IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Airman First Class (E-3) **BRANDEN C. HAYNES,** United States Air Force *Appellant*	)	No. ACM 40306
	)	28 June 2023

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

ASSIGNMENTS OF ERROR[1]

I.

WHETHER AB HAYNES' SENTENCE IS INAPPROPRIATELY SEVERE?

II.

R.C.M. 1106(d)(3) PROVIDES AN ACCUSED FIVE DAYS TO RESPOND TO A VICTIM'S POST-TRIAL SUBMISSION OF MATTERS. DID THE CONVENING AUTHORITY VIOLATE BASIC DUE PROCESS RIGHTS WHEN HE ACTED WITHOUT

[1] Undersigned Counsel notes there are two other errors within the Record of Trial (ROT) but asserts no prejudice and requests no relief related to these two omissions in the Record. AB Haynes is aware of these errors and does not assert prejudice nor request relief. While the Article 32 Preliminary Hearing Report is included in the ROT as required under RCM 1112(f), that report is not complete as PHO Exhibits 8 and 12 are not included. Preliminary Hearing, Disc containing "US v. Haynes PHO Report and Attach" ROT Vol. 2. The Article 32 preliminary hearing and report relates only to charges and specifications that were ultimately withdrawn and dismissed with prejudice. *See* Disc containing "US v. Haynes PHO Report and Attach" ROT Vol. 2 and Entry of Judgement (EOJ) ROT Vol. 1, dated 8 June 2022. Additionally, while the Pretrial Advice on the Second Additional Charge was completed, there is no record of receipt by the Accused or Trial Defense of this advice as required IAW DAFI 51-201, *Administration of Military Justice* (14 Apr 2022, para 13.1.4) and previously under AFI 51-201, para 13.20. *See* Pretrial Advice, ROT Vol. 2, dated 25 March 2022. The Pretrial Advice is otherwise in proper form. *Id.*

GIVING AB HAYNES AN OPPORTUNITY TO RESPOND TO THE 1106A POST-TRIAL SUBMISSIONS?

STATEMENT OF THE CASE

On 31 March 2022, at Nellis Air Force Base (AFB), Nevada, a general court-martial composed of a military judge alone found Airman First Class (A1C) Branden C. Haynes guilty, consistent with his pleas, of the following: one charge with two specifications of willful dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 92.[2] R. at 167; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, dated 8 Jun 2022. The military judge sentenced A1C Haynes to a reduction to E-1, total forfeitures, 4 months confinement, and a bad conduct discharge.[3] R. at 215. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, ROT Vol. 1, 28 April 2022.

STATEMENT OF FACTS

Sentence Severity

AB Haynes arrived at Nellis Air Force Base, NV in March 2019, and met K.A., the individual in Specification 2 of the Second Additional Charge at the First Term Airman's Course. Defense Exhibit (Def. Ex.) K; Prosecution Exhibit (Pros. Ex.) 1, page

[2] All references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

[3] The military judge sentenced AB Haynes to 2-months confinement for Specification 1 of the Second Additional Charge, and 4-months confinement for Specification 2 of the Second Additional Charge, with confinement running concurrently. R. at 215.

3. The charged timeframe for the harassment against K.A. is from 6 June 2019 through 30 August 2020. EOJ, ROT Vol. 1, dated 8 June 2022. Between April 14, 2019, and June 6, 2019, AB Haynes and K.A. were friends, went out to dinner, engaged in sexual intercourse on multiple occasions, and remained on good terms. Pros. Ex. 1, page 3. During this time, K.A. advised AB Haynes she did not want an exclusive relationship, because she was going through a divorce. *Id.* K.A. then advised AB Haynes she did not want to date him at all, sometime in May 2019 when she went on leave. *Id.* On June 6, 2019, AB Haynes went to K.A.'s apartment and was invited into her apartment. *Id.* The two engaged in sexual intercourse, although AB Haynes and K.A. disagree whether the encounter was consensual. *Id.* AB Haynes has not been convicted of any sexual assault or rape charge. EOJ, ROT Vol. 1, dated 8 June 2022. The sexual harassment is that AB Haynes left K.A. voicemails, went to her home uninvited and left her a gift, engaged her in conversation at various places on base, and asked coworkers and friends for information about her. EOJ, ROT Vol. 1, dated 8 June 2022. The stipulation of fact and the record of trial does not document that K.A. contacted her command, AB Haynes' command, law enforcement, nor any other authority to stop any unwanted behavior towards her by AB Haynes. Pros. Ex. 1. The Stipulation does reflect K.A. communicated her desire to have AB Haynes stop contacting her and showing up at her apartment, given she told him as much, and ultimately she blocked him from making further electronic communications with him. Pros. Ex. 1, page 3, R. at 136. The record only reflects direct contact between AB

Haynes and K.A. between 6 June 2019 and August 2019. Pros. Ex. 1, Attachment 2; Pros. Ex. 1; R. at 112-20.

Specification 1 of the Second Additional Charge occurred on 9 September 2020. EOJ, ROT Vol. 1, dated 8 June 2022. This specification involves S.M., a coworker whom AB Haynes was working with on that day R. at 88; Pros. Ex. 1. S.M. and AB Haynes were in an open work center with people freely walking in and out. Pros. Ex. 1 and Attachment 1. AB Haynes and S.M. continued to work together throughout the day, after AB Haynes harassed S.M. Pros. Ex. 1, Attachment 1. The record does not document any further contact between AB Haynes and S.M. There is no indication in the record that S.M. continued to work with or interact with AB Haynes after 9 September 2020.

The Government offered no evidence in aggravation at sentencing. R. at. 171-78. Trial Defense offered 8 character letters in support of AB Haynes. Def. Ex. A. Individuals described AB Haynes as hardworking and trustworthy. Def. Exs. B, F, and G. R.K., the Programs Section Chief, with over 22 years of service, and after working with AB Haynes for approximately 16 months, found him to have "high rehabilitation potential." Def. Ex. C; R. at 187. Others describe AB Haynes as dependable, generous, and outgoing. Def. Ex. D and I. A family friend who has known AB Haynes for 10 years opined AB Haynes has "high rehabilitative potential." Def. Ex. H.

K.A. provided an unsworn statement at trial. Court Exhibit (Ct. Ex.) A. She noted impact, in part, from conversations others were having about the sexual

harassment, "hearing so many things" that eventually she stopped being able to trust. *Id.* S.M. also provided a statement at trial. Ct. Ex. B. She expressed, in part, difficulty with the timeline of and coordination required by the court-martial process, which is not attributable to AB Haynes. *Id.*

The maximum punishment for willful dereliction of duty is 6 months confinement, reduction to E-1, total forfeitures, and a Bad Conduct Discharge.[4] Article 92, UCMJ d.(3)(C), 10 U.S.C. § 892.

Post-trial Processing

The Government did not offer any evidence at sentencing to rebut AB Haynes' rehabilitative potential, nor produce anything related to AB Haynes' "lack of good moral character." *See* R. at 171-78, 193; Ct. Ex. A and B. AB Haynes was sentenced on 31 March 2022, and his matters in clemency were due on 10 April 2022. Submission of Matters to the Convening Authority, ROT Vol. 2, undated. On 9 April 2022, Trial Defense submitted clemency matters on behalf of Appellant. Request for Clemency, ROT Vol. 2, dated 9 April 2022. AB Haynes, through counsel, requested to reduce his time in confinement to 2 months. *Id.* Although he did not ask for clemency related to his reduction in rank or total adjudged forfeitures, he did express the difficulty in not being able to provide support to his single mother, who has chronic health conditions and a fixed income. *Id.*

[4] AB Haynes faced 12 months confinement given he was charged with two specifications in violation of Article 92 for willful dereliction of duty. R. at 140.

On 8 April 2022, Trial Defense receipted for a Victim Submission of Matters dated 4 April 2022. Receipt, ROT Vol. 2, dated 8 Apr 2022. On 18 April 2022, Trial Defense receipted for another Victim Submission of Matters dated 8 April 2022. Receipt, ROT Vol. 2, dated 18 April 2022.

In a memorandum dated 4 April 2022, K.A. asserted the following: "[D]ue to Airman Haynes' *lack of good moral character*, I am now unable to feel safe in every environment that I am supposed to feel safe in." Victim Submission of Matters, ROT Vol. 2, dated 4 April 2022 (emphasis added). She expressly asked the Convening Authority to consider the impact these actions, which she described to include AB Haynes' "lack of good moral character" when making his decision on the sentence in this case, and requested the sentence be upheld. *Id.*

S.M. also provided post-trial matters for the Convening Authority to consider. Submission of Matters from S.M., ROT Vol. 2, dated 8 April 2022. She thought four months of confinement "sufficed" and that a bad conduct discharge, BCD, would be 'highly effective.' *Id.* She asked for the sentence to be upheld as adjudged. *Id.*

On 28 April 2022, the Convening Authority issued a decision on Action via memorandum, considering matters submitted under Rules for Court-Martial (RCM) 1106 and 1106A. Convening Authority Decision on Action, ROT Vol. 1, dated 28 April 2022. The Convening Authority took no action on the findings or the sentence. *Id.* There is no record the Government ever provided copies of these matters submitted under 1106A to AB Haynes.

RCM 1101A(c)(2)(A) limits submissions under the rule; they may not include matters that related to the character of the accused unless such matters were admitted as evidence at trial. AB Haynes did not file a post-trial motion in accordance with R.C.M. 1104(b)(2)(B) within five days of receiving the Convening Authority's action to address an asserted error in the action.

Had AB Haynes been given the opportunity to respond, he would have. Declaration of Branden Haynes, dated 28 June 2023, Appendix A, Motion to Attach dated 28 June 2023 (hereinafter, Appendix A). He would have provided additional evidence in rebuttal related to his character, would have offered the statements of high rehabilitative potential, and would have asked for additional relief. *Id.*

ARGUMENT

I.

THE ADJUDGED SENTENCE IS INAPPROPRIATELY SEVERE.

Standard of Review

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

Law

This Court "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [it] finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). Considerations include "the particular appellant, the nature and

seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted). "The breadth of the power granted to the Courts of Criminal Appeals to review a case for sentence appropriateness is one of the unique and longstanding features of the [UCMJ]." *United States v. Hutchison*, 57 M.J. 231, 233 (C.A.A.F. 2002) (citations omitted). This Court's role in reviewing sentences under Article 66(d) is to "do justice," as distinguished from the discretionary power of the convening authority to grant mercy. *See United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998).

Analysis

AB Haynes' sentence is inappropriately severe for at least two reasons: (1) the sentence does not adequately reflect AB Haynes' rehabilitative potential and (2) the sentence is too severe in light of the nature of the offenses of which he was convicted.

First, AB Haynes offered unrebutted evidence of his rehabilitative potential, yet he was sentenced to confinement just two months' shy of the maximum punishment of confinement for specification 2 and he was otherwise given the maximum punishment, including total forfeitures, reduction to E-1, and a bad conduct discharge. R. at 215, 187, 193; Def. Ex. C, H. Rehabilitative potential, as defined under RCM 1001(b)(5), refers to "the accused's potential to be *restored*, through vocational, correction, or therapeutic training or other corrective measures to a *useful and constructive* place in society." (emphasis added). While a sentence to 4 months confinement vice 6 months can indicate some consideration of AB Haynes'

rehabilitative potential, adding on the total forfeitures, reduction to E-1 and a bad conduct discharge, that sentence places roadblocks in front of AB Haynes, limiting his ability to be restored to that useful and constructive place in society. These financial burdens, on top of the stigma of a punitive discharge, saddle AB Haynes with every possible roadblock to a successful entry into society. This, despite the evidence before the Trial Court and this Court—that AB Haynes will be able to function as a contributing and successful member of society given his unrebutted "high rehabilitative potential."

Secondly, AB Haynes was convicted of willful dereliction of duty for sexually harassing a woman he dated in the immediate period following the end of their relationship, and for harassing a coworker on one day, without any record of ongoing personal contact with K.A. after August 2019 and none with S.M. after the charged timeframe, 9 September 2020. While AB Haynes acknowledges his conduct meets the definition of sexual harassment and takes responsibility for his conduct through is plea of guilty, he should be sentenced based solely on the evidence presented at trial.

In this case, the Government provided no evidence in aggravation at sentencing. While there is evidence in the record of trial "that K.A. told AFOSI she was sexually assaulted by AB Haynes on 6 June 2019," the military judge correctly stated he was not going consider this evidence in determining an appropriate sentence. R. at 171-78, 206. However, it does not appear based on the punishment adjudged, that the Court was able to disregard this inflammatory and irrelevant

evidence. While AB Haynes pled to sexual harassment that consisted in part of leaving K.A. voicemails in June and August 2019, stopping by her place in June 2019, and on one occasion leaving her food that she liked unsolicited, the context of this behavior is central to crafting an appropriate sentence. R. at 111-13, 118-20; Pros. Ex. 1.

The conduct between AB Haynes and K.A. was based on a prior dating and sexual relationship and the sexual harassment should be evaluated, not in a vacuum, but with those facts in mind. The context of this behavior is that this was in the immediate period at the end of their short-lived dating relationship after both of them had arrived to their first duty station, having met at First Term Airman's Course. Def. Ex. K; Pros. Ex. 1. AB Haynes and K.A.'s relationship was ever-changing, starting with a dinner and a sexual relationship, to then being told by K.A. that she did not want to be exclusive due to pending divorce, to K.A. breaking things off altogether within a matter of months. Pros. Ex. 1. Then, in June 2019 after this break up, when AB Haynes went to K.A.'s home to speak with her, K.A. invited him into her apartment. *Id*. He also left her voicemails between June and August 2019. Pros. Ex. 1, Attachment 2. However, in reviewing those voicemails, the tone/tenor of them is also important, in the context of a break-up. The contact on base, as admitted to by AB Haynes at trial, was happenstance, in that he was not following her or seeking her out, but he did not avoid her when he saw her at the Shoppette or base gym when he was otherwise there even after K.A. had told AB Haynes she did not want to be with him or speak to him. R. at 119. This conduct with direct contact by

AB Haynes with K.A. was over a matter of *three months* not over the span of a year or more. Pros. Ex. 1 and Attachment 2, R. at 112-20.

Understanding why Appellant found himself unable or unwilling – based on this prior relationship with K.A. – to walk away from K.A. is integral to sentencing him appropriately for his sexual harassment of K.A. This is no way is a shift of blame to K.A. – she was clear in her intentions and AB Haynes fully acknowledged he sexually harassed K.A., but AB Haynes' conduct was done in the course of the end of a tumultuous romantic relationship. Additionally, in part, K.A. attributed impact from this and her "inability to trust" to other people talking about the sexual harassment, which is not attributable to AB Haynes. Given the context of their prior dating relationship, the record reflecting a shorter timespan of direct contact with K.A., and AB Haynes' rehabilitative potential, and some of the impact reported as a result of this court-martial that is not attributable to AB Haynes, this sentence is too severe as adjudged.

The nature of the offense involving S.M., while meeting the definition of sexual harassment, should be considered in light of the facts of that conduct. At trial AB Haynes pled to, and the Government did not rebut, AB Haynes' conduct with S.M. was limited to only such conduct described on one day with no ongoing contact between AB Haynes and S.M. after that date. Similar to K.A., there is no evidence that any authority had to step in to stop AB Haynes' conduct with S.M. While the conduct between AB Haynes and S.M. was wrongful, this was an isolated incident with S.M. The record does not show AB Haynes required a third-party to intervene

to stop this behavior, nor did he return to continue such behavior past 9 September 2020 with S.M. As such, while this meets the definition of sexual harassment, it was isolated to one day, without recurrence, and AB Haynes took the first step to accepting responsibility by pleading guilty. Given these mitigating factors, his rehabilitative potential, and the combined effects of receiving the maximum punishment in nearly all available modes of punishment, sentence relief is warranted.

Reassessing the sentence will not negate the seriousness of the offenses he committed – nor the impacts thereof on K.A. and S.M., but it will ensure the sentence is no more severe than warranted by the entire record of trial and consistent with justice.

WHEREFORE, AB Haynes respectfully requests this Honorable Court reassess the sentence.

II.

THE CONVENING AUTHORITY VIOLATED BASIC DUE PROCESS RIGHTS WHEN HE ACTED WITHOUT GIVING AB HAYNES OPPORTUNITY TO RESPOND TO THE CRIME VICTIMS POST-TRIAL SUBMISSION OF MATTERS.

Standard of Review

This Court assesses proper post-trial processing *de novo*. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). When reviewing post-trial errors, this Court will grant relief if an appellant presents "some colorable showing of possible prejudice." *United*

States v. LeBlanc, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)).

Law

Under R.C.M. 1106A(a), a victim may "submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109 or 1110." "The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided *to the accused* as soon as practicable." R.C.M. 1106A(c)(3) (emphasis added). If a crime victim submits matters under R.C.M. 1106A, "the accused shall have five days from receipt of those matters to submit any matters in rebuttal." R.C.M. 1106(d)(3). "Before taking or declining to take any action on the sentence under this rule, the convening authority shall consider matters timely submitted under R.C.M. 1106 and 1106A, if any, by the accused and any crime victim." R.C.M. 1109(d)(3)(A). A convening authority "may not consider matters adverse to the accused without providing the accused an opportunity to respond." R.C.M. 1106A(c)(2)(B), Discussion.

"[T]he convening authority is an appellant's 'best hope for sentence relief.'" *United States v. Bischoff,* 74 M.J. 664, 669 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999)). "The essence of post-trial practice is basic fair play--notice and an opportunity to respond." *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996). "Serving victim clemency correspondence on the accused for comment before convening authority action protects an accused's due process rights under the Rules for Courts-Martial and preserves the actual and perceived

fairness of the military justice system." *United States v. Bartlett*, 64 M.J. 641, 649 (A. Ct. Crim. App. 2007).

This Court recently addressed this issue in *United States v. Valentin-Andino*, 83 M.J. 537 (A.F. Ct. Crim. App. 2023). In *Valentin-Andino*, the victim submitted matters to the convening authority, but there was no record Appellant ever received the victim's post-trial matters. *Id.* at 540. This Court held that the convening authority abused his discretion and that new post-trial processing was warranted to provide Appellant what he is entitled: "the right to be served with K.G.'s submission of matters and the opportunity to submit rebuttal matters for the convening authority's consideration, before the convening authority decides whether to grant [Appellant's requested relief]." *Id.* at 544.

For such post-trial errors, CAAF requires the appellant "to demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter or explain' the new matter." *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). "[T]he threshold should be low, and if an appellant makes some colorable showing of possible prejudice, we will give that appellant the benefit of the doubt and 'we will not speculate on what the convening authority might have done' if defense counsel had been given an opportunity to comment." *Id.* at 323–34 (quoting *United States v. Jones*, 44 M.J. 242, 244 (C.A.A.F. 1996)). The low threshold for material prejudice "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." *Scalo*, 60 M.J. at 437

(citation omitted). "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 new post-trial action. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

Analysis

The Government introduced no evidence in aggravation nor victim impact during presentencing. R. at 171-78. While both K.A. and S.M. provided statements at presentencing, found in Court Exhibits A and B, at no point was evidence offered of Appellant's "lack of good moral character." Thus, when K.A. disparaged AB Haynes' character to the Convening Authority, AB Haynes had an absolute right to respond under R.C.M. 1106(d)(3). Victim Submission of Matters, ROT Vol. 2, dated 4 April 2022. While the Convening Authority considered both the statements provided by K.A. and S.M. offered under 1106A and did not grant relief as they both requested, AB Haynes never signed receipt for either submission. Convening Authority Decision on Action dated 28 April 2022, ROT Vol. 1. AB Haynes does not recall ever getting the matters submitted S.M. post-sentencing and while he may have had a discussion with his trial defense counsel about the memorandum submitted by K.A., he does not recall getting either memo served on him by the Government. Appendix A, Motion to Attach dated 28 June 2023. Under R.C.M. 1106(d)(3), Appellant had five days to provide a response. As this Court recognized in *Valentin-Andino*, making a decision on action without allowing an opportunity to respond was an abuse of discretion. *See Valentin-Andino* at 543.

At the time of the decision on action, the Convening Authority would not have the transcript to validate or invalidate any claims related to AB Haynes' character. The court-reporter did not finish transcribing the record until 28 April 2022. Court Reporter Chronology, ROT Vol. 2, undated. Nor is it realistic that the Convening Authority would have reviewed all of the exhibits entered in presentencing. Both K.A. and S.M. asked the Convening Authority to take no action on the findings or sentence. Victim Submission of Matters, ROT Vol. 2, dated 4 April 2022 and S.M. Submission of Matters, ROT Vol. 2, dated 8 April 2022. Given the opportunity to respond, AB Haynes could have highlighted to the Convening Authority the improper nature of such a statement related to his character, and could have offered evidence to rebut it that was contained within the record already. Appendix A, Motion to Attach dated 28 June 2023. Additionally, AB Haynes could have asked for alternate relief in terms of remission of the adjudged forfeiture or reduction in rank. *Id.* Most importantly, AB Haynes explained that he would have taken the opportunity to respond. *Id.* But the Convening Authority acted without ensuring AB Haynes received a copy of these post-sentencing submissions and therefore without giving him an opportunity to respond.

The Convening Authority indicated that he considered AB Haynes' initial submission under R.C.M. 1106 and the crime victims' statements under RCM 1106A. Convening Authority Decision on Action, ROT Vol. 1, dated 28 Apr. 2022. This raises the broader question of whether the Convening Authority was advised against

considering matters related to AB Haynes' character that were improper. This only strengthens the case to remand for post-trial processing.

AB Haynes has demonstrated some colorable showing of possible prejudice. The low threshold for material prejudice is "designed to avoid undue speculation as to how certain information might impact the convening authority's exercise of such broad discretion." *Scalo*, 60 M.J. at 437. The Convening Authority could have granted some relief. Consequently, this Court should either remand for new post-trial processing or, in light of the sentence's inappropriate severity, reassess his sentence.

WHEREFORE, AB Haynes respectfully requests that this Honorable Court provide meaningful sentencing relief or remand for new post-trial processing.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 28 June 2023.

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27 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	) **UNITED STATES' ANSWER**) **TO ASSIGNMENTS OF ERROR**
v.	) Before Panel No. 2
Airman First Class (E-3) **BRANDEN C. HAYNES**, USAF *Appellant.*	) No. ACM 40306

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

ISSUES PRESENTED

I.

WHETHER [APPELLANT'S] SENTENCE IS INAPROPRIATELY SEVERE?

II.

R.C.M. 1106(d)(3) PROVIDES AN ACCUSED FIVE DAYS TO RESPOND TO A VICTIM'S POST-TRIAL SUBMISSION OF MATTERS. DID THE CONVENING AUTHORITY VIOLATE BASIC DUE PROCESS RIGHTS WHEN HE ACTED WITHOUT GIVING AB HAYNES AN OPPORTUNITY TO RESPOND TO THE 1106A POST-TRIAL SUBMISSIONS?

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

At a general court-martial, the military judge sitting alone found Appellant guilty, consistent with his pleas, of Specifications 1 and 2 of the Second Additional Charge for willful dereliction of duty in violation of Article 92, UCMJ, for sexually harassing SM and KA. (*Entry of Judgment*, dated 8 June 2022, ROT Vol. 1). The remainder of the charges and specifications

were dismissed with prejudice in accordance with Appellant's offer of plea agreement. (Id; App. Ex. XVII). The military judge sentenced Appellant to four (4) months confinement, a bad-conduct discharge, forfeiture of all pay and allowance, and reduction in grade to E-1. (Id.)

a. Sexual Harassment Involving SM.

While on duty in the 57th Aircraft Maintenance Squadron, Appellant began a sexually-charged conversation with SM, whom he had only known professionally for a short time and not at all personally. (Pros. Ex. 1). He asked her about her sexual preferences, whether she wanted to have sex with women, and if he could have sex with her and her husband. (Id.)

Appellant opened his phone in SM's presence and began to scroll through sexually explicit photos and videos, some of which were of himself engaging in sexual acts. (Id.) Without any prompting or request, Appellant displayed a video of himself having sex with a woman to SM and told her to look at it. (Id.) SM looked at the video as directed by Appellant, which was captured on security cameras, and turned her attention away after a few seconds. (Id.)

On another occasion, Appellant directed SM to unlock his phone and to look at it. (Id.) When SM did as Appellant instructed, the phone showed explicit pictures and videos of Appellant's exposed erect penis as well as him engaging in sexual acts with women. (Id.) At no point did SM ask to be shown or consent to being shown the images or videos. (Id.)

b. Sexual Harassment Involving KA.

After meeting KA at the First Term Airman Course at Nellis AFB, Nevada, Appellant and KA had dinner together followed by their first sexual encounter on 14 April 2019. (Id.) While they were at dinner, KA informed Appellant she did not want an exclusive relationship due to her ongoing divorce. (Id.) However, Appellant became more interested in a serious and

exclusive dating relationship, told his family and friends about KA, and talked about a future with her. (Id.)

KA and Appellant continued to spend time together and have consensual sexual encounters over the next two months. (Id.) In May 2019, KA went on leave and around that time she broke off the relationship with Appellant and asked him to take his things from her apartment. (Id.)

KA said after she ended the relationship with Appellant he showed up at her apartment without invitation, including one time when he knocked on her door for an extended period (possibly an hour) and asked to be let in. (Id.) KA did not let him in. (Id.) On another occasion, she opened the door to tell him the relationship was over and to stop coming to her apartment. (Id.) He came knocking at her door another time while intoxicated begging her to let him in, and the only way to make him leave was to threaten to call the police. (Id.)

On 6 June 2019, Appellant again went to KA's apartment to renew the relationship, and she let him in. (Id.) They eventually engaged in sexual intercourse. (Id.) Appellant told KA, among other things, he needed her, he would miss her, they could have a good life together, and if they were going to break up, they need to have sex one last time. (Id.) KA told him she was not interested in having sex that night, but Appellant continued to talk about having sex with her and kissed her on the face and neck as she turned her face away. (Id.) As he continued to touch her, KA moved his hands away. (Id.)

Appellant then grabbed KA, picked her up bear hug style, and took her to her bedroom, and he had an erection at the time. (Id.) Over KA's protests, including saying no several times, Appellant started trying to take off KA's clothes. (Id.) She tried to get away from Appellant by rolling toward the wall. (Id.) Appellant then took his own pants off. (Id.) KA told him no again

and tried to push his hand away from her body. (Id.) Appellant then held her down by her hands and penetrated her vagina with his penis until he ejaculated. (Id.) Afterwards, Appellant left. (Id.) KA told Appellant either while he was at her apartment or within 24-hours that she was no longer interested in a sexual or dating relationship with Appellant. (Id.)

After the sexual encounter, KA started to fear Appellant and it compounded the impact of subsequent interactions with Appellant. (Id.) Appellant thought the sexual encounter was consensual, while KA thought it was not consensual. (Id.) The parties agreed to the following term in the plea agreement:

> I agree that the details of the sexual encounter between [KA] and myself on or about 6 June 2019, as well as any victim impact stemming from that encounter as defined under R.C.M. 1001(c)(2)B), are directly related to Specification 2 of the Second Additional charge and are appropriate matters to be included in any victim impact statement she may offer under R.C.M. 1001(c), so long as such statement comports with the other requirements of R.C.M. 1001(c)(5)(A).

(App. Ex. XVII). The military judge interpreted this to mean the parties agreed to not object to any mentions of the sexual encounter if referenced in KA's victim impact statement. (Id.) The parties agreed the military judge could consider the sexual encounter entered into evidence in the stipulation of fact for any and all purposes as it relates to the charge Appellant pled guilty to; however, the military judge stated he understood that he was only to sentence Appellant for the offenses for which he pled guilty. (R. at 74). He also *sua sponte* analyzed Prosecution Exhibit 4 and stated he would not consider the letter of reprimand issued to Appellant the week before trial that covered the Article 120, UCMJ, offenses Appellant had otherwise been charged with before the plea agreement terms and excluded it as evidence. (R. at 181).

After the sexual encounter, Appellant called KA repeatedly and left a series of at least seven, to a number possibly in the teens, voicemails over an almost two-month period. (Pros.

Ex. 1; R. at 111). In the voicemails, Appellant acknowledged that KA told him "no," told KA good luck trying to find a guy who cares as much about her as him, asked her to meet up with him or go on a date with him, told her he left food outside her door, told her he was sorry, told her he didn't care she was dating other people, told her he saw her car in the parking lot when he drove by, asked to hear from her, told her he saw something that reminded him of her, told her sorry for texting her and asking her how she has been, asked her if she was with someone or just going on random dates, and told her he was getting help because she really hurt him. (Id.)

Appellant also ran into KA at various locations around Nellis AFB where he approached her an engaged her in small talk. (Id.) On one of the occasions, he told KA that he considered moving into her apartment complex, and she could get a referral bonus if he put her down as the one who referred him. (Id.) KA did not initiate the encounters and was curt with Appellant. (Id.) KA stated the encounters caused her to be uncomfortable and fearful. (Id.)

Appellant sought information about KA's personal and professional life on several occasions from her friends and coworkers. (Id.) When KA learned of these inquiries, it made her fearful and uneasy, especially while she was on base, because she knew Appellant was likely also on base. (Id.)

c. Victims' Impact Statements

At trial, KA submitted a two-paragraph victim impact statement that detailed the emotional and social impact Appellant's sexually harassing behavior had on her. (Court Ex. A). Appellant's actions caused her to stop trusting others and destroyed her ability to feel safe at work, home, and in her car. (Id.) His behavior stopped KA from going out with her friends and sharing information about herself and made her afraid of strangers. (Id.)

SM also submitted a victim impact statement, dated 28 March 2022, regarding Appellant's conduct and how it had affected her for the year and a half since it occurred. (Court Ex. B). She described how Appellant saw her as a "target for his own enjoyment." (Id.) Appellant's actions caused continuous impacts to SM's day-to-day life and made her feel she had to second guess her vocabulary when she talked to anyone at work "to prevent unprovoked sexual conversations[.]" (Id.) She now harbors doubts about the way her peers perceive her and that they see her in a degrading manner. (Id.) She told the military judge that she felt Appellant needed to be punished for what he did, because he would not learn proper boundaries or respect for others without it. (Id.)

d. Post-trial

On 8 April 2022, Appellant's trial defense counsel acknowledged receipt of a Victim Submission of Matters, dated 4 April 2022. (Receipt of Victim Post Sentencing Matters, 8 April 2022). On 18 April 2022, trial defense counsel acknowledged receipt of a Victim Submission of Matters, dated 8 April 2022. (Receipt of Victim Post Sentencing Matters, 18 April 2022). On 28 April 2022, the convening authority filed his decision on action in Appellant's case. (*Convening Authority Decision on Action*, dated 28 April 2023, ROT Vol. 1). The convening authority took no action on the sentence as adjudged and stated he considered the matters timely submitted by the Appellant and the victims under R.C.M. 1106 and 1106A. (Id.) The military judge completed the Entry of Judgment on 8 June 2022. (*Entry of Judgment*, dated 8 June 2022, ROT Vol. 1).

SM submitted a statement to the convening authority describing how relieved she felt when she heard the verdict in Appellant's case, because she could not have asked for a "better sentence to reflect the severity of the crimes he committed." (Submission of Matters from [SM]

– U.S. v. Haynes, 8 April 2022). She felt he would realize his actions have consequences with the amount of confinement he received. (Id.) She stated what Appellant did was "abhorrent and he deserves to be held accountable." (Id.) She asked that the convening authority uphold the sentence exactly as adjudged. (Id.)

KA again submitted a two-paragraph victim submission of matters to the convening authority describing how Appellant's actions had a "significant and lasting impact" on her life. (Victim Submission of Matters, dated 4 April 2022.) She stated specifically, "Due to Airman Haynes' lack of good moral character, I am now unable to feel safe in every environment that I am supposed to feel safe in." (Id.) She included her home, personal vehicle, Nellis AFB, and work in the places she no longer feels safe. (Id.) She told the convening authority she is "terrified of the potential fact that be might just show up at any point in time and [she] would not be able to protect [herself] from him." She requested the convening authority uphold the sentence as adjudged. (Id.)

ARGUMENT

I.

APPELLANT'S SENTENCE IS APPROPRIATE.

Standard of Review

This court reviews sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006). The Court may only affirm the sentence if it finds the sentence to be "correct in law and determines, on the basis of the entire record, [it] should be approved." Article 66(d)(1), UCMJ.

Law and Analysis

The appropriateness of a sentence is assessed "by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). Unlike the act of bestowing mercy through clemency, which was delegated to other hands by Congress, Courts of Criminal Appeals are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

Appellant agreed to plead guilty to both specifications of the Second Additional Charge and enter into a reasonable stipulation of fact, and, in exchange, the convening authority agreed to dismiss Charge I and its two specifications for sexual assault in violation of Article 120, UCMJ; Charge II and its specification for stalking in violation of Article 130, UCMJ; Charge III and its specification for indecent conduct in violation of Article 134, UCMJ; and the Additional Charge and its specification for assault consummated by battery in violation of Article 128, UCMJ. (App. Ex. XVII). Appellant's trial defense counsel specifically crafted the Second Additional Charge and specifications for the plea agreement. (R. at 116). Appellant agreed that he would receive no less than fourteen (14) days of confinement for each specification of the Second Additional Charge that would run concurrently. (Id.) Appellant agreed there were no other sentence limitations. (Id).

A plea agreement with the convening authority is "some indication of the fairness and appropriateness of [an appellant's] sentence." United States v. Perez, No. ACM S32637 (f rev), 2021 CCA LEXIS 501, at *7 (A.F. Ct. Crim. App. 28 September 2021) (unpub. op.); *see also* United States v. Casuso, No. 202000114, 2021 CCA LEXIS 328, at *8 (N-M. Ct. Crim. App. 30

June 2021) (unpub. op.) (questioning an appellant's "claim of inappropriate severity when the sentence he received was within the range of punishment he was expressly willing to accept in exchange for his pleas of guilty."). In total, Appellant received the benefit of the convening authority dismissing, with prejudice, four charges and their specifications, which limited his punitive exposure from a dishonorable discharge and 68 years and 6 months confinement to only one (1) year of confinement and a bad conduct discharge. Manual for Courts-Martial (2019 ed.), Appendix 12. Appellant's plea agreement did not preclude the military judge from adjudging him the bad conduct discharge or four months confinement that he did adjudge. Here, Appellant received the sentence he agreed to and indeed deserved based on his conduct, and his agreement is a strong indication of its appropriateness.

Through his misconduct, Appellant victimized two fellow Air Force members. He failed to understand the most basic concept of "no" meaning "no." In victimizing SM through sexual harassment, Appellant made the decision to degrade SM by showing her multiple sexually explicit images and videos of himself. By doing so, he created a hostile and offensive environment in the Air Force for SM who should have been able to feel safe and professional in her workplaces. Instead, she felt targeted for Appellant's own amusement and left doubting whether she was respected by her peers. (Court Ex. B.) Since Appellant's conduct, SM has had to watch everything that she says in the workplace for fear someone would sexualize it the way Appellant sexualized their encounters. (Id.) His conduct should most certainly be considered in the context of their relationship – during a non-existent relationship outside of knowing each other for a short period of time as coworkers, he chose to show her sexually explicit images and asked to engage in sex with her and her husband. (Pros. Ex. 1.)

Furthermore, Appellant argues that his *sexual harassment* of KA should be evaluated with respect to his prior dating and sexual relationship with KA. (App. Br. at 10.) He makes these arguments as if he should get a pass on sexually harassing someone simply because he previously dated her – that he should be able to disregard her own autonomy because of his own feelings. (Id.) Appellant has been unable to accept "no" since the day KA told him she did not want an exclusive relationship with him on their very first date. He continued to follow her, call her, leave her sexually charged voicemails, ask her friends and coworkers about her, and seek to invade every aspect of her life with total disregard for her known wishes. His actions show he needed a solid punishment to ingrain in him that he could not simply do what he wanted to without any regard for another human being's autonomy.

The military judge crafted an appropriate punishment for Appellant within the terms Appellant's agreement with the convening authority. Appellant deserved the bad-conduct discharge and four months confinement he received at trial for his conduct. (*Entry of Judgment*, 8 June 2022, ROT Vol. 1). He placed another Airman in fear of him and then continued to hold power over her by continually insinuating that he was everywhere she was, from her apartment to shopping to her workplace. He then degraded his fellow airman by showing her sexually explicit images of himself engaging in sexual activities. Rather than placing roadblocks on Appellant's ability to be restored to a useful and constructive place in society, his sentence provides the necessary punishment to correct his actions. Obviously, Appellant's duties, the military environment, his victims' status as fellow military members, and his own inner compass were insufficient to keep Appellant from repeatedly violating the law and the autonomy of his victims. His sentence is appropriate for this Appellant and the circumstances of this case.

Ultimately, this Court should find, as the military judge did, that Appellant's agreed to sentence represents justice in this case considering this particular Appellant and his misconduct. Appellant willfully disregarded Air Force regulation and sexually harassed two fellow Airmen to the point they felt their workplaces in the Air Force were hostile and offensive. No Airman should have to feel this way due to Appellant's disregard for their lives.

The United States respectfully requests this Court deny Appellant's assignment of error and find Appellant's sentence is appropriate.

II.

R.C.M. 1106(d)(3) PROVIDES AN ACCUSED FIVE DAYS TO RESPOND TO A VICTIM'S POST-TRIAL SUBMISSION OF MATTERS. THE CONVENING AUTHORITY DID NOT VIOLATE BASIC DUE PROCESS RIGHTS WHEN HE ACTED ON APPELLANT'S SENTENCE.

Standard of Review

Proper completion of post-trial processing is a question of law, which this Court reviews *de novo*. United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000). When an appellant alleges error in an action and the appellant does not object in a post-trial motion, this Court reviews the alleged error for plain error. United States v. Brubaker-Escobar, 81 M.J. 471, 473 (C.A.A.F. 2021) (per curiam).

An Appellant claiming to have been denied a right to comment on post-trial matters "has the burden of making a colorable showing of possible prejudice" to be entitled to relief. United States v. Brown, 54 M.J. 289, 292 (C.A.A.F. 2000). A colorable showing of possible prejudice does not include sheer speculation about factual matters that are within the normal investigative capabilities of counsel. Id. at 293. CAAF requires an appellant to demonstrate prejudice by stating what, if anything, would have been submitted to deny, counter, or explain the new matter.

United States v. Chapman, 46 M.J. 321, 323 (C.A.A.F. 1997) (internal quotation marks and citations omitted). If an appellant can make that colorable showing of possible prejudice, the appellant is given the benefit of the doubt and the court will not speculate on what the convening authority might have done if defense counsel had been given an opportunity to comment. Id. at 323-34 (internal quotation marks and citations omitted).

Law and Analysis

In a case where a crime victim has submitted matters under R.C.M. 1106A, the accused shall have five days from receipt of those matters to submit any matters in rebuttal, which is limited to addressing matters raised in the crime victim's submissions. Rule for Courts-Martial (R.C.M.) 1106. Under R.C.M. 1106A, a crime victim may submit matters to the convening authority for consideration that may reasonably tend to inform the convening authority's exercise of discretion under R.C.M. 1109 or 1110, but the submission may not include matters related to the character of the of accused unless admitted as evidence at trial. *See* R.C.M. 1106A. The convening authority has the duty to ensure any matters submitted by the crime victims are provided to the accused as soon as practicable and the accused shall have five days from receipt to submit matters in rebuttal. R.C.M. 1106A(c)(3); R.C.M. 1106(d)(3). Under Air Force regulation, if a victim submits post-sentencing matters under R.C.M. 1106A, trial counsel shall serve those matters on defense counsel within two-duty days to allow the accused an opportunity to provide a written rebuttal. Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 14 April 2022.

After conclusion of his court-martial, Appellant did not raise a motion under Rule for Courts-Martial (R.C.M.) 1104(b)(1)(E)-(F) to allege an error in the post-trial processing of the court-martial nor did he raise an error in the convening authority's action under R.C.M. 1109 or

1110. United States v. Behunin, 2022 CCA LEXIS 412, *37 (A.F. Ct. Crim. App. 18 July 2022); *see also* R.C.M. 1104(b)(1)(F) (allowing post-trial motion to address "[an] allegation of error in the convening authority's action"). Rather, Appellant alleges error for the first time in this appeal. Therefore, this assignment of error is reviewed for plain error.

a. The convening authority did not err because he served the victims' submission of matters on Appellant's trial defense counsel and did not decide on action until five days had passed.

The convening authority did not err because he served the victims' submission of matters on Appellant's counsel, which provided Appellant's counsel ample opportunity to submit matters on his behalf to the convening authority and to gather any evidence to rebut statements in the victims' submission of matters. However, Appellant and Appellant's counsel chose not to include any reference to KA's submission of matters in Appellant's initial clemency request. (*Request for Clemency*, 9 April 2022, ROT Vol. 2.) Appellant's clemency request solely focused on Appellant rather than his impact on the victims and only requested that the convening authority reduce his sentence by two (2) months confinement. (*Request for Clemency*, dated 9 April 2022). Furthermore, even after SM's submission of matters, which Appellant's trial defense counsel received and acknowledged in writing on 18 April 2022, Appellant's trial defense counsel made no further submission of matters to the convening authority. Therefore, the Court does not need to speculate on what the convening authority might have done if trial defense counsel had been given the opportunity to comment, because trial defense counsel was given the opportunity to comment and made the decision not to do so. This is so because the convening authority did not err but served the victims' submission of matters on Appellant through his trial defense counsel.

This case differs from United States v. Baker, 2022 CCA LEXIS 523 (A.F. Ct. Crim. App. 6 September 2022). In Baker, like the present case, the appellant did not sign a receipt for the victim's submission of matters while his trial defense counsel did. Baker, 2022 CCA LEXIS 523, *3-4. However, in Baker, the appellant submitted his clemency matters four days before the victim submitted matters and the convening authority made his decision on action only two days after the victim submitted matters and only one day after trial defense counsel was provided a copy of the victim's submission rather than providing the Appellant with the five days required by R.C.M. 1106. Id. Therefore, this case differs from Baker in that in the present case, the convening authority provided matters to Appellant through his counsel and provided the appropriate amount of time for Appellant to rebut those submissions before making his decision on action. (*Convening Authority Decision on Action*, dated 28 April 2023, ROT Vol. 1.) This case also stands in contrast to United States v. Valentin-Andino, which is cited by Appellant, where the government in that case could not demonstrate that either the appellant's trial defense counsel or the appellant received the victim's submission of matters prior to the convening authority's decision on action. 83 M.J. 537, 539-540 (A.F. Ct. Crim. App. 30 January 2023). But, even if this Court finds that the convening authority committed plain error, Appellant was not prejudiced.

b. Appellant has failed to make some colorable showing of possible prejudice.

Appellant has failed to make some colorable showing of possible prejudice for three reasons. First, unlike Baker, the convening authority here made his decision on action well after--10 days after--Appellant's trial defense counsel received SM's submission of matters, as argued above. Appellant and Appellant's trial defense counsel had ample opportunity after learning of the memorandum submitted by KA prior to submission of clemency matters, and they had the

option to submit additional matters in response to her statement about his moral character. Second, Appellant has failed to provide more than mere speculation about what he *could* have submitted to the convening authority—he argues he "could have offered evidence to rebut it that was contained in the record already" – without indicating specifically information that would rebut any of the victims' statements. (App. Br. at 16). Third, KA and SM's submission of matters are largely the same as Court Exhibits A and B outside of the victims' requests for the convening authority to uphold Appellant's sentence.

To the second point, Appellant indicates no specific evidence that he would have submitted to the convening authority to rebut KA's assertion about his "lack of good moral character," especially as it concerns materials not already in the record, nor any other assertions by KA and SM. (*Cf.* App. Br. at 16). He has failed to demonstrate prejudice by failing to state what, if anything, would have been submitted to "deny, counter or explain" the new matter. *See* United States v. Chatman, 46 M.J. 321, 323 (C.A.A.F. 1997). Appellant merely states he could have highlighted portions of the record to rebut the victim's submissions but highlights none for this Court to consider. Nor has Appellant provided any rebuttal evidence along with this assignment of error that he would have raised to the convening authority--especially any evidence not already contained in the record. There is simply no basis for Appellant's argument that it was unrealistic that the convening authority would have reviewed all of the exhibits entered in presentencing. There were only 11 defense exhibits submitted at trial, which totaled no more than 22 pages in all. Therefore, Appellant has failed to meet his burden to reveal any information he would have put before the convening authority in rebuttal to the victims' submission of matters.

Finally, KA's statement about Appellant's "lack of good moral character" was made in conjunction with the same sentiment she expressed in her victim impact statement, which was that she was unable to feel safe in the environments she was supposed to feel safe in. (*Victim Submission of Matters*, dated 4 April 2022). She stated in her victim impact statement that her ability "to feel safe at work, home, even in [her] own vehicle was destroyed." (Court Ex. A). KA referring to Appellant's actions against her as a "lack of good moral character" is nothing more than a description on KA's part rather than actual character evidence and she provided no further evidence than what was already contained in the record. SM's statement is largely a request for the convening authority to uphold the sentence Appellant received as she felt it was appropriate, and she provided no new matters that Appellant could rebut other than her sentiment. (*Victim Submission of Matters*, dated 8 April 2022). In sum, Appellant does not show how he would have rebutted anything SM raised in her statement to establish prejudice here.

Since the convening authority did not err when he made his decision on action and Appellant has failed to make any colorable showing of prejudice, this Court should deny Appellant's assignment of error.

CONCLUSION

WHEREFORE, the United States respectfully requests this Court deny Appellant's claims and affirm the findings and sentence in this case.

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FOR

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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 Air Force Appellate Defense Division on 27 July 2023 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
	)	Before Special Panel
v.	)	
	)	No. ACM 40306
Airman First Class (E-3) **BRANDEN C. HAYNES,** United States Air Force	)	2 August 2023
Appellant	)	

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

Airman First Class Branden C. Haynes (Appellant), by and through his undersigned counsel and pursuant to Rule 31(c) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's Answer filed 27 July 2023 [hereinafter Answer]. Appellant stands on the arguments in his initial brief, filed on 28 June 2023 [hereinafter AOE], and in reply to the Answer, submits additional arguments for the issues listed below.

STATEMENT OF FACTS

Appellant relies on the facts laid out in his AOE, but will offer the following additional facts for this Court to consider. The sexually-charged facts recited in the Government's Answer regarding the allegations of non-consensual sex between the Appellant and K.A. were not considered by the military judge in formulating a sentence. Record (R.) at 74. The term of the plea agreement related to the content of K.A.'s victim impact statement was specifically addressed by the Military Judge,

who stated that he would not consider evidence outside of the parameters of the requirements of the Rules for Courts-Martial (R.C.M.) related to sentencing. R. at 156-57, 206.

Trial Defense Counsel receipted for K.A.'s post-trial submission on 8 April 2022. Receipt, Record of Trial (ROT), Vol. 2, dated 8 Apr 2022. Trial Defense Counsel signed as receipted for S.M.'s post-trial submissions on 6 June 2022, although the receipt was dated 18 April 2022. Receipt, ROT, Vol. 2, dated 18 April 2022. Trial Defense Counsel was assigned to Joint Base Elmendorf-Richardson in Alaska at the time of this trial. ROT, Vol. 2, Request for Clemency Header, dated 9 April 2022. Appellant was confined at Nellis Air Force Base, NV. ROT Vol. 2, Confinement Order dated 31 March 2022. There is no receipt showing the Government provided either K.A. or S.M.'s respective post-trial statements to Appellant. (ROT), Vol. 1-3. There is no indication in the record that the Appellant ever received or reviewed either memo. *Id.* In the Submission of Matters to the Convening Authority memo, signed by Appellant on March 31, 2022, the Government asserted, "Any matters submitted by a victim will be forwarded to *you* so that you may rebut them, if you so choose." ROT, Vol. 2, Submission of Matters memorandum, 2 pages (emphasis added).

ARGUMENT

APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE

The Government attempts to sidestep the inappropriately severe nature of Appellant's sentence by pointing to the fact that the Appellant agreed to a term of a

minimum of 14 days confinement with no other limitations on the sentence. While a plea agreement is "some indication of the fairness and appropriateness of [an appellant's] sentence," that is not dispositive here. *United States v. Perez*, No. ACM S32637 (f rev), 2021 CCA LEXIS 501, at *7 (A.F. Ct. Crim. App. 28 September 2021) (unpub. op.). In this case, the only indication of what Appellant thought was an appropriate sentence was a minimum term of 14 days confinement, with any sentence to confinement running concurrently. App. Ex. XVII. Appellant did not agree to a sentence that would include nearly all possible punishments, including the near maximum term of confinement, reduction to E-1, forfeitures of all pay and allowances, and a Bad Conduct Discharge.

The Government also incorrectly points to alleged sexually-charged statements made by K.A. to AFOSI to attempt to justify the inappropriately severe sentence, but those statements are not relevant to an assessment of sentence severity, as those are not crimes for which Appellant was convicted. Entry of Judgment (EOJ), ROT, Vol. 1, dated 8 Jun 2022. Similarly, any assertion that the allegation made by K.A. was included in any evaluation of victim impact is not properly before this Court as victim impact must be directly related to or arising from the offense of which the accused has been found guilty. *See* R.C.M. 1001(c)(2)(B). As such, the allegation of sexual assault by K.A. highlighted by the Government in the Answer should only be considered, consistent with the military judge's application of the rules, that is, for its tendency to support the providence of the plea. R. at 206. That is not an error assigned by Appellant. AOE, dated 28 June 2023. Therefore, those facts asserted by

the Government in the Answer should be disregarded by this Court in resolving the issue of sentence severity.

Similarly, the Government mischaracterizes Appellant's conduct as it relates to S.M. The assertion by the Government that Appellant was sentenced for not understanding 'no meaning no' is nowhere in the facts related to the conduct with S.M. Answer at 9. There is no evidence S.M. ever made a statement to Appellant regarding the video/photographs shown on his phone, nor in response to the questions he posed, but rather he engaged in the conduct constituting the sexual harassment with S.M. uninvited (not over protest). *See* Pros. Ex. 1, R. at 93; Answer at 9.

Moreover, the Government's assertion that Appellant argued he should "get a pass on sexually harassing someone simply because he previously dated her," misstates Appellant's argument related to his relationship with K.A. that provided the context to the circumstances surrounding the charged conduct. Answer at 10; AOE, 10-11. Contrary to the Government's assertions, the rapidly evolving and changing nature of their relationship is relevant to a proper review of Appellant's sentence. Critical here, Appellant and K.A.'s relationship went from meeting at First Term Airman Course (FTAC) to a sexual/dating relationship after one dinner, with ongoing sexual contact, conversations about dating versus not wanting to be exclusive due to K.A.'s pending divorce, and then to a break-up after a few months where they continued to talk and where she invited him into her home. *See* AOE, 10-11. This evolving, volatile relationship dynamic provided the context for Appellant's conduct. At no point during trial did Appellant advance the proposition that he was not in fact

guilty of sexual harassment by the voicemails he left, by showing up at her house uninvited, by talking to her when he saw her on base, or by asking coworkers and friends about her. But his conduct with K.A. does not exist in a vacuum. They had a back and forth relationship, with changing terms and conditions – which informed Appellant's behavior that ultimately constituted sexual harassment. Previously, when he pursued K.A., he was successful in continuing this relationship with K.A. despite her assertions she did not want a relationship. It is that context of the relationship between K.A. and Appellant that is a necessary part of assessing the nature and seriousness of the offense that should be considered in determining whether this sentence is inappropriately severe. *See United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted).

When this Court considers the relevant and admissible evidence regarding the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial, justice requires sentence reassessment. *See Anderson*, 67 M.J. at 705 (A.F. Ct. Crim. App. 2009) (citations omitted) and *United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998).

II.

THE CONVENING AUTHORITY VIOLATED BASIC DUE PROCESS RIGHTS WHEN HE ACTED WITHOUT GIVING AIRMAN FIRST CLASS HAYNES THE OPPORTUNITY TO RESPOND TO THE CRIME VICTIMS' POST-TRIAL SUBMISSION OF MATTERS.

The Record of Trial shows that the Government failed to personally serve Appellant with the victims' post-trial submissions. Instead, the Government attempts to justify this failure by noting that Trial Defense Counsel was served with the post-trial submissions on Appellant's behalf. Answer at 13. But the right to receive matters submitted by a crime victim under R.C.M. 1106A belongs to the Accused based on the plain reading of the R.C.M. 1106A[1].

Neither *United States v. Valentin-Adino*, 83 M.J. 537 (A.F. Ct. Crim. App. 2023), nor *United States v. Baker*, 2022 CCA LEXIS 523 (A.F. Ct. Crim. App., 6 September 2022) (unpub. op.) address the issue of whether service of the post-trial submissions on Trial Defense Counsel is sufficient under the Rules. Indeed this Court in *Baker* did not reach a decision on that specific issue. *Baker*, 2022 CCA LEXIS 523, *8 fn 6. To be sure, in *Baker*, this Court did not find that receipt by a trial defense counsel versus an Accused was dispositive in determining that the Convening Authority in that case abused her discretion in taking Action. Rather, *Baker* turned on whether the appellant in that case was afforded five days to submit matters in rebuttal. *Id.* at 8. However, this Court noted that relief was warranted to provide the appellant with what he is entitled: "*the right to be served with Mrs. JA's submission of matters*, and the opportunity to submit rebuttal matters for the convening authority's consideration before deciding whether to grant Appellant

[1] R.C.M. 1106A(c)(3) provides: "the convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to *the accused* as soon as practicable." (emphasis added).

sentence relief." *Id.* at 9 (emphasis added). Notably, this Court made this finding despite the fact that Trial Defense Counsel in that case did in fact receive post-trial submission of matters. *Id.* at 3.

Similar to *Baker*, in Appellant's case, Trial Defense Counsel alone receipted for the post-trial submission of matters on 8 April 2022 for K.A.'s matters and for S.M.'s matters on 3 June 2022, respectively. Receipt, ROT, Vol. 2, dated 8 April 2022, and Receipt, ROT, Vol. 2, dated 18 April 2022. In its answer, the Government cites a Department of the Air Force Instruction (DAFI) in an attempt to argue that service on Trial Defense Counsel was sufficient, but that Instruction was not effective until 14 April 2022, which post-dates both dated submissions by K.A. and S.M. (4 April and 8 April, respectively). As such, any reference to that version of DAFI 51-201 dated 14 April 2022 does not apply in this case, as it was not in effect as of the date of the submissions at issue.

Moreover, this cited provision in DAFI 51-201 conflicts with other language within the Rules for Courts-Martial, which demonstrate that requirement to serve any victim post-trial submissions is a right that belongs to the individual accused. "The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided *to the accused* as soon as practicable." R.C.M. 1106A(c)(3) (emphasis added).

This is consistent with the Government's assertions in the 31 March 2022, Submission of Matters memorandum. That memorandum states that Appellant himself would be served by the Government. "Any matters submitted by a victim

will be forwarded to *you* so that you may rebut them, if you so choose." ROT, Vol. 2, Submission of Matters Memo, 2 pages (emphasis added).

This distinction appears significant, as in this case, when an Accused is confined separate from his Trial Defense Counsel's assigned base. Here, Appellant was confined at Nellis Air Force Base, NV, and Trial Defense Counsel was assigned to Joint-Base Elmendorf-Richardson, AK, without in-person access to the Accused to provide copies of any post-trial submissions. *See* ROT, Vol. 2, Confinement Order dated 31 March 2022 and ROT, Vol. 2, Request for Clemency Header, dated 9 April 2022. Additionally, if the Government has this obligation, as the Government itself noted in the post-trial submission of matters memo, consistent with the reading of RCM 1106A(c)(3), there is no basis to rely on anything other than the plain reading of the rule in determining Appellant must be served with a copy of the post-trial submissions. *See United States v. Lowe*, 58 M.J. 261, 262 (C.A.A.F., 5 June 2023).

As to the issue of prejudice, for such post-trial errors related to ability to respond to post-trial submissions, "[t]he threshold should be low, and if an appellant makes some colorable showing of possible prejudice, we will give that appellant the benefit of the doubt and 'we will not speculate on what the convening authority might have done' if defense counsel had been given an opportunity to comment." *United States v. Chatman*, 46 M.J. 321, 323–34 (C.A.A.F. 1997) (quoting *United States v. Jones*, 44 M.J. 242, 244 (C.A.A.F. 1996)). The low threshold for material prejudice "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." *United States v. Scalo*, 60 M.J. 435, 437 (C.A.A.F. 2005).

Appellant has indicated that there was evidence he could have submitted to the Convening Authority had he been given an opportunity to respond. That is, he pointed to evidence already in the Record of Trial. That includes the presentencing evidence offered and admitted by the Defense at trial and the transcript and the presentencing matters submitted by the Government that were admitted at trial. This evidence could have rebutted the assertion there was any evidence of his "poor moral character," shown his evidence of high rehabilitative potential, and would have shown the Convening Authority the Government did not provide any evidence in aggravation at presentencing, nor any evidence of his character. Appendix A, Motion to Attach dated 28 June 2023.

The Record of Trial supports the conclusion that the Convening Authority did not review any evidence offered at trial based not only on the chronology of the court reporter's actions in this case that showed that the transcription was not complete until the day the Convening Authority took action, but also based on the fact that the document the Convening Authority signed showed that no other evidence or matters were considered other than those listed. Convening Authority Decision on Action dated 28 April 2022, ROT Vol. 1. and Court Reporter Chronology, undated, ROT Vol. 2.

This threshold is low for showing prejudice in part because this "post-trial conduct must consist of fair play, specifically giving the appellant 'notice and an

opportunity to respond.'" *United States v. Hunter*, No. 20170036, 2017 CCA LEXIS 527, at *4 (N.M. Ct. Crim. App. 8 Aug 2017) (unpub. op.) (quoting *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996). In this case, Appellant received no notice. While his geographically separated Trial Defense Counsel received post-trial matters submitted by K.A. and S.M., Appellant did not. If Appellant had been given an opportunity to respond, he would have. In another recent case, this Court has determined "some colorable showing of possible prejudice" was demonstrated when in that case the R.C.M. 1106A submission contained new information, the appellant articulated how he would have responded to the victim's submission had he been given the required opportunity, that his response would have been different from his initial clemency submission, and the convening authority could have granted some clemency relief." *Baker*, 2022 CCA LEXIS 523, *9.

Similar here, new information was contained with the post-trial submissions of K.A. and S.M. These submissions made assertions about Appellant's character, about upholding a sentence, and made further exposition as to the impact of the sentence and personal thoughts about the sentence as adjudged by both K.A. and S.M, which were not in Court Exs. A and B.

Appellant offered how he would have responded if he was given the opportunity. Appendix A, Motion to Attach dated 28 June 2023. The rebuttal of character evidence provided by K.A. in her post-trial submission would have been different from the original clemency submission, which did not address any evidence

of that nature as it was not part of the original record. And finally, the Convening Authority would have had power to grant clemency with this sentence as adjudged.

Basic due process has not been met in the post-trial processing of this case – and this case should be remanded for new post-trial processing. Appellant did not receive notice of 1106A matters submitted in this case, and as a result, was not given opportunity to respond to those matters prior to the Convening Authority taking Action. Further, the low threshold for establishing some possibility of prejudice has been met. Appellant could have and would have responded to the memorandums submitted by K.A. and S.M., these memorandums contained new information, his response would have been different than his clemency matters, and the Convening Authority would have had power to grant clemency.

WHEREFORE, Appellant respectfully requests that this Honorable Court provide meaningful sentencing relief or remand for new post-trial processing.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 2 August 2023.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40306 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Branden C. HAYNES	)	**DOCKETING**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

The record of trial in the above-styled case was returned to this court on 9 February 2024 by the Military Appellate Records Branch (JAJM) for re-docketing with the court.

Accordingly, it is by the court on this 12th day of February, 2024,

ORDERED:

That the Record of Trial in the above styled matter is referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before a Special Panel
Airman First Class (E-3) **BRANDEN C. HAYNES,** United States Air Force *Appellant*	)	No. ACM 40306 (f rev) 5 March 2024

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

ASSIGNMENTS OF ERROR[1]

III.[2]

WHETHER THE GOVERNMENT'S UNEXPLAINED POST-TRIAL DELAY WARRANTS RELIEF UNDER ARTICLE 66(d)(2), UCMJ?

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[1] Appellant specifically preserves and maintains Assignment of Error I (whether AB Haynes' sentence is inappropriately severe) raised in his Brief on Behalf of Appellant to this Court, 28 Jun. 2023 (Orig. Br.). On 30 August 2023, this Court returned this record of trial to the convening authority for new post-trial processing, giving Appellant full opportunity to respond to victim matters already submitted under R.C.M. 1106A. *United States v. Haynes*, No. ACM 40306, 2023 CCA LEXIS 361 at *9-10, (A.F. Ct. Crim. App. 30 Aug. 2023) (unpub. op.). This Court did not address the remaining assignment of error. However, appellant acknowledges that Assignment of Error II is now moot, as the Government corrected the post-trial processing error related to Appellant's right to respond to matters submitted by the victim under R.C.M. 1106A. Additionally, nothing has changed with regard to the two other errors within the Record of Trial identified in footnote 1 of the initial brief. (Orig. Br. at 1)

[2] Assignment of Error I is unchanged from the previous filing and Assignment of Error II has been corrected. The undersigned acknowledges that the attachments to clemency (three of them) are not included in the remand documents filed with this Court. Due to the significant delay already by the Government in processing this case, the undersigned asks that the Court not remand for this incomplete record, but rather to grant the relief requested for sentence severity and/or under *Tardif* to avoid further delay in the resolution of this case due to improper and untimely post-trial processing by the Government. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

STATEMENT OF THE CASE

On 31 March 2022, at Nellis Air Force Base (AFB), Nevada, a general court-martial composed of a military judge alone found Airman First Class (A1C) Branden C. Haynes guilty, consistent with his pleas, of one charge with two specifications of willful dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892.[3] R. at 167; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 8 Jun. 2022. The military judge sentenced A1C Haynes to a reduction to E-1, total forfeitures, 4 months confinement, and a bad conduct discharge.[4] R. at 215. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action (CADA), ROT Vol. 1, 28 Apr. 2022.

On 30 August 2023, this Court remanded the case to the trial judiciary to correct a post-trial processing error. *Haynes*, 2023 CCA LEXIS 361 * at 9-10. Upon remand, the convening authority again took no action on the findings or sentence. CADA, 30 Nov. 2023. A new Entry of Judgment was entered on 22 January 2024. EOJ, 22 Jan. 2024. This case was re-docketed with this Court on 12 February 2024.

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[3] All references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

[4] The military judge sentenced AB Haynes to 2-months confinement for Specification 1 of the Second Additional Charge, and 4-months confinement for Specification 2 of the Second Additional Charge, with confinement running concurrently. R. at 215.

STATEMENT OF FACTS

Unreasonable Delay

A sentence was entered on 31 March 2022. EOJ, 8 Jun. 2022. This case was docketed with the Court originally on 14 July 2022. Appellate Defense Counsel, and by no fault of Appellant, requested and received, with Government opposition, nine (9) requests for additional time. Haynes – 40306 – EOT 9 (1 Jun. 2023) w/OPP Granted, 6 Jun. 2023. Appellant submitted his brief of Assignment of Errors on 28 June 2023. Haynes – 40306 – Brief on Behalf of Appellant, 28 Jun. 2023. This Court then issued a decision on 30 August 2023, returning the case to the trial judiciary to correct post-trial processing errors. *Haynes*, 2023 CCA LEXIS 361 * at 9-10.

Appellant was afforded five days to respond to matters submitted under R.C.M. 1106A and Appellant submitted a second clemency package. Memorandum for Convening Authority, 11 Nov. 2023, 5 pages. Upon remand, the convening authority again took no action on the findings or sentence. CADA, 30 Nov. 2023. A new Entry of Judgment was entered on 22 January 2024. EOJ, 22 Jan. 2024. This case was re-docketed on 12 February 2024.

As of the date of submission, more than 18 months has elapsed since this case was originally docketed. After being remanded by this Court on 30 August 2023, the case was re-docketed with this Court on 12 February 2024, without any explanation why the Government needed nearly 5 months to correct this post-trial error. Government Response to Order of Status Compliance, 1 Feb. 2024. This error involved offering Appellant 5 days to respond to matters previously submitted by the victims

that were already part of the record. *Haynes*, 2023 CCA LEXIS 361 * at 9-10. For reference, a table is inserted below to provide clarification on the dates and time that has elapsed.

Table 1.

Date	Action	Days Elapsed	From Docketing
31 March 2022	Sentence Adjudged	0	
28 April 2022	CADA #1	29	
8 June 2022	EOJ #1	70	
14 July 2022	Original Docketing	106	
28 June 2023	AOE #1 filed	455	349
30 August 2023	Court Decision with Remand Order	518	412
31 October 2023	Trial Judiciary Order	580	474
11 November 2023	Clemency submitted	591	485
30 November 2023	CADA #2	610	504
22 January 2024	EOJ #2	663	557
22 January 2024	Status of Compliance Order	663	557
1 February 2024	Gov't Response	673	567
9 February 2024	Record Returned	681	575
12 February 2024	Re-docketed	684	578

ARGUMENT

THE UNEXPLAINED POST-TRIAL DELAY WARRANTS RELIEF UNDER ARTICLE 66(d)(2), U.C.M.J.

Standard of Review

The question of whether an appellant's due process rights are violated because of post-trial delay is reviewed *de novo*. *United States v. Livak*, 80 M.J. 631, 632 (A.F. Ct. Crim. App. 2020).

Law

A Court of Criminal Appeals has authority under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2)[5] to grant appropriate relief for unreasonable and unexplained post-trial delays. *United States v. Tardif*, 57 M.J. 219, 220 (C.A.A.F. 2002). A court's authority to grant relief under Article 66(d)(2) does not first require a showing of prejudice. *Id.* Considerations include all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay. *Id.* at 224. Relief can be granted even when the delay was not "most extraordinary." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

Factors to consider whether *Tardif* relief is appropriate are as follows:

(1) How long did the delay exceed the standards set forth in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006)?
(2) What reasons, if any has the government set forth for the delay? Is there any evidence of bad faith or gross indifference to the overall post-trial processing of this case?
(3) Keeping in mind that [the] goal under *Tardif* is not to analyze for prejudice, is there nonetheless some evidence of harm (either to appellant or

[5] At the time *Tardif* was decided, this authority rested in Article 66(c), but changed to (d)(2) in 2019.

institutionally) caused by the delay?
(4) Has the delay lessened the disciplinary effect of any particular aspect of the sentence, as is relief consistent with the dual goals of justice and good order and discipline?
(5) Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation?
(6) Given the passage of time, can this court provide meaningful relief in this particular situation?

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). No single factor is dispositive as other appropriate considerations may be apparent based on the individual case facts. *Id.* The length of time appellate defense counsel takes to file a brief, even if longer than the government delay, is not a bar to relief. *Id*.

Analysis

Appellant should be granted sentence relief due to the unexplained and unreasonable post-trial processing delay, consistent with this Court's authority under Article 66(d)(2), UCMJ and the standards set forth in *Tardif* and the factors outlined in *Gay*. To date, over 680 days have passed since Appellant was sentenced. Appellant's case has been pending appeal for over 590 days, which exceeds the threshold for appellate review set forth in *Moreno* of the completion of appellate review within 18 months from original docketing. As outlined in *Gay*, the length of time appellate defense counsel took to file a brief does not foreclose relief. *Gay*, 74 M.J. at 744. Thus, while Appellant acknowledges nearly a year of this delay was at the request of Appellant's defense counsel, it was through no fault of Appellant for that delay. Appellant should be granted relief under *Tardif* because (1) the government exceeded the standard for appellate review set forth by *Moreno*, (2) the government has set forth

no reason for delay, (3) there is institutional harm when appeals are pending for such a length of time without justification, and (4) the delay has lessened the effects of this sentence and relief is consistent with the dual goals of justice and good order and discipline. Finally, this Court can grant meaningful relief despite the passage of time.

First, as of the date of return of this case to this Court, the timeline set forth in *Moreno* has already been exceeded. *See* Table 1, *supra* at 4. More than 18 months have passed since this case was originally docketed.

Second, the Government provided no explanation as to the reasons for the delay. Further, the additional materials gathered on remand are not onerous in terms of the documents that needed to be prepared (standard EOJ and CADA). Finally, the addition to the record upon remand is not voluminous based on review of the 28 pages submitted when this case was returned to this Court for docketing. Government Response to Order of Status Compliance, 1 Feb. 2024.

Additionally, the institutional harm in allowing cases to languish on remand to correct post-trial errors undercuts the seriousness of this process and the life-altering consequences of this case for Appellant. By treating this Court's order without a sense of expediency or due care in compiling the post-trial paperwork, as evidenced by the lack of a complete record and the subsequent five months needed to collect 28 pages, this creates harm to the military justice system. The court-martial process is more than mere procedural requirements and checklists. Real people are impacted by these court filings—financially, emotionally, and economically.

Moreover, when Appellant was sentenced for his own dereliction of duty,

Appellant received not only a punitive discharge, but also confinement, a reduction in grade to the lowest enlisted rank, and total forfeitures. Here, the outside observer might rationally and reasonably question the fundamental fairness of this process when the Government's dereliction of duty is not similarly addressed and corrected. The Government's lack of due care in assembling this post-trial record and expediently processing this case on remand is similarly a dereliction – of the duties set forth not only in the Rules for Court Martial, but also in governing service regulations. Stated differently, not granting relief for the Government's dereliction of duty in failing to accurately and timely shepherd this case through the remand process seems to imply that there is a separate standard for carrying out duties when the actor is part of the judicial process, rather than being judged by it. Appellant's case is not unique, as the Government consistently struggles to accurately and timely process courts-martial.[6]

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[6] *See United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. 11 Sep. 2023) (remand order); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. 1 Aug. 2023) (remand order); *United States v. Manzano Tarin*, No. ACM S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. 27 Jun. 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. 15 Jun. 2023) (remand order); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Gammage*, No. ACM S32731, 2023 CCA LEXIS 240 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Goodwater*, No. ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. 31 May 2023) (remand order); *United States v. Irvin*, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim. App. 12 May 2023) (remand order); *United States v. Valentin-Andino*, 83 M.J. 537, 544 (A.F. Ct. Crim. App. 2023) (remanding because of audio issue); *United States v. Lake*, No. ACM 40168, 2022 CCA LEXIS 706 (A.F. Ct. Crim. App. 7 Dec. 2022) (remand order);
United States v. Fernandez, No. ACM 40290, 2022 CCA LEXIS 668 (A.F. Ct. Crim. App. 17 Nov. 2022) (remand order); *United States v. Stafford*, No. ACM 40131, 2022 CCA LEXIS 654 (A.F. Ct. Crim. App. 8 Nov. 2022) (remand order); *United States v. Lampkins*, No. ACM 40135, 2020 CCA LEXIS 500 (A.F. Ct. Crim. App. 25 Oct. 2022)

Regardless this disparate treatment is institutional harm and should not be tolerated.

Finally, this Court is empowered to disapprove a portion of the sentence to confinement, which would result in back-pay for the total forfeitures that were adjudged, and could also restore Appellant's rank to E-3 and reduce the adjudged forfeitures. The delayed finality of this case lessens the impact of the sentence. Thus, the relief requested, disapproval of portions of this sentence, are meaningful relief still available to this Court.

WHEREFORE, considering this court has at least 5 factors to consider in favor of granting *Tardif* relief, Appellant asks this Court to exercise its Article 66(d), UCMJ authority to grant meaningful sentence relief for the delay in completing appellate review.

(remand order); *United States v. Romero-Alegria*, No. ACM 40199, 2022 CCA LEXIS 558 (A.F. Ct. Crim. App. 22 Sep. 2022) (remand order); *United States v. Payan*, No. ACM 40132, 2022 CCA LEXIS 242 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Cooper*, No. ACM 40092, 2022 CCA LEXIS 243 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. 17 Mar. 2022) (unpub. op.); *United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43 (A.F. Ct. Crim. App. 20 Jan. 2022) (unpub. op.) (requiring second remand for noncompliance with initial remand order), *United States v. Goldman*, No. ACM 39939 (f rev), 2022 CCA LEXIS 511 (A.F. Ct. Crim. App. 30 Aug. 2022) (remand order); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10 (A.F. Ct. Crim. App. 6 Jan. 2022) (unpub. op.); *United States v. Daley*, No. ACM 40012, 2022 CCA LEXIS 7 (A.F. Ct. Crim. App. 5 Jan. 2022) (unpub. op.).

Respectfully submitted

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 5 March 2024.

NICOLE J. HERBERS, Maj, USAF
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Joint Base Andrews NAF, MD 20762

4 April 2024

THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **BRANDEN C. HAYNES**, USAF, *Appellant.*	))))))))	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR No. ACM 40306 (f rev) Special Panel

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

ISSUES PRESENTED

III.

WHETHER THE GOVERNMENT'S UNEXPLAINED POST-TRIAL DELAY WARRANTS RELIEF UNDER ARTICLE 66(D)(2), UCMJ?

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF FACTS

Delay Between Sentencing and Docketing

Appellant entered a plea of guilty to one Charge and two Specifications of willful dereliction of duty, in violation of Article 92, on 31 March 2022. (*Entry of Judgment*, ROT Vol. 1.) Appellant's case was docketed with this Court on 14 July 2022. Between his sentence and docketing with this Court, 106 days elapsed.

Delay Prior to Remand

After this case was docketed, Appellant requested and received nine enlargements of time, all of which were opposed by the government. (Appellant's Motion for Enlargement of Time (Ninth), dated 1 June 2023). Appellant submitted his Assignments of Error on 28 June

2023. (App. Br. at 1.) In Appellant's initial Assignments of Error, he notified this Court that he had not been afforded the required five days to respond to the victim's submission of matters, as required by R.C.M. 1106. (App. Br. at 12-17.) At the time of Appellant filing his initial Assignments of Error, 350 days had elapsed. On 30 August 2023, this Court remanded the case to the Air Force Trial Judiciary to remedy the post-trial processing error. United States v. Haynes, ACM 40306, 2023 CCA LEXIS 361, *9-10 (A.F. Ct. App. Aug. 30, 2023). At that point, 413 days had elapsed since docketing.

Delay Between Remand and Re-Docketing

On 11 October 2023, the Air Force Trial Judiciary detailed a military judge for post-trial corrective actions. (*Change of Judge for Post-trial Processing on Remand*, 11 October 2023, ROT Vol. IV.) The previously detailed military judge was not reasonably available as he had retired from active duty. (Id.) On 31 October 2023, the detailed military judge issued a post-trial order providing guidance on the remand process to government trial counsel, along with a scheduling order. (*Post-trial Order*, 31 October 2023, ROT Vol. IV.) On the date the post-trial order was issued, 475 days had elapsed since docketing with this Court.

Upon receipt of the post-trial order, government trial counsel coordinated with trial defense counsel and served Appellant the submission of matters on 7 November 2023. (Gov. Motion to Attach, dated 4 April 2024, Appx. A; *Receipt of Post-Trial and Victim Post-Sentencing Matters*, 7 November 2023, ROT Vol. IV.) On 11 November 2023, Appellant submitted his response to the victims' submission of matters, in accordance with R.C.M. 1106. (*Request for Clemency*, 11 November 2023, ROT Vol. IV.) The base legal office contacted the Military Justice Law and Policy Division (JAJM) to request a review of the draft Corrected Convening Authority Decision on Action Memorandum on 17 November 2023. (Gov. Motion to

Attach, Appx. A). The Convening Authority Decision on Action Memorandum was provided to the Convening Authority on 22 November 2023. The Convening Authority took action on 30 November 2023. (*Convening Authority Decision on Action Memo*, 30 November 2023, ROT Vol. IV.) Appellant was served a copy of the Convening Authority Decision on Action Memorandum on 8 December 2023. (*Receipt for Convening Authority Decision on Action Memorandum*, 8 December 2023, ROT Vol. IV.) On 15 December 2023, the military judge requested that trial defense counsel confirm that they did not intend to file any motions alleging errors with the Convening Authority's action. (Gov. Motion to Attach, Appx. A). Trial defense counsel responded in the negative on 18 December 2023. (Gov. Motion to Attach, Appx. A). On 20 December 2023, the military judge asked government trial counsel clarification questions regarding the draft Entry of Judgement (EOJ). (Gov. Motion to Attach, Appx. A). Government trial counsel emailed JAJM to ensure the military judge's question was properly resolved on 22 December 2023. (Id.) On 5 January 2024, government trial counsel provided the military judge with JAJM's input regarding the draft EOJ. (Id.) The military judge signed the EOJ on 22 January 2024. (*Entry of Judgment*, 22 January 2024, ROT Vol. IV.)

This Court issued a Status of Compliance order on 22 January 2024. (*Compliance Order*, 22 January 2024). The government provided a response to this Court's order informing the Court the base legal office had mailed the majority of the corrected documentation to JAJM on 31 January 2024 and would be mailing the last of the responsive items imminently. (Gov. Notice of Status of Compliance, 1 February 2024.) This case was re-docketed with this Court on 12 February 2024. From the initial docketing date of 14 July 2022 to the date of this filing, 631 days have elapsed (approximately 20 months and 22 days).

ARGUMENT

III.

APPELLANT IS NOT ENTITLED TO RELIEF UNDER MORENO OR TARDIF.

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

This Court applies an aggregate standard threshold to ensure appellants' due process rights to timely post-trial and appellate review are protected. Livak, 80 M.J. at 633. To avoid unreasonable delay, the entire period from the end of trial to docketing on appeal must be within 150 days. Id. at 633-634. Additionally, in Moreno, the CAAF held a presumption of unreasonable post-trial delay should be applied when appellate review is not complete, and a decision is not rendered within 18 months of docketing before the Court of Criminal Appeals. *See* Moreno, 63 M.J. at 142. When evaluating whether a case has been docketed within the appropriate timeframe, this Court has not required the ROT to be complete and without errors to stop the clock. *See* United States v. Miller, No. ACM 39323 (rem), 2021 CCA LEXIS 412 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.). Moreover, this Court held so long as a record is docketed within the 150-day Livak standard, an appellant is not entitled to unreasonable post-trial delay when the record is later found to be incomplete. 80 M.J. at 633.

When a case does not meet either the 150-day Livak standard or the 18-month Moreno standard, the delay is presumptively unreasonable. *See* Moreno, 63 M.J. at 135 (citing Barker v. Wingo, 407 U.S, 514, 530 (1972)). When a delay is presumptively unreasonable, courts apply a

balancing test to determine whether a due process violation occurred, which includes: (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, which considers preventing oppressive pretrial incarceration, minimizing anxiety of the accused, and limiting the possibility of an impaired defense. Id. 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. 353m 362 (C.A.A.F. 2006).

Analysis

Appellant is not entitled to any relief for post-trial delay. The government met the 150-day Livak threshold for initial docketing with this Court when the case was initially docketed on 14 July 2022, 106 days after Appellant's sentencing. But, applying the 18-month threshold established in Moreno, there is a facially unreasonable delay. From the date of the initial docketing of this case with this Court to the date of this filing, 631 days have passed, which is more than the 18-month threshold required to show a facially unreasonable delay. Since there is 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.

Appellant asserts he is entitled to sentencing relief for unreasonable post-trial delay based on Article 66(d)(2), UCMJ, and the standards established in Tardif. (App. Br. at 6, 5 March 2024.) Appellant is wrong. Analyzing the six factors established in United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), Appellant is not entitled to relief as the delay in this case does not meet any of the non-exhaustive Gay factors.

A. Barker Factor Analysis: Length of the Delay

This factor weighs in favor of the Appellant. The 631 days that have elapsed from the initial docketing of this case to the date of this filing exceeds the 18-month Moreno threshold. This is a facially unreasonable delay. But even though the delay is presumptively unreasonable, it does not end the inquiry. The delay alone is not sufficient to justify relief; it merely triggers a due process analysis.

B. Barker Factor Analysis: Reasons for the Delay

The second Barker factor favors the government. During the remand period, the government consistently drove the post-trial process forward and there are reasonable explanations for the delay between initial remand and re-docketing with this Court. Under this factor, this Court examines how much of the delay was under the government's control. United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022). This Court also assesses any legitimate reasons for delay, including those attributable to appellant. Moreno, 63 M.J. at 136.

Appellant requested nine enlargements of time, resulting in 350 days elapsing between his case being docketed with this Court and the Appellant filing his initial Assignments of Error. (App. Br. at 1). The government opposed each of those requests for an enlargement of time. Appellant explicitly consented to eight of those nine requests for an enlargement of time, constituting a delay of almost 12 months of the 18-month Moreno threshold. Appellant took

almost a year to notify either the government or this Court about Appellant not being afforded the opportunity to respond to the victims' submission of matters in accordance with R.C.M. 1106. It is reasonable to believe that if the issues had been made known to the government or this Court earlier, they could have been resolved much earlier in the appellate process, thereby shortening the time of appellate review.

Once the issue was brought to the attention of this Court, this Court remanded the case after 413 days had elapsed. Once the military judge issued the post-trial order on 31 October 2023, the government was diligent in remedying the identified post-trial processing deficiencies. (*Post-trial Order*, 31 October 2023, ROT Vol. IV.) The government served the Appellant the victims' submission of matters within a week. (*Receipt of Post-trial and Victim Post-Sentencing Matters*, 7 November 2023, ROT Vol. IV.) Appellant was properly afforded the time to submit a response to the victims' submission of matters as required under R.C.M. 1106 and submitted his response on 11 November 2023. After receiving Appellant's response, the government drafted the required Corrected Authority Decision on Action Memorandum and provided it to JAJM for review on 17 November 2023. (Gov. Motion to Attach, Appx. A). The Convening Authority Decision on Action Memorandum was then provided to the Convening Authority on 22 November 2023, who took action on 30 November 2023-- presumably after having taken the appropriate time to consider Appellant's submission. (*Convening Authority Decision on Action Memo*, 30 November 2023, ROT Vol. IV.) Appellant was served with a copy of the Convening Authority Decision on Action Memorandum on 8 December 2023. (*Receipt for Convening Authority Decision on Action Memorandum*, 8 December 2023, ROT Vol. IV.) It took Appellant's trial defense counsel 10 days to indicate they did not intend to file a motion alleging errors with the Convening Authority's action. (Gov. Motion to Attach, Appx. A). Between 20

December 2023 and 5 January 2024, there were ongoing discussions between the military judge, government trial counsel, and JAJM to ensure the EOJ was properly corrected. (Gov. Motion to Attach, Appx. A). During that time, there were two federal holidays that likely accounted for any delay in ensuring the draft EOJ was properly corrected. The military judge signed the EOJ on 22 January 2024 and the majority of the corrected documentation was mailed to JAJM on 31 January 2024. (Gov. Motion to Attach, Appx. A; Gov. Notice of Status of Compliance, 1 February 2024). The case was re-docketed with this Court on 12 February 2024. The delay between the mailing of the corrected materials and the re-docketing was presumably a result of the transit time for the mail.

This was not a case of the government treating this Court's remand order without a sense of expediency or due care, as Appellant alleges. (App. Br. at 7). After the government's receipt of the post-trial order in this case, the government consistently progressed through the post-trial correction process, while being attentive to ensure the corrections were made appropriately to avoid any additional delays due to errors in the corrective paperwork. Because there are reasonable explanations for the delay, this Court should find that the government has rebutted the presumption of unreasonable delay and that this factor weighs in the government's favor.

C. Barker Factor Analysis: Appellant's Assertion of the Right of Timely Review and Appeal

This factor 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 to the Convening Authority, and Appellant's assignments of error are mute as to a post-trial demand for speedy trial. (App. Br., 5 March 2024; *Submission of Matters*, 11 November 2024, ROT Vol. IV.) Appellant also explicitly consented to eight of the nine requests for enlargement of time to file a brief, resulting in 350 days elapsing between this case's initial docketing with this Court and Appellant's filing of his initial Assignments of Error. Therefore, Appellant is not entitled to strong evidentiary weight for this factor, and it weighs in the government's favor.

D. Barker Factor Analysis: Prejudice

The prejudice factor also favors the government. The Supreme Court has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in cases of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id. Appellant does not allege any particularized or generalized prejudice to himself. (App. Br. at 6-9, 5 March 2024.) Appellant provided no indication of oppressive incarceration pending appeal, undue anxiety and concern, impairment of a retrial, or any other prejudice. Further detracting from any prejudice argument is that Appellant's requested nine enlargements of time resulted in 350 days of delay. To the extent that Appellant was "prejudiced" by the delay, he was arguably more prejudiced by his own delay in filing an appeal. Because no prejudice occurred, the Court then turns to the analysis under Toohey to determine if 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." 63 M.J. at 362. The Court looks at all four

Barker factors when considering the public perception standard. Id. In Toohey, no prejudice was found, but the length of the delay played largely into the Court's public perception analysis. Id. Approximately 47 months passed between the docketing of the appellant's appeal and the Navy-Marine Court of Criminal Appeals making their decision. Id. at 357. This delay far exceeded Moreno's 18-month threshold for appellate review and negatively affected the public's perception of fairness in the military justice system. Id. at 358. In contrast, the 20-month delay to this point is not remotely close to the 47 month delay. Moreover, because Appellant's nine requests for enlargement of time accounted for almost 12 months of the 20 months so far, the public's perception of fairness and integrity in the military justice system would not be adversely affected.

E. Appellant is not entitled to Relief under Tardif.

Appellant asserts he is entitled to sentencing relief under Tardif. (App. Br. at 6-9, 5 March 2024.) Appellant is incorrect. 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 relief is "for unreasonable *and* unexplained post-trial delays. Id. at 220 (emphasis added). 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. at 225. 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.

Gay, 74 M.J. at 744 (A.F. Ct. Crim. App. 2015). The delay in this case does not meet any of the non-exhaustive Gay factors. The government has provided reasonable explanations for the delay during the remand process, and there is no evidence of bad faith or gross negligence in the overall post-trial processing of this case. While Appellant claims that the government taking five months to correct the deficiencies identified in this Court's remand order creates harm to the military justice system (App. Br. at 7), this claim should fall on deaf ears. The five months of diligent efforts by the government pales in comparison to nearly 12 months of delay due to the nine expansions of time requested by Appellant prior to filing his initial Assignments of Error. Moreover, in Anderson, the Court held that a delay of 481 days between sentencing and convening authority action would not "cause the public to doubt the entire military justice system's fairness and integrity." 82 M.J. at 88. Where an Appellant takes 350 days to file his initial assignments of error, it is difficult to imagine that the government requiring five months of continuous effort to remedy an error would "cause the public to doubt the entire military justice system's fairness and integrity."

This Court granting relief in this case would not be consistent with the dual goals of justice and good order and discipline, given the seriousness of the charges of which Appellant was convicted and the absence of governmental bad faith. Providing sentence relief without a showing of actual prejudice in this case would not be meaningful. If this Court were to grant sentence relief, it would be rewarding Appellant for taking 350 days to file his brief after this case was originally docketed with this Court.

In this case, Appellant has not experienced any prejudice to date, and any future prejudice is speculative. A remedy is not warranted. A balancing of the six Gay factors weighs in the Government's favor. This Court should deny this 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.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

FOR

MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 4 April 2024 via electronic filing.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Special Panel
Airman First Class (E-3) **BRANDEN C. HAYNES** United States Air Force *Appellant*	)	No. ACM 40306 (f rev) 4 April 2024

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 the Court to attach the following documents to this motion:

- Appendix A – Declaration of Capt A C with Attachments, dated 3 April 2024 (18 pages total)

The attached declaration is responsive to Appellant's Assignment of Error III concerning requested sentencing relief for post-trial delay. (App. Br., 5 March 2024 at 1). In his brief, Appellant alleges he is entitled to relief due to unreasonable post-trial delay. (Id. at 6-9). The attachment provides a timeline of the remand processing and adds additional context surrounding the post-trial delay. The attachment is directly responsive to the issue raised by Appellant. The attachments inclusion in the record would be beneficial to this Court for resolution of the issue raised by Appellant.

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

Accordingly, the attached document is relevant and necessary to address Appellant's Assignment of Error III.

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

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

FOR
MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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 4 April 2024.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before a Special Panel
Airman First Class (E-3) **BRANDEN C. HAYNES,** United States Air Force *Appellant*	)	No. ACM 40306 (f rev) 10 April 2024

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

Airman First Class Branden C. Haynes, (Appellant), by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's Answer, filed 4 April 2024 (hereinafter Answer). Appellant stands on the arguments in his brief, filed 5 March 2024 (hereinafter Appellant's Br. #2[1]), and in reply to the Answer submits additional arguments for the issue listed below.

THE GOVERNMENT'S UNEXPLAINED POST-TRIAL DELAY WARRANTS RELIEF UNDER ARTICLE 66(d)(2), U.C.M.J.

The unexplained and unreasonable delay in Appellant's case warrants relief under Article 66(d). As a threshold matter, before delving into the reasons relief is warranted, two important points raised in the Answer must be addressed.

[1] Appellant also filed an initial brief prior to remand on 28 June 2023 (hereinafter Appellant's Br. #1).

First, the Government incorrectly attempts to recast Appellant's Assignment of Error raised pursuant to Article 66(d), U.C.M.J., as a due process violation. *See* Answer at 4-10. To be clear, Appellant is not asserting a due process violation under *Moreno*.[2] Rather, in the absence of a due process violation, this Court considers whether relief for excessive post-trial delay is warranted consistent with its authority under Article 66(d) U.C.M.J. Because there is no assertion of a due process violation under *Moreno*, the *Barker* factors are inapplicable in deciding whether relief under Article 66(d) is warranted in this case. Therefore, this Court should not rely on the analysis of the *Barker* factors set forth by the Government. Answer at 6-10.

Second, the Government conceded that the passage of 631 days since docketing without a final decision—now 636—constitutes a facially unreasonable delay in this case. Answer at 5. However, to grant relief to Appellant under Article 66(d), he does not have to (1) assert speedy appellate review nor (2) establish prejudice. *United States v. Tardif*, 57 M.J. 219, 220 (C.A.A.F. 2002).

This Court can grant Appellant relief for three reasons: (1) the Government does not provide reasonable explanations for the delay on remand; (2) the length of time Appellant takes to file an Assignment of Error, even when it exceeds the length of the Government delay, does not bar relief; and (3) the factors set forth in *Gay*[3] resolve in Appellant's favor.

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[2] *United States v. Moreno,* 63 M.J. 129, 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).
[3] *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015).

1. The Government's timeline leaves two months unaccounted for, and the information provided does not establish a reasonable explanation for the time taken.

The impetus for relief here is not whether there is "an accounting" of the time spent, but whether the reasons offered justify the time taken. Under the framework this Court articulated in *Gay*, 74 M.J. at 744, the second factor focuses on the "reasons" for the delay, searching for a "good explanation in the record for the delays," rather than a mere accounting. Notably, the Government did not, and apparently could not, provide any reason for the minimal action the Government took on this Court's order for two months. *See* Appendix A, United States' Motion to Attach Documents, 4 April 2024 [hereinafter Appendix A]. From 30 August through 31 October 2023, no substantial action was taken in this case. Record of Trial (ROT) Vol. IV, Memorandum for All Counsel, 11 October 2023; Post-Trial Order, 31 October 2023 (noting the record was forwarded to the trial judiciary on 5 September 2023 and a change in judge and detailing of a trial judge was made on 11 October 2023). It was not until 31 October 2023 that the Government first took substantive steps to move this case forward. Appendix A. Those forward steps continued only through 30 November 2023 when the Convening Authority signed the Convening Authority Decision on Action.[4] *Id.*

[4] Starting on 31 October 2023, the Government provided status updates to the trial judge, served the existing post-trial submissions on Appellant, and receipted for clemency all by 11 November 2023, with a decision on action by the Convening Authority on 30 November 2023. Appendix A.

However, in addition to the two months without explanation at the onset of this remand order, nearly two additional months are unexplained. From the time after the Convening Authority Decision on Action through the receipt by this Court, the Government has notations that steps were taken, but no reasonable explanation for the necessity or justification for why the time taken was so long. The notations provided at Appendix A show emails were sent and received, but there is no explanation of the complexity of the issues to be resolved within those emails. There is no explanation whether the questions posed were of such a nature to require extensive research and/or complex or comprehensive response to take the days and weeks that are documented in Appendix A.[5] This case was re-docketed on 12 February 2024, without an explanation for why this small record of 28 pages took three weeks to assemble and ship. Appendix A. One month of movement on this remand out of five months does not demonstrate diligence on behalf of the Government. Moreover, relief can be granted even when the delay was not "most extraordinary." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). Thus, while two months over the standard in *Moreno* to date may not be "the most extraordinary," this unexplained and unnecessary delay of nearly four of the five months on remand warrants relief.

[5] For example, in Attachment 1 of Appendix A, there is notation of emails between the Government components from 20 December 2023 through 24 January 2024, without any explanation of the pending issues and their complexity. Nothing in Attachment 1 provides any actual explanation why the Entry of Judgment (EOJ) could not have been signed mid-December, when a draft had been provided on 8 December 2023 and no additional matters were pending with the trial judge or the parties as of 18 December. Yet, the EOJ was not final until 22 January 2024. Appendix A, Attachment 1.

2. The length of time taken by Appellant to file a brief does not preclude relief under Article 66(d) and *Tardif*.

This Court, in *Gay*, granted relief even when the length of time appellate defense counsel took to file an assignment of error was longer than the Government delay at issue. *Gay*, 74 M.J. at 744. The reasons this Court would not want to hold this time against Appellant are numerous, but the least of which are that who Appellant is assigned as appellate defense counsel and her individual case docket are outside his control. *See, e.g., Moreno*, 69 M.J. at 137; *Barker*, 407 U.S. at 531 (noting that the delay attributable to appellate defense counsel's caseload and delay from an overcrowded docket is the responsibility of the Government).

Beyond the responsibility of the Government to control the docket, the explanations provided for the time to file Appellant's initial brief differs from the Government's unexplained post-trial delay here. As noted above, the Government offers no explanation other than its agents putting together 28 pages of the record for four months longer than it actively took to do so. By contrast, Appellant's counsel's requests for enlargements of time carried detailed explanations and justifications as required by this Court's Rules of Practice and Procedure and included an explanation that the delay(s) were through no fault of Appellant. *See*, *e.g.*, Motion for Enlargement of Time (Eighth), 1 May 2023 and Motion for Enlargement of Time (Ninth), 1 June 2023.

Finally, Appellant is under no obligation to "pre-review" the case as suggested by the Government, alerting it to its own error to ensure it meets its post-trial

obligations prior to the filing of his initial brief. Answer at 7. The Government asserts it is "reasonable to believe that if the issues had been made known to the government or this Court earlier, they could have been resolved much earlier in the appellate process, thereby shortening the time of appellate review." *Id*. Using that logic, had the Government not been derelict in the post-trial processing, we would not be here at this late hour either. Moreover, even when the time Appellant took to file his initial brief exceeds the Government delay at issue, it does not bar relief. *Gay*, 74 M.J. at 744. This post-trial error by the Government was raised, as one of three issues, in June 2023. Appellant's Br. #1 at 12. Yet, here it is April 2024, two years past the conviction and adjudged sentence, and this case is not yet final.

3. Appellant meets all six factors for relief set forth in *Gay*.

The first factor concerning how long the delay exceeded the standards set forth in *Moreno* weighs in the Appellant's favor. *See Gay*, 74 M.J. at 744. The Government conceded the more than 631 days since docketing exceeded the threshold of 18 months set out in *Moreno* and that the time taken thus far is facially unreasonable. Answer at 5. The total time it will exceed this standard for docketing to final decision is unknown, but to date, 636 days have passed, 87 days past the 18-month timeline.

Also weighing in the Appellant's favor, the second factor centers on what reasons 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. *Gay*, 74 M.J. at 744. Section 1, above, outlines this factor – which does not resolve in the Government's favor. The Government's Answer offered no explanation for the nearly two months

with little action on this Court's order, and after the Convening Authority Decision on Action, provided no meaningful explanation of why it took nearly an additional two months to get a signed Entry of Judgment by the trial judge. Appendix A. Notations that time was taken are not an explanation, otherwise, the delay itself would swallow the search for "reasons." *Gay*, 74 M.J. at 744. Thus, this factor resolves in favor of Appellant.

The third factor resolves in Appellant's favor; there is some evidence of institutional harm caused by the delay (noting this factor does not require a showing of prejudice). *Gay*, 74 M.J. at 744. There is no connection from the length of time Appellant took to file his initial brief to the institutional harm at issue here. The harm here is not the delay itself, but that which is *caused by* the delay. The institutional harm is the dereliction of duty by the Government in failing to meet its own processing times, after initially being derelict in its duty through failure to serve victim matters on Appellant prior to clemency. If the Government is not held to account for its dereliction causing this delay, public trust in the military justice system is eroded. *United States v. Miller*, 64 M.J. 666, 674 (A.F. Ct. Crim. App. 2007) (relying on Judge Erdmann's observation in *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005), noting "excessive post-trial delays erode servicemember's confidence in the military justice system as well as the public's perception of the fairness of the system." *Id*. at 106-07 (Erdmann, J., concurring and dissenting in part)). The processing of this case shows the public the military justice system only holds accountable those who are brought before it for dereliction of duty – but not the dereliction of duty of those who

participate in it. This factor weighs in favor of Appellant.

Fourth, the delay here lessened the disciplinary effect of the sentence, and relief for Appellant is consistent with the dual goals of justice and good order and discipline. *Gay*, 74 M.J. at 744. More than two years post-conviction, this case and the adjudged punitive discharge are not final. While Appellant wants to move home and move on, he is working in Las Vegas during the pendency of this appeal. ROT Vol. IV, Memorandum for Convening Authority, 11 November 2023. The delay from the conviction and sentence to completion of appeal lessens the impact of the sentence. Moreover, the impact of the sentence is lessened with each passing day as the effects thereof are no longer close in time to the guilty plea and conviction. Good order and discipline, at its core, contain a temporal tie between the crime and punishment – and that no longer exists here.

The next factor weighs in favor of Appellant; there is evidence of institutional neglect. *Gay*, 74 M.J. at 744. Appellant cited to evidence of institutional neglect concerning timely and accurate post-trial processing in his brief. Appellant's Br. #2 page 8, n. 6. The Government did not counter nor address this assertion, but said "no factors" were met by Appellant. Answer at 11.

Finally, this Court can grant meaningful relief. *Gay*, 74 M.J. at 744. This Court is empowered to disapprove a portion of the sentence to confinement, which would result in back-pay for the total forfeitures that were adjudged and could also restore Appellant's rank to E-3 and reduce the adjudged forfeitures. Thus, the relief requested, disapproval of portions of this sentence, are meaningful relief still available to this

Court.

WHEREFORE, considering this Court has 6 factors to consider in favor of granting *Tardif* relief, Appellant asks this Court to exercise its Article 66(d), U.C.M.J., authority to grant meaningful sentence relief for the delay in completing appellate review.

Respectfully submitted,

NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
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1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	) ANSWER TO SHOW CAUSE) ORDER
v.	)
Airman First Class (E-3) **BRANDEN C. HAYNES**, United States Air Force *Appellant.*	) Before Special Panel)) No. ACM 40306 (f rev))) 14 May 2024

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

On 31 March 2022, Appellant was convicted by a general court-martial of one charge consisting of two specifications of willful dereliction of duty, in violation of Article 92. (Entry of Judgment, ROT Vol. 1.) On 30 August 2023, this case was remanded because, *inter alia*, Appellant did not receive an opportunity to rebut the victim matters prior to convening authority action on his case. United States v. Haynes, No. ACM 40306, 2023 LEXIS 361, at *2 (A.F. Ct. Crim. App. 30 Aug. 2023) (unpub. op.). Following corrective action, Appellant's case was re-docketed with this Court on 12 February 2024. On 1 May 2024, this Court ordered the Government to show good cause as to why the record of trial should not be remanded for correction or other action (hereinafter "the Order"), based on the omission of (a) the three attachments to Appellant's 11 November 2023 clemency submission, and (b) Exhibits 8 and 12 from the preliminary hearing officer's report.

Statement of Facts

On 9 May 2024, the responsible base legal office provided the Government Trial & Appellate Operations Division (JAJG) with the three omitted attachments to Appellant's 11 November 2023 clemency request via email. (*United States Motion to Attach*, dated 14 May

2024, Appx. B.) The following day, the legal office mailed the discs containing the electronic files constituting Exhibits 8 and 12 of the preliminary hearing officer's report. (*United States Motion to Attach*, dated 14 May 2024, Appx. C.) The legal office also provided a declaration from the Non-Commissioned Officer in Charge, Litigation detailing how she was able to retrieve these items, verify their authenticity, and then provide them to the Court. (*United States Motion to Attach*, dated 14 May 2024, Appx. A.)

Law & Analysis

In the United States' Motion to Attach, the Government provided the omitted materials identified by this Court. This Court need not remand this case again, as the previously missing documents have now been provided to this Court. This Court has often elected not to provide any remedy for an incomplete record where the Government has provided the missing portions through a motion to attach.

When a record is incomplete, Rule for Court Martial 1112(d)(2) allows this Court to return the record of trial to the military judge for correction. But if the omitted portions of the record are provided to this Court and there is no dispute as to their authenticity, there is no utility in returning the record for correction. Where the government has produced missing documents through a motion to attach, this Court has often not granted any remedy. *See* United States v. King, ACM 39583, 2021 CCA LEXIS 415 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.); United States v. Jones, 2022 CCA LEXIS 584, *10 (A.F. Ct. Crim. App. 17 October 2022) (unpub. op.); United States v. Garron, 2023 CCA LEXIS 67, *5 (A.F. Ct. Crim. App. 9 February 2023) (unpub. op.). Here, there is no reason to dispute the authenticity of the declaration, the attachments to Appellant's clemency request, or the PHO exhibits. These are not the types of missing documents that would require military judge or trial and defense counsel involvement under R.C.M. 1112(d)(2) to correct the record. Since the United States has provided the missing

documents, there is good cause for this Court to retain the record without remanding it for correction. This is especially true given that Appellant asked this Court not to remand his case based on the incomplete record. (*Brief on Behalf of Appellant*, 5 March 2024.)

WHEREFORE, the United States respectfully requests this Court decline to remand the record for correction or take any additional corrective action.

Respectfully submitted,

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I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 14 May 2024.

KATE E. LEE, Capt, USAF
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Respectfully submitted,

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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 May 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**UNITED STATES' MOTION**
Appellee	)	**TO ATTACH DOCUMENTS**
	)	
v.	)	Before Special Panel
Airman First Class (E-3)	)	
BRANDEN C. HAYNES	)	No. ACM 40306 (f rev)
United States Air Force	)	
Appellant	)	14 May 2024

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 the Court to attach the following documents to this motion:

- Appendix A – Declaration of SSgt K K , dated 9 May 2024 (1 page)
- Appendix B – Attachments to Appellant's Clemency Request, various dates (5 pages)
- Appendix C – Disc Containing PHO Exhibits 8 & 12

This Court found that the record of trial was incomplete due to the omission of: (1) the three attachments to Appellant's 11 November 2023 clemency request, and (2) Exhibits 8 and 12 from the preliminary hearing officer's (PHO) report. (*Order*, dated 1 May 2024.) As a result, this Court ordered the United States to show good cause as to why this Court should not remand the record for correction under R.C.M. 1112(d). (Id.)

Appendix A to this motion is a one-page declaration from the Noncommissioned Officer in Charge of Litigation at Nellis Air Force Base that details her efforts to locate, verify, and provide the missing material.[1] Appendix B comprises the three omitted attachments to

[1] Although the declaration lists the missing materials as individual attachments, the missing items are being submitted as separate appendices for ease of reference.

Appellant's 11 November 2023 clemency request. Appendix C consists of the disks containing the digital files constituting PHO Exhibits 8 and 12.[2]

Our Superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). Here, the documents the United States seeks to attach are supposed to be part of the record of trial. Thus, they are necessary for resolving an issue raised by the current state of the "materials in the record"—whether the record of trial is complete. Id. The Appendices' inclusion in the record would resolve the issue this Court has identified and be beneficial to this Court's appellate review. Therefore, this Court should grant this motion to attach. *See* United States v. Baker, No. 11-6007/AR, 2011 CAAF LEXIS 1148, at *1 (C.A.A.F. June 10, 2011) (granting motion to attach appellate exhibit to record of trial); *see also* United States v. Jones, No. ACM 40113, 2022 CCA LEXIS 584, at *10 (A.F. Ct. Crim. App. Oct. 17, 2022) (unpub. op.) (where Court granted Government's motion to attach appellant's clemency submission to the record because it was a matter "required to be attached").

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

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Government Trial & Appellate Operations
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MARY ELLEN PAYNE
Associate Chief
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United States Air Force

[2] Appendix C will be delivered in hard-copy form to this Court and the Appellate Defense Division.

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 May 2024.

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Appellate Government Counsel
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United States Air Force