IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**APPELLANT'S CONSENT MOTION TO EXAMINE SEALED MATERIAL**
v.	)	
	)	Before Panel 2
Airman Basic (E-1) **JULIUS VONGPHACHANH,** United States Air Force, *Appellant*	)	No. ACM 40741
	)	5 February 2025

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

Pursuant to Rules 3.1(c) and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial 1113(b)(3(B)(i), Appellant moves for both parties to examine the following sealed material:

- Appellate Exhibit LXV, portions of Department of the Air Force Manual 31-115, *Department of the Air Force Corrections System*, vol. I (22 Dec. 2020) (seven pages), which the military judge ordered sealed on page 310 of the trial transcript.

All parties at trial had access to the sealed appellate exhibit. *See* Trial Tr. at 306. Appellate defense counsel's review of the sealed material is necessary to conduct a complete review of the record of trial and to be able to advocate competently on Appellant's behalf.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by Appellant.

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

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 5 February 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40741**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Julius VONGPHACHANH	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 4 February 2025, Appellant's counsel submitted a Consent Motion to Examine Sealed Material, requesting counsel for both parties be allowed to examine Appellate Exhibit LXV, ordered sealed by the military judge. The exhibit was reviewed by the parties at trial. Appellant's counsel avers counsel for the Government consents to this motion.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." R.C.M. 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2024 ed.).

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 7th day of February, 2025,

ORDERED:

Appellant's Consent Motion to Examine Sealed Material is **GRANTED**.

Appellate defense counsel and appellate government counsel may view **Appellate Exhibit LXV**, subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Deputy Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40741**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Julius VONGPHACHANH	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 5 February 2025, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. Appellant's counsel calculated the current due date for Appellant's brief is 18 February 2025, which is 63 days after this case was docketed with the court. Appellant's counsel cites Rules 18(d)(1) and 15 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals (Joint Rules) as the basis for requesting a delay of more than 60 days. In general opposition to the motion, the Government did not comment on Appellant's calculations of time.

Joint Rule 18(d)(1) states, inter alia, that an "appellant's brief shall be filed no later than 60 days after the Court has received the record of trial pursuant to Article 65(b), UCMJ, and has docketed the case." JT. CT. CRIM. APP. R. 18(d)(1). Joint Rule 15 states:

> In computing any period of time prescribed or allowed by these rues, order of the Court, or any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, or a day on which the Court is closed when the act to be done is the filing of a paper with the Court, in which event the period runs until the end of the net day that is not a Saturday, Sunday, holiday, or day on which the Court is closed. Unless specified otherwise, "day" indicates calendar day, and shall end at 2359 Eastern Time.

JT. CT. CRIM. APP. R. 15.

Rule 23.3 of this court's Rules of Practice and Procedure provides that an "appellant's first motion for enlargement may be granted for up to 60 calendar

days and does not require a showing of good cause." A. F. CT. CRIM. APP. R. 23.3(m)(2).

The court has considered Appellant's motion, the Government's opposition, the Joint Rules, and this court's Rules of Practice and Procedure. Sixty calendar days after docketing this case is Saturday, 15 February 2025. However, based on JT. CT. CRIM. APP. R. 18(d)(1), the 60th day after docketing is computed as 18 February 2025, because 15–17 February 2025 comprise a weekend and a federal holiday. Therefore, we agree with Appellant that his initial assignment of error brief is due to this court on 18 February 2025.

The question this motion presents is whether we grant Appellant an extension of more than 60 days from 18 February 2025 to file an initial brief or grant fewer days. In accordance with Rule 23.3(m), we decline to grant Appellant's request for an enlargement of more than 60 calendar days.

Accordingly, it is by the court on this 12th day of February, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED IN PART**. Appellant shall file any assignments of error **not later than 16 April 2025**.

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits.

Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to the 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. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time if counsel previously replied in the affirmative.

Counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal. *See* A. F. CT. CRIM. APP. R. 23.4.

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

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGMENT OF TIME (FIRST)**
v.	)	
	)	Before Panel 2
Airman Basic (E-1) **JULIUS VONGPHACHANH,** United States Air Force, *Appellant*	)	No. ACM 40741
	)	5 February 2025

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 a first enlargement of time to file his brief. Appellant's case was docketed on 17 December 2024. By operation of Rules 18(d)(1) and 15 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant's brief is currently due on Tuesday, 18 February 2025. Appellant requests an enlargement for a period of 60 days, which, by operation of Joint Rule 15, will end on Monday, **21 April 2025**. From the date of docketing to today, 50 days have elapsed. On the date requested, 125 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested first enlargement of time.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 5 February 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

7 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JULIUS VONGPHACHANH, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40741 Panel No. 2

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
[redacted]

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 7 February 2025.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel 2
Julius VONGPHACHANH	)	
Airman Basic (E-1)	)	No. ACM 40741
United States Air Force, *Appellant*	)	1 April 2025

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

Pursuant to Rule 23.3(m)(1) of this Honorable Court's Rules of Practice and Procedure, Appellant, Airman Basic Julius Vongphachanh, hereby moves for a second enlargement of time to file his brief to expire on 16 May 2025.

In accordance with Rule 23.3(m)(4), the undersigned counsel notes the following. Appellant's case was docketed on 17 December 2024. From that date until today, 105 days have elapsed. On the requested date, 150 days will have elapsed.

At a general court-martial convened by Commander, United States Air Force Warfare Center (ACC), and tried at Nellis Air Force Base, Nevada, on 3 January, 8 to 10 April, 20 May, and 17 to 27 June 2024, a panel consisting of officer and enlisted members found Appellant guilty of one specification of wrongfully and willfully discharging a firearm under circumstances such as to endanger human life and one specification of carrying a concealed weapon, both in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914. The panel found him not guilty of one specification of murder in violation of Article 118, UCMJ, 10 U.S.C. § 918, and one specification of manslaughter in violation of Article 119, UCMJ, 10 U.S.C. § 919. Trial Tr. at 1687; App. Ex. CXXIII. Appellant had pleaded not guilty to all charges and specifications. Trial Tr. at 12. The military judge sentenced him to a reprimand, a bad-conduct discharge, total

forfeiture of pay and allowances, and confinement for a total of 360 days. Trial Tr. at 1747–48. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action (11 Jul. 2024).

The trial transcript in Appellant's case is 1748-pages-long. The record contains fifty-one prosecution exhibits, seventeen defense exhibits, and 126 appellate exhibits. Appellant is not confined.

The undersigned counsel has reviewed the entire transcript in Appellant's case, has identified issues for further research and briefing, and has begun to draft a brief. However, because of work on cases that have been pending before this Court longer than Appellant's, in several of which the appellant is confined, the undersigned counsel has been unable to complete the brief through no fault of Appellant's.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested second enlargement of time.

Respectfully submitted,

[redacted]

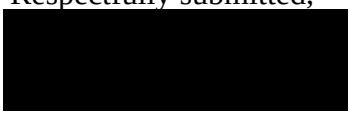
Dwight H. Sullivan
Appellate Defense Counsel

[redacted]

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



Dwight H. Sullivan
Appellate Defense Counsel

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Airman Basic (E-1) **JULIUS VONGPHACHANH,** United States Air Force, *Appellant.*	)	No. ACM 40741
	)	3 April 2025

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]

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 April 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGMENT OF TIME (SECOND)[1]**
v.	)	
	)	Before Panel 2
Airman Basic (E-1) **JULIUS VONGPHACHANH,** United States Air Force, *Appellant*	)	No. ACM 40741
	)	4 April 2025

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

Pursuant to Rule 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 May 2025**. The record of trial was docketed with this Court on 17 December 2024. From the date of docketing to the present date, 108 days have elapsed. On the date requested, 150 days will have elapsed.

At a general court-martial convened by Commander, United States Air Force Warfare Center (ACC), and tried at Nellis Air Force Base, Nevada, on 3 January, 8 to 10 April, 20 May, and 17 to 27 June 2024, a panel consisting of officer and enlisted members found Appellant guilty of one specification of wrongfully and willfully discharging a firearm under circumstances such as to endanger human life and one specification of carrying a concealed weapon, both in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914. The panel found him not guilty of one specification of murder in violation of Article 118, UCMJ, 10 U.S.C. § 918, and one specification of manslaughter in violation of Article 119, UCMJ, 10 U.S.C. § 919. Trial Tr. at 1687; App. Ex. CXXIII. Appellant had pleaded not guilty to all charges and specifications.

[1] In compliance with Rule 23.3(m)(1), Appellant's counsel previously filed a Motion for Enlargement of Time on 1 April 2025. However, the prior motion was denied pursuant to this Court's 12 February 2025 Order. In response to this denial, undersigned counsel has filed this corrected Motion for Enlargement of Time.

Trial Tr. at 12. The military judge sentenced him to a reprimand, a bad-conduct discharge, total forfeiture of pay and allowances, and confinement for a total of 360 days. Trial Tr. at 1747–48. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action (11 Jul. 2024).

The trial transcript in Appellant's case is 1748-pages-long. The record contains fifty-one prosecution exhibits, seventeen defense exhibits, and 126 appellate exhibits. Appellant is not confined.

Appellant' counsel has reviewed the entire transcript in Appellant's case, has identified issues for further research and briefing, and has begun to draft a brief. However, because of work on cases that have been pending before this Court longer than Appellant's, in several of which the appellant is confined, the counsel has been unable to complete the brief through no fault of Appellant.

Appellant was advised on his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested second enlargement of time.

Respectfully submitted,

[redacted]

JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 4 April 2025.

Respectfully submitted,

JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) **JULIUS VONGPHACHANH,** United States Air Force, *Appellant.*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME Before Panel No. 2 No. ACM 40741 8 April 2025

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]

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

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 8 April 2025.

[redacted]
JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel 2
Julius VONGPHACHANH	)	
Airman Basic (E-1)	)	No. ACM 40741
United States Air Force, *Appellant*	)	9 May 2025

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

Pursuant to Rule 23.3(m)(1) of this Honorable Court's Rules of Practice and Procedure, Appellant, Airman Basic Julius Vongphachanh, hereby moves for a third enlargement of time to file his brief of twenty-eight days to expire on 13 June 2025.

In accordance with Rule 23.3(m)(4), the undersigned counsel notes the following. Appellant's case was docketed on 17 December 2024. From that date until today, 143 days have elapsed. On the requested date, 178 days will have elapsed.

At a general court-martial convened by Commander, United States Air Force Warfare Center (ACC), and tried at Nellis Air Force Base, Nevada, on 3 January, 8 to 10 April, 20 May, and 17 to 27 June 2024, a panel consisting of officer and enlisted members found Appellant guilty of one specification of wrongfully and willfully discharging a firearm under circumstances such as to endanger human life and one specification of carrying a concealed weapon, both in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914. The panel found him not guilty of one specification of murder in violation of Article 118, UCMJ, 10 U.S.C. § 918, and one specification of manslaughter in violation of Article 119, UCMJ, 10 U.S.C. § 919. Trial Tr. at 1687; App. Ex. CXXIII. Appellant had pleaded not guilty to all charges and specifications. Trial Tr. at 12. The military judge sentenced him to a reprimand, a bad-conduct discharge, total

forfeiture of pay and allowances, and confinement for a total of 360 days. Trial Tr. at 1747–48. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action (11 Jul. 2024).

The trial transcript in Appellant's case is 1748-pages-long. The record contains fifty-one prosecution exhibits, seventeen defense exhibits, and 126 appellate exhibits. Appellant is not confined.

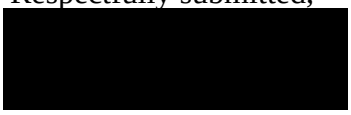
The undersigned counsel has reviewed the entire transcript in Appellant's case, has identified issues for further research and briefing, and has begun to draft a brief. However, because of work on cases that have been pending before this Court longer than Appellant's and an upcoming filing deadline with the Court of Appeals for the Armed Forces, the undersigned counsel has been unable to complete the brief through no fault of Appellant's.

In accordance with this Court's order of 12 February 2025, counsel notes the following: (1) Appellant has been advised of his right to timely appeal;[1] (2) Appellant has been updated on the status of counsel's progress on his case; (3) Appellant was advised of this request for a third enlargement of time; and (4) Appellant agrees with this request for an enlargement of time.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested third enlargement of time.

[1] Counsel acknowledges that this Court's order of 12 February 2025 provided that this question need not be answered in subsequent motions for enlargement of time if counsel previously replied in the affirmative. Counsel nevertheless includes this information for purposes of maintaining the 12 February 2025 order's numbering system.

Respectfully submitted,

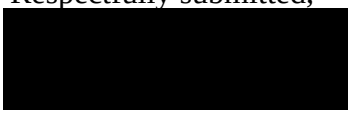


Dwight H. Sullivan
Appellate Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 9 May 2025.

Respectfully submitted,



Dwight H. Sullivan
Appellate Defense Counsel

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Airman Basic (E-1) **JULIUS VONGPHACHANH,** United States Air Force, *Appellant.*	)	No. ACM 40741
	)	13 May 2025

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]

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

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 13 May 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Panel 2
Airman Basic (E-1) **JULIUS VONGPHACHANH**, United States Air Force, *Appellant*.	)	No. ACM 40741
	)	13 June 2025

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

Assignments of Error

I.

The finding of guilty to carrying a concealed weapon is factually insufficient because the prosecution failed to prove beyond a reasonable doubt that Appellant concealed the pistol he was carrying or that the manner in which he carried the pistol was unlawful.

II.

The military judge committed plain error by instructing the members that "[t]he carrying of a concealed weapon may be inferred to be unlawful in the absence of evidence to the contrary."

III.

The convening authority erred by failing to act on Appellant's request to commute the adjudged forfeitures.

IV.

The 173-day delay from sentencing to docketing of this case with this Court was presumptively unreasonable, warranting appropriate relief.

V.

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

Statement of the Case

Appellant, Airman Basic Julius Vongphachanh, U.S. Air Force, was tried at Nellis Air Force Base, Nevada, and the North Las Vegas Municipal Courthouse, Nevada, on 3 January, 8 to 10 April, 20 May, and 17 to 27 June 2024, by a general court-martial convened by the Commander, United States Air Force Warfare Center (ACC). Contrary to Appellant's pleas, a panel consisting of officer and enlisted members found him guilty of one specification of wrongfully and willfully discharging a firearm under circumstances such as to endanger human life and one specification of carrying a concealed weapon, both in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914.[2] Consistent with Appellant's pleas, the panel found him not guilty of one specification of murder in violation of Article 118, UCMJ, 10 U.S.C. § 918, and one specification of manslaughter in violation of Article 119, UCMJ, 10 U.S.C. § 919.[3] The military judge sentenced Appellant to a reprimand, a bad-conduct discharge, total forfeiture of pay and allowances, and confinement for a total of 360 days.[4] The military

[1] The defense raises this assignment of error for issue preservation purposes.
[2] Trial Tr. at 12, 1687; App. Ex. CXXIII. The version of the UCMJ in effect at the time of the alleged offenses was that reprinted in Appendix 2 of the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.), as amended by the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019); the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (2021); and the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021). None of those statutes amended Article 114, 118, or 119, UCMJ.
[3] Trial Tr. at 12, 1687; App. Ex. CXXIII.
[4] Trial Tr. at 1747. The military judge imposed 345 days of confinement for Charge I, Specification 1, and fifteen days of confinement for Charge I, Specification 2. *Id.* He ordered that the confinement terms run consecutively. *Id.*

judge awarded Appellant 287 days of pretrial confinement credit.[5] The convening authority took no action on the findings or sentence.[6]

Appellant's case was docketed with this Court on 17 December 2024,[7] 173 days after sentencing.

Statement of Facts

Appellant was charged with four offenses, all of which arose from a house party in North Las Vegas on 3 July 2022.[8] A civilian man, AM, was shot in the head at the party.[9] He later died while hospitalized.[10] The court-martial members found Appellant not guilty of murder and manslaughter in connection with AM's death.[11] The members convicted Appellant of one specification of wrongfully and willfully discharging a firearm under circumstances such as to endanger human life and one specification of carrying a concealed weapon.[12]

At trial, the defense did not dispute that Appellant possessed a pistol on 3 July 2022 and fired two shots at the party.[13] Appellant's 9mm Luger semiautomatic pistol was black with a Polymer80 frame.[14] During an interrogation by civilian Las Vegas Metropolitan Police Department detectives, Appellant recounted that after gunfire erupted at the party, "I shot in the

[5] *Id.* at 1693, 1748.
[6] Convening Authority Decision on Action (11 Jul. 2024).
[7] AFCCA Court Docket, https://afcca.law.af.mil/docket.html, last accessed 10 June 2025.
[8] Charge Sheet.
[9] Trial Tr. at 860–61, 912, 923; Pros. Ex. 9.
[10] Pros. Ex. 16.
[11] Trial Tr. at 1687; App. Ex. CXXIII.
[12] Trial Tr. at 1687; App. Ex. CXXIII.
[13] *See*, *e.g.*, Trial Tr. at 1085.
[14] *Id.* at 1076, 1247; Pros. Ex. 24 at 1; Pros. Ex. 25 at 1; Pros. Ex. 26 at 26.

air."[15] He explained that he decided his "best option was to shoot into the sky" to deter whoever else was shooting.[16]

The only evidence the prosecution's closing argument cited as purportedly proving that Appellant concealed the pistol he possessed at the party was the testimony of IM-A, a civilian acquaintance of Appellant's.[17] IM-A went to the party at issue after attending another party.[18] The party at issue was very crowded, with approximately 100 people jammed into a walled backyard.[19] The yard was not well-lit; attendees described it as "dark."[20] IM-A and Appellant went to the party separately.[21] IM-A drank before arriving at the party and drank more once there.[22] He testified that at the time of the party, "I wasn't drunk, drunk. I was still pretty sober," but he suggested his lack of memory concerning events a short time later was "probably" the result of his drinking.[23]

During IM-A's direct examination by the prosecution, the following exchange occurred:

Q. Okay. Did you see Juju [Appellant's nickname] there?

A. Yes.

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[15] Trial Tr. at 1085.
[16] *Id.* at 1086.
[17] *Id.* at 1631–32. During closing argument, the special trial counsel also told the members that while Appellant was at the party, "no one, for more than 2 hours, saw him openly carrying a handgun. It was obviously concealed." *Id.* at 1632. The special trial counsel's argument that "no one, for more than 2 hours, saw him openly carrying a handgun" is unsupported by the evidence. The only person who testified to seeing Appellant at the party was IM-A. The evidence does not establish whether any other partygoer who encountered Appellant did or did not see the handgun he possessed.
[18] *Id.* at 946.
[19] *Id.* at 909, 948, 977; Def. Ex. F.
[20] Trial Tr. at 928 (testimony of JA-L, who attended the party, that "the back yard was dark, all dark"); *id.* at 1085 (Appellant telling a civilian Las Vegas Metropolitan Police Department detective, "The whole place was dark, mind you. . . . The whole place was dark, so it's kind of hard to see, especially with the group."). *See also id.* at 881, 887–89 (testimony of WC-Q, who attended the party, that the area where the fight broke out was particularly dark).
[21] *Id.* at 948.
[22] *Id.* at 977.
[23] *Id.* at 981.

Q. Did you see a weapon on him?

A. No, I hadn't, not that night.[24]

Later, during cross-examination, IM-A answered "No" when asked, "Do you know if Airman Basic Vongphachanh had a gun."[25] IM-A also testified that his brother, JA-C, did not have a firearm.[26] The senior defense counsel pressed: "Do you know for a fact he didn't?" IM-A answered, "Yes."[27] IM-A also testified about a fight that broke out at the party.[28] IM-A's brother, JA-C, was one of the combatants.[29] Another witness, WC-Q, testified that at the beginning of that altercation, JA-C brandished a firearm.[30] During closing argument, the defense argued that it was JA-C who actually shot and killed AM.[31]

In response to the prosecution's question about where Appellant was when the fight broke out, IM-A testified that "[h]e was, like, on the side of me, kind of, like behind, but on the side, if that makes sense."[32] The exchange continued:

Q. . . . So did he – when you were next to the fight, he was there next to you?

A. Yeah.

Q. Now were you two participating in the fight?

A. No. Well I wasn't.

Q. You weren't.

A. No.

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[24] *Id.* at 948.
[25] *Id.* at 978.
[26] *Id.* at 977.
[27] *Id.*
[28] *Id.* at 949–50.
[29] *Id.* at 978.
[30] *Id.* at 888.
[31] *Id.* at 1655–57.
[32] *Id.* at 951.

Q. Okay. Did you see if Juju was participating in the fight?

A. No.

Q. Okay. No you didn't see him or no he wasn't?

A. No I didn't see.[33]

A few seconds after the fight began, gunfire erupted in the backyard.[34] The crowd scattered when the shooting started.[35] IM-A agreed that the scene was chaotic, with many people pushing and shoving and some scaling a wall around the backyard.[36] IM-A testified that he did not see Appellant when the shooting started.[37] The Las Vegas Metropolitan Police Department homicide detectives who investigated the case determined that five shots were fired.[38] Appellant fired two of them; he later told police detectives that he shot into the air.[39] Those shots were the basis for Appellant's conviction of Charge I, Specification 1.

During the prosecution's case-in-chief, Sergeant (Sgt) AS of the Las Vegas Metropolitan Police Department testified.[40] Sgt AS's roles included serving as the sergeant of the Concealed Weapons Section.[41] Sgt AS testified that a concealed weapons permit, known as a "CCW," is required to carry a weapon in a manner that is not discernible to the public.[42] Sgt AS further testified that Appellant was not in a database of individuals to whom the state of Nevada had ever

[33] *Id. See also id.* at 953 (IM-A answering "Yeah" after being asked, "When you were making your way to the gate, you said when the fight started, Juju was right next to you. Is that right? When the fight was going on?").
[34] *Id.* at 978.
[35] *Id.* at 978–79.
[36] *Id.* at 979.
[37] *Id.* at 953.
[38] *Id.* at 1021.
[39] *Id.* at 1085.
[40] *Id.* at 1225.
[41] *Id.*
[42] *Id.* at 1226.

issued a CCW permit.[43] He also testified that while Nevada has concealed carry reciprocity with some states, it does not with California.[44] During his interrogation by Las Vegas Metropolitan Police Department detectives, when asked, "Where are your from," Appellant responded, "California."[45]

Sgt AS also testified that Nevada is an open carry state, meaning that "you would not have to possess any type of permit or license to carry a firearm open, which means discernible to the public."[46] When asked whether "open carry could be tucking the barrel of the gun into pants, having the handle exposed," AS replied, "Yes, as long as part of the weapon is discernible to the public, that would be considered open carry."[47] He also testified that to legally "possess a handgun" in Nevada, "you basically have to be 21."[48] Appellant turned twenty-one years old two days before 3 July 2022, the date of the charged offenses.[49]

During his findings instructions, the military judge instructed the members that "[t]he carrying of a concealed weapon may be inferred to be unlawful in the absence of evidence to the contrary. However, the drawing of this inference is not required."[50] Neither party objected to that instruction.[51]

During findings argument, the special trial counsel displayed a slide to the members that said, in part, "The carrying of a concealed weapon may be inferred to be unlawful in the absence

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[43] *Id.* at 1229.
[44] *Id.* at 1228.
[45] *Id.* at 1038–39.
[46] *Id.*
[47] *Id.* at 1230.
[48] *Id.* at 1232.
[49] *Id.* at 1447.
[50] *Id.* at 1595; App. Ex. CXXII at 2. *See also* Trial Tr. at 1579–80 (the military judge and the parties discussing that instruction).
[51] Trial Tr. at 1665.

of evidence to the contrary."[52] The portion of that quotation starting with "may be" was emphasized by being written in red.[53] In addition to displaying that slide, the trial counsel orally told the members that carrying a concealed weapon "may be inferred to be unlawful in the absence of evidence to the contrary. But we have the evidence."[54] After noting Appellant's arrival at the party at approximately 2230, the special trial counsel argued, "[IM-A] says, 'I did not see the accused with a handgun. I was standing right next to him.'"[55] The special trial counsel continued, "And the accused left the party at about approximately 0045 hours, certainly no later than that. And no one, for more than 2 hours, saw him openly carrying a handgun. It was obviously concealed. Don't check your common sense at the door."[56]

During closing argument, the senior defense counsel "very briefly" addressed "the concealed carry charge":

> Now what evidence do you have of that? Well members, you have this instruction. It has to be intentionally covered or kept from sight. You also have one of the Sergeants testifying about Nevada's open carry law. And so members, if he had the gun and it was sticking out and you could tell it was a gun, then he is within his rights under Nevada law. And that is a lawful carry.
>
> And what evidence do you have that he pulled up his shirt, pulled it out, and put two in the sky? No one will testify to that. What you have is [IM-A] saying, "I did not see him with a gun." You also have [IM-A] saying, "I didn't see [JA-C] with a gun either." And so members, I would ask you to evaluate the credibility of the only witness that the government had to establish that he was concealing his weapon that night.[57]

The members found Appellant guilty of the carrying a concealed weapon specification.[58]

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[52] App. Ex. CXX.
[53] *Id.*
[54] Trial Tr. at 1631.
[55] *Id.*
[56] *Id.* at 1631–32. *See supra* note 17 concerning the special trial counsel's claim that "no one, for more than 2 hours, saw him openly carrying a handgun."
[57] Trial Tr. at 1655.
[58] *Id.* at 1687; App. Ex. CXXIII.

Additional facts relevant to specific assignments of error are set out below, as warranted.

Argument

I.

The finding of guilty to carrying a concealed weapon is factually insufficient because the prosecution failed to prove beyond a reasonable doubt that Appellant concealed the pistol he was carrying or that the manner in which he carried the pistol was unlawful.

Standard of Review

This Court reviews issues of factual sufficiency de novo.[59]

Law and Analysis

This case—in which both findings of guilty were for offenses allegedly committed on or about 3 July 2022—is subject to this Court's factual sufficiency review authority under the version of Article 66(d)(1)(B), UCMJ, enacted by section 542(b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021.[60] Under that provision, this Court may conduct a factual sufficiency review "upon request of the accused if the accused makes a specific showing of a deficiency in proof."[61] Appellant makes such a request and, as demonstrated below, makes a specific showing of deficiency of proof that the pistol Appellant carried on 3 July 2022 was concealed and that the manner in which he carried it was unlawful.

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[59] *United States v. Cabuhat*, 83 M.J. 755, 770 (A.F. Ct. Crim. App. 2023) (en banc), *petition denied*, 84 M.J. 275 (C.A.A.F. 2024).

[60] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611 (2021). The amendment of Article 66 enacted by section 539E of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021), applies only to cases in which all findings of guilty are for offenses occurring after December 27, 2023. *Id.* at § 539E(f), 135 Stat. at 1706. Hence, that amendment is inapplicable to this case. The amendment of Article 66 enacted by section 544 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 did not affect subsection (d)(1). Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022).

[61] UCMJ art. 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B).

"[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."[62] If 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."[63] The Court of Appeals for the Armed Forces has explained:

> [F]or a CCA to be "clearly convinced that the finding of guilty was against the weight of the evidence," two requirements must be met. First, the CCA must decide that the evidence, as the CCA has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt. Second, the CCA must be clearly convinced of the correctness of this decision.[64]

When conducting a factual sufficiency review, this 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."[65]

Charge I, Specification 2 alleged that Appellant "did, at or near Las Vegas, Nevada, on or about 3 July 2022, unlawfully carry on or about his person a concealed weapon, to wit: a handgun."[66] That offense has three elements: (1) "That the accused carried a certain weapon concealed on or about the accused's person;" (2) "That the carrying was unlawful; and" (3) "That the weapon was a dangerous weapon."[67] The *Manual for Courts-Martial* explains that "[a] weapon is concealed when it is carried by a person and intentionally covered or kept from sight."[68]

The only evidence the prosecution produced as to whether Appellant concealed the handgun he carried on 3 July 2022 was the testimony of IM-A. Although the special trial counsel

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[62] *United States v. Harvey*, 85 M.J. 127, 131 (C.A.A.F. 2024).
[63] UCMJ art. 66(d)(1)(B)(iii), 10 U.S.C. § 866(d)(1)(B)(iii).
[64] *Harvey*, 85 M.J. at 132.
[65] UCMJ art. 66(d)(1)(B)(ii), 10 U.S.C. § 866(d)(1)(B)(ii).
[66] DD Form 458, Charge Sheet.
[67] *MCM*, Pt. IV, ¶ 52.b.(7) (2019 ed.).
[68] *Id.*, Pt. IV, ¶ 52.c.(4)(a).

told the members that "no one" at the party "saw [Appellant] openly carrying a handgun,"[69] that statement was entirely without factual support.[70] IM-A is the only person who testified to seeing Appellant at the party. The extent to which other partygoers who saw Appellant did or did not discern that he was carrying the handgun is unknown. And it was the Government's responsibility to produce that evidence, not the Appellant's to refute it. The special trial counsel's statement to the members about what other partygoers did or did not see was improper argument of facts not in evidence. This Court limits its factual sufficiency review "to the evidence produced at trial" and, therefore, "cannot speculate about testimony from witnesses that were not called."[71]

IM-A's testimony is woefully insufficient to establish *beyond a reasonable doubt* that Appellant concealed his handgun. First, as the senior defense counsel emphasized during the findings argument, IM-A was not a credible witness. He testified that his brother was not armed at the party while another witness credibly testified that he was.[72] There is a "real possibility"[73] that IM-A was lying when he testified that he did not see a weapon on Appellant, just as there is a real possibility he was lying when he testified that his brother was not armed at the party.

But even if IM-A's testimony that he did not see a weapon on Appellant was truthful, it was still insufficient to prove beyond a reasonable doubt that Appellant was carrying a concealed

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[69] Trial Tr. at 1631–32.
[70] *See supra* note 17.
[71] *United States v. Rice*, No. ACM 39071 (reh), 2021 CCA LEXIS 37, at *13 (A.F. Ct. Crim. App. Jan. 29, 2021).
[72] *Contrast* Trial Tr. at 977 (testimony of IM-A that he knew for a fact that JA-C was not armed at the party), *with id.* at 888 (testimony of WC-Q that JA-C was armed and brandished a firearm at the party).
[73] *United States v. Meeks*, 41 M.J. 150, 157 n.2 (C.M.A. 1994) (approvingly citing Federal Judicial Center, Pattern Criminal Jury Instructions 17–18 (1987)); *United States v. McClour*, 76 M.J. 23, 26 (C.A.A.F. 2017). *See also United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199, at *25 (N-M. Ct. Crim. App. June 8, 2020) ("If we believe there is a 'real possibility' that he is not guilty, there is reasonable doubt, and we cannot affirm Appellant's conviction.").

weapon for at least three reasons. First, the party was dark and the area where IM-A testified he was near Appellant was particularly dark.[74] He might not have seen the weapon on Appellant because of the darkness. This is particularly so because the pistol Appellant was carrying is black:[75]

Moreover, the pistol is fairly small. Extrapolating from the measurements displayed on page 26 of Prosecution Exhibit 26, the slide is less than eight inches long and the top of the slide to the bottom of the magazine well is approximately five inches. Due to the party venue's darkness and the firearm's color and size, there is more than a "real possibility" that IM-A would not have noticed the black pistol even if some or all of it was uncovered.

[74] *See*, *e.g.*, Trial Tr. at 881, 887–89, 928, 1085.
[75] Pros. Ex. 26 at 26.

Second, the prosecution failed to establish what opportunity IM-A had to observe Appellant. IM-A did not travel to the party with Appellant.[76] He testified that he saw Appellant at the party.[77] He also testified that when the fight broke out, Appellant "was, like, on the side of me, kind of, like behind, but on the side."[78] That is hardly a vantage point from which IM-A would have had a 360-degree view of Appellant's torso. Yet that is the only information the prosecution elicited concerning IM-A's proximity to Appellant. The prosecution failed to establish how long IM-A saw Appellant at the party. The prosecution failed to establish what portions of Appellant's body were visible to IM-A in the crowded backyard. The prosecution failed to establish the lighting conditions when IM-A saw Appellant in the dark backyard. IM-A's testimony would be consistent with catching a mere glimpse of Appellant's face immediately before the fight broke out. The responsibility for the negligible evidence concerning IM-A's observation of Appellant lies entirely with the prosecution.

Third, IM-A had been drinking that night, both at a previous party and at the party at issue.[79] His alcohol intake probably affected his ability to perceive and accurately remember what he perceived.[80]

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[76] Trial Tr. at 948.
[77] *Id.* at 948.
[78] *Id.* at 951.
[79] *Id.* at 977. IM-A's self-characterization as not "drunk, drunk" but "still pretty sober," yet sufficiently intoxicated to interfere with his memory of events minutes later, *id.* at 981, is not credible.
[80] *See Schinagel v. City of Albuquerque*, No. Civ. 07-481 LH/RLP, 2009 U.S. Dist. LEXIS 134197, *21 (D.N.M. Mar. 25, 2009) ("That alcohol may affect perception is within most lay witnesses' observations and does not require expert testimony."). *Accord Harris v. Clark*, No. 06-C-529, 2009 U.S. Dist. LEXIS 63643, at *7 n.1 (E.D. Wis. June 19, 2009) ("The effect of alcohol on a person's perceptions and behavior is a matter within the ordinary knowledge of an average juror. *Conde v. Starlight I, Inc.*, 103 F.3d 210, 213 (1st Cir. 1997) (holding that expert toxicology testimony not required to establish likely effects of alcohol consumption) . . . .").

In addition to failing to prove *beyond a reasonable doubt* that Appellant's handgun was concealed as that term is used in the military justice system, the prosecution also failed to prove beyond a reasonable doubt that the manner in which Appellant carried the pistol was unlawful. Sgt AS of the Las Vegas Metropolitan Police Department testified that it was lawful in Nevada for a twenty-one-year-old to carry a handgun "as long as part of the weapon is discernible to the public."[81] For the same reasons as discussed above, IM-A's testimony does not establish beyond a reasonable doubt that no part of the pistol Appellant carried was discernible to the public. Rather, the Government's case revolved around speculation about whether the handgun was unlawfully concealed as opposed to evidence affirmatively showing that it was. The finding of guilty to Charge I, Specification 2 is, therefore, factually insufficient.

Remedy

For the foregoing reasons, this Court should set aside the finding of guilty to Charge I, Specification 2 and dismiss that specification with prejudice. This Court should also set aside the fifteen days of confinement the military judge imposed for that offense, which was served consecutively with the sentence he received for the other conviction.[82] However, Appellant has already served his entire term of confinement. To provide appropriate relief, in addition to setting aside the confinement, this Court should also set aside the adjudged forfeitures. Doing so should result in Appellant receiving pay for the fifteen days during which his liberty was erroneously deprived. This Court should also set aside the adjudged reprimand because, as issued by the convening authority, it refers to "illegally carrying" a loaded firearm.[83]

[81] *Id.* at 1230.
[82] *Id.* at 1747.
[83] Convening Authority Decision on Action at ¶ 5 (11 Jul. 2024).

WHEREFORE, this Honorable Court should set aside the finding of guilty to Charge I, Specification 2, and affirm a sentence of a bad-conduct discharge and confinement for 345 days.

II.

The military judge committed plain error by instructing the members that "[t]he carrying of a concealed weapon may be inferred to be unlawful in the absence of evidence to the contrary."

Standard of Review

"Whether a panel was properly instructed is a question of law reviewed de novo."[84]

Law and Analysis

On 17 March 2025, this Court issued a significant opinion construing the Article 114, UCMJ, offense of carrying a concealed weapon: *United States v. Caswell*.[85] That opinion broke with previous case law holding that under the version of the carrying a concealed weapon offense that preceded the Military Justice Act of 2016's effective date, the fact-finder may infer that carrying a concealed firearm is unlawful absent evidence to the contrary.[86] This Court observed that in the wake of the Supreme Court's 2022 decision in *New York State Rifle & Pistol Association v. Bruen*, "an individual has a presumed constitutional right to carry a weapon on their person for self-defense."[87] This Court noted "that *Bruen* highlights the vast differences in state law with respect to how many states have their own criteria for licensing and carrying weapons."[88] This Court concluded:

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[84] *United States v. Hale*, 78 M.J. 268, 274 (C.A.A.F. 2019) (quoting *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011)).
[85] *United States v. Caswell*, No. ACM 23035, 2025 CCA LEXIS 98 (A.F Ct. Crim. App. Mar. 17, 2025), *petition filed*, __ M.J. __, No. 25-0162/AF, 2025 CAAF LEXIS 361 (C.A.A.F. May 12, 2025).
[86] *Id.* at *24–25 (citing, *inter alia*, *United States v. Lyons*, 33 M.J. 88 (C.M.A. 1991)).
[87] *Id.* at *25 (citing *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022)).
[88] *Id.*

> Given the complex nature of this right and its possible curtailments, we decline to carry over any previous presumption of unlawful action on the part of any Airman or Guardian who carries a weapon on his or her person, nor will we make illogical and unreasonable connections about this conduct as it relates to any state or local law, especially when a servicemember is off-duty and off-base.[89]

In this case, which involved an Airman in a non-duty status at an off-base party, the military judge instructed the members that "[t]he carrying of a concealed weapon may be inferred to be unlawful in the absence of evidence to the contrary."[90] As *Caswell* establishes, that was error.[91]

[89] *Id.*

[90] Trial Tr. at 1595; App. Ex. CXXII at 2. *See also* Trial Tr. at 1579–80 (the military judge and the parties discussing that instruction).

[91] To whatever extent *Caswell*'s status as an unpublished opinion affects this Court's application of its reasoning, *see* A.F. Ct. Crim. App. R. 30.4, this Court should independently adopt its rationale, ideally in a published, precedential ruling.

Where the defense has not preserved an instructional issue, absent waiver,[92] an appellate court tests for plain error.[93] "Under a plain error analysis, the accused has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused."[94] Here, all three conditions are satisfied.

The military judge's instruction on the permissive inference of illegality was erroneous.[95] As this Court has held, that permissive inference was extinguished upon the carrying a concealed

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[92] Here, there was no waiver, in part, because the law had changed while Appellant's case was pending on appeal. The Court of Appeals for the Armed Forces explained in *United States v. Davis* that waiver will not be found "when there is a new rule of law, when the law was previously unsettled, and when the trial court reached a decision contrary to a subsequent rule." *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (citation modified). The Court of Appeals for the Armed Forces' 2022 opinion in *United States v. Schmidt*, 82 M.J. 68 (C.A.A.F. 2022), reaffirmed *Davis*'s "new rule of law" paradigm in a manner that firmly establishes its applicability here. *Schmidt* dealt with whether a military judge erred when instructing the members concerning what "in the presence of" means for purposes of Article 120b(c), UCMJ. *Id.* at 71–72. Judge Sparks concluded that the "trial defense counsel's failure to object was not waiver given the unsettled nature of the law at the time of Appellant's court-martial," applying *Davis*'s "new rule of law" paradigm. *Id.* at 73 (opinion of Sparks, J.). Judge Sparks reasoned that "there was no binding precedent demonstrating that 'in the presence of' required victim awareness. Accordingly, trial defense counsel's failure to object was not waiver given the unsettled nature of the law at the time of Appellant's court-martial." *Id.* at 73 (opinion of Sparks, J.). Chief Judge Ohlson, joined by Senior Judge Erdmann, "agree[d] with Judge Sparks that this is not a waiver case." *Id.* at 74 (Ohlson, C.J., joined by Erdmann, S.J., concurring in the judgment). Judge Maggs, joined by Judge Hardy, agreed that waiver does not apply "when a new rule of law exists." *Id.* at 81 (Maggs, J., joined by Hardy, J., concurring in the judgment) (quoting *Davis*, 79 M.J. at 332). They disagreed with the other three judges concerning whether a new rule of law arose between the trial and appeal. Judge Maggs and Judge Hardy concluded there was no such new rule of law because "[a]ll the authorities that Appellant cites in support of his argument predate his trial. . . . Appellant is thus not asking for the benefit of a new rule announced during the pendency of his appeal, and is therefore not entitled to plain error review." *Id.* Here, Appellant *is* asking for the benefit of a new rule announced during the pendency of his appeal. Thus, as *Davis* and *Schmidt* make clear, Appellant's challenge to the military judge's permissive inference instruction is not waived. *See also* R.C.M. 920(f), *MCM* (2019 ed.) ("Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection.").

[93] *United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017).

[94] *United States v. Payne*, 73 M.J. 19, 23 (C.A.A.F. 2014).

[95] This point is not intended to cast blame on the military judge, who applied the law as it existed at the time of trial. As Judge Ryan observed in *United States v. Harcrow*, "Appellant is entitled to

weapon offense's migration from a presidentially enumerated Article 134 offense to a standalone UCMJ punitive article.[96]

The military judge's error was both plain and obvious. Whether the error was plain or obvious is evaluated "based on the law at the time of appeal," even if "the law at the time of trial was settled and clearly contrary to the law at the time of appeal."[97] Contrary to the state of the law at the time of trial, this Court's 17 March 2025 *Caswell* opinion makes clear that the permissive inference is no longer available, "especially when," as here, "a servicemember is off-duty and off-base."[98]

Finally, the error prejudiced Appellant's substantial rights. The right at issue—to be convicted only upon "evidence" that meets the Government's burden to prove "beyond a reasonable doubt that a person who was carrying a concealed weapon was unauthorized to do so by law"[99]—is substantial. The military judge's erroneous instruction prejudiced that right. Not only did the military judge's instructions allow the members to convict absent any evidence of illegality, but the prosecution exploited the permissive inference in its closing argument. The special trial counsel both orally quoted the military judge's permissive inference instruction and displayed a portion of it to the members visually in blood-red splendor:[100]

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avail himself of the plain error doctrine here only because [a subsequent appellate decision] announced a 'new rule' while his case was on direct review—not because the military judge in this case did anything wrong." 66 M.J. 154, 160 (C.A.A.F. 2008) (Ryan, J., concurring). Similarly, here, Appellant is entitled to have his conviction reversed due to the military judge's instruction on the permissive inference because this Court's *Caswell* opinion "announced a 'new rule' while his case was on direct review" and "not because the military judge in this case did anything wrong."

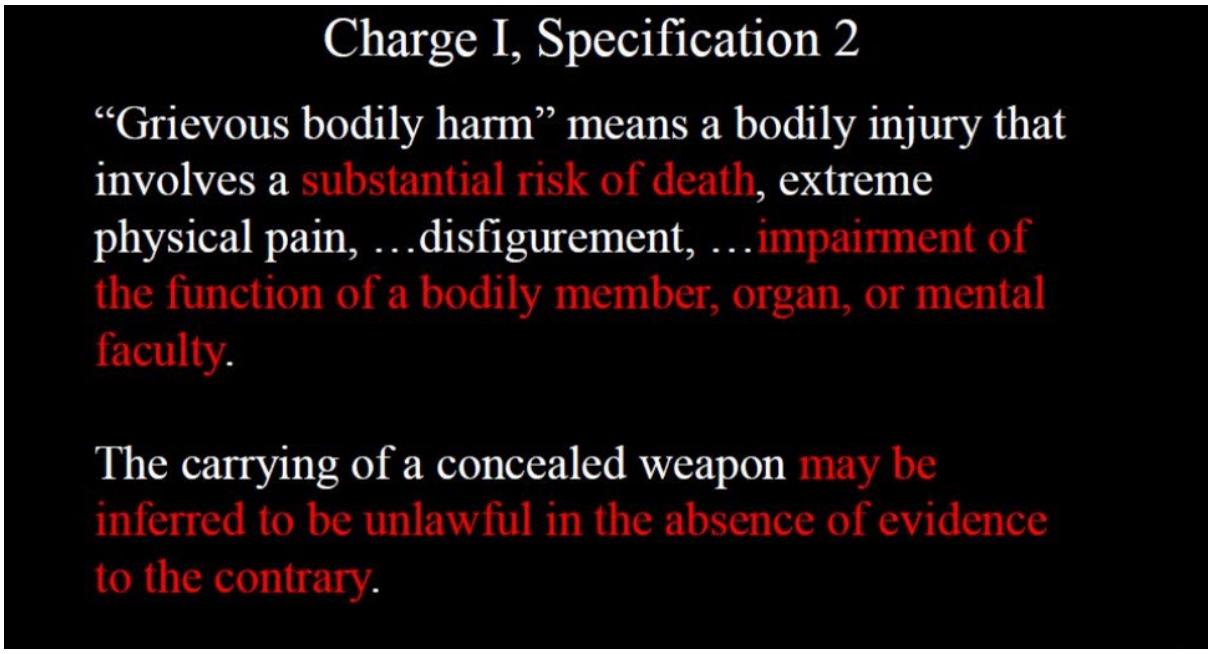
[96] *Caswell*, 2025 CCA LEXIS 98, at *25.

[97] *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

[98] *Id.*

[99] *Caswell*, 2025 CCA LEXIS 98, at *26.

[100] Trial Tr. at 1631; App. Ex. CXX.



There is particular danger that the members misapplied that inference here. For example, Sgt AS of the Las Vegas Metropolitan Police Department noted that Nevada has reciprocity with some jurisdictions concerning concealed carry permits.[101] The prosecution emphasized that California was not a state to which Nevada granted reciprocity.[102] But no mention was made of the other 48 states, the District of Columbia, or U.S. territories. The mere fact that Appellant answered the question, "Where are your from," with "California"[103] is hardly sufficient to prove that he never established legal residence in another state. In the absence of evidence showing that Appellant did not have a concealed carry permit from a jurisdiction to which Nevada extends reciprocity, the members may have relied on the permissive inference to essentially shift the burden of proof to Appellant to demonstrate that any concealed carrying of a weapon was lawful. This creates a substantial likelihood that but for the impermissible inference, the Government would not have secured a conviction.

[101] Trial Tr. at 1228.
[102] *Id.*
[103] *Id.* at 1038–39.

Remedy

WHEREFORE, this Honorable Court should set aside the finding of guilty to Charge I, Specification 2 and, for the same reasons as discussed in Assignment of Error I, above, affirm a sentence of a bad-conduct discharge and confinement for 345 days.

III.

The convening authority erred by failing to act on Appellant's request to commute the adjudged forfeitures.

Additional Facts

After trial, Appellant's counsel submitted a memorandum to the convening authority pursuant to Rule for Courts-Martial (R.C.M.) 1106, which allows an accused to "submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109, 1110, or 1306."[104] The submission asked the convening authority to "waive AB Vongphachanh's adjudged forfeitures of 'all pay and allowances' in accordance with Article 60a, UCMJ and R.C.M. 1109(c)(5)."[105] Citing Article 60a, UCMJ, the request observed that "[i]n this case, the [General Court-Martial Convening Authority (GCMCA)] is able to reduce, commute, and suspend the portion of the sentence which calls for forfeiture of all pay and allowances, and a reprimand.[106] The request continued:

> *Reduction of Sentence – R.C.M. 1109*. The GCMCA in this case is allowed to reduce or commute the portion of the sentence which calls for forfeiture of pay and allowances and the adjudged reprimand. *See* R.C.M. 1109(c)(5). In this case, it is appropriate to commute the portion of the sentence that calls for forfeiture of all pay and allowances.[107]

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[104] Rule for Courts-Martial 1106(a), *MCM* (2024 ed.).
[105] Memorandum for Convening Authority, from AF/JAJD, Subject: *U.S. v. AB Julius T. Vongphachanh* – Submission of Matters ¶ 1 (7 July 2024) [hereinafter R.C.M. 1106 submission].
[106] *Id.* at ¶ 3.a.
[107] *Id.* at ¶ 3.b.

Appellant's counsel concluded by requesting "that pursuant to Article 60, UCMJ and R.C.M. 1109(c)(5) the portion of his sentence which calls for forfeiture of all pay and allowances be waived."[108]

The convening authority responded:

> On 7 July 2024, the accused requested waiver of the adjudged forfeitures for the benefit of his dependent child. I deny the request because in accordance with Article 58b and R.C.M. 1103(h)(1) only automatic forfeitures may be waived. To the extent the accused's submission of matters may be construed as a requested waiver of automatic forfeitures for the benefit of his dependent child, the waiver request is hereby denied.[109]

Standard of Review

"The standard of review for determining whether post-trial processing was properly completed is de novo."[110]

Law and Analysis

Article 60a(b)(2) empowers a convening authority to "reduce, commute, or suspend" any sentence other than confinement if the total period of confinement is greater than six months, a punitive discharge, or death.[111] R.C.M. 1109(c)(5) specifically allows a convening authority to "[r]educe, commute, or suspend, in whole or in part," several specified forms of punishment, including forfeiture of pay or allowances.[112]

Portions of the defense's R.C.M. 1106 submission imprecisely used the word "waive" while requesting clemency "in accordance with Article 60a, UCMJ and R.C.M. 1109(c)(5)."[113] But even if that imprecision justified the convening authority's hypertechnical disregard of

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[108] *Id.* at ¶ 4.
[109] Convening Authority Decision on Action at ¶ 4.
[110] *United States v. Miller*, 82 M.J. 204, 207 (C.A.A.F. 2022).
[111] Art. 60a(b)(2), UCMJ, 10 U.S.C. § 860a(b)(2).
[112] R.C.M. 1109(c)(5), *MCM* (2024 ed.).
[113] R.C.M. 1106 submission, *supra* note 105, at ¶ 1.

Appellant's request, another portion of the R.C.M. 1106 submission should have satisfied even the most persnickety convening authority. Citing R.C.M. 1109(c)(5), paragraph 3.b of the request stated, "In this case, it is appropriate to commute the portion of the sentence that calls for forfeiture of all pay and allowances."[114] The Court of Appeals for the Armed Forces has explained that "to commute a sentence means 'a reduction of penalty,' not 'merely a substitution.'"[115] Appellant's counsel thus properly sought clemency concerning the *adjudged* forfeitures. Instead of responding to that request, the convening authority denied a *different* form of relief that Appellant did not seek: waiver of automatic forfeitures. Simply ignoring Appellant's actual request was improper. R.C.M. 1109(d)(3)(A) requires the convening authority to "consider matters timely submitted under R.C.M. 1106" before acting on the sentence.[116] Yet the Convening Authority Decision on Action indicates the convening authority did not consider Appellant's request for commutation of the adjudged forfeitures. That was error.

The convening authority's failure to consider the clemency request as to the adjudged forfeitures is not rendered harmless by his gratuitous consideration of waiving automatic forfeitures. For any period of time from fourteen days after the court-martial until Appellant's release from confinement, Appellant would have received no pay unless the convening authority both set aside the adjudged forfeitures and waived automatic forfeitures.[117] However, unlike automatic forfeitures, the adjudged forfeitures had the potential to adversely affect Appellant after his release from confinement, including during any period when he was on active duty before being placed on appellate leave, and possibly concerning pay for accrued annual leave while on

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[114] *Id.* at ¶ 3.b.
[115] *United States v. Carter*, 45 M.J. 168, 170 (C.A.A.F. 1996) (quoting *Waller v. Swift*, 30 M.J. 139, 143 (C.M.A. 1990)).
[116] R.C.M. 1109(d)(3)(A), *MCM* (2024 ed.).
[117] *See* UCMJ arts. 57, 58b, 10 U.S.C. §§ 857, 857b.

appellate leave.[118] Thus, setting aside the automatic forfeitures without clemency concerning the adjudged forfeitures would have done Appellant no good. Granting clemency concerning the adjudged forfeitures, on the other hand, may have held the promise of financial benefit even if automatic forfeitures remained in place. That is more than sufficient to cross the "low threshold for material prejudice" concerning error at the convening authority action stage—a minimal standard that "reflects the convening authority's entirely discretionary 'power in granting clemency'" while "avoid[ing] undue speculation" concerning the exercise of that discretion.[119]

Remedy

This Court should remand this case to the convening authority to do what he should have done the first time: consider Appellant's request for commutation of the adjudged forfeitures.

WHEREFORE, this Court should remand the case to the convening authority for a new consideration of Appellant's R.C.M. 1106 submission.

IV.

The 173-day delay from sentencing to docketing of this case with this Court was presumptively unreasonable, warranting appropriate relief.

Additional Facts

Appellant was sentenced on 27 June 2024.[120] Almost immediately thereafter, the court-martial adjourned.[121] The convening authority declined to act on the findings or sentence on 11

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[118] *See generally* UCMJ art. 76a, 10 U.S.C. § 876a; Dep't of Air Force Instruction 51-201, *Administration of Military Justice*, § 20.53.4 (24 Jan. 2024) ("An accused who has accrued leave when required to take excess leave may elect to either (1) receive pay and allowances during the period of accrued leave and then continue on unpaid excess leave, or (2) receive payment for the accrued leave as of the day excess leave begins and serve the entire period on unpaid excess leave.").
[119] *United States v. Kim*, No. ACM 40057, 2022 CCA LEXIS 276, at *6 (A.F. Ct. Crim. App. May 9, 2022) (quoting *United States v. Scalo*, 60 M.J. 435, 437 (C.A.A.F. 2005)).
[120] Trial Tr. at 1747.
[121] *Id.* at 1748.

July 2024, fourteen days after sentencing.[122] The military judge executed the entry of judgment on 22 July 2024, twenty-five days after sentencing.[123] The court reporter certified the record of trial on 22 July 2024, twenty-five days after sentencing.[124] The court reporter certified the transcript on 22 August 2024, fifty-six days after sentencing.[125] This Court docketed the case on 17 December 2024, 173 days after sentencing.[126]

Standard of Review

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

Law and Analysis

The post-trial delay in this case was presumptively unreasonable, warranting appropriate relief. In *United States v. Livak*,[127] this Court considered the standards for presuming unreasonable delay that the Court of Appeals for the Armed Forces prescribed in *United States v. Moreno*[128] and adapted them to the reformed post-trial processing system enacted by the Military Justice Act of 2016.[129] This Court concluded that "the specific requirement in *Moreno* which called for docketing to occur within 30 days of action no longer helps us determine an unreasonable delay under the new procedural rules."[130] Instead, this Court determined that under the new system, it is appropriate to "apply the aggregate standard threshold the majority established in *Moreno*: 150

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[122] Convening Authority Decision on Action – *United States v. Airman Basic Julius Vongphachanh* (19 Oct. 2023).
[123] Entry of Judgment (6 Nov. 2023).
[124] Certification of the Record of Trial (22 Jul. 2022).
[125] Certification of the Transcript (22 Aug. 2024).
[126] AFCCA Court Docket, https://afcca.law.af.mil/docket.html, last accessed 10 June 2025.
[127] *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020).
[128] *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006).
[129] Military Justice Act of 2016, Division E, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–42, 130 Stat. 2000, 2894–968 (2016).
[130] *Livak*, 80 M.J. at 633.

days from the day Appellant was sentenced to docketing with this court."[131] This Court explained, "This 150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in *Moreno*."[132] Here, the Government exceeded that 150-day threshold by twenty-three days. That delay is presumptively unreasonable.[133]

This Court is statutorily empowered to "provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial after the judgment was entered into the record."[134] That provision codified the authority the Court of Appeals for the Armed Forces previously recognized for Courts of Criminal Appeals to "grant sentence relief . . . where there has been unreasonable post-trial delay," even absent either prejudice or extraordinary circumstances.[135] While asserting his constitutional right to the timely completion of his appeal, Appellant does not allege that the delay thus far has violated his constitutional due process right to a timely appeal. Rather, Appellant seeks relief under this Court's express statutory authority to grant "appropriate relief" for excessive post-trial delay.[136]

This Court has identified non-exhaustive factors it considers when deciding whether relief for post-trial delay is appropriate.[137] Two of the factors ask (1) "Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation?"; and (2) "Given the passage of time, can this court provide meaningful

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[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).
[135] *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). *See also United States v. Valentin-Andino*, __ M.J. __, No. 24-0208, 2025 CAAF LEXIS 248, *10 n.4 (C.A.A.F. Mar. 31, 2025) ("errors regarding post-trial delay are now solely governed by Article 66(d)(2)").
[136] Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).
[137] *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015).

relief in this particular situation?"[138] Here, those factors favor a reduction in Appellant's sentence to address the presumptively unreasonable post-trial delay.

Facially unreasonable post-trial delay is all-too-common in Air Force military justice practice. In the past twelve months, this Court has decided at least thirteen cases in which the Government failed to meet the *Livak* 150-day standard.[139] In one of those cases—*Cassaberry-*

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[138] *Id.*

[139] *United States v. Cook*, No. ACM 40333, 2024 CCA LEXIS 276 (A.F. Ct. Crim. App. July 3, 2024) (200 days between sentencing and docketing; no relief granted), *petition granted on other grounds*, __ M.J. __, No. 24-0221/AF, 2025 CAAF LEXIS 65 (C.A.A.F. Jan. 29, 2025); *United States v. Hennessy*, No. ACM 40439, 2024 CCA LEXIS 343 (A.F. Ct. Crim. App. Aug. 20, 2024) (412 days between sentencing and docketing; relief granted), *vacated and reconsidered on other grounds*, 2024 CCA LEXIS 494 (A.F. Ct. Crim. App. Oct. 9, 2024) (order), *upon reconsideration*, No. ACM 40439, 2024 CCA LEXIS 503 (A.F. Ct. Crim. App. Nov. 25, 2024), *reconsideration denied*, No. ACM 40439 (A.F. Ct. Crim. App. Jan. 10, 2025) (order), *certificate for review filed on other grounds*, __ M.J. __, No. 25-0112/AF, 2025 CAAF LEXIS 183 (C.A.A.F. Mar. 11, 2025), *petition filed*, __ M.J. __, No. 25-0113/AF, 2025 CAAF LEXIS 184 (C.A.A.F. Mar. 11, 2025); *United States v. Byrne*, No. ACM 40391, 2024 CCA LEXIS 346 (A.F. Ct. Crim. App. Aug. 22, 2024) (290 days between sentencing and docketing; no relief granted), *petition denied*, __ M.J. __, No. 25-0014/AF, 2024 CAAF LEXIS 821 (C.A.A.F. Dec. 17, 2024); *United States v. Folts*, No. ACM 40322, 2024 CCA LEXIS 353 (A.F. Ct. Crim. App. Aug. 26, 2024) (362 days between sentencing and docketing; no relief granted), *petition granted on other grounds*, __ M.J. __, No. 25-00043/AF, 2025 CAAF LEXIS 170 (C.A.A.F. Mar. 5, 2025); *United States v. Scott*, No. ACM 40411. 2024 CCA LEXIS 415 (A.F. Ct. Crim. App. Oct. 7, 2024) (297 days between sentencing and docketing; no relief granted), *petition denied*, __ M.J. __, No. 25-0038/AF, 2025 CAAF LEXIS 250 (C.A.A.F. Apr. 1, 2025); *United States v. Nakken*, No. ACM S32767, 2024 CCA LEXIS 420 (A.F. Ct. Crim. App. Oct. 10, 2024) (222 days between sentencing and docketing; no relief granted); *United States v. Cassaberry-Folks*, No. ACM 40444, 2024 CCA LEXIS 500 (A.F. Ct. Crim. App. Nov. 22, 2024) (412 days between sentencing and docketing; relief granted); *United States v. Atencio*, No. ACM S32783, 2024 CCA LEXIS 543 (A.F. Ct. Crim. App. Dec. 20, 2024) (166 days between sentencing and docketing; no relief granted); *United States v. Floyd*, No. ACM S32784, 2025 CCA LEXIS 31 (A.F. Ct. Crim. App. Feb. 3, 2025) (155 days between sentencing and docketing; no relief granted), *petition denied*, __ M.J. __, No. 25-0126/AF, 2025 CAAF LEXIS 345 (C.A.A.F. May 6, 2025); *United States v. Covitz*, No. ACM 40193 (reh), 2025 CCA LEXIS 105 (A.F. Ct. Crim. App. Mar. 19, 2025) (155 days between sentencing and docketing; no relief granted), *petition filed*, __ M.J. __, No. 25-0169/AF, 2025 CAAF LEXIS 385(C.A.A.F. May 16, 2025); *United States v. Jenkins*, No. ACM S32765, 2025 CCA LEXIS 148 (A.F. Ct. Crim. App. Apr. 7, 2025) (154 days between sentencing and docketing; no relief granted), *petition filed*, __ M.J. __, No. 25-0180/AF, 2025 CAAF LEXIS 428 (C.A.A.F. June 2, 2025); *United States v. Johnson*, No. ACM 40537, 2025 CCA LEXIS 193 (A.F. Ct. Crim. App. May 2,

Folks—this Court observed:

> This court has recently been obliged to grapple with a series of cases involving post-trial delay at various stages, all of which raise serious questions as to the scope of potential institutional neglect within the Air Force, particularly when it comes to timely and accurate assembly of records of trial and forwarding of verbatim trial transcripts.[140]

In that case, this Court "fashion[ed] a remedy that significantly reduce[d] Appellant's sentence."[141]

This case provides still more evidence of institutional neglect. In *Cassaberry-Folks*, this Court aptly observed that "[f]or the sake of Appellant, and for the health of the entire Air Force military justice system, an appropriate remedy is required."[142] More than one dose of medicine is necessary to cure the persistent disease of unreasonable post-trial delay.

Remedy

"Excellence In All We Do" is an Air Force core value.[143] By any objective measure, post-trial processing of courts-martial has often fallen short of what should be acceptable in the Department of the Air Force. Such repeated failures are intolerable. Yet, to this point, they have largely been tolerated.[144] Article 66(d)(2), UCMJ, anoints this Court as the guardian of the Air Force's core values for post-trial processing purposes. Here, this Court can fulfill that function by providing a remedy that will signal this Court's unwillingness to tolerate further instances of unreasonable appellate delay, thereby incentivizing greater institutional vigilance. Here, that remedy should take the form of disapproving the adjudged forfeitures. Such a remedy would be

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2025) (196 days between sentencing and docketing; no relief granted); *United States v. Hagen*, No. ACM 40561, 2025 CCA LEXIS 234 (A.F. Ct. Crim. App. May 28, 2025) (183 days between sentencing and docketing; no relief granted).

[140] *Cassaberry-Folks*, 2024 CCA LEXIS 500, at *43.

[141] *Id.* at *44.

[142] *Id.* at *51.

[143] AIR FORCE HANDBOOK 1, AIRMAN, ¶ 1.3.3 (15 Feb. 2025).

[144] *See supra* note 139.

particularly appropriate if this Court were to set aside the finding of guilty to Charge I, Specification 2; setting aside the adjudged forfeitures would provide a combined remedy for that erroneous conviction and the presumptively unreasonable post-trial delay. Moreover, adopting that remedy would provide the additional advantage of rendering moot this brief's third assignment of error.

WHEREFORE, this Court should order the appropriate remedy of setting aside the adjudged forfeitures.

V.

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

Additional Facts

The defense moved to require that any finding of guilty be by a unanimous vote.[145] The prosecution opposed the motion.[146] The military judge denied it.[147]

During the prosecution's closing argument, the special trial counsel told the members, "It requires two-thirds to convict."[148] The military judge subsequently instructed the members:

> The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty, but since we have eight members, that means six members must concur in any finding of guilty. If you have at least six votes of guilty of any offense then that will result in a finding of guilty for that offense.[149]

The members found Appellant guilty of Charge I and its two specifications.[150] It is

[145] App. Ex. XXV; Trial Tr. at 17.
[146] App. Ex. XXVI; Trial Tr. at 17.
[147] Trial Tr. at 320–21.
[148] *Id.* at 1637.
[149] *Id.* at 1663 (paragraph break omitted).
[150] *Id.* at 1687; App. Ex. CXXIII.

unknown and unknowable whether the conviction for each specification was based on a vote of 6-2, 7-1, or 8-0.

Standard of Review

The standard of review for questions of constitutional law is de novo.[151]

Law and Analysis

In *United States v. Anderson*, the Court of Appeals for the Armed Forces held that non-unanimous findings of guilty do not violate a court-martial accused's constitutional rights.[152] Appellant acknowledges that, absent intervening Court of Appeals for the Armed Forces or Supreme Court case law, this Court is bound by the *Anderson* opinion. Nevertheless, Appellant maintains that *Anderson* was wrongly decided and expressly preserves this issue for further appellate review.

Remedy

WHEREFORE, this Honorable Court should reverse the findings of guilty to the charge and its specification and the sentence.

Respectfully submitted,

[redacted]
Joyclin N. Webster, Capt, USAF
Appellate Defense Counsel
[redacted]

[redacted]
Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

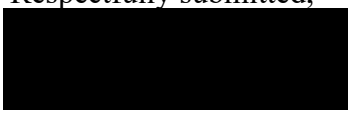
Counsel for Appellant

[151] *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016).
[152] *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024).

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 2
Airman Basic (E-1) **JULIUS VONGPHACHANH,** United States Air Force *Appellant.*	)	No. ACM 40741 14 July 2025

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

ISSUES PRESENTED

I.

THE FINDING OF GUILTY TO CARRYING A CONCEALED WEAPON IS FACTUALLY INSUFFICIENT BECAUSE THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT CONCEALED THE PISTOL HE WAS CARRYING OR THAT THE MANNER IN WHICH HE CARRIED THE PISTOL WAS UNLAWFUL.

II.

THE MILITARY JUDGE COMMITTED PLAIN ERROR BY INSTRUCTING THE MEMBERS THAT "[T]HE CARRYING OF A CONCEALED WEAPON MAY BE INFERRED TO BE UNLAWFUL IN THE ABSENCE OF EVIDENCE TO THE CONTRARY."

III.

THE CONVENING AUTHORITY ERRED BY FAILING TO ACT ON APPELLANT'S REQUEST TO COMMUTE THE ADJUDGED FORFEITURES.

IV.

THE 173-DAY DELAY FROM SENTENCING TO DOCKETING OF THIS CASE WITH THIS COURT WAS PRESUMPTIVELY UNREASONABLE, WARRANTING APPROPRIATE RELIEF.

V.

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED OF AN OFFENSE WITH NO REQUIREMENT THAT THE COURT-MARTIAL PANEL (THE FUNCTIONAL EQUIVALENT OF THE JURY) VOTE UNANIMOUSLY FOR A FINDING OF GUILTY.

STATEMENT OF CASE

At a general court-martial at Nellis Air Force Base, a panel of officer and enlisted members found Appellant guilty of wrongfully and willfully discharging a firearm and unlawfully carrying a concealed firearm in violation of Article 114, UCMJ. (*Entry of Judgment*, 22 July 2024, eROT, Vol. 1.) The panel found Appellant not guilty of murder in violation of Article 118, UCMJ and involuntary manslaughter in violation of Article 119, UCMJ. (Id.) The military judge, sitting alone, sentenced Appellant to a reprimand, total forfeitures of pay and allowances, confinement for 360 days, and a bad conduct discharge.[1] (R. at 1747, *Entry of Judgment*, 22 July 2024, eROT. Vol. 1.) The military judge gave Appellant 287 days of pretrial confinement credit. (Id.) The convening authority took no action on the findings or sentence. (Id.)

[1] The military adjudged two consecutive terms of confinement: 345 days for wrongfully and willfully discharging a firearm and 15 days for unlawfully carrying a concealed weapon. (R. at 1747.)

STATEMENT OF FACTS

Appellant's Law Enforcement Interview

Appellant told law enforcement that he went to a birthday party on the evening 2 July 2022 at a residential home in North Las Vegas, Nevada. (Pros. Ex. 3.) This birthday party had an open invitation and advertised on social media. (Id.) There were a lot of people at the party dancing. (R. at 1084.) Appellant was drinking minding his business. (R. at 1084-85.) During the party, but on 3 July 2023, Appellant heard people screaming followed by gunshots. (R. at 1085.) Appellant mentioned that "everybody started running, pushing, shoving. . . ." (R. at 1085.) And at this point, during the chaos, Appellant admitted he fired shots in the air because he thought that the "best option was to shoot into the sky" to stop the shooting. (R. at 1085-86.) Appellant stated that that he shot fire above the heads of everybody during that shoot out. (R. at 1076.) After the shooting, Appellant dissembled his firearm. (R. at 1077.)

As a result of the shoot out, a civilian, AM, was shot in the head. (R. at 1081.) Appellant denied any knowledge of the fatality even though news of AM's death was all over social media. (R. at 1081.) Appellant admitted that the firearm he possessed at the party was a Polymer80. (R. at 1076.)[2]

IM-A's Testimony

IM-A was at the party in North Las Vegas on 2 July 2022 – same party as Appellant. (R. at 946.) IM-A's brother JA-C was also at this party. (Id.) IM-A met Appellant through his brother JA-C. (Id.) By the time IM-A arrived at the party it was very crowded. (R. at 948.) IM-A saw Appellant at the party. (Id.) When asked whether he saw Appellant possess a firearm,

[2] Appellant purchased the Polymer 80 firearm a couple of months prior to the party. (R. at 1077.)

IM-A said, "No I hadn't, not that night." (R. at 948.) IM-A remembered "a fight breaking out." (R. at 949.) When the fight broke out, IM-A said "[Appellant] was, like on the side of me, kind of, behind, but on the side, if that makes sense." (R. at 951.) Appellant clarified that during the fight Appellant was next to him. (Id.)

IM-A testified that he did not see his brother carry a firearm that night. (R. at 977.) IM-A did testify that his brother was involved in the fight. (R. at 978.) WC-Q testified that JA-C showed him the weapon JA-C carried that night. (R. at 888.)

AS Testimony

AS worked at the Las Vegas Metropolitan Police Department (Metro) as a sergeant at the concealed weapons and the special investigation sections. (R. at 1225.) AS has been with Metro for over 10 years. (R. at 1226.) In the concealed weapons section, AS conducted background investigations on concealed weapons applications. (Id.) AS approved the applications to receive concealed weapons permit or denied or revoked concealed weapons permits based on Neveda or Federal law. (Id.) AS explained that a concealed carry weapons (CCW) permit allows people to carry a firearm concealed on their person or in their vehicle within the confines of Nevada law that require a permit to conceal carry. (Id.) Concealed carry allowed "you to carry your weapon in a fashion where it's not discernible to the public." (Id.)

The requirements to apply for a CCW permit in Clark County, Neveda are: 1) be at least 21 years of age; 2) have no felony convictions or domestic violence convictions; 3) not a habitual user of drugs or alcohol; and 4) not an illegal immigrant. (R. at 1227.) An applicant must also attend an 8-hour class certified through the Nevada Sheriffs and Chiefs Association, submit a CCW application, and get fingerprinted. (Id.) The fingerprint results would be sent to the FBI who would then return to Metro a list of the applicants criminal history. (Id.) From there, an

investigative specialist takes the information and conducts a thorough background check and either approves or denies the application. (Id.) Metro keeps a database for all individuals who are allowed to have a CCW permit. (R. at 1228.) There are two databases to view current or previous CCW permit holders. (Id.) One is called SCOPE – an external database used by different law enforcement agencies, and the other is called OnBase – an internal database that stores applicants information, such as their CCW applications. (Id.) It was possible in SCOPE to see if someone had applied for a CCW from another state. (Id.) Nevada does have reciprocity with other states. (Id.) But Nevada does not have reciprocity with California. (Id.)

AS looked up Appellant's name in the databases mentioned. (R. at 1228-29.) AS testified that Appellant did not have a CCW permit in any state and he did not apply for a CCW permit in the state of Nevada. (R. at 1229.) If Appellant had a CCW permit in another state, SA would have found Appellant's name in the databases. (Id.)

AS clarified and mentioned that if you are in the military you only have to be 18 to conceal carry instead of 21. (R. at 1230.) Nevada allows open carry so "long as part of the weapon is discernible to the public." (Id.) AS saif that once a Polymer80 is assembled, it is considered a firearm. (R. at 1233.)

ARGUMENT

I.

APPELLANT'S CONVICTION FOR UNLAWFULLY CARRYING A FIREARM WAS FACTUALLY SUFFICIENT.

Standard of Review

This Court reviews factual sufficiency is de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023).

Law and Analysis

Courts of Criminal Appeals (CCAs) "may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with [Article 66(d)(1)(B)]." Article 66(d)(1)(A), UCMJ (2024 ed.); United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024). Factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows "a specific deficiency in proof." Article 66(d)(1)(B)(i), UCMJ; Harvey, 85 M.J. at 130.

If both threshold elements are met, a CCA may "weigh the evidence and determine controverted questions of fact." Article 66(d)(1)(B)(ii). The CCA must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Id. "[T]he degree of deference will depend on the nature of the evidence at issue." Harvey, 85 M.J. at 130-131. Then, the CCA must be "clearly convinced that the finding of guilty was against the weight of the evidence" before they may "dismiss, set aside, or modify the finding, or affirm a lesser finding." Article 66(d)(1)(B)(iii), UCMJ.

The elements for unlawfully carrying a concealed weapon are: 1) that the accused carried a certain weapon concealed on or about the accused's person; 2) that the carrying was unlawful; and 3) that the weapon was a dangerous weapon. Manual for Courts Martial United States part IV, para. 52.b.(7)(a)-(c) (2019 ed.) (MCM).

Here, there is no dispute that Appellant carried a dangerous weapon. The prosecution presented evidence that Appellant did not obtain the required CCW permit. (R. at 1228-29.) Moreover, the prosecution proved concealed carry through IM-A's testimony. IM-A testified that he did not see Appellant carry a firearm at the party. (R. at 948.) But Appellant attempts to undermine IM-A's credibility. (App. Br. at 33.) Appellant's asserts that IM-A was lying because IM-A testified that his brother, JA-C, was not armed at the party when another witnesses noticed

JA-C carry a firearm. (App.Br. at 11.) Just because another witness saw JA-C carry a firearm did not mean that JA-C openly carried when IM-A was near JA-C. JA-C could have concealed his weapon throughout most of the party. Just because another witness saw JA-C with a firearm, did not mean that IM-A was lying.

In any event, Appellant's credibility concerns of IM-A did not undermine his testimony regarding whether Appellant had a visible firearm. "[F]actfinders may believe one part of a witness' testimony and disbelieve another." United States v. Harris, 8 M.J. 52, 59 (C.M.A. 1979.) It is within this Court's discretion to determine what level of deference is appropriate to give evidence. Harvey, 85 M.J. at 131. Our superior Court has indicated that deference for a witness who testified may be high because the CCA judges did not see the witness testify. Id. Thus, this Court should give deference to the panel's findings because they witnessed IM-A testify and found his testimony credible.

Appellant argues that even if IM-A testified credibly, his testimony alone was not sufficient to prove the charge beyond a reasonable doubt. (App. Br. at 11-12.) But a witness' testimony may be sufficient to prove a crime beyond a reasonable doubt. *See* United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.AF. 2006) (finding that the testimony of one witness may be enough to meet the burden beyond a reasonable doubt so long as the factfinder finds the witness's testimony relevant and sufficiently credible). Here IM-A's testimony was sufficient to prove that Appellant did not have his firearm visible given his credible testimony. Appellant's arguments trying to undermine the prosecution's evidence and IM-A's credibility lack merit.

Appellant also points out that it was dark at the party and therefore no one could see Appellant carrying his weapon – inferring that he lawfully opened carry. (App. Br. at 12.) But the evidence suggested otherwise. Prosecution exhibits 4 and 5, short videos of the party

showing attendees dancing and talking, revealed that although the party was outside in the evening and "dark" out, attendees and their clothing was still visible – even dark clothing. Contrary to Appellant's point that the prosecution failed to establish lighting conditions, the videos of that night showed that although dark you could still see what attendees were wearing. (App. Br. at 13; Pros. Ex. 4-5.) Therefore, IM-A would have seen Appellant's weapon if Appellant had his weapon discernable to the public.

Appellant states that the prosecution failed to establish what opportunity IM-A had to observe Appellant. (App. Br. at 13.) Appellant says that IM-A did not have "a vantage point from which IM-A would have had a 360-degree view of Appellant's torso." (Id.) When IM-A testified that he was next to Appellant that was when the fight occurred. (R. at 951.) This testimony did not mean that the only time IM-A saw Appellant that night was during the fight next to him. In any event, IM-A testified that he never saw Appellant carry a firearm "that night." (R. at 948.)

Next, Appellant argues that IM-A had been drinking at the party and his alcohol consumption could have affected his ability to perceive and remember what he perceived that night. (App. Br. at 13.) But there was no evidence at trial through expert testimony to show that IM-A alcohol consumption impaired his memory that night. Thus, this Court should not find this argument persuasive

For these reasons, this Court cannot be "clearly convinced that the finding of guilty was against the weight of the evidence." Appellant's crime for unlawfully carrying a concealed weapon was factually sufficient. Thus, this Court should deny this assignment of error.

II.

THE MILITARY JUDGE DID NOT ERR BY INSTRUCTING THE MEMBERS THAT "[T]HE CARRYING OF A CONCEALED WEAPON MAY BE INFERRED TO BE UNLAWFUL IN THE ABSENCE OF EVIDENCE TO THE CONTRARY."

Additional Facts

The military judge gave the following instruction regarding Article 114, UCMJ: "[t]he carrying of a concealed weapon may be inferred to be unlawful in the absence of evidence to the contrary. However, the drawing of this inference is not required." (R. at 1665.)

During findings argument, Special Trial Counsel mentioned that Appellant's concealed carry "may be inferred to be unlawful in the absence of evidence to the contrary." (R. at 1631.) But Special Trial Counsel went on to argue that there was in fact evidence that Appellant concealed his weapon. (Id.) First, Special Trial Counsel argued that IM-A, "did not see the accused with a handgun, [he] was standing right next to him." (R. at 1631.) Second, STC mentioned that AS testified that Appellant did not apply for a concealed weapons permit and therefore never had the authorization to conceal carry. (R. at 1632.)

Standard of Review

A military judge has "substantial discretionary power" in deciding on the instructions to give the panel members. United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993). This Court reviews a military judge's findings instructions for an abuse of discretion. *See* id.

Should this Court decide that the plain error standard applies, Appellant has the burden of demonstrating: 1) that there was error; 2) that the error was clear or obvious; and 3) that the error resulted in material prejudice to his substantial rights. United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014).

Law and Analysis

A. United States v. Caswell is not binding on this panel.

Appellant argues that the military judge here erred in instructing the members on the permissive inference. (App. Br. at 16.) Appellant's argument hinges on the United States v. Caswell, No. ACM 23035, 2025 CCA LEXIS 98 (A.F. Ct. Crim. App. 17 March 2025) (unpub. op.), an unpublished opinion from a different panel that declined to "carry over any previous presumption of unlawful action" in light of New York Rifle & Pistol Association v. Bruen, 597 U.S. 1 (2022). (App. Br. at 15-16.) In other words, the Caswell panel found the permissive inference – that a factfinder may infer that carrying a concealed firearm is unlawful absent evidence to the contrary – unconstitutional under recent Supreme Court Second Amendment precedent. But Caswell is not binding authority. Although unpublished opinions can serve as persuasive authority, this Court has held that "unpublished opinions [carry] no precedential weight." United States v. Taylor, 57 M.J. 578 (A.F. Ct. Crim. App. 2008) For the following reasons, this panel should not find Caswell's reasoning persuasive.

1. Bruen did not undermine precedent set forth in United States v. Lyons.

In United States v. Lyons, our superior Court's predecessor upheld that the prosecution can rely on the permissive inference that "unlawfulness may be inferred absent some evidence to the contrary, from the fact of the carrying." 33 M.J. 88, 91 (C.M.A. 1991). Lyons is a well-reasoned opinion relying on Supreme Court case law that supports the proposition that permissible inferences are lawful where it "can…be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Id. at 90 (quoting Leary v. United States, 395 U.S. 6, 36 (1969)). Lyons stated that "a permissible inference as to an essential element is constitutional if there is a 'rational connection

between the fact proved and the ultimate fact presumed…[The] inference [must not be] so strained as not to have a reasonable relations to the circumstances of life as we know them…'" Id. at 90 (quoting Tot v. United States, 319 U.S. 463, 467-68 (1943)). Simply put, a permissive inference leaves the factfinder free to "credit or reject the inference and does not shift the burden of proof." Id. (citing Court of Ulster Country, New York v. Allen, 442 U.S. 140, 157 (1979)). A permissive inference is problematic only when there is no rational way the factfinder could make the connection permitted by the inference. Id. at 90. Lyons held that the "unlawfulness of the carrying is an essential element of the offense carrying a concealed weapon under the first two clauses of Article 134" and that unlawfulness may be inferred. Id. at 91. The unlawful carrying remains an essential element of the offense even though the crime is now enumerated under Article 114, UCMJ instead of Article 134, UCMJ. MCM pt IV, para. 52.b.(7)(a)-(c) (2019 ed.).

The Lyons court determined that there was a "reasonable relation" and "rational connection" between carrying a firearm and unlawfully carrying a firearm without evidence to the contrary. Notably, the Supreme Court has recognized that prohibitions on carrying concealed weapons are lawful under the Second Amendment. District of Columbia v. Heller, 554 U.S. 570, 626 (2008). Thus, states are free to regulate concealed carry and require CCW permits. The inference articulated in Lyons is logical because conceal carry is heavily regulated and absent evidence to the contrary, it is permissible to infer unlawful possession.[3]

Yet, the Caswell panel emphasized that an individual has "a presumed constitutional right to carry a weapon on their person for self-defense" and declined to carry over the permissive

[3] 21 states require a concealed carry permit, including Nevada where Appellant's crime occurred. *Constitutional Carry/Unrestricted/Permitless Carry*, U.S. CONCEALED CARRY ASS'N, https://www.usconcealedcarry.com/resources/terminology/types-of-concealed-carry-licensurepermitting-policies/unrestricted/ (last visited Jul. 14, 2025).

inference of unlawful action. Caswell, unpub. op. at 25. The Caswell opinion also noted that the "Second Amendment's plain test thus presumptively guarantees…a right to 'bear' arms in public for self-defense." Id. (citing Bruen, 597 U.S. at 33.) But this right alone is not sufficient to undermined the permissive inference. Although Bruen recognized a constitutional right to bear arms even outside one's home for self-defense, such a right is not absolute. Bruen also highlighted that "the right secured by the Second Amendment is not unlimited…The right is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Bruen, 597 U.S. at 21. The permissive inference is just merely a tool for the factfinder to use to infer unlawfulness based on the facts and circumstances of the case. The permissive inference does not infringe upon the right to bear arms.

Bruen's holding did not undermine the permissive inference outlined in Lyons. Bruen narrowly held that the government must show that the regulation at issue reflects this nation's historical tradition of firearm regulation. 598 U.S. at 17. Bruen did not address the constitutionality of the permissive inference of unlawfulness, but rather addressed New York's regulation that placed the burden on an applicant to show a special need for self-defense to obtain a public carry license – essentially banning public carry of firearms. Id. at 11. The Supreme Court found that this regulation was unconstitutional because an individual has the right to bear arms in public for self-defense. Id. at 33. But Caswell, and this case, is distinguishable from Bruen because the permissive inference is not a regulation regulating an accused's right to bear arms, but simply a method to assist factfinders at trial. This Court should decline to read Bruen so broadly as the panel in Caswell did.

The Caswell panel failed to articulate how the permissive inference upheld in Lyons interfered with the Second Amendment rights given that state and federal governments can regulate concealed firearms. Although the appellant in Caswell had the right to bear arms, he did not have the right to bear arms in any manner whatsoever, and the appellant was still subjected to laws that regulated his unlawful carrying of a concealed weapon. *See* Bruen, 597 U.S. at 21; Heller, 552 U.S. at 626. The permissive inference is not a regulation that limits the right to bear arms. If anything, the permissive inference is in line with the constitutionality of regulating concealed carrying of a firearm allowing the factfinder to infer unlawfulness absent evidence of a defendant's lawful permit to conceal carry. *See* Heller, 552 U.S. at 626 (recognizing that states have the authority to regulate conceal carry). For these reasons, this panel should not find the Caswell opinion persuasive,[4] and find that the permissive inference is constitutional in light of Second Amendment jurisprudence.

2. Lyons still applies to unlawful conceal carry offenses under Article 114, UCMJ.

The Caswell opinion also notes that the Lyons opinion is no longer binding because Lyons analyzed unlawful carrying of a firearm under Article 134, UCMJ. Caswell, unpub. op. at 21. Now, unlawful carrying of a concealed weapon is criminalized under Article 114, UCMJ. Id. The panel found that this was an "intervening event that severed the prior precedent and control or consideration of the new Article 114, UCMJ." Id. Although this crime is now publishable under a different article – post the Military Justice Act of 2016, this intervening

[4] The Caswell panel acknowledged that it did not have the authority to "opine or to conclude whether our superior court's holding in Lyons remains good law after the Supreme Court's ruling in Bruen, only to determine if it is directly applicable to the case at bar." Caswell, unpub. op. at 21 n.18. Thus, this panel should find that Caswell's holding was limited to the facts of that case and is not applicable here.

event did not undermine Lyons. Our superior Court noted that when offenses move from Article 134 UCMJ to another article, prior case law on the subject matter *may* not be binding. United States v. Hiser, 82 M.J. 60, 67 (C.A.A.F. 2022) (emphasis added). But Lyons narrowly reviewed the element of unlawfulness – an element still enumerated in Article 114, UCMJ. MCM pt IV, para. 52.b.(7)(a)-(c). Lyons is still good law because it governs an element still applicable today despite the lack of a military nexus needed under Article 134, UCMJ, clauses one and two. For these reasons, this Court should not find Caswell's rejection of the permissive inference persuasive.[5]

Given that Caswell is not binding on this panel and our superior Court's decision in Lyons is still binding precedent, this Court should find that the military judge did not abuse his discretion by instructing the panel members on the permissive inference.

B. Even if it was error to provide the panel members the permissive inference, the prosecution presented evidence to prove that Appellant unlawfully carried a concealed weapon.

Assuming it was plain and obvious error for the military judge to give the permissive inference instruction, Appellant still did not meet his burden under plain error. Knapp, 73 M.J. at 36. The permissive inference instruction had no bearing on the findings of this case because there was independent evidence raised to prove that Appellant unlawfully concealed a firearm and therefore the panel members did not have to rely on the lack of evidence of a lawful carry.

[5] Given that the Caswell panel did not consider the permissive inference in its factual and legal sufficiency analysis, the panel looked to the evidence to find unlawfulness. The Caswell panel held that based on the limited evidence presented no rational factfinder could have found the unlawful carrying element beyond a reasonable doubt. Caswell, unpub. op. at 32-33. The panel was convinced that Appellant's alcohol consumption contemporaneous with or prior to his concealed carry did not carry the burden to prove the element of unlawfulness. Id. Absent the permissive inference, the panel found that the government did not meet its burden to prove unlawful concealed carry. Id. at 33.

Unlike Caswell where the record had very limited evidence to prove unlawfulness, here the prosecution admitted evidence to prove the element of unlawfulness. The prosecution did not need to rely on evidence "to the contrary." First, a Metro police agent who specializes in processing CCW permits testified that Appellant never applied for and never obtained a CCW permit in Nevada. (R. at 1228-29.) SA testified that he accessed a database to determine if Appellant had a CCW permit in other states and found no valid permit. (R. at 1228-29.) And second, IM-A testified that he never saw Appellant with a gun during the party. (R. at 948.). Thus, Appellant unlawfully concealed his firearm during the party before he admitted to firing shots in open air. (R. at 1085.)

Appellant makes the argument that Special Trial Counsel relied on this permissive inference and therefore the members used the permissive inference to find Appellant guilty beyond a reasonable doubt. (App. Br. at 18-19.) Special Trial Counsel's argument did not misapply the inference. In fact, Special Trial Counsel did not rely on the inference, but rather highlighted the evidence proving unlawfulness:

> Now I'm going to take the charges, and I'm going to briefly talk through the elements of each charge, alright, and what the government has to prove beyond a reasonable doubt and point you to evidence we believe shows that. I'm going to take them from least to most severe. So I'm going to start with the concealed weapons charge. That's Charge I, Specification 2.
>
> First element, the accused carried a handgun concealed at the time and place alleged. That it was unlawful, he didn't have a license, and that it was a dangerous weapon.
>
> Alright. So here's some definitions that the judge provided to you. It's concealed when it's intentionally covered or kept from sight. Dangerous weapon means it's specifically designed for the purpose of doing grievous bodily harm. That's what a handgun is. Here's what grievous bodily harm means; substantial risk of death, impairment of function, bodily member, organ, or mental faculty. The handgun fits.

> And it may be inferred to be unlawful in the absence of evidence to the contrary. But we have the evidence. The accused arrived at the party at approximately 2230 hours. You can see that in the cell site location information. The accused says it's about that same time in his interview, but we know we can believe it because we have independent evidence to corroborate.
>
> [IM-A] says, "I did not see the accused with a handgun. I was standing right next to him." And the accused left the party at about approximately 0045 hours, certainly no later than that. And no one, for more than 2 hours, saw 1 him openly carrying a handgun. It was obviously concealed. Don't check your common sense at the door.
>
> And then you have Officer Scott. The accused did not have, nor had he ever even applied for, a concealed weapons permit. And oh, by the way, the only other state that it could be from, maybe California, that's where the accused says he's from, we don't recognize California.

(R. at 1631-32.) Although Special Trial Counsel acknowledged the permissive inference instruction (and references it in his PowerPoint slide), he never argued that the panel members can infer unlawfulness in this case given lack of evidence to the contrary. Special Trial Counsel highlighted the evidence that proved that Appellant had no permit to conceal carry and that his firearm was not visible during the party. Thus, Special Trial Counsel argued that Appellant unlawfully carried a concealed weapon.[6]

For these reasons, assuming error, Appellant did not suffer prejudice. Absent the permissive inference, the prosecution proved unlawfulness by presenting independent evidence. This court should deny this assignment of error.

[6] Even if this Court does not recognize the permissive inference outlined in Lyons, the panel members were still free to infer unlawfulness given the facts of this case. No one saw Appellant with a firearm during the party, and IA confirmed that Appellant did not have a CCW permit in the state of Nevada or any other state.

III.

THE CONVENING AUTHORITY DID NOT ERR BY FAILING TO ACT ON APPELLANT'S REQUEST TO COMMUTE THE ADJUDGED FORFEITURES BECAUSE APPELLANT NEVER REQUESTED COMMUTATION.

Additional Facts

Appellant, through trial defense counsel, submitted matters to the Convening Authority for consideration under R.C.M. 1106. (*Submission of Matters*, 7 July 2025, eROT Vol, 3.) Citing the convening authority's ability to act under Article 60c and R.C.M. 1109(c)(4), Appellant requested that "the portion of his sentence which calls for forfeiture of all pay and allowances be waived." (Id.) Specifically, Appellant requested waiving the forfeiture of pay and allowances for the benefit of his dependent child. (Id.) The convening authority made the following determination:

> On July 2024, the accused requested waiver of the adjudged forfeitures for the benefit of his dependent child. I deny the request because in accordance with Article 58b and R.C.M. I 103(h)(l) only automatic forfeitures may be waived. To the extent the accused's submission of matters may be construed as a requested waiver of automatic forfeitures for the benefit of his dependent child, the waiver request is hereby denied.

(*Convening Authority Decision on Action*, 11 July 2024, eROT, Vol. 1.)

Standard of review

This Court reviews de novo whether post-trial processes was properly completed. United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000).

Law and Analysis

R.C.M. 1106 allows an accused to "submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109, 1110, or 1306." Article 60a(c)(2) grants the convening authority limited authority to act upon a sentence

if the sentence adjudged had a total period of confinement greater than six months, a punitive discharge, or death penalty. R.C.M. 1109(c)(4) allows the convening authority to "reduce, commute, or suspend, in whole or an part" any punishment adjudged for an offense.

Appellant now on appeal seeks remand for the convening authority to consider Appellant's request for commutation of adjudged forfeitures. (App. Br. at 23.) Although Appellant now argues that his submission of matters "imprecisely used the word 'waive' while requesting clemency," (App. Br. at 21) his clemency matters and specific request dictated otherwise. Appellant specifically asked that his adjudged forfeitures be *waived* for the benefit of his dependent child. (*Submission of Matters*, 7 July 2025, eROT Vol, 3.) This was not a request to commute a punishment.

As Appellant correctly pointed out, to commute a sentence means "a reduction of penalty." (App. Br. at 22 (citing United States v. Carter, 45 M.J. 168, 170 (C.A.A.F. 1996.)) In Carter, the appellant requested that his bad-conduct discharge be commuted to 24 months' confinement. Id. at 168. Carter demonstrates that commutation requires a specific request to reduce a part of a sentence adjudged. Here this did not happen. Appellant did not request a commutation of sentence – a reduction in penalty. Instead, Appellant requested that "the portion of his sentence which calls for forfeiture of all pay and allowances be waived" for the benefit of his dependent child. (*Submission of Matters*, 7 July 2025, eROT Vol, 3.) Nowhere in Appellant's submission of matters did he request a commutation. As a result, the convening authority did not consider commuting a part of Appellant's sentence.

Remand is not appropriate. Appellant had the opportunity to be heard and submitted clemency matters, via competent trial defense counsel, and specifically requested waiver of adjudged forfeitures. Moreover, the convening authority considered waiver of forfeitures and

waiver of forfeitures for the benefit of a dependent child – what Appellant asked for. Remand is not appropriate because Appellant on appeal should not get the opportunity to essentially submit additional matters given that he already had the opportunity. This Court should deny this assignment of error.

IV.

THE 23-DAY DELAY TO DOCKET THIS CASE DOES NOT WARRANT APPROPRIATE RELIEF.

Additional Facts

Appellant was sentenced on 27 June 2024. (*Entry of Judgement*, 27 July 2023, ROT, Vol. 1.) This Court docketed this case on 17 December 2024 – 173 days after sentencing. (*AFCCA Court Docket*, UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS, https://afcca.law.af.mil/content/docket.html (last visited 10 July 2025.))

The government in this case had to build a large record of trial. There were two court-reporters detailed in this case. (*SSgt EH Declaration*, 25 June 2025.) JM recorded and transcribed the proceedings that occurred on 3 January 2024, 8-10 April 2024, and 20 May 2024. (Id.) EK recorded and transcribed the proceedings that occurred 17-27 June 2024. (Id.) JM certified his transcript on 22 August 2024. EK certified the record of trial on 22 July 2024, and certified his portion of the transcript on 10 October 2024. (Id.)

SSgt EH received the finalized certified transcript from EK on 10 October 2024. (Id.) The next day was a family day, followed by the weekend and a federal holiday. On 15 October 2024, SSgt EH received EK's chronology, the Master Index and Exhibit Index, which was required for completion of the record of trial. (Id.) Between 16-18 October, SSgt EH, along with other office paralegals compiled the record of trial and routed it for quality check though the office. (Id.) October 19-20 fell on the weekend, and on 21 October SSgt EH was ill and

therefore not able to work on the record of trial. On 22 October 2024, the entire 23 volume record of trial was mailed to JAJM. (Id.)

The Military Justice Law and Policy division (JAJM) received the original (hard copy) record of trial in early November 2024. (*TSgt DK Declaration*, 2 July 2025.) The base legal office uploaded the electronic record of trial on 21 November 2024, which was received by JAJM on 22 November 2024. (Id.) During JAJM's review of the records of trial, DK noticed that documents were missing from the original record of trial. (Id.) Further, there were also missing audio for some of the sessions. (Id.) There were videos that did not function in the electronic record of trial. (Id.) On 25 November 2024, JAJM told the legal office to provide the missing documents from the original record of trial and to correct the electronic record of trial. (Id.)

JAJM received the missing documents and updated the electronic record of trial on 12 December 2024. On this date, JAJM delivered the original record of trial to this Court. (Id.) The electronic record of trial was also distributed to all parties. (Id.)

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

In Moreno, CAAF 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 more than 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. Now, this Court applies an aggregate standard threshold of 150 days from the day an appellant was sentenced to docketing with this Court. Id.

When a case does not meet one of the above standards, the delay is presumptively unreasonable and in reviewing claims of unreasonable post-trial delay this Court evaluates (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 135 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). All four factors are considered together and "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

To find a due process violation when there is no prejudice under the fourth Barker factor, a court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). In United States v. Tardif, CAAF determined that an appellant may be entitled to relief under Article 66(c), UCMJ, because it allows courts "to grant relief for excessive post-trial delay without a showing of 'actual prejudice'…if it deems relief appropriate under the circumstances." 57 M.J. 219, 224 (C.A.A.F. 2002). The existence of a post-trial delay does not necessitate relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225.

Analysis

Applying Livak, there was a facially unreasonable delay. From announcement of sentence to docketing, 173 days passed, which is more than the 150-day threshold required to show a facially unreasonable delay. Given that there was a facially unreasonable delay, this Court must assess whether there was a due process violation by considering the four Barker factors. Analyzing each of the Barker factors, Appellant is not entitled to relief for post-trial delay because there are reasonable explanations for the delay, Appellant never asserted his right to speedy post-trial processing, and Appellant suffered no prejudice.

Length of the Delay

Even though the delay is presumptively unreasonable, that does not end the inquiry. The delay alone is not sufficient to justify relief—it merely triggers a due process analysis. First courts look at the length of the delay and this factor weighs in favor of the government. The length of time was not "egregious," it was only 23 days more than the 150-day benchmark set out in Livak. Even in cases where the government has taken over three times the presumptively reasonable amount of time to docket an appellant's case, courts have not awarded sentence relief. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding that 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.") This factor favors the government.

Reasons for the Delay

There was no "deliberate attempt to delay the trial in order to hamper the defense." Barker, 407 U.S. at 531. The court reporters in this case had to transcribe a very lengthy court-martial, totaling 1,748 pages. Further, the legal office had to create a 23 volume original record

of trial. (SSgt *EH Declaration*, 25 June 2025.) Still, the government was well within the 150-day benchmark when they mailed the record of trial to JAJM on 22 October 2024. (Id.) What appears to cause the delay was the required corrections identified during JAJM's review. (*TSgt DK Declaration*, 2 July 2025.) Although the legal office had to make corrections, the legal office had to essentially compile two large records of trial – one original hard copy version containing 23 volumes and an electronic copy containing 7,086 pages. Even though corrections had to be made, the legal office worked expeditiously to correct the record of trial even during short duty weeks surrounding the Thanksgiving holiday. The reasons for delay assured that this Court and the parties received a completed record of trial, which is exemplified by the lack of assignments of error alleging record of trial omissions and errors. This factor favors the government.

Appellant's Assertion of the Right of Timely Review and Appeal

This factor also favors the Government. 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). In this case, Appellant did not assert his right to speedy post-trial processing. Appellant is not entitled to strong evidentiary weight for this factor.

Prejudice

The prejudice factor also favors the government. Appellant concedes that the delay did not violate his constitutional due process right to a timely appeal. (App. Br. at 25.) Thus, Appellant agrees that he did not suffer any prejudice from the post-trial delay.

Relief Under Tardif and Gay

Nonetheless, Appellant seeks relief, disproving adjudged forfeitures, under this Court's statutory authority to grant "appropriate relief" for excessive post-trial delay. (App. Br. at 27-28.) An appellant may be entitled to relief under Tardif even without a showing of actual prejudice "if [the court] deems relief appropriate under the circumstances." 57 M.J. at 224. The existence of post-trial delay does not necessitate relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225. However, this authority to grant appropriate relief is "for unreasonable *and* unexplained post-trial delays." Id. at 220 (emphasis added). Relief is not required, but the court may "tailor an appropriate remedy, if any is warranted, to the circumstances of the case." Id. at 225. Further, relief under Article 66, UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Id. In deciding whether to invoke Article 66, UCMJ, to grant relief as a "last recourse," this Court laid out a non-exhaustive list of factors to be considered, including:

> (1) How long the delay exceeded the standards set forth in Moreno;
>
> (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;
>
> (3) Whether there is some evidence of harm (either to the appellant or institutionally) caused by the delay;

> (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;
>
> (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing; and
>
> (6) Given the passage of time, whether the court can provide meaningful relief.

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). The delay in this case does not meet any of the non-exhaustive Gay factors. The delay was attributed to ensuring that the records of trial were complete and accurate before docketing with this Court. There was no bad faith nor neglect concerning Appellant's post-trial processing. In fact, the government displayed due diligence in compiling a large record of trial even though the initial compilation of the record of trial required corrective action. For these reasons, there was no institutional neglect or harm.

Appellant asserts that there was institutional neglect given the trend of untimely docketing and incomplete records of trial filed with this Court. (App. Br. at 26-27.) While this may be true in that records of trial have been remanded for correction, there was no neglect in Appellant's own post-trial process. In Valentin-Andino this Court did "not find that sentence relief is per se warranted due to errors in compilation of a complete record of trial." No. ACM 40185 (f rev), 2024 CCA Lexis 223, at *19 (A.F. Ct. Crim. 7 June 2024) (unpub. op.). This case is distinguishable from Valentin-Andino. In Valentin-Andino the record of trial was still incomplete even after a remand demonstrating institutional neglect. Id. at *2. Here, that was not the case, the record was completed and accurate once it was initially docketed with the Court. This is not a case in which the government displayed gross indifference or institutional neglect in post-trial processing requiring a remand.

Appellant also asserts that the passage of time warrants a remedy. (App. Br. at 26.) The passage of time here was only a 23-day delay here. While Appellant asserts that "post-trial delay is all-too-common in the Air Force military justice practice," he fails to assert facts and circumstances related to his specific case that warrant relief. (Id.) The passage of time here does not favor Appellant. Appellant also cites *Cassaberry-Folks* to support his argument that a remedy is required. No. ACM 40444, 2024 CCA LEXIS 500 (A.F. Ct. Crim. App. Nov. 22, 2024) (unpub. op.) (App. Br. at 27.) But in *Cassaberry-Folks*, there was 412 days between sentencing and docketing – a vast contrast to a 23-day delay for a record of trial that contained 23 volumes. Id. at *11.

In sum, the existence of a post-trial delay does not require relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Tardiff, 55 M.J. at 225. Appellant did not experience any prejudice from the minor 23-day delay, and a remedy is not warranted. The four Barker factors and the six Gay factors weigh in the government's favor, and the 23-day delay is not an egregious and prejudicial delay requiring post-trial sentencing relief from this Court. This Court should deny this assignment of error.

V.

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS GUILTY VERDICT.

Additional Facts

Trial defense counsel filed a motion for appropriate relief for a unanimous verdict. (App. Ex. XXV.) The military judge denied the motion. (R. at 320-21.)

Standard of Review

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

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members in accordance with Article 52, UCMJ. (R. at 1663.) Appellant now argues that he was deprived of his constitutional right to a unanimous guilty verdict. (App. Br. at 28-29.)

In Ramos v. Louisiana, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. 590 U.S. 83 (2020). The Court further held that the Fourteenth Amendment incorporated this right to criminal proceedings at the state level. Id. at 90-91. The Supreme Court did not state that this interpretation extended to military courts-martial.

CAAF addressed the applicability of Ramos to courts-martial in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). Our Superior Court reaffirmed that servicemembers do not have a Sixth Amendment right to a jury trial. Id. at 295. CAAF rejected the same claims Appellant raises now:

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

Id. at 298. CAAF held that Fifth Amendment due process does not require unanimous verdicts in courts-martial. Id. at 300. Further, our Superior Court found that non-unanimous verdicts did

not constitute an equal protection violation under the Fifth Amendment. Id. at 302. This Court should follow CAAF's binding precedent and deny Appellant's assignment of error.

CONCLUSION

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

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 14 July 2025.

[redacted]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Panel 2
Airman Basic (E-1) **JULIUS VONGPHACHANH**, United States Air Force, *Appellant*.	)	No. ACM 40741
	)	21 July 2025

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

Pursuant to Rule 18(d)(1) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant replies to the United States' answer filed on 14 July 2025 (hereinafter Government's Brief).

Assignment of Error I

The evidence was factually insufficient to prove that the pistol Appellant carried to a party on 2 July 2022 was concealed or that the carrying was unlawful.

A. The prosecution failed to prove beyond a reasonable doubt that the pistol Appellant carried on 2 July 2022 was concealed.

Charge I, Specification 2 alleged that Appellant carried a concealed weapon in violation of Article 114, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 914.[1] As Article 114(d)'s title suggests, one necessary fact the prosecution must prove beyond a reasonable doubt to obtain a conviction for carrying a concealed weapon is that the weapon was "concealed."[2] As the Government's Brief acknowledges, the evidence the prosecution presented in an attempt to prove

[1] Charge Sheet, Charge I, Specification 2.
[2] Pt. IV, ¶ 52.b.(7)(a), *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*). The 2024 edition of the *MCM* includes an identical provision.

that fact was limited to the testimony of IM-A.[3] IM-A's cursory account of seeing Appellant at the party and not noticing a weapon[4] is woefully inadequate to prove beyond a reasonable doubt that no part of Appellant's pistol was visible to the public.

Even if IM-A's testimony were to be fully credited,[5] it was insufficient to prove that Appellant's pistol was concealed. Several of the party's attendees described the venue as dark[6] and the pistol Appellant carried was black.[7] The Polymer80 pistol grip—the portion of a pistol most likely to be visible to the public when the weapon is carried openly—appears to be made of a nonreflective black synthetic substance,[8] which would be particularly difficult to see in a dark area. It would be even more difficult to see if worn in front of a dark-colored shirt; in a picture of Appellant taken about two hours after the party, he was wearing a dark-colored shirt.[9] Under those conditions, IM-A might easily not have noticed the pistol even if much of it was outside Appellant's clothing. The Government's Brief attempts to counter those facts by arguing that "Prosecution exhibits 4 and 5, short videos of the party showing attendees dancing and talking, revealed that although the party was outside in the evening and 'dark' out, attendees and their clothing was still visible – even dark clothing."[10] That assertion fails for several reasons. There was no testimony concerning the kind of cellphone that was used to record the footage in Prosecution Exhibit 4 or 5 or whether either was made with the benefit of night mode features that

[3] Government's Brief at 6–8.
[4] Trial Tr. at 948, 951, 953, 978.
[5] Appellant's opening brief discussed why IM-A was not a credible witness. Appellant's Brief at 11.
[6] Trial Tr. at 881, 887–89, 928, 1085.
[7] Pros. Ex. 26 at 26.
[8] *Id.*
[9] Pros. Ex. 15; *see also* Trial Tr. at 1182 (testimony by Detective JS, Las Vegas Metropolitan Police Department, that the photo in Pros. Ex. 15 was taken a couple hours after the party).
[10] Government's Brief at 7–8.

many cellphones use to make objects in low-lighting conditions more visible than they would be to the naked eye.[11]

Beyond the lack of evidence concerning the recording devices' technical specifications, there are specific features of each of the videos demonstrating they do not depict the lighting conditions in the only area of the backyard where IM-A testified to seeing Appellant. It is common knowledge that many cellphones employ built-in LED lights to illuminate an area while taking video footage in low-lighting conditions. It is apparent that the video in Prosecution Exhibit 4 was taken with the aid of such a feature.[12] Prosecution Exhibit 4 is not probative of the lighting conditions at the party in areas that were not illuminated by a cellphone's LED lights. While the quality of the footage in Prosecution Exhibit 5 is poor, it also appears to have been made with the benefit of such a feature.[13] What is certain is that it was taken in an area of the backyard with artificial lighting. Both Prosecution Exhibit 4 and Prosecution Exhibit 5 show there was a violet light in the area where Prosecution Exhibit 5 was recorded. Those lighting conditions were not representative of the sole area of the backyard where IM-A testified to seeing Appellant. WC-Q, who attended the party, explained that while the backyard "was pretty dark," an area "towards the front" that he described as a concrete or cement area was better lit than the rest of the yard.[14] That better-lit area appears to be what is depicted in Prosecution Exhibits 4 and 5. WC-Q testified that the area in the rear of the backyard was darker.[15] That darker rear area is where the fight occurred

[11] *See* Trial Tr. at 408–09 (foundation for admission of Pros. Exs. 4, 5), 852–53 (publication of Pros. Exs. 4, 5 to the members).
[12] *See* Pros. Ex. 4. For example, near the end of the video, the light from the cellphone taking the video shines off the hair of a woman standing near it. Other aspects of the video also clearly demonstrate that it was taken with the aid of projected light.
[13] *See* Pros. Ex. 5.
[14] Trial Tr. at 881.
[15] *Id. See also id.* at 928 (JA-L answering the question "It was very dark?" with "In the back, yeah").

and that is the only area of the backyard where IM-A testified he saw Appellant.[16] Thus, the only relevant area of the backyard was dark, making it exceedingly difficult to see the grip of a black Polymer80 pistol frame against a dark shirt.

Further demonstrating that IM-A's testimony does not prove beyond a reasonable doubt that the pistol was concealed, there is no evidence that IM-A ever saw Appellant's waist area—where a pistol is likely to be carried—much less that he had a 360-degree view of Appellant's lower torso. Appellant's opening brief pointed out that the only time IM-A recounted seeing Appellant was when Appellant was "like on the side of me, kind of, behind, but on the side."[17] The Government's Brief cavils, "This testimony did not mean that the only time IM-A saw Appellant that night was during the fight next to him."[18] The problem for the Government is that there is no *evidence* of IM-A seeing Appellant at any other point that night. If such evidence existed, it was the prosecution's burden to present it to the factfinder. It did not. Given that failure, it would be impermissible to speculate that IM-A might have testified that he saw Appellant at some other point during the party had he been asked. And there is no reason to believe he did.

The weight of IM-A's cursory testimony concerning Charge I, Specification 2 is further undermined by his alcohol intake that night. Appellant's opening brief observed that IM-A was drinking both before and at the party, which probably degraded his ability to perceive and accurately remember what he perceived.[19] Appellant cited federal civilian court decisions for the proposition that alcohol's adverse effect on perception does not require expert testimony and is

[16] *Id.* at 887–89, 948, 951, 953, 978.
[17] *Id.* at 948, 951.
[18] Government's Brief at 8.
[19] Appellant's Brief at 13.

within the ordinary knowledge of an average juror.[20] Thus, as civilian federal courts of appeals have recognized, jurors understand the effects of alcohol without the need for expert opinion.[21] Yet the Government's Brief objects that because "there was no evidence at trial through expert testimony to show that IM-A['s] alcohol consumption impaired his memory that night, . . . this Court should not find this argument persuasive."[22] In conducting factual sufficiency review, this court—no less than civilian jurors or court-martial members—may apply "common sense and knowledge of the ways of the world."[23] Expert testimony is not needed for this Court to recognize that IM-A's alcohol intake on the night of the party could have degraded his perception and memory.

All those factors combine to render the scanty evidence the prosecution presented factually insufficient to prove beyond a reasonable doubt that the pistol Appellant carried at the party was concealed.

B. Even assuming arguendo that the prosecution proved beyond a reasonable doubt that Appellant carried a concealed weapon on 2 July 2022, it failed to prove beyond a reasonable doubt that the carrying was unlawful.

Another requirement for a conviction for violating Article 114(d) is that the Government prove beyond a reasonable doubt that "the carrying was unlawful."[24] Unfortunately, while attempting to rebut Appellant's opening brief's demonstration that the evidence was factually

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[20] *Id.* (citing *Harris v. Clark*, No. 06-C-529, 2009 U.S. Dist. LEXIS 63643, at *7 n.1 (E.D. Wis. June 19, 2009); *Schinagel v. City of Albuquerque*, No. Civ. 07-481 LH/RLP, 2009 U.S. Dist. LEXIS 134197, *21 (D.N.M. Mar. 25, 2009); *Conde v. Starlight I, Inc.*, 103 F.3d 210, 213 (1st Cir. 1997)).
[21] *E.g.*, *United States v. Stewart*, No. 22-7025, 2023 U.S. App. LEXIS 27065, at *17-18 (10th Cir. Oct. 12, 2023) ("the average juror likely understands the general effects of alcohol intoxication on cognitive and physical functions"); *United States v. Hillsberg*, 812 F.2d 328, 333 (7th Cir. 1987).
[22] Government's Brief at 8.
[23] *United States v. Henderson*, No. ACM 40419, 2025 CCA LEXIS 172, *12 (A.F. Ct. Crim. App. Apr. 18, 2025) (citing *United States v. Green*, 52 M.J. 803, 805 (N-M. Ct. Crim. App. 2000)).
[24] Pt. IV, ¶ 52.b.(7)(b), *MCM*. Again, the 2024 edition of the MCM includes an identical provision.

insufficient to prove that element beyond a reasonable doubt, the Government's Brief mischaracterizes one aspect of a witness's testimony while offering an incomplete, misleading account of another aspect.[25]

As discussed in Appellant's opening brief, the testimony of Sergeant AS of the Las Vegas Metropolitan Police Department creates a "real possibility" that Appellant had a permit to carry a concealed weapon from another jurisdiction to which Nevada extends reciprocity.[26] Sergeant AS's duties included supervising the department's concealed weapons section.[27] Sergeant AS answered affirmatively when asked whether Nevada has "reciprocity with another state, if someone has a CCW[[28]] in another state."[29] He answered that Nevada does not have reciprocity with California,[30] but he was not asked about reciprocity with any other state and he offered no additional information about reciprocity with any other state.

After Sergeant AS testified about two databases his section used to check whether an individual has or had a concealed carry permit, the trial counsel asked, "And in these databases, can you see if someone had applied for a CCW from another state?"[31] Sergeant AS answered, "From another state? We would possibly be able to see that in SCOPE,[[32]] but generally no, we

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[25] This is not intended to suggest that the Government Brief's incorrect and misleading accounts of witness testimony reflected a deliberate effort to mislead this Court. On the contrary, given the extremely high level of professional conduct that characterizes the Government's representation before this Court, the mischaracterizations were no doubt inadvertent.
[26] Appellant's Brief at 19; *see also United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199, at *25 (N-M. Ct. Crim. App. June 8, 2020) ("If we believe there is a 'real possibility' that he is not guilty, there is reasonable doubt, and we cannot affirm Appellant's conviction.").
[27] Trial Tr. at 1225–26.
[28] Sergeant AS testified that the phrase CCW permit means a concealed weapons permit. Trial Tr. at 1226.
[29] *Id.* at 1256.
[30] *Id.*
[31] *Id.* at 1228.
[32] Page 8 of the Air Force Office of Special Investigations Report of Investigation indicates that SCOPE stands for Shared Computer Operations for Protection and Enforcement.

cannot."[33] Yet the Government's Brief, citing that very page of the transcript, states, "It was possible in SCOPE to see if someone had applied for a [carrying concealed weapon permit] from another state."[34] The Government's Brief fails to note that Sergeant AS's testimony indicated that while it might *sometimes* be possible to see a concealed carry permit from another state, *generally*, that information could *not* be seen.[35] The Government's Brief then states, "If Appellant had a CCW permit in another state, SA [sic] would have found Appellant's name in the databases," citing page 1229 of the trial transcript in support of that proposition.[36] *Nothing* on page 1229 of the transcript—or anywhere else in Sergeant AS's testimony—supports that proposition. On the contrary, Sergeant AS actually testified, "I did not find that individual to have ever had a CCW or apply for a CCW *in the state of Nevada*."[37] Similarly, on redirect examination, Sergeant AS answered no when the trial counsel asked, "Has Julius Vongphachanh ever had a valid CCW permit *in the state of Nevada*?"[38] Based on the actual evidence at Appellant's trial, the prosecution failed to prove beyond a reasonable doubt that, even if the weapon was concealed, such concealment was unlawful because the prosecution failed to prove the absence of a concealed carry permit from a jurisdiction to which Nevada extended reciprocity.

For the foregoing reasons as well as those set out in Appellant's opening brief, this Court should set aside the finding of guilty to Charge I, Specification 2, dismiss that specification with prejudice, reassess the sentence, and set aside the adjudged forfeitures.

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[33] Trial Tr. at 1228.
[34] Government Brief at 5 (citing Trial Tr. at 1228).
[35] Trial Tr. at 1228 ("generally no, we cannot").
[36] Government's Brief at 5.
[37] Trial Tr. at 1229 (emphasis added).
[38] *Id.* at 1233 (emphasis added).

Assignment of Error II

A permissive inference may not be employed to establish an element in a criminal case where, as here, that inference would more often be untrue than true.

This Court correctly held in *United States v. Caswell* that no permissive inference of illegality arises from the mere possession of a concealed weapon.[39] The Government's Brief helps to establish that it would be unconstitutional to infer that the mere act of carrying a concealed weapon warrants a presumption that the carrying is unlawful.

The Supreme Court held in *Leary v. United States* that, in a criminal case, a statutory inference is "'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[40]

The Court further requires that permissive inferences "satisfy due process standards in light of present-day experience."[41] The number of Americans with a concealed carry permit increased by almost a factor of eight over the quarter century starting in 1999.[42] In that year, there were roughly 2.7 million concealed carry permit holders; by 2024, that number was 21.5 million.[43] The growth in permitless concealed carry jurisdictions has been even more striking. Before 2003, only

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[39] *United States v. Caswell*, No. ACM 23035, 2025 CCA LEXIS 98 (A.F Ct. Crim. App. Mar. 17, 2025), *petition denied*, __ M.J. __, No. 25-0162/AF, 2025 CAAF LEXIS 527 (C.A.A.F. July 7, 2025).
[40] *Leary v. United States*, 395 U.S. 6, 36 (1969).
[41] *Barnes v. United States*, 412 U.S. 837, 844–45 (1973).
[42] John R. Lott, Jr., Carlisle E. Moody & Rujan Wang, *Concealed Carry Permit Holders Across the United States: 2024*, Crime Prevention Research Center 5 (November 2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5040077, last accessed 19 July 2025 [hereinafter 2024 Concealed Carry Report].
[43] *Id.*

one state—Vermont—allowed carrying a concealed weapon without a permit.[44] By 2022, a majority of states allowed permitless concealed carry.[45] Thus, in the twentieth century, the case would have been much stronger for an inference that carrying a concealed weapon without a permit was unlawful absent evidence to the contrary. But "present-day experience"[46] teaches that is no longer true.

In most places in the United States, it is lawful for an individual who is at least twenty-one years old (as was Appellant on the date of the charged offense[47]) to possess a concealed weapon. The Government's Brief *supports* that proposition. Despite arguing that the permissive inference that carrying a concealed weapon is unlawful absent evidence to the contrary "is logical," the Government's Brief concedes that only twenty-one states require a permit to carry a concealed weapon lawfully.[48] The Government's Brief cites a website listing the twenty-nine U.S. states in which a twenty-one-year-old may lawfully carry a concealed weapon without a permit.[49] Those twenty-nine states collectively account for more than 68 percent of the landmass of the United

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[44] Nicholas Moeller, Note, *The Second Amendment Beyond the Doorstep: Concealed Carry Post-*Heller, 2014 U. ILL. L. REV. 1401, 1408.
[45] *See infra* note 48 and accompanying text.
[46] *Barnes*, 412 U.S. at 844–45.
[47] Trial Tr. at 1447.
[48] Government's Brief at 11 & 11 n.3. At the time of the alleged offenses, that number was greater. Louisiana and South Carolina joined the majority of states by allowing the carrying of concealed weapons without a permit starting in 2024. *See* LA. REV STAT. § 14:95.M (2025); South Carolina Constitutional Carry/Second Amendment Preservation Act of 2024, 2023 Bill Text SC H.B. 3594 (enrolled Mar. 7, 2024).
[49] Government's Brief at 11 n.3 (citing Constitutional Carry/Unrestricted/Permitless Carry, U.S. CONCEALED CARRY ASS'N, https://www.usconcealedcarry.com/resources/terminology/types-of-concealed-carry-licensurepermitting-policies/unrestricted/). Those twenty-nine states are Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wyoming. Constitutional Carry/Unrestricted, Permitless Carry, United States Concealed Carry Association, https://www.usconcealedcarry.com/resources/terminology/types-of-concealed-carry-licensurepermitting-policies/unrestricted/, last accessed 19 July 2025.

States.[50] Thus, there is more than a two-thirds chance that a twenty-one year old standing in any particular location in the United States may carry a concealed weapon lawfully without a permit. In the twenty-one states in which a permit is required plus the District of Columbia, more than 8.5 million residents possess such permits.[51] There is no reason to believe that in even those states, more than 8.5 million people carry concealed firearms without a permit. Thus, it emphatically cannot "be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[52]

Nevada's status as a reciprocity state further undermines the validity of the permissive inference. Sergeant AS testified that Nevada extends reciprocity to concealed carry permits from some other states.[53] The prosecution failed to present additional evidence as to the scope of that reciprocity beyond establishing that California was not a jurisdiction to which Nevada extends reciprocity.[54] The possibility that literally millions of permitholders[55] from outside Nevada—including holders of non-resident permits in other states—may lawfully carry a concealed weapon in Nevada further precludes concluding "with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[56] Therefore, the instruction the military judge gave that "[t]he carrying of a concealed weapon may be inferred to

[50] The total landmass of the United States is 3,532,316 square miles. U.S. Census Bureau, Nation, United States, https://data.census.gov/profile, last accessed 19 July 2025. The twenty-nine states listed in note 49, *supra*, total 2,413,973 square miles in land area. *See* U.S. Census Bureau, State Area Measurements and Internal Point Coordinates, https://www.census.gov/geographies/reference-files/2010/geo/state-area.html, last accessed 19 July 2025.
[51] 2024 Concealed Carry Report, *supra* note 42, at 16–18.
[52] *Leary*, 395 U.S. at 36.
[53] Trial Tr. at 1256.
[54] *Id.*
[55] 2024 Concealed Carry Report, *supra* note 42, at 5.
[56] *Leary*, 395 at 36.

be unlawful in the absence of evidence to the contrary"[57] is unconstitutional as applied to Appellant.[58]

Appellant was prejudiced by that permissive inference instruction. The special trial counsel both mentioned the permissive inference during closing argument and, as the Government's Brief acknowledges, displayed it to the members on a PowerPoint slide.[59] And the military judge delivered that instruction to the members both orally and in writing.[60] "Absent evidence to the contrary," a military appellate court "may presume that members follow a military judge's instructions"[61] Even if the special trial counsel had not mentioned the inference both orally and in writing, the military judge's instruction allowing the members to find the element of unlawfulness based on the permissive inference would have been prejudicial.

The Government's argument for harmlessness relies on the same mischaracterization of Sergeant AS's testimony discussed above.[62] The Government's Brief erroneously asserts that "SA [sic] testified that he accessed a database to determine if Appellant had a CCW permit in other states and found no valid permit. (R. at 1228-29.)"[63] On the contrary, Sergeant AS testified that the database searches he ran would generally *not* reveal a concealed carry permit from another state.[64]

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[57] Trial Tr. at 1595; App. Ex. CXXII at 2.
[58] *See Barnes*, 412 U.S. at 841–43. *See also County Court v. Allen*, 442 U.S. 140, 162-63 (1979) (noting that the validity of a permissive inference is evaluated as applied to the record before the court).
[59] Trial Tr. at 1631; App. Ex. CXX; Government's Brief at 16.
[60] Trial Tr. at 1595; App. Ex. CXXII at 2.
[61] *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000).
[62] *See supra* notes 32–38 and accompanying test.
[63] Government's Brief at 15.
[64] Trial Tr. at 1228.

The Government's Brief then makes a second mistake in arguing harmlessness. It asserts, "No one saw Appellant with a firearm during the party . . . ."[65] The party was attended by approximately 100 people.[66] The prosecution presented the testimony of six people who attended the party, only one of whom (IM-A) testified to seeing Appellant there.[67] The Government is asking this Court to guess that if roughly ninety-three attendees whom the prosecution did not call as witnesses were to have testified, all would have said they did not see a weapon on Appellant. Of course, the law forbids that sort of guesswork.[68]

For the foregoing reasons as well as those set out in Appellant's opening brief, the military judge plainly erred by instructing the members that they could infer that the carrying of a concealed weapon is unlawful and that error prejudiced Appellant. Accordingly, this Court should set aside the finding of guilty to Charge I, Specification 2 and remand the case for a decision whether to retry it without the unconstitutional permissive inference instruction.

Assignment of Error III

The Government's Brief relies on the erroneous assertion that "[n]owhere in Appellant's submission of matters did he request a commutation" when Appellant's R.C.M. 1106 submission expressly stated that "it is appropriate to commute the portion of the sentence that calls for forfeiture of all pay and allowances."

Appellant's opening brief demonstrated that the convening authority failed to act on Appellant's R.C.M. 1106 submission's request to commute the adjudged forfeitures.[69] The Government's argument to the contrary rests on the foundation of an obvious factual error. The

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[65] Government's Brief at 16 n.6.
[66] Trial Tr. at 977.
[67] *Id.* at 849–66 (testimony of JT-C), 868–904 (testimony of WC-Q), 905–18 (testimony of VC-D), 918–40 (testimony of JA-L), 946–88 (testimony of IM-A), 990–98 (testimony of JN).
[68] *See, e.g.*, *United States v. Rice*, No. ACM 39071 (reh), 2021 CCA LEXIS 37, at *13 (A.F. Ct. Crim. App. Jan. 29, 2021).
[69] Appellant's Brief at 20–23.

Government claims that "[n]owhere in Appellant's submission of matters did he request a commutation"[70] On the contrary, the R.C.M. 1106 submission expressly stated, "[I]t is appropriate to commute the portion of the sentence that calls for forfeiture of all pay and allowances."[71] Because it was built on a faulty factual foundation, the Government's opposition to this assignment of error crumbles.

In light of the true facts, the resolution of this issue is clear. R.C.M. 1109(d)(3)(A) requires the convening authority to "consider matters timely submitted under R.C.M. 1106" before acting on the sentence. Here, Appellant made a timely submission under R.C.M. 1106 that called for the commutation of the adjudged total forfeiture of pay and allowances.[72] Yet the convening authority did not consider that request. Instead, he determined he was without authority to waive adjudged forfeitures and declined to waive automatic forfeitures.[73] But as even the Government's Brief acknowledges, waiver of a penalty is distinct from commutation of a penalty.[74] Thus, the convening authority failed to fulfill R.C.M. 1109(d)(3)(A)'s mandate that he consider matters timely submitted under R.C.M. 1106.

The appropriate remedy is also clear. In *United States v. Wheelus*, the Court of Appeals for the Armed Forces observed:

> Because clemency is a highly discretionary Executive function, there is material prejudice to the substantial rights of an appellant if there is an error and the appellant makes some colorable showing of possible prejudice. If the appellant makes such a showing, the Court of Criminal Appeals must either provide meaningful relief or return the case to the Judge Advocate General concerned for a remand to a convening authority for a new post-trial recommendation and action.[75]

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[70] Government's Brief at 18.
[71] Memorandum for Convening Authority, from AF/JAJD, Subject: *U.S. v. AB Julius T. Vongphachanh* – Submission of Matters ¶ 3.b (7 July 2024) [hereinafter R.C.M. 1106 Submission].
[72] R.C.M. 1106 Submission, *supra* note 71, at ¶ 3.b.
[73] Convening Authority Decision on Action – *United States v. Airman Basic Julius Vongphachanh* ¶ 4 (19 Oct. 2023).
[74] Government's Brief at 18.
[75] *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

In its subsequent decision in *United States v. Scalo*, the Court of Appeals for the Armed Forces explained that the "low threshold for material prejudice" in the post-trial clemency context "reflects the convening authority's vast power in granting clemency and is designed to avoid undue speculation as to how certain information might impact the convening authority's exercise of such broad discretion."[76] This Court has observed that while "the United States Court of Appeals for the Armed Forces (CAAF) was interpreting" the pre-Military Justice Act of 2016 "version of Article 60, UCMJ, 10 U.S.C. § 860, in [*Scalo*] and *Wheelus*, the CAAF has not indicated its jurisprudence regarding the appropriate standard for assessing post-trial processing error has changed."[77] In the absence of such direction, *Scalo*'s "low threshold for material prejudice" remains the governing standard.

The convening authority erred by failing to consider Appellant's request to commute the adjudged forfeitures. Appellant's opening brief made a colorable showing of possible prejudice.[78] Therefore, under *Wheelus*, this Court must either provide meaningful relief or remand the case for a new convening authority decision on action.[79] In the interest of judicial economy, this Court should provide meaningful relief by setting aside the adjudged forfeitures. In the alternative, this Court may remand the case for a new convening authority decision on action with proper consideration of Appellant's request for commutation of the adjudged forfeitures.

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[76] *United States v. Scalo*, 60 M.J. 435, 437 (C.A.A.F. 2005).
[77] *United States v. Douglas*, No. ACM 40324, 2023 CCA LEXIS 502, *7 n.4 (A.F. Ct. Crim. App. Dec. 5, 2023).
[78] Appellant's Brief at 22–23.
[79] See *Wheelus*, 49 M.J. at 289.

For the foregoing reasons as well as those set out in Appellant's opening brief, this Court should set aside the adjudged forfeitures or remand the case for a new convening authority decision on action.

Assignment of Error IV

The Government's claim that "there was no neglect" in this case's post-trial processing is belied by the base legal office forwarding to the Office of The Judge Advocate General an original record of trial missing some required documents and an electronic record of trial missing audio recordings of five days of the court-martial and including some inoperative videos.

The Department of the Air Force has a systemic problem with both untimely and defective post-trial processing of records of trial. This Court has noted that problem in several decisions.[80] Additionally, as Appellant's opening brief demonstrated, in the year preceding its filing, this Court decided at least thirteen cases in which the Government failed to meet the *Livak* 150-day standard.[81] Additionally, this Court has recently remanded a spate of cases because the Government docketed defective records of trial with this Court.[82]

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[80] *E.g.*, *United States v. Cassaberry-Folks*, No. ACM 40444, 2024 CCA LEXIS 500, at *43 (A.F. Ct. Crim. App. Nov. 22, 2024) ("This court has recently been obliged to grapple with a series of cases involving post-trial delay at various stages, all of which raise serious questions as to the scope of potential institutional neglect within the Air Force, particularly when it comes to timely and accurate assembly of records of trial and forwarding of verbatim trial transcripts"); *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, *17 (A.F. Ct. Crim. App. June 7, 2024) ("we find a systemic problem indicating institutional neglect. These errors in records of trial cause delays in appellate review"), *aff'd*, __ M.J. __, No. 24-0208, 2025 CAAF LEXIS 248 (C.A.A.F. Mar. 31, 2025).

[81] Appellant's Opening Brief at 26 and 26-27 n.139; *see United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

[82] *E.g.*, *United States v. Hooker*, No. ACM 40646 (A.F. Ct. Crim. App. July 9, 2025) (order); *United States v. Turtu*, No. ACM 40649, 2025 CCA LEXIS 300 (A.F. Ct. Crim. App. June 30, 2025) (order); *United States v. Robinson*, No. ACM 24044, 2025 CCA LEXIS 259 (A.F. Ct. Crim. App. June 6, 2025) (order); *United States v. Anderson*, No. ACM 40654, 2025 CCA LEXIS 204 (A.F. Ct. Crim. App. May 8, 2025) (order); *United States v. Kindred*, No. ACM 40607, 2025 CCA LEXIS 147 (A.F. Ct. Crim. App. Apr. 7, 2025) (order); *United States v. Burkhardt-Bauder*, No. ACM 24011, 2025 CCA LEXIS 81 (A.F. Ct. Crim. App. Feb. 19, 2025) (order).

This case demonstrates the inattention to detail that so often causes unreasonable post-trial delay in the Department of the Air Force. As the Government now confesses, the base legal office forwarded a faulty record of trial to the Office of The Judge Advocate General for docketing with this Court.[83] The electronic record was missing audio recordings of five days of the court-martial.[84] The original record was missing "several documents . . . from the required attachments and allied papers."[85] And some of the videos in the electronic record were inoperable.[86] Those deficiencies remained after the base legal office purported to take time to perform a "quality check" on the record of trial.[87] The deficiencies were discovered by the Military Justice Policy Division, which returned the record for correction.[88] That process caused seventeen of the twenty-three days of presumptively unreasonable delay in this case.

What is even more alarming than the base legal office's negligence is the Government's position that "there was no neglect" in this case's "post-trial process."[89] Neglect means "[t]he failure to give proper attention to a person or thing, whether inadvertent, negligent, or willful; the act or treating someone or something heedlessly or inattentively."[90] Thus, in the Government's view, forwarding an electronic record of trial missing audio recordings of five days of a trial reflects "proper attention" to post-trial processing. Forwarding an original record of trial missing

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[83] Government's Brief at 19; United States' Motion to Attach Documents, *United States v. Vongphachanh*, No. ACM 40741 (filed July 14, 2025) [hereinafter Government's Motion to Attach Documents], at Appendix B (TSgt DK Declaration).
[84] Government's Motion to Attach Documents, *supra* note 83, at Appendix B (TSgt DK Declaration).
[85] *Id.*
[86] *Id.*
[87] *See* Government's Brief at 19; Government's Motion to Attach Documents, *supra* note 83, at Appendix A (SSgt E-C H Declaration).
[88] *See* Government's Brief at 19; Government's Motion to Attach Documents, *supra* note 83, at Appendix A (SSgt E-C H Declaration).
[89] Government's Brief at 25.
[90] *Neglect*, BLACK'S LAW DICTIONARY (11th ed. 2019).

required documents reflects "proper attention" to post-trial processing. Forwarding an electronic record with inoperative embedded video reflects "proper attention" to post-trial processing. The Government's blasé attitude demonstrates that it must be incentivized to do better. Providing meaningful relief in this case would be a first step in helping the Government realize that what occurred in this case was not merely neglect, but intolerable neglect.

The Government further demonstrates its apathy concerning dilatory post-trial processing by misstating the amount of post-trial delay in this case. The header of the portion of the Government's Brief concerning this issue refers to "the 23-day delay to docket this case."[91] The delay in docketing was 173 days from sentencing, not twenty-three days. There were twenty-three days of *presumptively unreasonable* delay.[92] The Government's attempt to minimize the extent of delay in this case reflects its indifference to the dilatory post-trial processing that plagues the Department of the Air Force.

The Government further demonstrates its misplaced complacency by insisting that, despite seventeen days of unreasonable delay resulting directly from having to send a defective record of trial back to the base level for correction, the reason for delay "favors the government."[93] The Government goes so far as to claim that it "displayed due diligence in compiling a large record of trial even though the initial compilation of the record of trial required corrective action."[94] Thus, the Government avows that the post-trial processing in this case was not merely acceptable, but creditable. But the Government does not deserve kudos for fixing its own mistakes. This Court should ensure that the Government understands that delay resulting from a base legal office

[91] Government's Brief at 19 (capitalization altered).
[92] *See Livak*, 80 M.J. at 633.
[93] Government's Brief at 23.
[94] *Id.* at 25.

forwarding a defective record of trial to the Office of The Judge Advocate General is culpable, not creditable.

Beyond boasting about post-trial processing of which it should be embarrassed, the Government misapprehends the law. The Government writes, "An appellant may be entitled to relief under *Tardif* even without a showing of actual prejudice 'if [the court] deems relief appropriate under the circumstances.'"[95] But as the Court of Appeals for the Armed Forces has made clear, *Tardif* no longer provides a basis for relief for post-trial delay claims.[96] "*Tardif* and its progeny have been superseded by Article 66(d)(2)."[97] Thus, "errors regarding post-trial delay are now solely governed by Article 66(d)(2)."[98] The Government errs by suggesting otherwise.

Several of the non-exclusive *Gay* factors[99] suggest that Article 66(d)(2) relief is appropriate here. These include the reasons for the delay (the base legal office's assembly and forwarding of defective original and electronic records of trial), the demonstrable institutional neglect concerning timely and accurate post-trial processing in the Department of the Air Force, and the availability of meaningful relief notwithstanding the passage of time (setting aside the adjudged forfeitures). Moreover, there is an additional urgent reason to provide relief: to correct the Government's indifference to deficient assembly of the record of trial at the base level that its brief demonstrates.

For the foregoing reasons as well as those set out in Appellant's opening brief, this Court should hold that the unreasonable post-trial delay in this case warrants the Article 66(d)(2) relief of setting aside the adjudged forfeitures.

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[95] *Id.* at 24 (bracketed material in original) (quoting *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002)).
[96] *United States v. Valentin-Andino*, __ M.J. __, No. 24-0208, 2025 CAAF LEXIS 248, at *10 n.4 (C.A.A.F. Mar. 31, 2025).
[97] *Id.*
[98] *Id.*
[99] *See United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015).

Respectfully submitted,

[redacted]
Joyclin N. Webster, Capt, USAF
Appellate Defense Counsel
[redacted]

[redacted]
Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 21 July 2025.

Respectfully submitted,

[redacted]
Dwight H. Sullivan
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 2
Airman Basic (E-1) **JULIUS VONGPHACHANH,** United States Air Force *Appellant.*	)	No. ACM 40741
	)	14 July 2025

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

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

- Appendix A – *SSgt EH declaration*, dated 25 June 2025 (1 page)
- Appendix B – *TSgt DK Declaration*, dated 2 July 2025 (1 page)

Appellant's fourth assignment of error asserts that he is entitled to relief due to post-trial processing delays. This case was docketed 23 days after the 150 day benchmark outlined in United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

In evaluating the reasonableness of a post-trial delay this Court reviews (1) the length of the delay; (2) the reasons for the delay, among other factors. *See* United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006). The declarations provide context to explain the reasons for delay, which is necessary for this Court to conclude whether the delay was reasonable and whether Appellant is entitled to any relief for post-trial processing.

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J.

437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442. (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). The issue of post-trial delay was directly raised by materials in the record because they show, but do not fully explain, the delays in the post-trial processing of Appellant's case.

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

[redacted]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

[redacted]

MATTHEW D. TALCOTT, Col, USAF
Chief
[redacted]

FOR

[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Counsel Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 14 July 2025.

[redacted]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S RESPONSE TO UNITED STATES' MOTION TO ATTACH**
Appellee	)	
	)	
v.	)	
	)	Before Panel 2
Airman Basic (E-1)	)	
JULIUS VONGPHACHANH,	)	No. ACM 40741
United States Air Force,	)	
Appellant.	)	21 July 2025

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

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby responds to the United States' Motion to Attach Documents.

Appellant supports the Government's motion. The declarations the Government moves to attach demonstrate that negligence caused seventeen of the twenty-three days of presumptively unreasonable delay in this case.

The declaration at Appendix B establishes that the legal office at Nellis Air Force Base, Nevada, assembled and forwarded defective original and electronic records of trial to the Office of The Judge Advocate General, which required seventeen days to correct. *See* United States' Motion to Attach Documents, Appendix B (Declaration of TSgt DK). The electronic record of trial was missing audio of five days of the court-martial and included some inoperative videos. *Id.* The original record of trial was missing several documents from the required attachments and allied papers. *Id.* The base legal office forwarded those defective records to the Office of The Judge Advocate General despite having previously taken time to perform an apparently flawed "quality check." United States' Motion to Attach Documents, Appendix A (Declaration of SSgt EC-H). The declarations the Government moves to attach are, therefore, relevant to this Court's consideration of Assignment of Error IV, which

concerns the presumptively unreasonable 173-day delay from sentencing to the docketing of the record of trial in this case.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the United States' Motion to Attach Documents.

Respectfully submitted,

[redacted]
Joyclin N. Webster, Capt, USAF
Appellate Defense Counsel
[redacted]

[redacted]
Dwight H. Sullivan
Appellate Defense Counsel
[redacted]

[redacted]

[redacted] **FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 21 July 2025.

Respectfully submitted,

[redacted]
Dwight H. Sullivan
Air Force Appellate Defense Division

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40741**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Julius VONGPHACHANH	)	**CHANGE**
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 27th day of August, 2025,

ORDERED:

The record of trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
MENDELSON, JAMIE L., Lieutenant Colonel, Appellate Military Judge
MCCALL, KRISTIN K.B., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40741**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Julius T. VONGPHACHANH	)	**CHANGE**
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 30th day of April, 2026,

ORDERED:

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

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

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
MCCALL, KRISTIN K.B., Colonel, Appellate Military Judge
KUBLER, JOSEPH J., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal