'s demeanor while he interacted with the court and the parties, I found him to be honest and credible when providing answers. Nothing in the substance of his answers was indicative that he would do anything other than listen to the evidence, and apply the law as instructed by the court. Therefore, this court finds no actual bias. In analyzing the defense's challenge under the implied bias standard, I look to the totality of the circumstances viewing it objectively through the eyes of the public.
>
> While answering the questions of the parties, although sometimes his responses took longer than other members, the court found that physical observations that he was very deliberate and thoughtful when he was responding. Although he was familiar with the named victims, this court does not find that his familiarity with them rises to the level that case law talks about being a per se disqualification. Specifically, [Lt Col CT], he doesn't believe he's even seen him face-to-face and he only referenced work-related group emails and nothing that was sent one-on-one. With regards to [MSgt AM], recognizing that he is the new First Sergeant at the Med Group where [Capt JT] works, [Capt JT] clarified his knowledge of him and that he has just seen – seen group emails from him as the First Sergeant and he probably would not even recognize him in person.
>
> Additionally, [Capt JT] knows the potential witness [TSgt JE], who also works in the Med Group. Although they do not work closely, as evidenced by the interaction over the last two years which was

> approximately 10 times, recognizing that it was in fact face-to-face interaction. Counsel had some follow-up questions, particularly regarding the weight of the witness testimony, and whether or not he would give [TSgt JE] more weight than other witness's based on his interaction with him. Although he took a long pause when asked by trial counsel, this court does not find that to rise to a level of substantial concern regarding the fairness of the accused's court-martial.
>
> Based on my observations of his response, he was thoughtful and deliberate when he answered the party's questions and he – his response was consistent with how the court had previously instructed. He didn't respond verbatim, but he recognized the need and the importance of evaluating the witness the same way. Combining that approach to how he responded to defense counsel's questions during individual *voir dire*, particularly with the trial counsel question from group *voir dire*, in talking about the level of accountability for someone with a mental health condition or diagnosis, [Capt JT] physically took more time to deliberate on the questions, which demonstrated his thoughtfulness. At times, you could tell from his face he was a little bit confused; some of the questions were long, and I don't know if that was partly due to a language barrier or just some of the – some of the broad questions. However, when combining all the bases for — for challenge, this court still does not find it to be a — a close case. The court finds that based on the totality of circumstances, an objective observer would not have substantial doubt about the fairness of the accused's court-martial panel if [Capt JT] was on the panel. Therefore, the challenge is denied.

(R. at 351.)

Appellant later employed his preemptory challenge on a separate panel member, and did not use it on either Capt KB or Capt JT. (R. at 366.)

Analysis

To begin, should this Court find in Issue II that the military judge did not err in refusing to give the lack of mental responsibility instruction to the members at trial, Appellant's issue here is moot as it relies solely on Capt JT's and Capt KB's responses to questions regarding that defense. If this Court determines the lack of mental responsibility defense was not raised in this

case, Capt JT's and Capt KB's answers regarding this defense are irrelevant to the outcome of the case.

Additionally, the military judge, in ruling on the challenges for both Capt KB and Capt JT, analyzed the challenges on the basis of both actual and implied bias and the mandate to liberally grant defense challenges and placed that analysis on the record. (R. at 346, 351.)[10] Thus, for her rulings, the military judge should be given "great deference" on actual bias, "increased deference" on implied bias, and, because the military judge recognized his duty to liberally grant defense challenges and placed her reasoning on the record, a reversal of her exercise of discretion should "indeed be rare." *See* Napolitano, 53 M.J. at 166; Dockery, 76 M.J. at 96; Clay, 64 M.J. at 277.

- *Capt JT*

For Capt JT, Appellant claims the "military judge erred in denying the defense's implied bias challenge of Capt JT." (App. Br. at 31.) Appellant claims the "heart of the challenge was Capt JT's ability to understand the crucial legal concepts that, at least at the time of voir dire, appeared to be the centerpiece of the trial: mental responsibility," adding that Capt JT's answers were "baffling" and "raise significant questions about his willingness to entertain the central defense, and even his ability to understand the underlying legal concepts." (Id. at 32.) Appellant is incorrect.

To start, as the military judge noted during voir dire, Appellant's counsel was asking Capt JT about legal concepts, namely mental responsibility, that had not yet been instructed to the members. Indeed, when the military judge stated to Capt JT, "I know sometimes during voir

[10] The military judge also repeatedly employed these analyses in other member challenges as well. *See*, for example, R. at 336, 342.

dire counsel ask questions kind of, in a vacuum, and because they want to talk about different concepts that will likely come into the court itself, but you don't have the instruction from the judge yet, right," Capt JT answered, "Right." (R. at 217.) The military judge would later tell Appellant's counsel, "you're asking questions based on instructions, that [Capt JT] doesn't have, and we don't have evidence presented yet." (R. at 220.)

However, when the military judge then asked Capt JT if he would set aside his personal views and follow the instructions given, even if they contradicted his personal beliefs, Capt JT responded, "Yes, yes, in this setting, yet." (R. at 217.) When asked by Appellant's counsel why he'd be able to do that, Capt JT responded as follows:

> Because, because perspective is one thing; however, instructions from the, as far as the authority setting, is still required in this environment. So, setting aside perspective, I think is a, it doesn't mean that it doesn't exist within myself, but it just means that in this setting, it needs to be set aside to continue. I suppose you're saying, if need be.

(Id.) Each of these answers shows Capt JT unequivocally knew that he needed to put aside any personal perspectives or beliefs he had and was required to follow, and in fact would follow, the military judge's instructions.

Additionally, a full review of the transcript shows Appellant's counsel's questions to Capt JT were quite lengthy and convoluted,[11] with a few questions being over 60 words in length covering five to six lines of transcript. Indeed, in denying Appellant's excusal request, the military judge stated Capt JT "was a little bit confused; some of the questions were long, and I don't know if that was partly due to a language barrier or just some of the – some of the broad

[11] Even Appellant's counsel stated, "It's kind of convoluted . . . ." (R. at 217.)

questions." (R. at 351.) Moreover, the military judge had to interject at one point to more clearly ask Appellant counsel's question. (R. at 217.)

Yet, even in the face of these convoluted questions, when asked if "there could be a situation in which someone's mental condition could make them *not* responsible for their actions," Capt JT responded, "Potentially," before adding such a situation could include an "inaccurate medical diagnosis" or "actually a lot of variables." (R. at 219.) (emphasis added.) Here, even though Capt JT had not been instructed on what the lack of mental responsibility defense even meant, his answer here explicitly showed Capt JT was open to the defense of lack of mental responsibility (i.e., someone not being held responsibility for their actions due to a mental condition) under the right circumstances. (R. at 219.)

As opposed to Appellant's claim that Capt JT's answers "both raise significant questions about his willingness to entertain the central defense, and even his ability to understand the underlying legal concepts,"[12] Capt JT's answers to both the military judge and Appellant's counsel show he was willing to entertain a mental responsibility defense and would follow the military judge's instructions.

Appellant's attempts to tie Capt JT's answers to other cases is misplaced. Appellant first relies on United States v. Rogers, 75 M.J. 270 (C.A.A.F. 2016). However, Appellant, in simply stating that "CAAF ultimately held the military judge abused her discretion by denying an implied bias challenge despite the potential member's statement that she could follow the law,"[13] fails to provide the full context as to why CAAF ruled in that appellant's favor.

[12] *See* App. Br. at 32.

[13] Id.

In Rogers, a panel member had a "strongly held opinion" that "it was not possible for an intoxicated person to give consent to sexual activity under" the circumstances of the case. Id. CAAF found error because even though the member stated she could change her mind if so instructed by the military judge, the military judge (1) "never instructed or corrected" the member's misinterpretation of the law; (2) did not answer a question about the definition of "competent" (a word used in the definition of "consent") when asked by the member *during deliberations* (which the Court said effectively endorsed the member's erroneous understanding of the issue); and (3) did not instruct the member to disregard her personally held belief. Id. at 273-75.

To start, as opposed to the panel member in Rogers, Capt JT voiced no similar "strongly held opinion" about the issue of mental responsibility, and even stated that there were "a lot of variables" in terms of when someone's mental condition could make them *not* responsible for their actions. As opposed to the member in Rogers whose answer was wrong under the law, Capt JT here espoused an openness to the lack of mental responsibility concept even without an instruction from the military judge.

Additionally, the mental responsibility defense was correctly never instructed upon for the reasons stated in Issue II above. However, even during voir dire, the military judge told Capt JT that he would have to set his personal beliefs aside and follow the military judge's instructions. Capt JT agreed to do just that. Additionally, the military judge made it well known to Appellant's counsel during voir dire that neither Capt JT nor any other panel member had been instructed on the mental responsibility issue because the evidence had not yet raised it. Undoubtedly, if the evidence at trial had actually raised, the military judge would have issued the

lack of mental responsibility instruction which would have cured any alleged confusion Capt JT had on the mental responsibility issue. Rogers is not a comparable case here.

Next, Appellant turns to United States v. Keago, 84 M.J. 367 (C.A.A.F. 2024). Again, however, Appellant's attempt to compare his case falls short. There, one member "appeared to enter the court-martial – prior to the presentation of any evidence – believing that the Government had already established some portion of its case against Appellant," made concerning statements about the appellant's right to remain silent by stating that he would like to see the appellant testify to prove his innocence, and that he wanted to "hear the Defense's side of the story." Id. 84 M.J. at 374. Here, Appellant tries to compare that member's "confus[ion] about Appellant's presumption of innocence and right to remain silent" to Capt JT's supposed "confusion about the main thrust of [Appellant's] defense." (App. Br. at 33.)

Yet there is no such comparison. First, as discussed above, there was no confusion from Capt JT. Second, nothing Capt JT said about mental responsibility comes close to what the member in Keago stated. Further, while this member's particularly thinking about such basis rights as the presumption of innocence and the right to remain silent might cause a reasonable member of the public to wonder how an appellant could receive a fair trial, nothing Capt JT said rises to such a level. Here, nothing Capt JT said in response to both the military judge and Appellant's counsel would cause any reasonable member of the public to wonder whether Appellant received a fair trial in this case.

Appellant then attempts to compare Capt JT to another member in Keago who "suggested that she did not believe that mistake of fact was a viable defense to a sexual assault charge." Keago, 84 M.J. at 374. Again, however, Capt JT never said or even suggested he did not believe that a mental condition could not be a viable defense in Appellant's case.

Here, the military judge found Capt JT to be "very deliberate and thoughtful" and correctly found this was not a close call. Overall, any reasonable, disinterested observer would have come to the exact same conclusion as the military judge with regards to the challenge of Capt JT. Even Appellant's trial defense counsel did not think Capt JT's answers so egregious as to warrant the exercise of a peremptory challenge against him, choosing instead to challenge another member. Therefore, even under an objective standard, Appellant's claim of error provides no basis for relief from this Court. The military judge's decision not to grant the challenge for cause was not an error, and this Court should not disturb it.[14]

- *Capt KB*

The same holds true for Capt KB. First, as noted by the military judge, Capt KB answered the military judge's questions where he indicated that he would follow the judge's instructions, and he would keep an open mind and consider the evidence that is presented, and apply the military judge's instructions as given to him. Additionally, the military judge correctly found that Capt KB's answers did not show an "inelastic predisposition" on the issue of mental responsibility. For one, Appellant's counsel's two questions regarding mental responsibility were made in a vacuum, devoid of any instruction on the defense of mental responsibility or

[14] While Appellant does not mention Capt JT's knowledge of potential witnesses in the title or the majority of his discussion for this issue, Appellant does allude to this issue in one sentence, stating, "And the fact that Capt JT had connections to so many witnesses only strengthened the case for the challenge." (App. Br. at 34.) However, as discussed by the military judge, Capt JT's "connections" with potential witnesses was slight at best. Capt JT had never seen Lt Col CT face-to-face or corresponded one-on-one. (R. at 205.) Capt JT only knew of MSgt AM through group emails and probably could not recognize him. (R. at 204.) Capt JT had interacted with TSgt JE approximately 10 times in the last two years and had not interacted with Lt Col EG in over a year and a half. (R. at 206.) For both, Capt JT said he would given neither any more weight than other people's testimony. Considering these circumstances, as found by the military judge, there is no implied bias here.

what that defense entailed. Additionally, the questions themselves were broad and lacked context.

The first question just broadly asked if Capt KB believed that someone with a mental condition could *never* be held criminally responsible for their actions. Capt KB's answer of "No" here actually follows the law since, as discussed in Issue II above, someone can be held criminal responsible for their actions even if they have a mental condition, illness, or diagnosis. There should be no concern with Capt KB's answer to this question.

As to the second question, Appellant's counsel broadly asked whether "there could be a situation in which someone's mental health diagnosis is so severe that it negates their responsibility or do you believe that there is always a level of responsibility?" (R. at 240.) Noticeably absent from this question is the word "criminal" before "responsibility." Here, Appellant's counsel is broadly asking about responsibility overall – not criminal responsibility. Likewise, Capt KB's response only speaks broadly to the concept of "some level of responsibility." Capt KB certainly does not say he believes that someone is always criminally responsible. As the trial counsel correctly noted while arguing to the military judge, "the words of saying responsibility and being held criminally responsible, those are different ideas." (R. at 344.)

Here, Appellant's broad questions about "responsibility" and Capt KB's broad responses about "responsibility" do not show an inelastic predisposition to the lack of mental responsibility defense, especially when Capt KB "did not have the luxury of having the court instructions or hearing any of the evidence." (R. at 346.) Here, contrary to Appellant's assertions, Capt KB did not express any opinion or belief that rose to the level of an actual bias or would cause a reasonable person to have doubts as to whether Appellant could receive a fair trial.

Finally, Appellant's reliance on United States v. Richardson, 61 M.J. 113, 119 (C.A.A.F. 2005), is misplaced as that case involved a military judge denying a defense request to re-open questioning of a particular member. As this Court highlighted in United States v. Covitz, ACM 40193, 2022 CCA LEXIS 563 (A.F. Ct. Crim. App. 30 September 2022), an appellant has the "burden of establishing the basis for his challenge, not the military judge." Id. at *36 (*citing* R.C.M. 912(f)(3); United States v. Wiesen, 57 M.J. 48, 49 (C.A.A.F. 2002). Noting that the defense in Covitz never requested the member in question to be called back, this Court, citing our sister court, stated "it is up to the parties to obtain the information from the members to support their respective positions." Id. at *36 (*citing* United States v. Mayo, ARMY 20140901, 2017 CCA LEXIS 239, at *7-8 (A. Ct. Crim. App. 7 April 2017) (unpub. op.) ("As is often the case, a military judge during voir dire knows little about the case, the evidence, or the parties' theories at trial, which makes a judge poorly positioned to determine whether any one issue is important to the case.").[15]

Here, Appellant's contention that "[i]f the military judge believed more information was required, she could have easily obtained that information," is inapposite to this Court's holding in Covitz. Instead, Appellant had the burden of establishing the challenge, not the military judge, and neither Appellant nor his trial defense counsel ever sought to reexamine Capt KB to further expound on Capt KB's answers.

[15] While this Court found the military judge erred in Covitz by ultimately not excusing the member in question, the Court held this because "having a member who has lived in the Appellant's house – the very site of the charged offenses – alongside the victim and her children in a case in which the physical layout of the house was expected to be an issue was 'asking too much of both him and the system.'" Id. at *40.

In all, the military judge did not abuse her "great discretion" in denying Appellant's challenge based on actual bias. Likewise, considering the lengthy rationale placed on the record by the military judge on both actual and implied bias, this case is not the "rare" instance when the military judge's discretion should be reversed.

Yet, as initially discussed above, Appellant's issue here is moot as the defense of lack of mental responsibility was not ultimately raised by the evidence in this case and was correctly not instructed to the members. Thus, any issues regarding Capt JT, Capt KB, and their thoughts on the issue of mental responsibility had no bearing on Appellant's convictions. Accordingly, this Court should deny Appellant's claim.

IV.

THE RECORD OF TRIAL IS SUBSTANTIALLY COMPLETE.

Additional Facts

On 18 July 2022, the Fifth Air Force (5AF) Staff Judge Advocate (SJA) provided the General Court-Martial Convening Authority (GCMCA) pretrial advice and recommended the GCMCA select 24 members from the attached indorsement. (ROT, Vol. 3, Pretrial Advice.) The first indorsement shows the GCMCA's electronic initials on 24 of the 31 provided names. (Id.) All the provided and selected names were officers.

In the following months, eight members requested excusal from court-member duty. All eight requests are signed by the requesting member and/or other levels of command. Five of these requests are missing a concurrence signature from Col MR, the 35th Fighter Wing Commander and Special Court-Martial Convening Authority (SPCMCA). (*See* Excusal Requests from 1LT JM, Lt Col NH, Maj JR, Capt BD, and Capt EB.)

On 28 August 2022, Appellant elected to be tried by a panel of both officer and enlisted members.

On 19 October 2022, Col MR, the SPCMCA, in a memorandum to the GCMCA entitled *Replacement and Selection of Court Members*, noted the eight members who had requested excusal and stated, "I recommend approval of all the excusal requests." (ROT, Vol. 3.) Col MR also provided a listing of 25 potential enlisted members, 16 of which were initialed by Col MR. (Id.)

On 20 October 2022, the GCMCA issued Special Order A-3, which relieved the eight members who requested excusal and detailed 10 enlisted members. (ROT, Vol. 1.) All 10 enlisted members were listed on Col MR's memorandum, though some of them were not initialed by Col MR.

At trial, neither Appellant nor his trial defense counsel raised any issue regarding the member selection process.

Standard of Review

Whether a record of trial is complete and substantially verbatim is a question of law we review de novo. United States v. Henry, 53 M.J. 108, at 110 (C.A.A.F. 2000).

Law and Analysis

A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one. Henry, 53 M.J. at 111 (internal citations omitted). The determination of what constitutes a substantial omission from the record of trial is decided on a case-by-case basis. United States v. Abrams, 50 M.J. 361, 363 (C.A.A.F. 1999).

Here, Appellant complains that the ROT is incomplete because member selection paperwork associated with Special Order A-3, dated 20 October 2022, is not included in the ROT. However, the paperwork for this special order is not required as part of the official ROT so its omission is not in error.

First, Appellant cites to AF/JAJM's *Article 65/66 Review ROT and Attachments Assembly Checklist*, and claims, "A record of trial must include pretrial court member replacement requests and excusals." (App. Br. at 38.) However, as Appellant is forced to admit, the replacement requests and excusals are contained in the record.[16] (*See* ROT, Vol. 3.) Moreover, the AF/JAJM checklist does not include a requirement to include court member selection sheets.

Appellant also cites to the Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial* (21 April 2021). However, Appellant fails to cite any portion of the DAFMAN that requires the inclusion of member selection paperwork. Indeed, DAFMAN 21-203 does not specifically state that member selection paperwork must be included in the allied papers.

Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice* (24 January 2024), paragraph 13.5, *Forwarding of Pretrial Advice in General Courts-Martial*, states that "If the GCMCA must detail members to a court-martial to try the forwarded case, appropriate documentation should be forwarded [in the pretrial advice] for court-member selection." Here, in the original pretrial advice from the 5AF SJA, appropriate documentation,

[16] While Appellant argues that the excusal memoranda did not contain all signatures, the only signature not contained on some excusal memoranda was from Col MR. However, Col MR later stated in his own memorandum that he concurred with the excusal of each member and recommended that the GCMCA excuse each member. The resulting convening order A-3 then excused each member. Thus, contrary to Appellant's claim, there is *no* question as to "whether the members were properly excused at all." (*See* App. Br. at 39.)

including a listing of 24 potential members and their court-member data sheets, was provided to the GCMCA. Thus, this requirement was met and this documentation, minus the court-member data sheets, are included in the ROT.

Notably, this requirement is specifically for the pretrial advice and the original detailing of members to a court-martial by a GCMCA. The DAFI makes no similar document requirement for when a convening order is amended or when additional members are detailed to a court-martial. *See* DAFI 51-201, paragraph 14.4, 14.5.6. Yet, even if it did apply, the ROT contains the SPCMCA's memorandum to the GCMCA which provided a listing of additional members and also contained court-member data sheets as an attachment.

This Court decided this exact issue in United States v. Grenald, ACM S32283, 2016 CCA LEXIS 414 (A.F. Ct. Crim. App. 14 July 2016). There, the appellant contended his record of trial was incomplete because it did include the member excusal and selection paperwork associated with a subsequent convening order. The appellant claimed this omission from the record of trial made it "impossible for his appellate counsel and this court to perform their duties under Article 66, UCMJ." Id. at *6. This Court disagreed.

While this Court stated it "would be preferable for the record of trial to include the document on which the convening authority indicated his personal decisions regarding" the subsequent convening order," this Court held, "However, we do not find the paperwork's absence in this case to be a substantial omission nor that it prevents us from fulfilling our responsibilities under Article 66, UCMJ." Id. at *6.

First, citing to R.C.M. 505(c)(1)(A), this Court noted that "[b]efore the court-martial is assembled, the convening authority may change the members of the court-martial without showing cause." Second, the Court highlighted that the record included "a convening order

reflecting the intent of the convening authority to relieve one member and detail two others," even though "the order was signed 'For the Commander' by his Staff Judge Advocate, as were the other two convening orders." Id. This Court presumed the SJA was properly delegated the authority to publish the subsequent order as the convening authority had expressly directed her to do so for previous orders and also presumed the convening order properly reflected the convening authority's personal decision to relieve one member and select two others for Appellant's court-martial. Finally, this Court noted that the defense "did not raise an issue at trial regarding the member selection process, nor does Appellant articulate any specific prejudice now regarding the absence of the paperwork from the record of trial." Id.

The same reasoning should hold for this case as well. Here, the excusal and detailing of new members occurred prior to the court-martial being assembled. Further, the convening order reflecting the excusal or members and selection of new members was signed by the GCMCA's SJA, who this Court can presume had the authority to do so since she had signed the original convening order in a similar fashion. Finally, Appellant had ample opportunity to raise this issue at trial, but never did. He also has failed to articulate any specific prejudice now to this Court regarding the absence of the paperwork from the record of trial. Instead, just as the appellant did in Grenald, Appellant makes a generalized claim that the "absence of these documents impedes appellate review for [Appellant] and this Court" – a claim this Court rejected in Grenald. Id. at *6-7.

In sum, the paperwork at issue is not required for a ROT, nor is it a substantial omission if not included in the ROT. *See* Grenald, at *6-7. Appellant never raised any issue about court member selection at trial and the omission of this paperwork is insubstantial as member selection was not an issue at trial, nor before this Court. Finally, the convening authority is assumed to

have fulfilled his obligations in selecting members. *See* United States v. Townsend, 12 M.J. 861, 862 (A.F.C.M.R. 1981) ("As a general principle, it is proper to assume that a convening authority is aware of his duties, powers and responsibilities and that he performs them satisfactorily.") Accordingly, this Court should deny Appellant's claim.

V.

APPELLANT IS ENTITLED TO NO RELIEF FOR ANY POST-TRIAL DELAY IN THIS CASE.

Additional Facts

Appellant was sentenced at his court-martial on 28 October 2022. Appellant's case was docketed with this Honorable Court on 8 June 2023, 223 days later. Appellant never asserted a right to speedy post-trial processing during this time.

In the next 9 months, Appellant's counsel submitted eight enlargement of time motions. In the eighth motion, Appellant's counsel wrote, "Appellant was informed of his right to a timely appeal and this request for enlargement of time, and Appellant agrees with this request for an enlargement of time." (App. Mot., dated 25 March 2024.) Appellant never asserted a right to speedy post-trial processing during this time.

On 29 March 2024, Appellant's counsel moved this Court to remand Appellant's record for correction. Appellant did not assert a right to speedy post-trial processing in the motion. This Court remanded Appellant's case on 9 April 2024 and the case was re-docketed with this Court on 13 June 2024.

Appellant's counsel submitted another enlargement of time on 2 August 2024. For the first time, Appellant "demand[ed] speedy appellate review."

Standard of Review

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

Law

When evaluating post-trial constitutional due process complaints of delay, our superior Court has adopted the Supreme Court's analysis in Barker v. Wingo, 407 U.S. 514 (1972). Moreno, 63 M.J. at 135. The four factors set forth in Barker are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 135 (*citing* Barker, 407 U.S. at 530). All of these factors are to be considered together with the relevant circumstances in the case. Id. at 136.

In Moreno, our superior Court established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision over 18 months after the case is docketed with the court. 63 M.J. at 142-143. Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633.

This Court now applies an aggregate standard threshold of 150 days from the day the appellant was sentenced to docketing with this Court. Id. W

Absent a showing of prejudice, a due process violation warranting relief only occurs when, "in balancing the other three factors [for analyzing post-trial delays], the delay is so

egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).

In United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002), our superior Court determined that an appellant may be entitled to relief pursuant to a Court of Criminal Appeals Article 66(d) power "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' . . . if it deems relief appropriate under the circumstances." Tardif, 57 M.J. at 224. Post-trial delay does not require that relief be given under these circumstances; rather, appellate courts are cautioned to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225. Additionally, this Court is guided by the following factors, with no single factor being dispositive:

> (1) How long the delay exceeded the standards set forth in Moreno;
>
> (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;
>
> (3) Keeping in mind that our goal under Tardif is not to analyze for prejudice, whether there is nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay;
>
> (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;
>
> (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation; and
>
> (6) Given the passage of time, whether this court can provide meaningful relief in this particular situation.

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). Relief under Article 66(d), UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Tardif, 57 M.J. at 225.

Analysis

The circumstances of this case do not warrant relief. For the reasons set forth below, Appellant's claim should be denied.

a. Moreno Analysis

The first factor, the length of delay, weighs slightly in Appellant's favor since this case exceeded the Livak standard of sentence to action by 73 days. While considered facially unreasonable, the circumstances of this case do not warrant relief. Additionally, our superior Court has not awarded relief even when the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.")

The second factor, the reasons for delay, also weighs slightly in the Appellant's favor. A review of the timeline of Appellant's post-trial processing shows that nearly 83% of the processing time was filled by transcribing the record. The record was certified on 2 May 2023, 186 days after Appellant was sentenced. The court reporter's chronology shows the court reporter had multiple week-long trials during this time and also shows the transcript was sent to counsel multiple times for revision.

However, once the transcript was certified, the SPCMCA legal office finalized the ROT in just three days before sending it along to 5 AF/JA on 5 May 2023. Though5 AF/JA did not

receive the ROT until 16 May 2023, that delay was due to United States Postal Service shipping issues that were outside the control of either the Misawa legal office or 5 AF. (*See* Dec. of MSgt ST.) Yet, even then, 5 AF/JA completed its review of the ROT on 18 May 2023, only two days, before forwarding the ROT to JAJM. (Id.)

Simply put, post-trial processing of Appellant's case did not languish after his trial. Though the court reporter did not begin to transcribe this case until 7 December 2022, the post-trial processing was still ongoing, including the submission of matters by Appellant and his victims, as well as the GCMCA's Decision on Action all being completed during November 2022. Moreover, once the transcript was certified, the Misawa legal office completed the finalized the ROT in just three days and the 5 AF/JA completed its review in only two days. Thus, while the court reporter's chronology shows she had multiple cases ongoing during this time, the chronologies and MSgt ST's declaration shows Appellant's case was worked on a consistent basis throughout the timeframe from Appellant's sentencing to this Court's docketing.

The third factor, whether Appellant asserted his right to speedy post-trial processing, weighs heavily in the Government's favor. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (*quoting* Barker, 407 U.S. at 528).

As he concedes in his brief, Appellant asserted his right to timely appellate review for the first time on 2 August 2024, at the same time that he was asking for an enlargement of time to file his brief. However, Appellant never asserted this right during the 223 days between his

sentence and this Court's docketing, never asserted it during the nine months his case was initially docketed with this Court, and then not for another two months after it was re-docketed with this Court. Further, Appellant fails to highlight that, although he was advised of his right to a timely appeal, he still specifically agreed to eight enlargements of time during this case's original docketing period.

Regarding prejudice because of this delay, our superior Court has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in case of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.

Notably, Appellant provided this Court no declaration addressing any alleged prejudice he has faced. Further, within his brief, Appellant offers no individualized bases for prejudice. He makes no claim of oppressive incarceration pending appeal nor does he claim any undue anxiety or concern. Instead, citing Moreno, Appellant only states the delays "necessitated the addition of undersigned counsel who had to complete a review of the record due to prior counsel's unavailability." (App. Br. at 44.) However, Appellant fails to explain how receiving an additional appellate counsel prejudiced him in any fashion. Moreover, considering his lengthy brief with multiple issues raised, Appellant has failed to show any impairment to his grounds for appeal due to the addition of an appellate counsel.

All told, Appellant has faced no prejudice due to the delay between his sentencing and docketing with this Court. Thus, Appellant's Moreno claim for relief should be denied.

As to relief pursuant to Toohey, our superior Court held that a delay of 481 days between sentencing and convening authority action was "not severe enough to taint public perception of the military justice system," adding that it did not involve the years of post-trial delay seen in Moreno and Toohey.[17] *See* Anderson, 82 M.J. at 86. The reasons for delay in that case included delays in "creating the transcript or authenticating the record of trial." Id. at 86-87. Notably in Anderson, the appellant made three speedy trial requests to the Chief of Justice, but "there was no indication that [the Chief of Justice] took any steps to speed the process beyond confirming that the military judge had the record." Additionally, the military judge in that case took 298 days to authenticate the record. Id.

Despite the appellant's repeated assertion of his speedy trial rights and the 481-day delay, our superior Court still granted no Toohey relief because there "is no indication of bad faith on the part of any of the Government actors," and "no indication of prejudice." Id. at 88. The Court continued, "Though we cannot condone the military judge's unsubstantiated delay in authenticating a fairly straightforward trial record, we find it difficult to imagine these circumstances causing the public to doubt the entire military justice system's fairness and integrity." Id.

The same can be said in this case. Here, there is no indication of bad faith on the part of any Government actor and there is no indication of prejudice. Further, the delay in this case, 73 total days, is 258 days less than the delay in Anderson. Using our superior Court's reasoning and basis for not granting Toohey relief in Anderson, this Court should likewise grant Appellant no relief in this case.

[17] Toohey involved a six-year delay from the end of the appellant's trial to the lower court issuing a decision. Toohey, 63 M.J. at 362.

b. Tardif Analysis

Appellant's case does not warrant relief under Tardif either. As discussed above, 86% of the post-trial processing time in this case was due to the transcript of this case. However, the court reporter's chronology shows this was not due to an indifference or lackadaisical approach to this case. Moreover, both immediately after the sentence and then immediately after the transcript was complete, the SPCMCA and GCMCA legal offices worked expeditiously to complete post-trial processing in this case as quickly as possible. There is no showing in this case of either bad faith or gross indifference in the overall post-trial processing of this case.

Moreover, there is no evidence of harm, either to Appellant or institutionally, caused by the delay in this case. While Appellant states, "To the extent the [Moreno] prejudice analysis above did not persuade the Court, at the very least there is still 'some evidence of harm,'" Appellant fails to explain what that harm is. (*See* App. Br. at 44-45.) Further, there is no evidence that the delay has lessened the disciplinary effect of any particular aspect of Appellant's sentence, and any granted relief would be inconsistent with the dual goals of justice and good order and discipline. Moreover, Appellant has failed to show any "gross indifference" or "systemic institutional neglect" on the part of Misawa AB or 5 AF/JA.

Finally, while this Court recently granted sentence relief pursuant to Tardif and Gay in United States v. Hennessy, ACM 40439, 2024 CCA LEXIS 343 (A.F. Ct. Crim. App. 20 August 2024), that case involved a sentence-to-docketing timeline of 412 days, more than one-and-a-half times the delay in this case. This Court should deny this assignment of error.

VI.

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

Additional Facts

The Staff Judge Advocate's first indorsement to the Statement of Trial Results (STR) and Entry of Judgment (EOJ) in Appellant's case contains the following statements: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Y[es.]" (*STR* and *EOJ*, ROT, Vol. 1.)

Standard of Review

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

Law and Analysis

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

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him. (App. Grostefon Br. at 1.) Appellant asserts that any prohibitions on the possession of firearms imposed runs afoul of the Second Amendment, U.S. Const. Amend. II, the Supreme Court's

interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). Appellant's constitutional argument is without merit and is a collateral matter beyond this Honorable Court's authority to review.

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

This Court recently held in its published opinion in United States v. Vanzant, 84 M.J. 671 (A.F. Ct. Crim. App. 2024), that 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are beyond the scope of this Court's jurisdiction under Article 66, UCMJ. Id. at 681. Our superior Court also recently held in United States v. Williams, 2004 CAAF LEXIS 501, __ M.J. __, at *12-15 (C.A.A.F. 5 September 2024), that service courts of criminal appeal have no authority to act upon the portion of the statement of trial results that references the firearms prohibition.

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

Even if this Court has jurisdiction to review this issue, Appellant was found guilty of assaulting a superior officer by lifting a knife against his commander, in violation of Article 89, UCMJ, which is a crime punishable by imprisonment for a term exceeding one year, that is by 10 years of confinement. Manual for Courts-Martial, pt. IV, para. 15.d (2019 ed.). Appellant was also found guilty of willfully disobeying a superior officer, in violation of Article 90, UCMJ, which is a crime punishable by imprisonment for a term exceeding one year, that is by five years of confinement. Id. at pt. IV, para. 16.d. Appellant was also found guilty of assaulting a superior non-commissioned officer, in violation of Article 91, UCMJ, which is a crime punishable by imprisonment for a term exceeding one year, that is by three years of confinement.

Id. at pt. IV, para. 17.d. Thus, the Staff Judge Advocate followed the appropriate Air Force regulations in signing the first indorsement to the STR and EOJ. DAFI 51-201, dated 14 April 2022, paras. 29.30, 29.32.

- ***The Firearm Prohibition in the Gun Control Act of 1968 is Constitutional as Applied to Appellant and His Convictions are Crimes of Violence.***

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

Appellant's argument presumes, incorrectly, that his crime was not a violent offense or "crime of violence." (App. Grostefon Br. at 2.) However, federal law defines the term "crime of violence" as "an offense that has as an element of the offense the use, attempted use, or

threatened use of physical force against the person or property of another." 18 U.S.C. §§ 924(c)(3)(A), 3156(a)(4)(A). Appellant's act of chasing Lt Col CT and MSgt AM with a knife meets that definition.

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

VII.

APPELLANT'S CONVICTIONS ARE FACTUALLY SUFFICIENT.

Standard of Review and Law

The standard of review and law pertinent to this issue is the same as that in Issue I above.

Analysis

In Issue I, Appellant claimed his convictions of the Article 90 offense and of Specification 1 of the Article 92 offense were factually insufficient. Now, he also claims they are legally insufficient. (App. Grostefon Br. at 6.) However, Appellant provides no additional reasoning here as to why his convictions are legally insufficient. Instead, he states, "For the reasons discussed in the main brief in Assignment of Error I, the convictions for disobeying orders and dereliction of duty challenged as factually insufficient are also legally insufficient." (Id.)

However, Appellant's arguments in Issue I failed to show any factual insufficiency and, likewise, show no legal insufficiency. For his Article 90 conviction, Appellant never questions the proof for any of the elements of the offense. Instead, Appellant only claims fault in his conviction because he believes his "compliance was impossible" because he was "detained and

could not pack his bags and go to the terminal." (App. Br. at 12.) However, as explained above, Appellant faced no issue of impossibility. Instead, Appellant's compliance with Lt Col CT's command was entirely, and easily, possible well before Appellant was detained, which occurred only as a result of Appellant chasing his commander and first sergeant through the dorm with a knife. Again, there is no impossibility of performance issue here. Thus, for the same reasons discussed in Issue I above, the record shows this specification is legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

As to Specification 1 of Article 92, Appellant again never questions the fact that he did not complete out-processing requirements. Instead, as discussed in Issue I above, Appellant claims the specification "lack[s] of clarity" and asks, "what was the duty." (App. Br. at 13.) He also claims the Government failed to prove Appellant's knowledge "with evidence of the out-processing requirements, such as a checklist." (Id.) However, as explained above, the record is clear on what Appellant's duties were and they did not involve a "lack of clarity." Further, MSgt AM's ability to complete out-process requirements *for* Appellant shows Appellant had the ability to complete these tasks on his own, but willfully chose not to complete them. Thus, for the same reasons discussed in Issue I above, the record shows this specification is legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

Finally, Appellant takes issue with his Article 89 and Article 91 convictions, claiming "his convictions for assaulting his superior commissioned officer and insubordinate conduct

towards a noncommissioned officer are legally insufficient because of lack of mental responsibility." (App. Grostefon Br. at 6.) Notably, Appellant again never questions any of the proof for any of the elements of these offenses. Instead, Appellant rests his argument on his continuing claim regarding the lack of mental responsibility defense.

However, as discussed in Issue II above, the military judge correctly found that Appellant at trial failed to raise "some evidence" of this defense. Indeed, there is no evidence in the record showing Appellant could not appreciate the wrongfulness of his actions or the nature and quality of his acts. Moreover, even if the military judge had instructed the panel on the defense, Appellant has also failed to show by clear and convincing evidence that he was not mentally responsible at the time of the alleged offense. Thus, for the same reasons discussed in Issue II above, Appellant's claim of lack of mental responsibility lacks merit as it relates to all of his convictions, including his Article 89 and Article 91 convictions. Here, the record shows Appellant's convictions are legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

MATTHEW D. TALCOTT, Colonel, USAF
Chief, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 29 October 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40478 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Brian D. HOWARD	)	**PANEL CHANGE**
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 6th day of November, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

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

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

Tanica S. Bagmon
Appellate Court Paralegal

29 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO ATTACH DOCUMENT
v.	)	
	)	ACM 40478 (f rev)
Airman (E-3) BRIAN D. HOWARD, USAF *Appellant*.	)	Panel No. 1

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States submits the following document in support of the government's Answer to Appellant's Assignment of Error brief in the above referenced case:

Declaration of MSgt ST, dated 29 October 2024, 1 page.

This document provides additional information and context outside the record but are relevant and necessary for the United States to answer Appellant's brief. Specifically, MSgt ST's declaration provides this Court necessary background and context regarding Appellant's claim that he is entitled to relief due to post-trial processing delay. MSgt ST's declaration provides needed context necessary to address Appellant's claims.

Our superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate claim of post-trial delay is directly raised by materials in the record. This Id. at 442 (*quoting* United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Here,

GRANTED
7 NOV 2024

declaration is relevant to address Appellant's claims of prejudice due to post-trial processing delay. Thus, this Court may consider them under Jessie.

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

G. MATT OSBORN, Lt Col, USAF
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 29 October 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40478 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Brian D. HOWARD	)	
Airman (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 29 October 2024, counsel for the Government submitted a Motion To Exceed Page Limit to its answer to Appellant's assignments of error brief, dated 29 September 2024. The Government requests this court authorize the Government to exceed the court's length and word limitations pursuant this court's Rule 17.3, "due to the nature and number of issues raised by Appellant in his Assignments of Error brief." *See* A.F. CT. CRIM. APP. R. 17.3 (where unless authorized by the court, "filings shall not exceed either 50 pages or 20,000 words" without good cause shown). Appellant raised, through counsel, five assignments of error, and personally raised two *Grostefon*[*] issues. Appellant's brief follows the court's rules on length and word limitations. Appellant did not submit opposition to the Government's motion.

The court has considered the Government's motion, the lack of any opposition by Appellant, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 12th day of November, 2024,

ORDERED:

The Government's Motion to Exceed Page Limit is **DENIED** for lack of good cause. The Government shall file their Answer not later than **26 November 2025**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

---

[*] *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

26 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40478 (f rev)
Airman (E-3) BRIAN D. HOWARD, USAF *Appellant*.	)	Panel No. 1

ANSWER TO ASSIGNMENTS OF ERROR

G. MATT OSBORN, Lt Col, USAF
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

MATTHEW D. TALCOTT, Colonel, USAF
Chief, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

INDEX

TABLE OF AUTHORITIES

CASES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

STATUTES

OTHER AUTHORITIES

26 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40478 (f rev)
Airman (E-3) BRIAN D . HOWARD, USAF *Appellant*.	)	Panel No. 1

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

ISSUES PRESENTED

I.

WHETHER [APPELLANT' S] DISOBEYING ORDERS AND DERELICTION OF DUTY CONVICTIONS ARE FACTUALLY INSUFFICIENT AND TWO OF HIS DERELICTION OF DUTY CONVICTIONS ARE LEGALLY INSUFFICIENT?

II.

WHETHER THE MILITARY JUDGE ERRED WHEN SHE REFUSED TO INSTRUCT ON LACK OF MENTAL RESPONSIBILITY?

III.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE DENIED CHALLENGES FOR CAUSE AGAINST TWO PANEL MEMBERS WHO QUESTIONED THE CENTRAL DEFENSE OF LACK OF MENTAL RESPONSIBILITY?

IV.

WHETHER THE RECORD OF TRIAL'S OMISSION OF COURT MEMBER SELECTION SHEETS REQUIRES RELIEF OR, AT A MINIMUM, REMAND FOR CORRECTION?

V.

WHETHER [APPELLANT] IS ENTITLED TO SENTENCE RELIEF BECAUSE OF THE 223-DAY DELAY BETWEEN ANNOUNCEMENT OF THE SENTENCE AND DOCKETING WITH THIS COURT.

VI.[1]

WHETHER, AS APPLIED TO [APPELLANT], 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION

VII.

WHETHER [APPELLANT'S] ASSAULT AND INSUBORDINATE CONDUCT CONVICTIONS ARE LEGALLY SUFFICIENT.

STATEMENT OF THE CASE

The United States generally accepts Appellant's Statement of the Case.

STATEMENT OF FACTS

CT, Appellant's commander, took command in July 2020. (R. at 391.) In Fall 2021, AM became the first sergeant of the unit. (Id.) CT first met Appellant, a member of his command, in July 2020. CT said he began to have more consistent and recurring interactions with Appellant in late February to March 2021, stating that over the course of his two years of interactions with Appellant, Appellant reported to his office at least five times. (R. at 395.)

By the Spring of 2022, Appellant had been reassigned to the front command section office where CT saw Appellant on a daily basis. (R. at 397.) In April 2022, CT recommended

[1] Issues VI and VII are raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

that Appellant be discharged, the separation authority agreed, and Appellant's separation date was set for 13 May 2022. (R. at 399.)

CT testified about Appellant's requirement to attend pre-separation appointments. (Id.) CT explained in detail how Appellant's out-processing was "happening slowly," as there were "some failed appointments, or rescheduling of some appointments." (R. at 400.) CT said "increasing involvement was definitely necessary for [Appellant] . . . all the way up to, really in the end, when even some of those efforts failed, in the last days, and you know, really days, leading up to that separation date, was kind of those forceful separation actions that could be done on behalf of the command team; as it was alluded that [AM] had to take care of a lot of stuff, or at least document that things that were not happening." (R. at 400-01.) CT explained a multitude of last-minute out-processing actions that "needed significant engagement" to ensure the actions occurred prior to Appellant's separation. (R. at 401.)

CT said Appellant's separation orders were approved for Friday, 13 May 2022, however, Appellant did not make his 12 May 2022 flight because Appellant did not complete a required pre-departure COVID test. (R. at 405.)

Once Appellant missed the flight, CT said the command team gathered to determine the next steps, which included extending Appellant's separation orders. Command determined the next PAX rotator flight would occur on the following Tuesday, 17 May 2022. (R. at 408.)

CT stated that Appellant's flight likely would not leave on that Tuesday until 1700, but that the cut-off time to check in was 1100 hours. (R. at 410.) CT said "anybody on that flight that day, was supposed to be checked-in between 0800 and 1100 hours," adding, "I knew that was why [sic] they advertised, because we had other folks, members of the squadron that day flying. All of them got checked in during that time." (R. at 445.)

CT explained the plans the unit went through to ensure Appellant arrived to the PAX terminal on time, including having one of Appellant's friends, SrA DC, help out. (R. at 410-11.) When asked what was left for Appellant to leave Misawa, CT said, "It was really, just physically, getting the member over to the PAX terminal." (R. at 412.)

On 17 May 2022, however, AM approached CT at approximately 1050 hours and said that Appellant was still in his dorm and not packed. CT and AM went to Appellant's dorm room around 1115 hours. (R. at 446.) When they arrived, Appellant opened the door in a "very cordial" manner, and the three talked about getting Appellant to the terminal. (R. at 414.) When asked about the conversation's tone, CT said, "Very much like today . . . just a soft, friendly tone, very kind of, encouraging in nature," adding that "I think we just, just trying to get him out of there . . . ." (R. at 414.) CT said Appellant responded, "very, very nonchalantly, very friendly responses back, and with you know, 'Yeah, yeah no, I got it, I got it. I'm good. I'll get over there. I've got a car, I can get to the terminal on my own.'" (Id.)

Looking into Appellant's room, CT could see that Appellant had "no bags packed and ready" and that it looked like "the member was still living in their dorm room, full-time." (R. at 415.) CT said Appellant then muttered, "Oh, yeah, don't worry about it. I'll be a foreigner tomorrow." (R. at 416.)

When asked how he took that comment, CT said, "You know, knowing the member is supposed be on a plane back to the United States, headed to his home of record. Foreigner to me means he could be strolling out of the gate with, with a car, a new car, not to be seen again. Which, again, does not solve the issue of separation overseas. You know, so obviously, I was concerned that maybe a flight risk, or something there. Other than departing into Japan versus getting on the flight." (R. at 416.)

CT again told Appellant, "Hey, like, you do know that today is the day. You need to get your bags packed. It's time to go to the terminal. Like it's time." (R. at 417.) When asked if he and AM "were persistent" in asking Appellant about him going to the airport, CT said, "Yeah, I mean obviously, we had one missed show time for the flight the previous, the previous week and a pattern, or history where it was, we knew there was a very high potential he wouldn't show, so that is correct." (R. at 441.) CT stated he would "rephrase[] questions to make sure [Appellant] understood that it was time, or past time, that he should get over there to be checked in." (Id.) CT said, "We purely wanted, wanted the member to obviously, to get packed up and get to the terminal." (R. at 417.)

In response, Appellant slammed the door "very, very forceful[ly]" in their faces. (Id.) CT said that, as the door was shutting, he could see Appellant "turning again and lunging for something in the room, and you know, either on the bed, kind of on a table, towards the back by the window. Definitely see that [Appellant] was going for something in the room, which made me very nervous at that point." (R. at 418.) CT and AM began a "full sprint down the hallway of the dorm room" and into the stairway. (R. at 418.)

CT heard a door "open behind us and slam shut again." (R. at 419.) CT could hear Appellant coming down the stairway. When CT looked up the stairwell, he saw Appellant "brandishing something in his hand . . . in an aggressive manner." (R. at 420.) CT felt Appellant was "coming to stab, stab us at that point." (Id.)

CT and AM continued running out of the stairwell to the main floor and eventually outside. (R. at 422.) CT said, "I knew [Appellant] was in pursuit of us." (Id.) CT said he saw a truck in the lodging parking lot that had two people sitting inside. CT said he jumped into the truck and told the driver to drive. (R. at 425.) On cross-examination, CT said that when he was

in the truck, "that is definitely when I made initial eye contact with [Appellant], he was still coming up behind us." (R. at 444.)

CT said Appellant at this point was "very close to the back of the truck." (R. at 428.) The passenger of the truck got out and went to the back of the truck and began speaking with Appellant. (Id.) Appellant then turned and began walking back towards the dorms.

Maj PT was the passenger in the truck. (R. at 461.) Maj PT said CT was "fairly frantic" and "it seem[ed] like he was nervous/scared of whatever was going on." (R. at 462.) Maj PT got out of the truck and saw a person standing about five yards behind the truck. Maj PT identified Appellant as the person he saw. (R. at 465.)

When Maj PT asked if there was a problem, the person responded, "I don't have a problem, do you have a problem." (Id.) When Maj PT said, "Are we good," the person responded, "Yeah, I'm good." (Id.) Maj PT described Appellant as "pretty calm," "very, very calm," and exchanged fist bumps with Appellant. (R. at 463-64.)

SSgt RW, a Security Forces member, responded to the incident and went to Appellant's dorm room, but no one answered the door. (R. at 476.) Appellant then walked up with a dorm master key and told SSgt RW that "he didn't know what was going on, he just locked himself out of his dorm room." (Id.) Appellant was detained and searched. When asked if he had anything on him that would harm the searching airman, Appellant said, "No." (R. at 477-78.) However, while searching Appellant, A1C JJ, another Security Forces member, found a pocketknife in Appellant's back, right pocket. (R. at 478.) During this interaction, SSgt RW said Appellant was "[v]ery calm, little jittery, would repeatedly laugh every few minutes, like kind of a nervous tick." (R. at 480.)

A1C JJ agreed that Appellant was "very calm" and remembered Appellant "saying something along the lines of that there was – that this was a misunderstanding." (R. at 489.) On cross-examination, A1C JJ agreed that Appellant was respectful, compliant, showed no signs of aggression, and was extremely calm. (R. at 498.)

TSgt KG, a Security Forces investigator, interviewed Appellant following the incident. During a break in the interview, TSgt KG watched Appellant from the camera while in another room. (R. at 511.) TSgt KG said Appellant was "was looking around inside the room, he was talking, maybe to himself, I'm not sure." (Id.) When asked if the interview was hard to follow, TSgt KG responded, "Yes, ma'am, at the beginning. So, once — when I asked [Appellant] to explain to me the situation, basically what had happened, it was kind of all over the place, his story. When I asked direct questions he was able to respond to direct questions, but yeah." (R. at 512.)

Prosecution Exhibit 4 is Appellant's flight itinerary for the 12 May 2022 flight that he did not board. (R. at 522.) Prosecution Exhibit 5 is Appellant's rotator flight itinerary. (R. at 527.) Ms. MT, who worked in the travel office, explained that the hand-written markings in the right-hand corner was the check-in time for the rotator. (Id.) The hand-written markings show the report no earlier than time as 0800 hours and the report no later than time as 1100 hours. (*See* Pros. Ex. 5.) Ms. MT stated that she provided this document to Appellant's first sergeant. (R. at 529.)

SrA DC, Appellant's friend who was assisting with Appellant's out-processing, took Appellant to breakfast on the morning of 17 May 2022. (R. at 578.) SrA DC said the plan after breakfast was "[t]o try to get his belongings to the airport, him and his belongings to the airport." (Id.) During breakfast, SrA DC said Appellant was very relaxed and in a good mood. (R. at

579.) At some point, Appellant told SrA DC that "he had some more belongings and that we would be coming back, most likely to his dorm to get that situated." (Id.) SrA DC offered to help Appellant pack and get his bags to his car. (Id.) Once back at the dorm, SrA DC asked if Appellant needed help, but Appellant said no because he still had to pack. (R. at 581.)

AM testified about the various tasks Appellant had to complete so that he could transition out of Misawa. (R. at 600.) AM said these tasks included "a whole lot of base out-processing, the entire checklist from FSS," as well as "squadron items and different memorandums." (R. at 601.) AM said that he assisted Appellant in making a game plan for Appellant to accomplish all of his out-processing tasks. (R. at 606.)

However, Appellant failed to accomplish these tasks. For example, even though AM told Appellant to either provide AM his chemical gear or turn it in himself, Appellant never did. AM said he eventually got Appellant's real-world chemical gear from SrA DC, but that he had never been able to find Appellant's training gear. (R. at 607.) AM also made a finance appointment for Appellant. However, Appellant never showed for the appointment and AM had to out-process finance for Appellant. (R. at 608-09.)

At one point, AM went with Appellant to a pre-final out appointment at the personnel flight. (R. at 615.) Because there "were still a lot of things that needed done," a second appointment was scheduled with the personnel flight. However, Appellant did not show for the appointment. (Id.)

Additionally, AM told Appellant on multiple occasions that he needed to get a COVID test to be able to take a commercial flight back to the United States. (R. at 611-12.) However, Appellant never took the test and, as a result, was not able to make his 12 May 2022 flight because "he didn't meet the travel requirements." (R. at 614.)

AM said the first indication of an issue that morning was SrA DC sending him a message that Appellant did not have his bags when they went to breakfast and that Appellant "still needed to pack." (Id.) AM and MSgt MH then went to the dorm to talk to Appellant and "give a friendly reminder to let him know I had seen the sluggish delays on the out-processing." (R. at 618.) AM said Appellant was friendly and that he offered to give Appellant a ride, which Appellant declined. (R. at 619.)

AM said he informed CT about the situation and the two went to Appellant's dorm. (R. at 620.) When Appellant answered the door, Appellant called CT only by his last name. AM said Appellant did not call CT by "sir, or rank or anything like that, which kind of stood out to me." (R. at 621.) AM said that he and CT told Appellant that he needed to get to the terminal. (Id.) AM said that Appellant told them that he had a car and was good, but mentioned that "he was a foreigner now." (Id.) AM said, "At the end of the conversation, pretty much the last thing I had said to him was you know, 'You need to get your stuff, let's go.'" (R. at 622.) Appellant then slammed the door in their faces.

AM said he could hear "metal banging around" the Appellant's room and testified, "I didn't think what was coming next was going to be a good thing if I stayed there." (R. at 623.) He and CT ran down the hallway and down the stairs. AM said as he was running again and "heard what sounded like [Appellant] was barking at us." (R. at 624.) Once outside, CT went left toward the Misawa Inn, and AM decided to split up from him and went right. AM ended up at the Wing Youth Center where he yelled for someone to call 911. (Id.)

Prosecution Exhibit 6 contains videos from the dorms. (R. at 643-46; Pros. Ex. 6.) The videos show CT and AM walking down the hallway of Appellant's dorm, knocking on his door, and conversating with Appellant. (Pros. Ex. 6.) The videos also show CT and AM running

down the hallway away from Appellant's room with Appellant chasing them down the hallway and down the stairs, just seconds behind them, with a knife in his hand. (Id.) By the time CT and AM exits the stairway and the building, Appellant, still holding the knife in his hand, was just two seconds behind them. The sixth video shows CT and AM splitting up once they exit the building. The video shows Appellant walking out of the doorway to the street while looking around. Appellant looks in the direction in which CT ran and, after a few seconds, begins running in that direction.

Additional facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

I.

APPELLANT'S CONVICTIONS ARE FACTUALLY AND LEGALLY SUFFICIENT.

Standard of Review

While this Court has not yet determined a clear standard of review for issues of factual sufficiency under the amended Article 66(d)(1), UCMJ, this Court has agreed that Congress intended this new statutory standard to "make [] it more difficult to [an appellant] to prevail on appeal."[2] *See* United States v. Csiti, ACM 40386, 2024 CCA LEXIS 160 (A.F. Ct. Crim. App. 29 April 2024). This Court reviews issues of legal sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential

[2] All specifications in this case occurred after 1 January 2021.

elements beyond a reasonable doubt." United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). Applying this test, this Court draws every reasonable inference from the evidence in the record of trial in favor of the prosecution. United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993).

The test of factual sufficiency is governed by the following amendment to Article 66(d)(1), UCMJ, which allows this Court to consider whether the finding is correct in fact upon request of the accused *if* the accused makes a specific showing of a deficiency in proof. If an accused makes such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and appropriate deference to findings of fact entered into the record by the military judge. If, as a result of the review, this Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding. *See* National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Section 542(b), 134 Stat. 3611-12.

The requirement of 'appropriate deference" when a Court of Criminal Appeals weighs the evidence and determines controverted questions of fact "depend[s] on the nature of the evidence at issue." United States v. Harvey, __ M.J. __, No. 23-0239, 2024 CAAF LEXIS 502, at *8 (C.A.A.F. 6 September 2024). This Court has discretion to determine what level of deference is appropriate. Id. "[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." Id. at *10. For this Court "to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements must be met." Id. at *12. First, this Court must decide that the evidence, as it weighs it, "does

not prove that the appellant is guilty beyond a reasonable doubt." Id. Second, this Court "must be clearly convinced of the correctness of this decision." Id.

Finally, conflicts between the pleadings and proof raise the issue of variance rather than one of sufficiency of the evidence. United States v. Mann, 50 M.J. 689, 699 (A.F. Ct. Crim. App. 1999). It is well established that in order "to prevail on a fatal variance claim, an appellant must show both that the variance was material and that he was substantially prejudiced thereby." United States v. Treat, 73 M.J. 331, 336 (C.A.A.F. 2014) (emphasis added). "A variance can prejudice an appellant by (1) putting 'him at risk of another prosecution for the same conduct,' (2) misleading him 'to the extent that he has been unable adequately to prepare for trial,' or (3) denying him 'the opportunity to defend against the charge.'" Treat, 73 M.J. at 336 (citation omitted).

Analysis

- ***Article 90 and its Specification***

Under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

Notably, Appellant does not claim that he did not receive CT's lawful command, that CT was Appellant's superior commissioned officer or that he knew CT was his superior commissioned officer. Instead, Appellant only claims fault in his conviction because he believes his "compliance was impossible" because he was "detained and could not pack his bags and go to the terminal." (App. Br. at 12.)

Appellant is wrong. To start, Appellant completed his act of willfully disobeying CT's lawful command well before he was detained. Evidence showed Appellant knew he was supposed to be at the terminal by 1100 hours that morning. However, by the time CT and AM arrived, which was after 1100 hours, Appellant had still not packed and, obviously, was not at the terminal. Add in that Appellant had already been scheduled for a flight the previous week, which he did not board, and he was *still* not packed to leave Misawa, his willful intent to not pack his belongings or go to the terminal that morning was clear even before CT and AM arrived at his door.

Yet then, once CT and AM did come to his dorm (again after Appellant was already supposed to be at the terminal), Appellant again showed his willful intent to disobey CT. CT testified that he told Appellant that it was "past time" for him to get packed up and go to the terminal. (R. at 441.) Appellant responded by slamming the door in CT's face "very, very forceful[ly]" while turning and "lunging for something in the room." (R. at 417.) That something, as evidenced later, was a knife.

Again, all of this occurred prior to Appellant being detained. Moreover, CT's lawful command was to pack and go to the terminal immediately. At that point in time, standing in his doorway, Appellant had an easy opportunity to comply. He simply could have turned around, packed his belongings, and gone to the terminal. If he had done that, there would have been no issue. Instead, Appellant chose to slam his door in CT's face, grab a knife, and chase both CT and AM through his dorm with the knife. Appellant's claim of "impossibility" is not supported by the facts.

Appellant's reliance on United States v. Pinkston, 21 C.M.R. 22, 25 (C.M.A. 1956), United States v. Heims, 12 C.M.R 174 (C.M.A. 1953), and United States v. King, 17 C.M.R. 3

(C.M.A. 1954) is similarly misguided. Pinkston involved an appellant who was financially unable to remedy a uniform deficiency. Pinkston, 21 C.M.R. at 25. Heims involved an appellant who received an order to tie sandbags even though the appellant had an injured hand and was physically unable to perform the order. Heims, 12 C.M.R. at 177. King involved an appellant who received an order to rejoin his squad even though the appellant had just returned from being treated for frostbitten feet and was physically unable to perform the order. King, 17 C.M.R. at 5.

Here, Appellant faced no such physically disability standing at the door with CT and AM. In contrast to Pinkston, Heims, and King, Appellant's compliance with CT's command was entirely, and easily, possible well before Appellant was detained. Further, his detainment occurred only as a result of Appellant chasing his commander and first sergeant through the dorm with a knife. There is no "impossibility of performance" here as Appellant alleges. (*See* App. Br. at 12.) As such, his claim must fail.

- ***Article 92, Specification 1***

Again, under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence.

Here, Appellant does not contest the fact that he did not complete out-processing requirements. Instead, for the first time on appeal, Appellant claims the specification "lack[s] of clarity" and asks, "what was the duty." (App. Br. at 13.) He also claims the Government failed to prove Appellant's knowledge "with evidence of the out-processing requirements, such as a checklist." (Id.)

Yet, AM testified both broadly and specifically about the tasks Appellant was required to accomplish while out-processing. First, AM stated that the tasks included "a whole lot of base out-processing, the entire checklist from FSS," as well as "squadron items and different memorandums." (R. at 601.) Here, these documents and checklists put Appellant on notice of his requirements. AM then specifically testified about tasks from those documents that Appellant failed to perform, including (1) turning in chemical gear; (2) attending and out-processing with finance; (3) completing items to final-out with personnel; and (4) attending a final-out appointment with personnel.

Appellant, who knew of all of these requirements, failed to do any of them. Instead, AM had to get a portion of Appellant's chemical gear from Appellant's friend, while the remaining pieces of Appellant's chemical gear still remained unaccounted for at the time of Appellant's trial. (R. at 608-09.) When Appellant did not show up for his finance appointment, AM had to out-process Appellant himself. (Id.)

Notably, Appellant's counsel never argued at trial about any "lack of clarity" as to what duties this specification entailed and also never filed a Bill of Particulars regarding this specification. In fact, in closing arguments, Appellant's counsel argued that Appellant "was actively working to complete out-processing." (R. at 810.) Here, the record is clear on what Appellant's duties were and they did not involve a "lack of clarity."

Next, Appellant, who just one paragraph before claimed that a checklist would prove Appellant's knowledge, then in the next paragraph of his brief attempts to downplay the importance of checklists by stating, "Out-processing is a flurry of checklists with items of negligible value," while also arguing that some agencies were "difficult to contact." (App. Br. at 13.) Yet, AM's testimony showed that he was able to navigate Appellant's out-processing

essentially in Appellant's place since Appellant repeatedly failed to show up for appointments or complete his tasks. Here, AM's ability to out-process for Appellant shows (1) there were no agencies that were "difficult to contact" and (2) that Appellant had the ability to complete these tasks on his own. Instead, he willfully chose not to complete them.

Next, Appellant rhetorically asks if a member can be convicted of willful disobedience if that member "cannot, for example get the base library to sign off in time?" (App. Br. at 14.) Of course, Appellant's non sequitur is not what occurred in this case. Indeed, this is not a case where Appellant was banging on the door of the finance or personnel office begging to finish his out-processing but was turned away by those offices emptyhanded. Instead, Appellant was never at their door at all as he missed appointments with both offices and failed to complete items required from those offices. Again, AM was able to complete these tasks on Appellant's behalf once Appellant failed to show up himself to complete them. This showed that the personnel and finance offices were the not problem here – the problem was Appellant.

Here, while Appellant may claim that he did not have a "precise understanding" of his out-processing duties and that there was "weak evidence of specific willful acts," the evidence at trial showed otherwise. When providing the panel members the required and appropriate deference for having seen all the witnesses and evidence at trial, including AM's sworn testimony, this Court should *not* be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt. Accordingly, Appellant's factual sufficiency claim must fail.

- ***Article 92, Specification 3***

Again, under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to

the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Further, Appellant has failed to show his conviction is legally insufficient.

Here, Appellant does not dispute any of the underlying facts about the elements of this offense. Appellant does not dispute he had a duty to board a flight, does not dispute he knew of that duty, and does not dispute that he did not board a flight on 17 May 2022. Instead, Appellant renews his impossibility defense by claiming he was not willfully derelict in performing his duty since "he could not go the passenger terminal because he was detained." (App. Br. at 14.) Yet, as previously discussed, Appellant had plenty of opportunity to get to the terminal and board the plane. Before CT and AM even went to his dorm, Appellant knew he was supposed to have already been at the terminal and checked in for his flight. But yet, he remained in his dorm room with his personal belongings still looking as if he "was still living in the[] dorm room, full-time." (R. at 415.) The circumstances of this situation make it quite clear Appellant had no intention of going anywhere.

But even after CT and AM arrived and spoke to him, Appellant still had ample opportunity to simply pack his bags and go to the terminal. Instead, Appellant chose to slam his door in his commander's and first sergeant's face, grab a knife, and chase his two leaders out of the dorm building. Just as with his Article 90 conviction, Appellant's "impossibility" claim here is meritless and should be denied.

Next, Appellant claims the flight number "V272" listed in the specification "appears nowhere in the evidence in the case." (App. Br. at 14.) Appellant states Prosecution Exhibit 5 "describes the flight details for the rotator," but then seemingly believes the exhibit does not speak to the flight number, stating, "Maybe this was Flight V272, maybe it was not." (Id. at 14-

15.) Appellant claims the Government's decision to "add Flight V272 to the charge sheet, but then not prove it, is a fatal flaw." (Id. at 15.)

Appellant is again wrong. A cursory examination of Prosecution Exhibit 5 shows the "Mission" number for the flight, which is "TKCV2720A137." In particular, that entry includes the flight number listed in the specification – V272. Here, there is no fatal flaw in the specification's language and it was perfectly clear to all parties, the military judge, and the panel that the flight Appellant failed to board on 17 May 2022 was the flight booked for Appellant and referenced in Prosecution Exhibit 5.

Here the evidence shows Appellant's newfound claim of "impossibility" lacks merit and that the Government proved Appellant failed to get on Flight V272. When providing the panel members the required and appropriate deference for having seen all the witnesses and evidence at trial, this Court should *not* be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt. Accordingly, Appellant's factual sufficiency claim must fail.

The same holds true for his legal sufficiency claim. Here, the record shows the specification is legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

- ***Article 92, Specification 2***

Again, under the new factual sufficiency standard, Appellant has failed to make a specific showing of a deficiency of proof. Yet even if he had, after making the appropriate deference to the trial court hearing the witnesses at trial, the Court should not be clearly convinced that the

finding of guilty was against the weight of the evidence. Further, Appellant has failed to show his conviction is legally insufficient.

Here, Appellant does not dispute any of the underlying facts about the elements of this offense. Appellant does not dispute he had a duty to board a flight, does not dispute he knew of that duty, and does not dispute that he did not board a flight on 12 May 2022. Instead, Appellant's only complaint is regarding the flight number listed in the specification, stating that the "Government charged him with dereliction for failing to board JL154," but "only admitted evidence . . . that [Appellant] was booked on JL156." (App. Br. at 16.)

However, Appellant's concern here is an issue of variance, not legal or factual sufficiency. *See* Mann, 50 M.J. at 699; *see also* Treat, 73 M.J. at 331 (C.A.A.F. 2014). This Court, as well as the Army Court of Criminal Appeals (ACCA) and our superior Court, has dealt with similar issues such as Appellant's claim multiple times, with each being reviewed as a claim of variance.

In United States v. Packrone, ACM 36389, 2006 CCA LEXIS 271 (A.F. Ct. Crim. App. 19 October 2006), this Court dealt with an appellant who had pled and was found guilty of wrongfully appropriating money from his wife using her government travel card. However, on appeal, the appellant asserted in a legal and factual sufficiency claim that the evidence showed the money was not the property of the appellant's wife, but of the financial institution holding the wife's account. Jumping right to a prejudice analysis, this Court found the appellant faced no prejudice because he made no claim that he was misled or surprised by the variance, or that he was open to a future criminal sanction for his conduct. Id., at *3.

In Mann, an appellant was convicted of violating an order by one officer when the written order stated the order was "directed" by a second officer. Mann, 50 M.J. at 698. Though this

Court also found no variance, the Court further found no prejudice because the appellant "presented no evidence of prejudice," was "not misled to the extent that he was unable to prepare[,] and he is protected against another prosecution for the same offense." Id. at 699.

In United States v. Williams, ARMY 20140604, 2017 CCA LEXIS 178 (A. Ct. Crim. App. 21 March 2017), an appellant filed a legal and factual sufficiency claim because the assault offense in that case did not occur at the location alleged. Seeing the issue as an issue of material variance, ACCA found no prejudice and affirmed the conviction. Id. at *1. As an initial matter, ACCA found the evidence was legally and factually sufficient to establish that appellant assaulted the victim in the case, but agreed with the appellate government counsel that the real issue in the case involved a variance as to the location of the assault since the appellant was found guilty of assaulting the victim at a location that was a significant distance away from where the assault actually occurred. Id. at *3-4.

Though ACCA found the difference in location was a material variance, the court found "no possible prejudice to the appellant" because (1) the variance did not "put appellant at risk for another prosecution for the same conduct" as the evidence clearly established the appellant was convicted for an assault perpetrated at the correct location; (2) the appellant was not "misled or left flat-footed in the preparation of his defense against this assault specification;[3] and (3) the variance did not deny appellant the opportunity to defend against the charge. Id. at *5-6.

Finally, in Treat (a case cited by Appellant in his brief), our superior court dealt with a guilty verdict by exceptions and substitutions that changed the charged language "Flight

[3] The Court noted the appellant's defense counsel did not move for a bill of particulars or discovery regarding events that occurred at the charged location (versus the actual location) and did not make a motion for a finding of not guilty as to the specification. Id. at *5-6.

TA4B702" to "the flight dedicated to . . . transport Main Body 1 of 54th Engineer Battalion from Ramstein Air Base, Germany, to Manas Air Base, Kyrgyzstan." Treat, 73 M.J. at 335. The appellant in that case claimed the change was a fatal variance that "denied him the right to prepare and defend against the specification as convicted." Id. Our superior court disagreed.

First, CAAF found a material variance occurred because "the Government chose to describe the specific aircraft as Flight TA4B702, and thus the specific flight number became an integral part of an element of the offense." Id. at 336. However, CAAF found no prejudice. The Court stated that the defense did not claim in any manner that the appellant "was unaware of the specific aircraft he was supposed to be on." Id. at 337. Additionally, the Court stated, "While trial defense counsel did mention the lack of evidence of the flight number in her closing argument, she did not channel her efforts into disproving the Flight TA4B702 element," adding, "Furthermore, despite citing the lack of proof that it was specifically Flight TA4B702 that Appellant missed, trial defense counsel did not move pursuant to R.C.M. 917 for a finding of not guilty on that particular charge." Id.

Finally, CAAF highlighted that the defense had not identified "any different trial strategy it might have employed," and that "[a]ll indications are that appellant's defense . . . would have remained precisely the same whether or not he was charged per the original specification or per the exceptions and substitutions." Id. Finding "no reasonable possibility that the verdict in this case would have been any different," CAAF found the appellant "was not denied the opportunity to defend against the charge on which he was convicted," and that the variance was not fatal since it did not prejudice the appellant.

For Appellant's case, as noted above, there is no question that Appellant negligently failed to board a flight on 12 May 2022. Thus, the evidence is legally and factually sufficient to

support the conviction. *See* Williams at *3-4. The real issue is a conflict between the pleadings and the proof raised – which is an issue of variance rather than one of evidence sufficiency. *See* Mann, 50 M.J. at 699; Packrone at *3; Williams at *3-4. Here, like in Treat, the variance involves a flight number, namely the flight number stated in the charge – JL154 – and the flight number listed in Prosecution Exhibit 4 – JL156.

Here, even assuming, based on the reasoning in Treat, that the variance between "JL154" and "JL156" is material, Appellant has failed to show any prejudice in this variance. Thus, the variance is not fatal and Appellant's claim must fail.

Notably, in his brief, Appellant does not address the issue of variance and offers no argument related to prejudice. However, a review of prejudice similar to the analysis conducted in Treat, Mann, Packrone, and Williams shows there is no prejudice in this case. To start, Appellant's counsel never raised this issue at trial and never argued that Appellant was unaware of the specific flight he was supposed to board on 12 May 2022. Further, as opposed to the defense counsel in Williams, Appellant's trial defense counsel never mentioned the flight number issue in their closing argument. Instead, the defense's closing argument on this specification centered on whether Appellant's failure to board the flight was willful. (R. at 811-12.) There was never an argument about a lack of evidence as to the flight itself or whether Appellant was confused or unaware about which flight to board.

Moreover, even once the issue was specifically raised by the panel during deliberations, Appellant's counsel did not move for an R.C.M. 917 finding of not guilty. Appellant's counsel also did not object to the military judge's instruction to the members on the matter and never raised the issue again. (R. at 835-36, 838.) Further, Appellant has never argued, either at that point in the trial, at any other time during the trial, or now before this Court, that either Appellant

or the defense team had been misled, surprised, or left flat-footed by the variance or that they were unable to prepare Appellant's defense or defend against the charge. *See* Mann, 50 M.J. at 698-99; Packrone at *3; Williams at *5-6.

Whether at his trial or now before this Court, Appellant has failed to identify "any different trial strategy it might have employed," and all indications are that Appellant's defense strategy for this specification – namely that he did not willfully miss the flight – would have remained his defense for this specification no matter what flight number was listed in the specification.[4] *See* Treat, 73 M.J. at 337. The evidence clearly shows Appellant was well aware of what flight he was supposed to board and has never argued or claimed, either at trial or now to this Court, that he was confused or unaware about which flight to board.

Finally, due to the clear testimony and documentary evidence presented at trial showing the flight number and date of the flight Appellant missed, the variance does not put Appellant at risk for another prosecution for the same conduct.

In sum, the variance in this case did not put Appellant at risk for another prosecution for the same conduct, did not mislead Appellant in any way, and did not deny Appellant the ability to defend against the charge. Accordingly, there is no possible prejudice to Appellant. Thus, as Appellant has failed to show any prejudice in this variance, and there is "no reasonable possibility that the verdict in this case would have been any different,"[5] the variance in this case is not fatal, and Appellant's claim must fail.

[4] Notably, this defense strategy worked as Appellant was only found guilty of negligent dereliction of duty, not willful.

[5] *See* Treat, 73 M.J. at 337.

II.

THE MILITARY JUDGE DID NOT ERR IN NOT GIVING A LACK OF MENTAL RESPONSIBILITY INSTRUCTION.

Additional Facts

During his trial testimony, CT agreed that several members of his units raised concerns about Appellant's mental health. (R. at 432.) CT ordered two command-directed evaluations, both of which occurred in 2021. CT said the first evaluation "did not g[ive] any concrete diagnosis," but instead "Basically, returned [Appellant] to duty, back to us. No restrictions, and you know, really just to continue to monitor, and encourage him to seek help, and treatment voluntarily on his own accord at that point." (R. at 448.)

After CT received additional concerns about Appellant's behavior, the second evaluation was ordered. (Id.) The second evaluation resulted in the mental health provider finding that Appellant had unspecified bipolar disorder with severe psychotic episodes. (R. at 433-34.) The provider recommended going through the "evaluation for discharge through the medical board process." (R. at 435.)

After the second evaluation, Appellant began receiving treatment at Misawa. However, by September 2021, the Misawa medical team stated the requirements for Appellant's treatment exceeded their abilities and recommended he be sent to a high-level treatment program in San Antonio, Texas. (R. at 450.)

The unit supported and Appellant voluntarily accepted the treatment. After completing the five-month treatment, Appellant returned to Misawa. During the course of this treatment, CT stated that "the folks that had been working with him during those five months determined that bipolar was not the correct diagnosis, and that's when they adjusted diagnosis to basically, a

behavioral disorder and essentially was returned back to duty." (R. at 451.) CT also stated this diagnosis correction "stopped the clock and ceased the med board process for a medical discharge, at that point, and was returned to us with the new condition." (Id.)

Dr. SF, a psychiatrist called by the defense, interacted with Appellant three times in the summer of 2021 timeframe. (R. at 700.) None of those interactions were in person. (R. at 699.) Dr. SF said he did not interact with Appellant in the spring of 2022 or in May 2022. (R. at 700.)

Dr. SF agreed that someone talking to themselves or talking to someone who was not there was an example of a psychotic feature. (R. at 698-99.) However, on cross-examination, Dr. SF also agreed that regular people talk to themselves. (R. at 702.)

Lt Col DA, a forensic psychiatrist, provided a second opinion of Appellant's diagnosis in April 2021. (R. at 708.) At that time, Lt Col DA determined Appellant "was not in a fully manic state." (Id.)

Lt Col EG, a clinical psychologist, provided Appellant's initial diagnosis from his first command directed evaluation. (R. at 716.) During her evaluation, which consisted of seeing Appellant four to six times, Lt Col EG "did not see [Appellant] as an imminent risk to himself or others." (R. at 726.) Lt Col EG PCS'd from Misawa in July 2021 and did not interact with Appellant at all after her PCS. (R. at 727.) She did not interact with him in spring 2022, in May 2022, or on 17 May 2022. (Id.)

When asked, "You have no idea what his mental state was on 17 May 2022," Lt Col EG replied, "Yeah, I can only speak to the time period for what I saw [Appellant], correct." (Id.) When asked, "You have no idea if he was exhibiting psychotic features on that particular day," Lt Col EG responded, "Correct. I cannot speak to that particular day, I can only speak to that timeframe from which I saw [Appellant]." (Id.)

At the close of findings, Appellant's counsel requested the lack of mental responsibility instruction. (R. at 742, 746.) Appellant's counsel referenced the testimonies of Lt Col EG, Dr. SF, and Lt Col DA, as well as other testimony from Government witnesses about Appellant's actions during the charged timeframe. Appellant's counsel argued Appellant was in a "manic state at the time of the charged offenses." (R. at 746-51.) The Government countering by arguing that the court had no testimony showing Appellant could not appreciate the wrongfulness of his actions or the nature and quality of his acts. (R. at 751-52.)
The military judge initially stated that she did not find the defense "was reasonably raised by the evidence," but stated she would take the evening to read cases cited by the parties and apply those to the facts raised to the court. (R. at 753.) The following morning, the military judge denied Appellant's request with an in-depth ruling. (R. at 758.)

Additionally, prior to trial, from 24 June 2022 until 27 June 2022, the Government completed a sanity board on Appellant. (Sanity Board, ROT, Vol. 4, PHO Exhibit 29.) The sanity board found that Appellant was not, at the time of the alleged criminal conduct, suffering from a severe mental disease or defect and was not unable to appreciate the nature and quality or wrongfulness of his conduct. (Id.) The board also found Appellant had sufficient mental capacity to understand the nature of the proceedings and to cooperate intelligently in his own defense. (Id.)

Standard of Review

The adequacy of a military judge's instructions is reviewed de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). Whether the evidence reasonably raises a required findings instruction under R.C.M. 920(e) is also a question of law reviewed de novo. United States v. Davis, 76 M.J. 224, 229 (C.A.A.F. 2017) (citations omitted).

Law

"The military judge bears the primary responsibility for ensuring that mandatory instructions . . . are given and given accurately." United States v. Miller, 58 M.J. 266, 270 (C.A.A.F. 2003). Instructions on findings shall include "[a] description of any special defense under R.C.M. 916 in issue." R.C.M. 920(e)(3). Lack of mental responsibility is an affirmative defense under R.C.M. 916(k)(1). Special defenses are often called affirmative defenses. R.C.M. 916(a), Discussion.

The military judge must instruct the members "on the availability and legal requirements of an affirmative defense if 'the record contains some evidence to which the military jury may attach credit if it so desires.'" United States v. Hibbard, 58 M.J. 71, 72 (C.A.A.F. 2003) (citations omitted). An affirmative defense is "in issue" when "some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose." United States v. Stanley, 71 M.J. 60, 61 (C.A.A.F. 2012). "Any doubt whether an instruction should be given should be resolved in favor of the accused." United States v. Davis, 53 M.J. 202, 205 (C.A.A.F. 2000) (citation omitted). "Where an instructional error raises constitutional implications, [we have] traditionally tested the error for prejudice using a 'harmless beyond a reasonable doubt' standard." United States v. Davis, 73 M.J. 268, 271 (C.A.A.F. 2014) (footnote omitted).

Article 50a(a), UCMJ, 10 U.S.C. § 850a(a) describes the defense of lack of mental responsibility as follows:

> It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

R.C.M. 916(k)(1) contains almost identical language to Article 50a(a). R.C.M. 916(k)(3) states "[t]he accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense." Generally, once a defense "is placed in issue by some evidence, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist." United States v. Berri, 33 M.J. 337, 343 (C.M.A. 1991) (*quoting* R.C.M. 916(b)). Lack of mental responsibility is an exception to that general rule. R.C.M. 916(b)(2).

Analysis

While Appellant's counsel attempted to place the lack of mental responsibility "at issue" through their voir dire questions and opening statement, the actual evidence presented at Appellant's trial never placed Appellant's supposed lack of mental responsibility "at issue" and the military judge did not err in not giving the lack of mental responsibility instruction.

To start, there is no question that Appellant received an initial diagnosis for bipolar disorder in 2021, began receiving treatment for the disorder, and completed a five-month treatment program in early 2022. Notably, coming out of that treatment program, Appellant's initial bipolar diagnosis was found to be incorrect, and the adjusted diagnosis of a behavior disorder allowed Appellant to return to duty.

However, per Article 50a, UCMJ, having a mental disease or defect does not constitute the defense of lack of mental responsibility *unless* "at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts." *See* Article 50a, UCMJ.

Here, there is no evidence showing Appellant failed to appreciate the nature and quality or the wrongfulness of his acts.

From an initial standpoint, as noted above, a sanity board determined prior to Appellant's trial that Appellant was not, at the time of the alleged criminal conduct, suffering from a severe mental disease or defect and was not unable to appreciate the nature and quality or wrongfulness of his conduct. (Sanity Board, ROT, Vol. 4, PHO Exhibit 29.)

Further, at trial, there was no expert testimony regarding Appellant's mental state at the time of his acts. Indeed, Dr. SF had not interacted with Appellant since the summer of 2021, nearly a year prior to Appellant's acts. The same holds true for Lt Col EG, who said she had not interacted with Appellant since her PCS from Misawa in July 2021, 10 months before Appellant's acts. Finally, Lt Col DA's stipulation stated he had only interacted with Appellant in April 2021, over a year prior to Appellant's acts. Moreover, even at that time, when Appellant was initially diagnosed with bipolar disorder, Lt Col DA's stipulation stated he "was not in a fully manic state." (R. at 708.)

Appellant seemingly recognizes the record is hollow of any expert testimony regarding Appellant's state of mind *at the time of the offenses*. So instead, Appellant takes highly-selected testimony from lay witnesses about specific instances of Appellant's behavior over the course of the week prior to 17 May 2022, and then attempts to connect that testimony with expert testimony that says those behaviors "*could* indicate a manic state." (App. Br. at 21.) (emphasis added.) However, as stated above, these mental health providers had not seen Appellant in over a year and had no idea what Appellant's *actual* mental state was at the time of his offenses.

Moreover, the specific behaviors Appellant cites show no indication that Appellant did not appreciate the nature and quality or the wrongfulness of his acts. Appellant first cites

testimony about Appellant purchasing a car before leaving Misawa and calling himself a "foreigner" as evidence of his mental instability. (App. Br. at 20-21.) However, Appellant fails to note SrA DC's testimony that Appellant's prior car had been "junked" in the winter or early spring of that year, that SrA DC had been giving him rides, and that SrA DC was "aware he was trying to get a new car." (R. at 576.) Further, based on Appellant's statement to CT and AM that he would be a "foreigner" the next day, CT took that to mean Appellant "could be strolling out of the gate with, with a car, a new car, not to be seen again." (R. at 416.) Thus, the actual testimony at Appellant's trial, versus pure conjecture from medical providers who had not seen Appellant in over a year, showed Appellant bought the car for transportation purposes and, potentially, to stay in Japan following his separation.[6] In any case, Appellant's purchase of a vehicle or calling himself a "foreigner" is no indication about whether or not he appreciated the nature and quality or the wrongfulness of his acts.

Next, Appellant states that Appellant "got in AM's face at the travel office over the innocuous question of his home of record." (App. Br. at 21.) However, Appellant fails to note this occurred on 9 May 2022, a full week prior to the events of 17 May 2022, and occurred as AM was having to physically walk Appellant through the out-processing process because Appellant would not go to his appointments. Considering Appellant was being involuntarily discharged and was not completing his out-processing appointments, it should come as no

[6] SrA DC, Appellant's friend, testified that Appellant had previously talked to him about his feelings towards Japan. When asked how Appellant felt about Japan, SrA DC said, "[Appellant] felt the culture was very honorable, good place to be, very safe place, nice environment. So, many great things about the people there." (R. at 575.) SrA DC also stated Appellant had established connections off-base at a church and required a vehicle to get off-base to the church. (Id.)

surprise that AM accompanying Appellant to the travel office to make travel plans for his involuntary departure from Misawa, a place Appellant liked, would be tense.

Further, while Appellant did get near AM's face on this occasion, AM's testimony downplays the incident. AM testified as follows:

> There was a point in time where the SATO rep had tried to ask and verify what his home of record address was, and he just kind of vocalized, I guess, "It depends on who's pushing the buttons," and looked out over at me in an uncomfortable way, if I can put it that way.
>
> . . .
>
> So, I had kind of backed up a little bit away from him to kind of see the change in demeanor, and he had gotten up out of his seat and come over to me and kind of really close to my face, and asking me if there's a problem, is there a problem, are you okay.

(R. at 611.) SSgt CK, who worked at the travel office and witness the interaction, testified that Appellant "did get into [AM's] face like kind of like leaned over and got into his face, and was asking him like, 'Is that okay with you? Would that work for you?' Things like that." (R. at 539.)

Considering these circumstances, it appears Appellant was simply frustrated with having to schedule his travel itinerary for his involuntary discharge. But yet again, frustration or angst about being involuntarily discharged and forced to leave Japan does not equate to "some evidence" that Appellant failed to understand the nature and quality or the wrongfulness of his acts, especially for those acts that would not occur for days or a week later.

Finally, Appellant claims that Appellant "talking, maybe to himself" and pulling his hair equates to a showing of Appellant's inability to appreciate the nature of his actions. Yet, TSgt KG testified that she only observed this behavior via a camera in another room and that she was

not even sure what Appellant was doing, stating, "[Appellant] was looking around inside the room, he was talking, maybe to himself, *I'm not sure*. Seemed like he was maybe having a conversation and then he was pulling his hair a little bit, but yeah." (R. at 511.) Further, while Appellant was initially hard to follow at the beginning of the interview, TSgt KG stated that Appellant was able to answer her direct questions. (R. at 512.) Here again, Appellant *maybe* talking to himself after he had just chased his commander and first sergeant is no indication of his inability to not appreciate his actions.

Importantly, Appellant fails to cite the litany of evidence showing Appellant was *not* in a manic or unstable state during the charged timeframe. For instance, on the morning of 17 May 2022, SrA DC said Appellant was "[v]ery relaxed," "seemed refreshed," and was "in a good mood." (R. at 579.) MSgt MH, who accompanied AM the first time AM went to Appellant's room on the morning of 17 May 2022, described Appellant as "[v]ery calm." (R. at 593.) AM said Appellant "greeted us with first bumps" and had a friendly demeanor. (R. at 619.)

CT testified that Appellant was "very friendly" when he and AM began speaking with Appellant at his dorm room and was "very, very nonchatlant[]." (R. at 414.) AM agreed, stating Appellant was "very calm, friendly." (R. at 621.) Maj PT described Appellant as "pretty calm," "very, very calm," and exchanged fist bumps with Appellant. (R. at 463-64.) SSgt RW described Appellant after the incident as "[v]ery calm." (R. at 480.) SrA JJ said Appellant was "very calm," called the the incident "was a misunderstanding," and agreed that Appellant was compliant, showed no signs of aggression and was extremely calm. (R. at 489, 498)

This evidence shows Appellant was not in a manic state or having any sort of "episode." In other words, Appellant showed no signs, and the military judge was provided no actual evidence, that Appellant was unable to appreciate the nature and quality or the wrongfulness of

his acts. Thus, the military judge correctly denied Appellant's request for a lack of mental responsibility instruction.

Though Appellant tried to distance his case from this Court's opinion in United States v. Roman, ACM 39381, 2019 CCA LEXIS 45 (A.F. Ct. Crim. App. 7 February 2019), the facts and holding of that case are instructive. There, on appeal, the appellant argued testimony, including testimony from a medical expert, raised the lack of mental responsibility defense. Id. at *9. This Court found the military judge at that trial "had conclusive evidence that Appellant suffered from a severe mental disease or defect, persistent depressive disorder, at the time of the offenses," and that a "sanity board, which was ordered by the convening authority, found as much." Id. at *12. However, this Court determined "there was not 'some evidence' presented during the trial that Appellant was 'unable to appreciate the nature and quality or the wrongfulness of the acts," noting that the medical expert's testimony "fell well short of being 'some evidence' that Appellant was unable to appreciate the nature and quality or the wrongfulness of the acts themselves at the time of the offenses." Id., at *13.

Similarly here, the sanity board found Appellant had an adjustment and personality disorder and evidence of Appellant's condition was before the military judge. Also like in Roman, the sanity board also found Appellant was not, at the time of the alleged criminal conduct, suffering from a severe mental disease or defect and was not unable to appreciate the nature and quality or wrongfulness of his conduct.

In somewhat of a difference from Roman, the medical experts at Appellant's trial provided *no evidence at all* that Appellant was unable to appreciate the nature and quality or the wrongfulness of the acts themselves at the time of the offenses. As noted above, none of the three witnesses had seen Appellant for over a year before his acts and had not interacted with

him since the offenses. Moreover, none of these witnesses had interacted or examined Appellant since he returned from a five-week, in-person treatment in early 2022 and had received a new diagnosis. In short, they had no idea what was actually going on with Appellant at the time of the offense. Just as in Roman, this Court should find the evidence in this case falls "well short of being 'some evidence' that Appellant was unable to appreciate the nature and quality or the wrongfulness of the acts themselves at the time of the offenses." Roman, at *13.

Finally, Appellant claims the facts of his case are similar to that of United States v. Martin, 56 M.J. 97 (C.A.A.F. 2001). They are not. To start, the appellant in that case was diagnosed at a sanity board re-evaluation with bipolar disorder and the board determined that the appellant was unable to appreciate the nature and quality or wrongfulness of his conduct while experiencing the manic episodes. The sanity board also had concerns of whether the appellant could participate in his defense because of "concerns that the clinical course of the bipolar disorder is variable even with treatment." Id. at 100.

Additionally, a psychologist who performed "extensive psychological testing" on the appellant prior to and after the offenses, testified at trial about bipolar disorder and "testified that the link between appellant's grandiose self-image and his ability to appreciate the nature, quality and wrongfulness of his behavior was direct." Id. The appellant's treating psychiatrist who diagnosed Appellant with bipolar disorder prior to trial, testified that the appellant "had recurrent hypomanic episodes." Id.

The differences in these cases are obvious. There, a sanity board found the appellant was unable to appreciate the nature of his acts. There, two medical experts examined the appellant *after* his offenses, diagnosed him with bipolar disorder, and then testified about the links between

the appellant's medical condition and his offenses, including one expert saying the appellant had recurrent hypomanic episodes.

The opposite is true in this case. Here, a sanity board found the appellant was able to appreciate the nature of his acts. Here, there was no diagnosis of bipolar disorder by the sanity board. Further, the in-person treatment center found Appellant's initial diagnosis of bipolar disorder in 2021 was in error and re-diagnosed him. Most importantly, no medical experts testified about any links between Appellant's medical condition and his acts. In fact, the medical experts who testified had not seen Appellant in over a year and had no idea about his current diagnosis or his mental state at the time of the offenses. Worse still for Appellant, one expert, Lt Col DA, said that even in April 2021, Appellant was "not in a fully manic state." The differences in these cases are profound. Thus, Appellant's attempt to compare these cases should be easily dismissed.

Finally, even if the military judge did err, Appellant has failed to show prejudice. Noticeably in his prejudice argument, Appellant fails to note that had the instruction been given, he would have had to prove "by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense." *See* R.C.M. 916(k)(3). For the same reasons noted above, Appellant's case falls woefully short of this high standard. Here, no medical personnel who testified had actually interacted, treated, or examined Appellant in over a year. Moreover, the diagnosis provided by these medical personnel was later found to be a misdiagnosis after Appellant completed a five-week treatment program in early 2022. Each of these medical personal openly admitted they had no idea about Appellant's mental condition during the charged timeframe.

Just as the military judge correctly found that Appellant failed to raise "some evidence" of the defense, this Court, for the reasons listed above, should be convinced beyond a reasonable doubt that if the military judge had given the instruction, Appellant would have still failed to prove the lack of mental responsibility defense to the members by clear and convincing evidence. Accordingly, this Court should deny Appellant's claim.

III.

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION BY DENYING THE CHALLENGE FOR CAUSE AGAINST CAPT JT AND CAPT KB.

Standard of Review

The standard of review for a military judge's decision whether to grant a challenge for cause is whether he clearly abused his broad discretion in not applying the liberal-grant mandate. United States v. Napoleon, 46 M.J. 279, 283 (C.A.A.F. 1997). In United States v. Tippit, 9 M.J. 106 (C.M.A. 1980), our superior Court stated:

> The reviewing court need not engage in minute dissection of responses by members to artful, sometimes ambiguous, inquiries from counsel. Unless it is apparent to [the court] from the record of the *voir dire* that a court member has a closed mind about the case he is to try, denial by the military judge of a challenge for cause should not be reversed.

Tippit, 9 M.J. at 108. The challenged action must be found to be "arbitrary," "clearly unreasonable," or "clearly erroneous" to be invalidated on appeal. United States v. Travers, 25 M.J. 61 (C.M.A. 1987).

This Court reviews rulings on challenges for actual bias for an abuse of discretion. United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F. 2020) (citation omitted). Indeed, this Court must give the "military judge great deference when deciding whether actual bias exists because it

is a question of fact, and the judge has observed the demeanor of the challenged member." United States v. Napolitano, 53 M.J. 162, 166 (C.A.A.F. 2000).

This Court reviews rulings on challenges for implied bias "pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo review." United States v. Peters, 74 M.J. 31, 33 (C.A.A.F. 2015). "The focus is on the perception or appearance of fairness of the military justice system." United States v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995). Therefore, implied bias is reviewed under an objective standard. United States v. Daulton, 45 M.J. 212, 219 (C.A.A.F. 1996). Even so, "[t]he burden of maintaining the challenge belongs to the challenging party." Dinatale, 44 M.J. at 328; R.C.M. 912(f)(3). Although it is not required for a military judge to place his or her implied bias analysis on the record, doing so is highly favored and warrants increased deference from appellate courts. United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017).

Law

"A military judge's determinations on the issue of member bias, actual or implied, are based on the 'totality of the circumstances.'" United States v. Terry, 64 M.J. 295, 302 (C.A.A.F. 2007) (citation omitted).

Actual bias is defined as "bias in fact." Hennis, 79 M.J. at 384. "Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial." Hennis, 79 M.J. at 384 (citation omitted). "Because a challenge based on actual bias involves judgements regarding credibility, and because 'the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire,' a military judge's ruling on actual bias is afforded great discretion. United States v. Clay, 64 M.J. 274, 276 (C.A.A.F. 2007).

Implied bias, on the other hand, is "bias conclusively presumed as [a] matter of law." Hennis, 79 M.J. at 385 (citation omitted). "Implied bias exists when most people in the same position as the court member would be prejudiced." United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008). It is evaluated objectively under the totality of the circumstances and "'through the eyes of the public,' reviewing 'the perception or appearance of fairness of the military justice system.'" Id.. Where a military judge "recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of discretion will be reversed will indeed be rare." Clay, 64 M.J. at 277.

". . . [I]f after weighing the arguments for the implied bias challenge the military judge finds it is a close question, the challenge should be granted." Peters, 74 M.J. at 34. Although a military judge is not expected to provide dissertations on his or her decision on implied bias, the military judge does have to apply the right law. Id. "Incantation of the legal test without analysis is rarely sufficient in a close case." Id. A military judge will be afforded less deference if an analysis of the implied bias challenge on the record is not provided." Id.

Additional Facts

During the Government's general voir dire questioning, the members were asked, "Now, just knowing someone has a mental condition, illness, or diagnosis, would anyone be unable to find that person, who had either that mental condition, illness or diagnosis; would you be unable to find that person guilty of a crime?," and "Do any of you believe that because someone has a mental condition, illness, or diagnosis that they can never be held criminally responsible for their actions?" (R. at 96.) The members provided negative responses to both questions.

- *Capt JT*

During the Defense's individual voir dire, Appellant's trial defense counsel, the military judge, and Capt JT had a lengthy exchange regarding the mental condition issue. (R. at 216-20.)

- *Capt KB*

During the Government's individual voir dire, Capt KB answered "Not at all," when asked if he had any concern about setting aside his experiences in a prior court-martial and following the military judge's instructions in this case. (R. at 236.

During the Defense's individual voir dire, Appellant's trial defense counsel and Capt KB exchanged multiple questions and answers regarding the mental condition issue. (R. at 239-40.)

- *Member Challenges*

Appellant's panel had 26 members. The Government and Appellant's defense team jointed agreed to challenge 11 of those members. (R. at 323-24.) The military judge granted all 11 challenges. (R. at 335.) The defense had seven additional challenges. (R. at 335, 346.) The Government did not oppose two of those challenges. (R. at 335.) Of the remaining five challenges, the military judge denied four and granted one. (R. at 339, 343, 346, 351, 356.)

Two of the denied challenges involved Capt JT and Capt KB. For Capt KB, the Defense challenged because in "his answer to the government's question about holding someone accountable with mental health issues, he indicated, 'I don't believe people get a free pass in their actions.'" (R. at 343.) Appellant's counsel argued this and Capt KB's later answer that "there is always some level of responsibility on the member," indicated an inelastic predisposition to consider a defense, perhaps a lack of mental responsibility, or partial mental responsibility. (Id.) The military judge denied the challenged with an in-depth ruling. (R. at 346.)

For Capt JT, Appellant's counsel challenged for implied bias, arguing that Capt JT knew several witnesses and because Capt JT "seem[ed] to struggle with either understanding the questions that were being asked or – or understanding some of the basic legal concepts." (R. at 348.) The military judge denied the challenged with an in-depth ruling. (R. at 351.)

Appellant later employed his preemptory challenge on a separate panel member, and did not use it on either Capt KB or Capt JT. (R. at 366.)

Analysis

To begin, should this Court find in Issue II that the military judge did not err in refusing to give the lack of mental responsibility instruction to the members at trial, Appellant's issue here is moot as it relies solely on Capt JT's and Capt KB's responses to questions regarding that defense. If this Court determines the lack of mental responsibility defense was not raised in this case, Capt JT's and Capt KB's answers regarding this defense are irrelevant to the outcome of the case.

Additionally, the military judge, in ruling on the challenges for both Capt KB and Capt JT, analyzed the challenges on the basis of both actual and implied bias and the mandate to liberally grant defense challenges and placed that analysis on the record. (R. at 346, 351.)[7] Thus, for her rulings, the military judge should be given "great deference" on actual bias, "increased deference" on implied bias, and, because the military judge recognized his duty to liberally grant defense challenges and placed her reasoning on the record, a reversal of her exercise of discretion should "indeed be rare." *See* Napolitano, 53 M.J. at 166; Dockery, 76 M.J. at 96; Clay, 64 M.J. at 277.

[7] The military judge also repeatedly employed these analyses in other member challenges as well. *See*, for example, R. at 336, 342.

- *Capt JT*

For Capt JT, Appellant claims the "military judge erred in denying the defense's implied bias challenge of Capt JT." (App. Br. at 31.) Appellant claims the "heart of the challenge was Capt JT's ability to understand the crucial legal concepts that, at least at the time of voir dire, appeared to be the centerpiece of the trial: mental responsibility," adding that Capt JT's answers were "baffling" and "raise significant questions about his willingness to entertain the central defense, and even his ability to understand the underlying legal concepts." (Id. at 32.) Appellant is incorrect.

To start, as the military judge noted during voir dire, Appellant's counsel was asking Capt JT about legal concepts, namely mental responsibility, that had not yet been instructed to the members. Indeed, when the military judge stated to Capt JT, "I know sometimes during voir dire counsel ask questions kind of, in a vacuum, and because they want to talk about different concepts that will likely come into the court itself, but you don't have the instruction from the judge yet, right," Capt JT answered, "Right." (R. at 217.) The military judge would later tell Appellant's counsel, "you're asking questions based on instructions, that [Capt JT] doesn't have, and we don't have evidence presented yet." (R. at 220.)

However, when the military judge then asked Capt JT if he would set aside his personal views and follow the instructions given, even if they contradicted his personal beliefs, Capt JT responded, "Yes, yes, in this setting, yet." (R. at 217.) When asked by Appellant's counsel why he'd be able to do that, Capt JT responded as follows:

> Because, because perspective is one thing; however, instructions from the, as far as the authority setting, is still required in this environment. So, setting aside perspective, I think is a, it doesn't mean that it doesn't exist within myself, but it just means that in this

> setting, it needs to be set aside to continue. I suppose you're saying, if need be.

(Id.) Each of these answers shows Capt JT unequivocally knew that he needed to put aside any personal perspectives or beliefs he had and was required to follow, and in fact would follow, the military judge's instructions.

Additionally, a full review of the transcript shows Appellant's counsel's questions to Capt JT were quite lengthy and convoluted,[8] with a few questions being over 60 words in length covering five to six lines of transcript. Indeed, in denying Appellant's excusal request, the military judge stated Capt JT "was a little bit confused; some of the questions were long, and I don't know if that was partly due to a language barrier or just some of the – some of the broad questions." (R. at 351.) Moreover, the military judge had to interject at one point to more clearly ask Appellant counsel's question. (R. at 217.)

Yet, even in the face of these convoluted questions, when asked if "there could be a situation in which someone's mental condition could make them *not* responsible for their actions," Capt JT responded, "Potentially," before adding such a situation could include an "inaccurate medical diagnosis" or "actually a lot of variables." (R. at 219.) (emphasis added.) Here, even though Capt JT had not been instructed on what the lack of mental responsibility defense even meant, his answer here explicitly showed Capt JT was open to the defense of lack of mental responsibility (i.e., someone not being held responsibility for their actions due to a mental condition) under the right circumstances. (R. at 219.)

As opposed to Appellant's claim that Capt JT's answers "both raise significant questions about his willingness to entertain the central defense, and even his ability to understand the

[8] Even Appellant's counsel stated, "It's kind of convoluted . . . ." (R. at 217.)

underlying legal concepts,"[9] Capt JT's answers to both the military judge and Appellant's counsel show he was willing to entertain a mental responsibility defense and would follow the military judge's instructions.

Appellant's attempts to tie Capt JT's answers to other cases is misplaced. Appellant first relies on United States v. Rogers, 75 M.J. 270 (C.A.A.F. 2016). However, Appellant, in simply stating that "CAAF ultimately held the military judge abused her discretion by denying an implied bias challenge despite the potential member's statement that she could follow the law,"[10] fails to provide the full context as to why CAAF ruled in that appellant's favor.

In Rogers, a panel member had a "strongly held opinion" that "it was not possible for an intoxicated person to give consent to sexual activity under" the circumstances of the case. Id. CAAF found error because even though the member stated she could change her mind if so instructed by the military judge, the military judge (1) "never instructed or corrected" the member's misinterpretation of the law; (2) did not answer a question about the definition of "competent" (a word used in the definition of "consent") when asked by the member *during deliberations* (which the Court said effectively endorsed the member's erroneous understanding of the issue); and (3) did not instruct the member to disregard her personally held belief. Id. at 273-75.

To start, as opposed to the panel member in Rogers, Capt JT voiced no similar "strongly held opinion" about the issue of mental responsibility, and even stated that there were "a lot of variables" in terms of when someone's mental condition could make them *not* responsible for

[9] *See* App. Br. at 32.

[10] Id.

their actions. As opposed to the member in Rogers whose answer was wrong under the law, Capt JT here espoused an openness to the lack of mental responsibility concept even without an instruction from the military judge.

Additionally, the mental responsibility defense was correctly never instructed upon for the reasons stated in Issue II above. However, even during voir dire, the military judge told Capt JT that he would have to set his personal beliefs aside and follow the military judge's instructions. Capt JT agreed to do that. Additionally, the military judge made it well known to Appellant's counsel during voir dire that neither Capt JT nor any other panel member had been instructed on the mental responsibility issue because the evidence had not yet raised it. Undoubtedly, if the evidence at trial had actually raised, the military judge would have issued the lack of mental responsibility instruction which would have cured any alleged confusion Capt JT had on the mental responsibility issue. Rogers is not a comparable case here.

Next, Appellant turns to United States v. Keago, 84 M.J. 367 (C.A.A.F. 2024). Again, however, Appellant's attempt to compare his case falls short. There, one member "appeared to enter the court-martial – prior to the presentation of any evidence – believing that the Government had already established some portion of its case against Appellant," made concerning statements about the appellant's right to remain silent by stating that he would like to see the appellant testify to prove his innocence, and that he wanted to "hear the Defense's side of the story." Id. 84 M.J. at 374. Here, Appellant tries to compare that member's "confus[ion] about Appellant's presumption of innocence and right to remain silent" to Capt JT's supposed "confusion about the main thrust of [Appellant's] defense." (App. Br. at 33.)

Yet there is no comparison. First, as discussed above, there was no confusion from Capt JT. Second, nothing Capt JT said about mental responsibility comes close to what the member in

Keago stated. Further, while this member's particularly thinking about such basis rights as the presumption of innocence and the right to remain silent might cause a reasonable member of the public to wonder how an appellant could receive a fair trial, nothing Capt JT said rises to such a level. Here, nothing Capt JT said in response to both the military judge and Appellant's counsel would cause any reasonable member of the public to wonder whether Appellant received a fair trial in this case.

Appellant then attempts to compare Capt JT to another member in Keago who "suggested that she did not believe that mistake of fact was a viable defense to a sexual assault charge." Keago, 84 M.J. at 374. Again, however, Capt JT never said or even suggested he did not believe that a mental condition could not be a viable defense in Appellant's case.

Here, the military judge found Capt JT to be "very deliberate and thoughtful" and correctly found this was not a close call. Overall, any reasonable, disinterested observer would have come to the exact same conclusion as the military judge with regards to the challenge of Capt JT. Even Appellant's trial defense counsel did not think Capt JT's answers so egregious as to warrant the exercise of a peremptory challenge against him, choosing instead to challenge another member. Therefore, even under an objective standard, Appellant's claim of error provides no basis for relief from this Court. The military judge's decision not to grant the challenge for cause was not an error, and this Court should not disturb it.[11]

[11] While Appellant does not mention Capt JT's knowledge of potential witnesses in the title or the majority of his discussion for this issue, Appellant does allude to this issue in one sentence, stating, "And the fact that Capt JT had connections to so many witnesses only strengthened the case for the challenge." (App. Br. at 34.) However, as discussed by the military judge, Capt JT's "connections" with potential witnesses was slight at best. Capt JT had never seen Lt Col CT face-to-face or corresponded one-on-one. (R. at 205.) Capt JT only knew of AM through group emails and probably could not recognize him. (R. at 204.) Capt JT had interacted with TSgt JE approximately 10 times in the last two years and had not interacted with Lt Col EG in

- *Capt KB*

The same holds true for Capt KB. First, as noted by the military judge, Capt KB answered the military judge's questions where he indicated that he would follow the judge's instructions, and he would keep an open mind and consider the evidence that is presented, and apply the military judge's instructions as given to him. Additionally, the military judge correctly found that Capt KB's answers did not show an "inelastic predisposition" on the issue of mental responsibility. For one, Appellant's counsel's two questions regarding mental responsibility were made in a vacuum, devoid of any instruction on the defense of mental responsibility or what that defense entailed. Additionally, the questions themselves were broad and lacked context.

The first question just broadly asked if Capt KB believed that someone with a mental condition could *never* be held criminally responsible for their actions. Capt KB's answer of "No" here actually follows the law since, as discussed in Issue II above, someone can be held criminal responsible for their actions even if they have a mental condition, illness, or diagnosis. There should be no concern with Capt KB's answer to this question.

As to the second question, Appellant's counsel broadly asked whether "there could be a situation in which someone's mental health diagnosis is so severe that it negates their responsibility or do you believe that there is always a level of responsibility?" (R. at 240.) Noticeably absent from this question is the word "criminal" before "responsibility." Here, Appellant's counsel is broadly asking about responsibility overall – not criminal responsibility.

---

over a year and a half. (R. at 206.) For both, Capt JT said he would given neither any more weight than other people's testimony. Considering these circumstances, as found by the military judge, there is no implied bias here.

Likewise, Capt KB's response only speaks broadly to the concept of "some level of responsibility." Capt KB certainly does not say he believes that someone is always criminally responsible. As the trial counsel correctly noted while arguing to the military judge, "the words of saying responsibility and being held criminally responsible, those are different ideas." (R. at 344.)

Here, Appellant's broad questions about "responsibility" and Capt KB's broad responses about "responsibility" do not show an inelastic predisposition to the lack of mental responsibility defense, especially when Capt KB "did not have the luxury of having the court instructions or hearing any of the evidence." (R. at 346.) Here, contrary to Appellant's assertions, Capt KB did not express any opinion or belief that rose to the level of an actual bias or would cause a reasonable person to have doubts as to whether Appellant could receive a fair trial.

Finally, Appellant's reliance on United States v. Richardson, 61 M.J. 113, 119 (C.A.A.F. 2005), is misplaced as that case involved a military judge denying a defense request to re-open questioning of a particular member. As this Court highlighted in United States v. Covitz, ACM 40193, 2022 CCA LEXIS 563 (A.F. Ct. Crim. App. 30 September 2022), an appellant has the "burden of establishing the basis for his challenge, not the military judge." Id. at *36 (*citing* R.C.M. 912(f)(3); United States v. Wiesen, 57 M.J. 48, 49 (C.A.A.F. 2002). Noting that the defense in Covitz never requested the member in question to be called back, this Court, citing our sister court, stated "it is up to the parties to obtain the information from the members to support their respective positions." Id. at *36 (*citing* United States v. Mayo, ARMY 20140901, 2017 CCA LEXIS 239, at *7-8 (A. Ct. Crim. App. 7 April 2017) (unpub. op.) ("As is often the case, a military judge during voir dire knows little about the case, the evidence, or the parties'

theories at trial, which makes a judge poorly positioned to determine whether any one issue is important to the case.").[12]

Here, Appellant's contention that "[i]f the military judge believed more information was required, she could have easily obtained that information," is inapposite to this Court's holding in Covitz. Instead, Appellant had the burden of establishing the challenge, not the military judge, and neither Appellant nor his trial defense counsel ever sought to reexamine Capt KB to further expound on Capt KB's answers.

In all, the military judge did not abuse her "great discretion" in denying Appellant's challenge based on actual bias. Likewise, considering the lengthy rationale placed on the record by the military judge on both actual and implied bias, this case is not the "rare" instance when the military judge's discretion should be reversed.

Yet, as initially discussed above, Appellant's issue here is moot as the defense of lack of mental responsibility was not ultimately raised by the evidence in this case and was correctly not instructed to the members. Thus, any issues regarding Capt JT, Capt KB, and their thoughts on the issue of mental responsibility had no bearing on Appellant's convictions. Accordingly, this Court should deny Appellant's claim.

[12] While this Court found the military judge erred in Covitz by ultimately not excusing the member in question, the Court held this because "having a member who has lived in the Appellant's house – the very site of the charged offenses – alongside the victim and her children in a case in which the physical layout of the house was expected to be an issue was 'asking too much of both him and the system.'" Id. at *40.

IV.

THE RECORD OF TRIAL IS SUBSTANTIALLY COMPLETE.

Additional Facts

On 18 July 2022, the Fifth Air Force (5AF) Staff Judge Advocate (SJA) provided the General Court-Martial Convening Authority (GCMCA) pretrial advice and recommended the GCMCA select 24 members from the attached indorsement. (ROT, Vol. 3, Pretrial Advice.) The first indorsement shows the GCMCA's electronic initials on 24 of the 31 provided names. (Id.) All the provided and selected names were officers.

In the following months, eight members requested excusal from court-member duty. All eight requests are signed by the requesting member and/or other levels of command. Five of these requests are missing a concurrence signature from Col MR, the 35th Fighter Wing Commander and Special Court-Martial Convening Authority (SPCMCA). (*See* Excusal Requests from 1LT JM, Lt Col NH, Maj JR, Capt BD, and Capt EB.)

On 28 August 2022, Appellant elected to be tried by a panel of both officer and enlisted members.

On 19 October 2022, Col MR, the SPCMCA, in a memorandum to the GCMCA entitled *Replacement and Selection of Court Members*, noted the eight members who had requested excusal and stated, "I recommend approval of all the excusal requests." (ROT, Vol. 3.) Col MR also provided a listing of 25 potential enlisted members, 16 of which were initialed by Col MR. (Id.)

On 20 October 2022, the GCMCA issued Special Order A-3, which relieved the eight members who requested excusal and detailed 10 enlisted members. (ROT, Vol. 1.) All 10

enlisted members were listed on Col MR's memorandum, though some of them were not initialed by Col MR.

At trial, neither Appellant nor his trial defense counsel raised any issue regarding the member selection process.

Standard of Review

Whether a record of trial is complete and substantially verbatim is a question of law we review de novo. United States v. Henry, 53 M.J. 108, at 110 (C.A.A.F. 2000).

Law and Analysis

A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one. Henry, 53 M.J. at 111 (internal citations omitted). The determination of what constitutes a substantial omission from the record of trial is decided on a case-by-case basis. United States v. Abrams, 50 M.J. 361, 363 (C.A.A.F. 1999).

Here, Appellant complains that the ROT is incomplete because member selection paperwork associated with Special Order A-3, dated 20 October 2022, is not included in the ROT. However, the paperwork for this special order is not required as part of the official ROT so its omission is not in error.

First, Appellant cites to AF/JAJM's *Article 65/66 Review ROT and Attachments Assembly Checklist*, and claims, "A record of trial must include pretrial court member replacement requests and excusals." (App. Br. at 38.) However, as Appellant is forced to admit,

the replacement requests and excusals are contained in the record.[13] (*See* ROT, Vol. 3.) Moreover, the AF/JAJM checklist does not include a requirement to include court member selection sheets.

Appellant also cites to the Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial* (21 April 2021). However, Appellant fails to cite any portion of the DAFMAN that requires the inclusion of member selection paperwork. Indeed, DAFMAN 21-203 does not specifically state that member selection paperwork must be included in the allied papers.

Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice* (24 January 2024), paragraph 13.5, *Forwarding of Pretrial Advice in General Courts-Martial*, states that "If the GCMCA must detail members to a court-martial to try the forwarded case, appropriate documentation should be forwarded [in the pretrial advice] for court-member selection." Here, in the original pretrial advice from the 5AF SJA, appropriate documentation, including a listing of 24 potential members and their court-member data sheets, was provided to the GCMCA. Thus, this requirement was met and this documentation, minus the court-member data sheets, are included in the ROT.

Notably, this requirement is specifically for the pretrial advice and the original detailing of members to a court-martial by a GCMCA. The DAFI makes no similar document requirement for when a convening order is amended or when additional members are detailed to a court-martial. *See* DAFI 51-201, paragraph 14.4, 14.5.6. Yet, even if it did apply, the ROT

[13] While Appellant argues that the excusal memoranda did not contain all signatures, the only signature not contained on some excusal memoranda was from Col MR. However, Col MR later stated in his own memorandum that he concurred with the excusal of each member and recommended that the GCMCA excuse each member. The resulting convening order A-3 then excused each member. Thus, contrary to Appellant's claim, there is *no* question as to "whether the members were properly excused at all." (*See* App. Br. at 39.)

contains the SPCMCA's memorandum to the GCMCA which provided a listing of additional members and also contained court-member data sheets as an attachment.

This Court decided this exact issue in United States v. Grenald, ACM S32283, 2016 CCA LEXIS 414 (A.F. Ct. Crim. App. 14 July 2016). There, the appellant contended his record of trial was incomplete because it did include the member excusal and selection paperwork associated with a subsequent convening order. The appellant claimed this omission from the record of trial made it "impossible for his appellate counsel and this court to perform their duties under Article 66, UCMJ." Id. at *6. This Court disagreed.

While this Court stated it "would be preferable for the record of trial to include the document on which the convening authority indicated his personal decisions regarding" the subsequent convening order," this Court held, "However, we do not find the paperwork's absence in this case to be a substantial omission nor that it prevents us from fulfilling our responsibilities under Article 66, UCMJ." Id. at *6.

First, citing to R.C.M. 505(c)(1)(A), this Court noted that "[b]efore the court-martial is assembled, the convening authority may change the members of the court-martial without showing cause." Second, the Court highlighted that the record included "a convening order reflecting the intent of the convening authority to relieve one member and detail two others," even though "the order was signed 'For the Commander' by his Staff Judge Advocate, as were the other two convening orders." Id. This Court presumed the SJA was properly delegated the authority to publish the subsequent order as the convening authority had expressly directed her to do so for previous orders and also presumed the convening order properly reflected the convening authority's personal decision to relieve one member and select two others for Appellant's court-martial. Finally, this Court noted that the defense "did not raise an issue at trial

regarding the member selection process, nor does Appellant articulate any specific prejudice now regarding the absence of the paperwork from the record of trial." Id.

The same reasoning holds for this case as well. Here, the excusal and detailing of new members occurred prior to the court-martial being assembled. Further, the convening order reflecting the excusal or members and selection of new members was signed by the GCMCA's SJA, who this Court can presume had the authority to do so since she had signed the original convening order in a similar fashion. Finally, Appellant had ample opportunity to raise this issue at trial, but never did. He also has failed to articulate any specific prejudice now to this Court regarding the absence of the paperwork from the record of trial. Instead, just as the appellant did in Grenald, Appellant makes a generalized claim that the "absence of these documents impedes appellate review for [Appellant] and this Court" – a claim this Court rejected in Grenald. Id. at *6-7.

In sum, the paperwork at issue is not required for a ROT, nor is it a substantial omission if not included in the ROT. *See* Grenald, at *6-7. Appellant never raised any issue about court member selection at trial and the omission of this paperwork is insubstantial as member selection was not an issue at trial, nor before this Court. Finally, the convening authority is assumed to have fulfilled his obligations in selecting members. *See* United States v. Townsend, 12 M.J. 861, 862 (A.F.C.M.R. 1981) ("As a general principle, it is proper to assume that a convening authority is aware of his duties, powers and responsibilities and that he performs them satisfactorily.") Accordingly, this Court should deny Appellant's claim.

V.

APPELLANT IS ENTITLED TO NO RELIEF FOR ANY POST-TRIAL DELAY IN THIS CASE.

Additional Facts

Appellant was sentenced at his court-martial on 28 October 2022. Appellant's case was docketed with this Honorable Court on 8 June 2023, 223 days later. Appellant never asserted a right to speedy post-trial processing during this time.

In the next 9 months, Appellant's counsel submitted eight enlargement of time motions. In the eighth motion, Appellant's counsel wrote, "Appellant was informed of his right to a timely appeal and this request for enlargement of time, and Appellant agrees with this request for an enlargement of time." (App. Mot., dated 25 March 2024.) Appellant never asserted a right to speedy post-trial processing during this time.

On 29 March 2024, Appellant's counsel moved this Court to remand Appellant's record for correction. Appellant did not assert a right to speedy post-trial processing in the motion. After remand, this case was re-docketed with this Court on 13 June 2024, Appellant's counsel submitted another enlargement of time on 2 August 2024. For the first time, Appellant "demand[ed] speedy appellate review."

Standard of Review

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

Law

When evaluating post-trial constitutional due process complaints of delay, our superior Court has adopted the Supreme Court's analysis in Barker v. Wingo, 407 U.S. 514 (1972).

Moreno, 63 M.J. at 135. The four factors set forth in Barker are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 135 (*citing* Barker, 407 U.S. at 530). All of these factors are to be considered together with the relevant circumstances in the case. Id. at 136.

In Moreno, our superior Court established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision over 18 months after the case is docketed with the court. 63 M.J. at 142-143. Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633.

This Court now applies an aggregate standard threshold of 150 days from the day the appellant was sentenced to docketing with this Court. Id.

Absent a showing of prejudice, a due process violation warranting relief only occurs when, "in balancing the other three factors [for analyzing post-trial delays], the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).

In United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002), our superior Court determined that an appellant may be entitled to relief pursuant to a Court of Criminal Appeals Article 66(d) power "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' . . . if it deems relief appropriate under the circumstances." Tardif, 57 M.J. at 224. Post-trial delay does not require that relief be given under these circumstances; rather, appellate courts are

cautioned to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225. Additionally, this Court is guided by six factors described in United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). Relief under Article 66(d), UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Tardif, 57 M.J. at 225.

Analysis

The circumstances of this case do not warrant relief. For the reasons set forth below, Appellant's claim should be denied.

a. Moreno Analysis

The first factor, the length of delay, weighs slightly in Appellant's favor since this case exceeded the Livak standard of sentence to action by 73 days. While considered facially unreasonable, the circumstances of this case do not warrant relief. Additionally, our superior Court has not awarded relief even when the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.")

The second factor, the reasons for delay, also weighs slightly in the Appellant's favor. A review of the timeline of Appellant's post-trial processing shows that nearly 83% of the processing time was filled by transcribing the record. The record was certified on 2 May 2023, 186 days after Appellant was sentenced. The court reporter's chronology shows the court reporter had multiple week-long trials during this time and also shows the transcript was sent to counsel multiple times for revision.

However, once the transcript was certified, the SPCMCA legal office finalized the ROT in just three days before sending it along to 5 AF/JA on 5 May 2023. Though5 AF/JA did not receive the ROT until 16 May 2023, that delay was due to United States Postal Service shipping issues that were outside the control of either the Misawa legal office or 5 AF. (*See* Dec. of MSgt ST.) Yet, even then, 5 AF/JA completed its review of the ROT on 18 May 2023, only two days, before forwarding the ROT to JAJM. (Id.)

Post-trial processing of Appellant's case did not languish after his trial. Though the court reporter did not begin to transcribe this case until 7 December 2022, the post-trial processing was still ongoing, including the submission of matters by Appellant and his victims, as well as the GCMCA's Decision on Action all being completed during November 2022. Moreover, once the transcript was certified, the Misawa legal office completed the finalized the ROT in just three days and the 5 AF/JA completed its review in only two days. Thus, while the court reporter's chronology shows she had multiple cases ongoing during this time, the chronologies and MSgt ST's declaration shows Appellant's case was worked on a consistent basis throughout the timeframe from Appellant's sentencing to this Court's docketing.

The third factor, whether Appellant asserted his right to speedy post-trial processing, weighs heavily in the Government's favor. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (*quoting* Barker, 407 U.S. at 528).

As he concedes in his brief, Appellant asserted his right to timely appellate review for the first time on 2 August 2024, at the same time that he was asking for an enlargement of time to file his brief. However, Appellant never asserted this right during the 223 days between his sentence and this Court's docketing, never asserted it during the nine months his case was initially docketed with this Court, and then not for another two months after it was re-docketed with this Court. Further, Appellant fails to highlight that, although he was advised of his right to a timely appeal, he still specifically agreed to eight enlargements of time during this case's original docketing period.

Regarding prejudice because of this delay, our superior Court has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in case of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.

Notably, Appellant provided this Court no declaration addressing any alleged prejudice he has faced. Further, within his brief, Appellant offers no individualized bases for prejudice. He makes no claim of oppressive incarceration pending appeal nor does he claim any undue anxiety or concern. Instead, Appellant only states the delays "necessitated the addition of undersigned counsel who had to complete a review of the record due to prior counsel's unavailability." (App. Br. at 44.) However, Appellant fails to explain how receiving an additional appellate counsel prejudiced him in any fashion. Moreover, considering his lengthy

brief with multiple issues raised, Appellant has failed to show any impairment to his grounds for appeal due to the addition of an appellate counsel.

All told, Appellant has faced no prejudice due to the delay between his sentencing and docketing with this Court. Thus, Appellant's Moreno claim for relief should be denied.

As to relief pursuant to Toohey, our superior Court held that a delay of 481 days between sentencing and convening authority action was "not severe enough to taint public perception of the military justice system," adding that it did not involve the years of post-trial delay seen in Moreno and Toohey.[14] *See* Anderson, 82 M.J. at 86. The reasons for delay in that case included delays in "creating the transcript or authenticating the record of trial." Id. at 86-87. Notably in Anderson, the appellant made three speedy trial requests to the Chief of Justice, but "there was no indication that [the Chief of Justice] took any steps to speed the process beyond confirming that the military judge had the record." Additionally, the military judge in that case took 298 days to authenticate the record. Id.

Despite the appellant's repeated assertion of his speedy trial rights and the 481-day delay, our superior Court still granted no Toohey relief because there "is no indication of bad faith on the part of any of the Government actors," and "no indication of prejudice." Id. at 88. The Court continued, "Though we cannot condone the military judge's unsubstantiated delay in authenticating a fairly straightforward trial record, we find it difficult to imagine these circumstances causing the public to doubt the entire military justice system's fairness and integrity." Id.

[14] Toohey involved a six-year delay from the end of the appellant's trial to the lower court issuing a decision. Toohey, 63 M.J. at 362.

The same can be said in this case. Here, there is no indication of bad faith on the part of any Government actor and there is no indication of prejudice. Further, the delay in this case, is 258 days less than the delay in Anderson. Using our superior Court's reasoning and basis for not granting Toohey relief in Anderson, this Court should likewise grant Appellant no relief in this case.

b. Tardif Analysis

Appellant's case does not warrant relief under Tardif either. As discussed above, 86% of the post-trial processing time in this case was due to the transcript of this case. However, the court reporter's chronology shows this was not due to an indifference or lackadaisical approach to this case. Moreover, both immediately after the sentence and then immediately after the transcript was complete, the SPCMCA and GCMCA legal offices worked expeditiously to complete post-trial processing in this case as quickly as possible. There is no showing in this case of either bad faith or gross indifference in the overall post-trial processing of this case.

Moreover, there is no evidence of harm, either to Appellant or institutionally, caused by the delay in this case. While Appellant states, "To the extent the [Moreno] prejudice analysis above did not persuade the Court, at the very least there is still 'some evidence of harm,'" Appellant fails to explain what that harm is. (*See* App. Br. at 44-45.) Further, there is no evidence that the delay has lessened the disciplinary effect of any particular aspect of Appellant's sentence, and any granted relief would be inconsistent with the dual goals of justice and good order and discipline. Moreover, Appellant has failed to show any "gross indifference" or "systemic institutional neglect" on the part of Misawa AB or 5 AF/JA.

Finally, while this Court recently granted sentence relief pursuant to Tardif and Gay in United States v. Hennessy, ACM 40439, 2024 CCA LEXIS 343 (A.F. Ct. Crim. App. 20 August

2024), that case involved a sentence-to-docketing timeline of 412 days, more than one-and-a-half times the delay in this case. This Court should deny this assignment of error.

VI.

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

Standard of Review

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

Law and Analysis

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

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

This Court recently held in its published opinion in United States v. Vanzant, 84 M.J. 671 (A.F. Ct. Crim. App. 2024), that 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are beyond the scope of this Court's

jurisdiction under Article 66, UCMJ. Id. at 681. Our superior Court also recently held in United States v. Williams, 2024 CAAF LEXIS 501, __ M.J. __, at *12-15 (C.A.A.F. 5 September 2024), that service courts of criminal appeal have no authority to act upon the portion of the statement of trial results that references the firearms prohibition.

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

Even if this Court has jurisdiction to review this issue, the Staff Judge Advocate followed the appropriate Air Force regulations in signing the first indorsement to the STR and EOJ. DAFI 51-201, dated 14 April 2022, paras. 29.30, 29.32, because Appellant was found guilty of multiple offenses punishable by imprisonment for a term exceeding one year.

- ***The Firearm Prohibition in the Gun Control Act of 1968 is Constitutional as Applied to Appellant and His Convictions are Crimes of Violence.***

Because Appellant has been convicted by a general court-martial of serious crimes, application of 18 U.S.C. 922(g) to him is constitutional. *See* United States v. Rahimi, 144 S. Ct. 1889, 1897, Docket No. 22-915, 2024 U.S. LEXIS 2714 (21 June 2024) (slip op.); District of Columbia v. Heller, 554 U.S. 570, 626 (2008); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 20 (2022); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010); Barrett v. United States, 423 U.S. 212, 220 (1976), Lewis v. United States, 445 U.S. 55, 62 (1980)

Appellant's argument presumes, incorrectly, that his crime was not a violent offense or "crime of violence." (App. Grostefon Br. at 2.) However, federal law defines the term "crime of violence" as "an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §§ 924(c)(3)(A), 3156(a)(4)(A). Appellant's act of chasing CT and AM with a knife meets that definition.

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

VII.

APPELLANT'S CONVICTIONS ARE LEGALLY SUFFICIENT.

Standard of Review and Law

The standard of review and law pertinent to this issue is the same as that in Issue I above.

Analysis

In Issue I, Appellant claimed his convictions of the Article 90 offense and of Specification 1 of the Article 92 offense were factually insufficient. Now, he also claims they are legally insufficient. (App. Grostefon Br. at 6.) However, Appellant provides no additional reasoning here as to why his convictions are legally insufficient. Instead, he states, "For the reasons discussed in the main brief in Assignment of Error I, the convictions for disobeying orders and dereliction of duty challenged as factually insufficient are also legally insufficient." (Id.) For the same reasons discussed in Issue I above, Appellant's conviction for the Article 90 offense and of Specification 1 of Article 92 are legal sufficient.

Appellant next takes issue with his Article 89 and Article 91 convictions, claiming "his convictions for assaulting his superior commissioned officer and insubordinate conduct towards a noncommissioned officer are legally insufficient because of lack of mental responsibility." (App. Grostefon Br. at 6.) Notably, Appellant again never questions any of the proof for any of the elements of these offenses. Instead, Appellant rests his argument on his continuing claim regarding the lack of mental responsibility defense.

However, as discussed in Issue II above, the military judge correctly found that Appellant at trial failed to raise "some evidence" of this defense. Indeed, there is no evidence in the record showing Appellant could not appreciate the wrongfulness of his actions or the nature and quality of his acts. Moreover, even if the military judge had instructed the panel on the defense, Appellant has also failed to show by clear and convincing evidence that he was not mentally responsible at the time of the alleged offense. Thus, for the same reasons discussed in Issue II above, Appellant's claim of lack of mental responsibility lacks merit as it relates to all of his convictions, including his Article 89 and Article 91 convictions. Here, the record shows Appellant's convictions are legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[redacted]

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

[redacted]

MATTHEW D. TALCOTT, Colonel, USAF
Chief, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 26 November 2024 via electronic filing.

[redacted]

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Special Panel
Airman (E-2) **BRIAN D. HOWARD,** United States Air Force *Appellant*	)	No. ACM 40478 (f rev) 29 November 2024

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

Appellant, Airman (Amn) Brian D. Howard, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer, dated 26 November 2024 (Ans.). In addition to the arguments in his opening brief, filed on 29 September 2024 (App. Br.), Amn Howard submits the following arguments.

I.

WHETHER AIRMAN HOWARD'S DISOBEYING ORDERS AND DERELICTION OF DUTY CONVICTIONS ARE FACTUALLY INSUFFICIENT AND TWO OF HIS DERELICTION OF DUTY CONVICTIONS ARE LEGALLY INSUFFICIENT.

1. Disobeying TC's order to pack and go to the terminal.

Amn Howard's chief argument was the legal impossibility of compliance with CT's order to pack and go the passenger terminal. (App. Br. at 12.) To support its claim that Amn Howard never intended to board the plane, the Government asks this Court to consider that Amn Howard was previously scheduled for a flight that he did not board. (Ans. at 13.) This spillover-type argument seeks to transplant

Amn Howard's intent from a week earlier and relates to an offense of which the members acquitted Amn Howard. This Court should pause before resting a conviction on such unstable grounds.

2. Willful Dereliction for Failure to Out-Process

In his opening brief, Amn Howard focused on the unclear duty underlying the dereliction offense. This was evident to the Government at trial. It had to compensate for its failure to introduce documentary evidence of the out-processing requirements by arguing the classic cover for absence of evidence, "you use your common sense and your knowledge in the ways of the world, when you move bases or leave the Air Force you gotta out-process." (R. at 795.) The Government on appeal does not address this point, instead relying on AM's description of some of the appointments that he scheduled for Amn Howard.

But in so doing, the Government downplays a key part of AM's testimony. The Government claims that AM's scheduling of appointments for Amn Howard shows "there were no agencies that were 'difficult to contact.'" (Ans. at 16.) Yet this conflicts with AM's own testimony, when he acknowledged it was an exercise week at Misawa Air Base and there was difficulty contacting agencies, such that he had to get assistance from other First Sergeants. (R. at 627–28.) And if "common sense and knowledge of the ways of the world," rather than evidence, is our guide, consider who would get more traction trying to schedule appointments and close out checklists: an Airman or a First Sergeant with the help of other First Sergeants?

3. Failure to Board Flight V272

Amn Howard maintains his impossibility defense for this Specification: he could not board the flight because he was detained. Regarding the flight number, the Government points out that "V272" is located in a string of other digits and numbers: "TKCV2720A137." (Ans. at 18.) At least the Government on appeal has done more than the Government at trial by trying to connect the evidence to the charge sheet. But the number and letters are in the "MISSION" section of Prosecution Exhibit 5 and is not clearly the flight number. At trial, the Government focused on the show time for the rotator and did not bother to have the witness explain what flight number it was. (R. at 526–35.) These should be easy, checklist-type steps in a direct examination. But the Government failed to do so, and it cannot correct its omissions on appeal.

4. Failure to Board Flight JA154

The Government asks this Court to review the erroneous flight number in the record as purely an issue of variance, not of sufficiency. (Ans. at 19.) But the framing of the issue matters, and variance was not raised. Indeed, cases that apply variance often do so in response to a finding with exceptions and substitutions, not a pure error in the findings. *See United States v. Lee,* 1 M.J. 15, 16 (C.M.A. 1975) (addressing a certified question where a military judge found the appellant guilty by exceptions and substitutions); *United States v. Treat*, 73 M.J. 331, 336 (C.A.A.F. 2014) (same); *United States v. Miller*, 34 M.J. 598, 599–600 (A.C.M.R. 1992) (same). *But see United States v. Mann*, 50 M.J. 689, 699 (A.F. Ct. Crim. App. 1999) (which cited *Lee* and *Miller* but

did not involve exceptions and substitutions).[1] Of note, the members had the chance to make exceptions and substitutions when they noticed the Government's error, but they did not. (App. Ex. XXIX; R. at 838.)

In *United States v. English*, the Court of Appeals for the Armed Forces noted that variance allowed a factfinder to make exceptions and substitutions, but that appellate courts have no discretion to make such exceptions and substitutions. 79 M.J. 116, 122 & n.6 (C.A.A.F. 2019) ("While we do not doubt that multiple methods of force were readily available for the Government to present at trial, absent a finding by exceptions and substitutions under R.C.M. 918 at trial, those alternatives were precluded by the specific language included in Specification 6 of Charge I."). This Court should not take a step that the members could have, but did not, take.

To the degree this Court finds *Mann* applicable and thus binding, Amn Howard preserves this argument for further appellate review.

WHEREFORE, Amn Howard respectfully requests this Honorable Court set aside the findings for the Specification of Charge III and Specifications 1-3 of Charge V, and the sentence.

[1] Other cases involve distinguishable date issues. *See, e.g.*, *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993). *But see United States v. Simmons*, 82 M.J. 134, 138 (C.A.A.F. 2022) (citing *Hunt* and discussing how it addressed a material variance date issue "in a factual sufficiency context").

II.

WHETHER THE MILITARY JUDGE ERRED WHEN SHE REFUSED TO INSTRUCT ON LACK OF MENTAL RESPONSIBILITY.

The starting point for this analysis is that "[a]ny doubt whether an instruction should be given should be resolved in favor of the accused." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (citing *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981)). And there was doubt here. There are four issues to note in the Government's response.

First, the test is whether "some evidence" at trial put the defense in issue. And it is revealing that the Government is selective about the evidence that it emphasizes. For instance, some of the key testimony about Amn Howard's behavior came from Lieutenant Colonel EG. (App. Br. at 3–5, 18.) The Government recites her testimony in the facts section, but entirely neglects to discuss it during its analysis, except to emphasize that she saw Amn Howard a year before the incident. (Ans. at 25–26, 29.)

This links to the second point. The Government complains that the providers who gave evidence about Amn Howard's behavior, and about bipolar disorder in general, saw Amn Howard long before the incident. This is true, but not as important as the Government asserts. Amn Howard's providers explained the symptoms he manifested and opined on whether his close-to-the-incident behaviors were indicative of manic episodes. (App. Br. at 3–5, 18.) It should have been the members' decision on whether this evidence was clear and convincing.

Third, the Government contends the evidence cited in the opening brief was up to a week prior to the incident, and points out that Amn Howard had lucid periods before and after the incident. (Ans. at 29, 32.) But this is not a problem when read in light of the trial testimony. Dr. SF testified that bipolar disorder can wax and wane over time, with different people coming in and out of manic episodes in different ways. (R. at 697–98.) A manic episode lasts at least a week, by definition. (R. at 701.) Thus, the providers' opinions about behavior from the week before the incident remain highly relevant. One provider also explained that even during the manic episodes, a person suffering from mania "could definitely still have normal conversations with people." (*Id.*) Consequently, it is unsurprising that Amn Howard had periods of calm near the incident.

Fourth, the Government repeatedly points to the sanity board result, which was not introduced at trial. (Ans. at 29, 33, 35.) This has no bearing on the instruction decision and should not be part of this Court's analysis. *United States v. Best*, 61 M.J. 376, 382 (C.A.A.F. 2005) (sanity boards do not bind a court-martial on the question of mental responsibility).

WHEREFORE, Amn Howard respectfully requests this Honorable Court set aside the findings and the sentence.

III.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE DENIED CHALLENGES FOR CAUSE AGAINST TWO PANEL MEMBERS WHO QUESTIONED THE CENTRAL DEFENSE OF LACK OF MENTAL RESPONSIBILITY.

Amn Howard's mental responsibility—whether through the lack of mental responsibility instruction he desired (*see* AOE II) or the partial lack of mental responsibility instruction he received (R. at 773–76)—was central to the trial. Yet before even reaching the merits of the member challenge issue, the Government invites this Court to commit clear reversible error. The Government asserts, without citation to authority of any kind, that this Court can find the member challenges mooted if the lack of mental responsibility instruction was not required. (Ans. at 40.)

Although there are many problems with this argument, two stand out. First, there is no prejudice analysis on a member challenge issue. (*See* App. Br. at 36 n.5. (collecting cases).) Against this the Government cites nothing. Second, even if this Court accepts the Government's flawed position that AOE II *could* moot AOE III, it would not on these facts. That is because the military judge instructed the members on the defense of partial lack of mental responsibility. (*See, e.g.*, R. at 774 ("An accused, because of some underlying mental disease, defect, or condition, may be mentally incapable of having the knowledge of the certain duties alleged in Specifications, specifically Specifications 1 through 3."); *see also* App. Br. at 23–24.) Thus, this Court should reject that Government's deeply wrong assertion that "any issues regarding Capt JT, Capt KB, and their thoughts on the issue of mental

responsibility had no bearing on Appellant's convictions." (Ans. at 48.) It should instead address the issue on the merits.

1. Capt JT

The Government takes the maximalist approach, claiming that "nothing" Capt JT said during voir dire would "cause any reasonable member of the public to wonder whether Appellant received a fair trial in this case." (Ans. at 45.) But after Capt JT's confusing voir dire, it is hard to understand what he believed about mental responsibility and accountability.[2] For instance, the Circuit Defense Counsel (CDC) tried to clarify the confusing answers and got this reply on how an inaccurate diagnosis would affect his belief: "Yes, that would be a potential and depending on if the individual follows-up, I suppose, this is an if scenario, if it was conveyed to them, the individual and how they follow-up with the treatment plan, I suppose." (R. at 219.) The CDC tried to figure out what this meant, and the military judge shut down the line of questioning. (R. at 220.)

It is fair to say that neither this Court nor the military judge knows what Capt JT believed at the end of his voir dire. This suffices to support the defense's

[2] Some examples: (1) "So, even if it was, I suppose the, the state of the person is in, the action has been performed, so there is, I suppose, accountability or consequences of that action still exists." (R. at 216); (2) "Because, because perspective is one thing; however, instructions from the, as far as the authority setting, is still required in this environment. So, setting aside perspective, I think is a, it doesn't mean that it doesn't exist within myself, but it just means that in this setting, it needs to be set aside to continue. *I suppose you're saying*, if need be." (R. at 217 (emphasis added)); (3) Or when asked about what could cause lack of mental responsibility, he responded, "That would be based on, that would be based on inaccurate diagnosis. Inaccurate, medical diagnosis, and how it — there's actually a lot of variables and so it's hard to say." (R. at 219.)

implied bias challenge. Where mental responsibility was central to the trial, it should concern an objective member of the public that a panel member believes mental responsibility might hinge on compliance with a treatment plan.

The military judge's ruling also downplayed a central issue: Capt JT's confusion about the defense of mental responsibility. (R. at 351.) The military judge acknowledged Capt JT's confusion but did not elaborate in her ruling. (*Id.*) And while the Government calls Capt JT's answers "explicit[]" and "unequivocal[]," (Ans. at 42), this Court should read the bewildering voir dire for what it is: a basis for an objective member of the public to be concerned about the fairness of Amn Howard's court-martial.

2. Capt KB

Capt KB believed a person was always responsible for their actions, even with a severe mental health condition. (R. at 240.) The Government urges this Court to overlook his answers and makes two problematic arguments in the process. First, it draws a supposed distinction between "criminal responsibility" in his first answer and "responsibility" in his second. (Ans. at 46–47.) The Government claims that Capt KB was only discussing "responsibility" when he said someone is always responsible, and that this does not relate to criminal responsibility. But what other responsibility matters in a criminal trial? And the follow up question from the CDC was "talk me through your thought process in that question?" (R. at 240.) So, it was a direct follow-up question to the criminal responsibility question. Even if the

Government on appeal puts this spin on the voir dire, that is certainly not in line with the military judge's ruling.

Second, the Government ignores the important point that the military judge mistakenly considered Capt KB's answers on different questions when ruling against the implied bias challenge on this mental responsibility issue. The Government repeats the military judge's error, claiming that "[Capt KB] indicated that he would follow the judge's instructions, and he would keep an open mind and consider the evidence that is presented, and apply the military judge's instructions as given to him." (Ans. at 65.) (The military judge, in her ruling, stated that "[Capt KB] said repeatedly he would keep an open mind during all the evidence." (R. at 346).)

But Capt KB's actual answers do not show this. Only twice was he asked about willingness to follow instructions, and those involved his prior court-martial experience and his experience administering nonjudicial punishment. (*See* R. at 236, 238.) Given his answers on responsibility, Capt KB's status as a member would adversely affect public perception of the court-martial's fairness. *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015) ("The core of that objective test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel.").

WHEREFORE, Amn Howard respectfully requests this Honorable Court set aside the findings and sentence.

IV.

WHETHER THE RECORD OF TRIAL'S OMISSION OF COURT MEMBER SELECTION SHEETS REQUIRES RELIEF OR, AT A MINIMUM, REMAND FOR CORRECTION.

The Government focuses exclusively on whether the omission is substantial. The Government does not address whether this Court should remand for correction. As this Court said in *United States v. Grenald*, and the Government quotes, "it 'would be preferable for the record of trial to include the document on which the convening authority indicated his personal decisions regarding' the subsequent convening order." (Ans. at 52 (citing ACM S32283, 2016 CCA LEXIS 414 (A.F. Ct. Crim. App. 14 Jul. 2016).) While presumably not a concession from the Government, it is telling that it offers no argument against remand.

WHEREFORE, Amn Howard respectfully requests this Honorable Court provide sentencing relief or a remand for correction.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 29 November 2024.

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

26 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO EXCEED PAGE LIMIT
v.	)	
	)	ACM 40478 (f rev)
Airman (E-3) BRIAN D. HOWARD, USAF *Appellant*.	)	Panel No. 1

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

Pursuant to Rules 17.3 and 23.3(q) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States moves to file its Answer to Appellant's Assignments of Error in excess of Rule 17.3's page length limitations.[1] This Answer requires exceeding this Honorable Court's length limitation due to the nature and number of issues raised by Appellant in his Assignments of Error brief.

On 29 September 2024, Appellant filed his Assignments of Error brief. The brief raises a total of seven issues, five raised through counsel and two raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982). Appellant raises factual and/or legal sufficiency claims involving six of his convictions, requiring in-depth discussions of the facts and witness testimonies regarding each of those convictions. Appellant also raises issues regarding instruction rulings and member challenges, requiring in-depth analysis on discussions between parties, the military judge, and two members during voir dire. Finally, Appellant raises post-trial delay and record of trial completeness issues, requiring analysis of Appellant's record of trial and post-trial processing.

GRANTED
3 DEC 2024

[1] While the 65-page filing does exceed 50 pages, it does not exceed 20,000 words. *See* Rule 17.3.

Additionally, Appellant's brief on the five issues raised by counsel spans 45 pages. Appellant's Grostefon brief, in which he raises two additional issues, spans an additional seven pages. While Appellant's brief does not exceed this Court's 50-page limitation because Appellant's Grostefon brief is listed as an appendix and therefore excluded from Rule 17.3's page count, the Government is still required to completely and comprehensively respond to all seven issues, which span over 50 pages in Appellant's filing. The Government should, in kind, be allowed to exceed this Court's 50-page limitation to completely and comprehensively respond to those issues.

WHEREFORE, the United States respectfully requests this Court grant this motion to exceed length limitations in its Answer.

G. MATT OSBORN, Lt Col, USAF
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 26 November 2024 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40478 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Brian D. HOWARD	)	**PANEL CHANGE**
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 13th day of December, 2024,

ORDERED:

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

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40478 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Brian D. HOWARD	)	**PANEL CHANGE**
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 2d day of June, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

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

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

CHRISTIAN A. BOND, SrA, USAF
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40478 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Brian D. HOWARD	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 4th day of August, 2025,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Special Panel and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

AGNIESZKA M. GAERTNER, Capt, USAF
Commissioner