IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

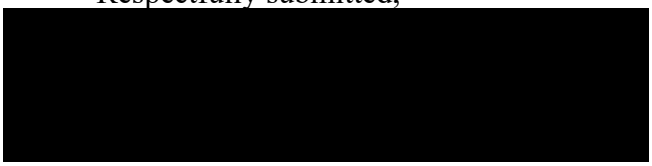
UNITED STATES, *Appellee,*	)	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ**
v.	)	
Master Sergeant (E-7), **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM SXXXXX
	)	8 January 2024

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

On 21 – 22 April 2023 and 24 -27 April 2023, a special court-martial composed of officer members convened at Hulbert Field, Florida, convicted Master Sergeant (MSgt) Jason R. Copp, contrary to his plea, of one charge and three specifications of larceny in violation of Article 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 921 (2019). The panel sentenced MSgt Copp to forfeitures of pay and/or allowances of $1,000.00 pay per month for six (6) months, 30 days of hard labor without confinement, and a reprimand. Record of Trial (ROT) Vol. 1, Entry of Judgment, dated 8 June 2023; R. at 314.

On 12 October 2023, the Government purportedly sent MSgt Copp the required notice by mail of his right to appeal within 90 days. Pursuant Article 66(b)(1)(A), UCMJ, MSgt Torres Gonzalez files his notice of direct appeal with this Court.

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4784
Email: michael.bruzik@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 8 January 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Jason R. COPP	)	**DOCKETING**
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	

On 8 January 2024, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

As of the date of this notice, the court has not yet received a record of trial in Appellant's case.

Accordingly, it is by the court on this 9th day of January, 2024,

ORDERED:

The case in the above-styled matter is referred to Panel 2.

It is further ordered:

The Government will forward a copy of the record of trial to the court forthwith.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24029**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jason R. COPP	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 23 July 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. Counsel noted that from the date of docketing to when this enlargement would end, 120 days will have elapsed, and from the date of receipt of the record of trial to when this enlargement would end, 53 days will have elapsed. The Government opposes the motion.

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

Accordingly, it is by the court on this 26th day of July, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **28 September 2024.**

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

Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time if counsel previously replied in the affirmative.

Counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal.

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

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Master Sergeant (E-7), **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM 24029
	)	23 July 2024

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **28 September 2024**. The record of trial was docketed with this Court on 9 January 2024. This Court acknowledged receipt of the record of trial on 31 May 2024. From the date of that receipt to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

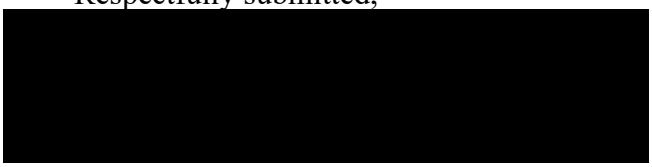
[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 23 July 2024.

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
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25 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) JASON R. COPP, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24029 Panel No. 2

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

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

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

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 25 July 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Master Sergeant (E-7), **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM 24029
	)	20 September 2024

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 October 2024**. The record of trial was docketed with this Court on 9 January 2024. This Court acknowledged receipt of the record of trial on 31 May 2024. From the date of that receipt to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 21 – 22 April 2023 and 24 – 27 April 2023, a special court-martial convened at Hulbert Field, Florida, convicted Master Sergeant (MSgt) Jason R. Copp of three specifications of larceny in violation of Article 121, Uniform Code of Military Justice (UCMJ). (R. at 13, 729.) The members sentenced MSgt Copp to a reprimanded, to forfeit $1,000 pay per month for six months, and to perform hard labor without confinement for 30 days. (R. at 809.) The record of trial provided by the Government to undersigned counsel does not contain a copy of the entry of judgment or the convening authority decision on action.

The record of trial consists of seven volumes. The transcript is 812 pages. There are 29 prosecutions exhibits, two defense exhibits, and 74 appellate exhibits. MSgt Copp is not currently in confinement. MSgt Copp has been advised of his right to timely appellate review, as well as

the request for an enlargement of time. MSgt Copp has agreed to the request for an enlargement of time. Additionally, undersigned counsel has been in contact with MSgt Copp concerning the current status of the case. Counsel asserts attorney-client privilege regarding the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its eleventh enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its ninth enlargement of time. Counsel has been at work drafting an assignment of errors.
3) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its seventh enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Counsel's has been at work with

civilian counsel in order to draft an assignment of errors for *United States v. Hilton*. Additionally, counsel has been working on an assignment of errors for *United States v. Martinez* which counsel intends to submit without any additional enlargements of time. Furthermore, counsel is at work on a supplement to a petition for review before the Court of Appeals for the Armed Forces in *United States v. Schneider.* All of these matters have taken priority over completing work on the case at bar. Accordingly, an enlargement of time is necessary for counsel to fully review Appellant's case.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 20 September 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

24 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) JASON R. COPP, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24029 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 September 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Master Sergeant (E-7), **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM 24029
	)	21 October 2024

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 November 2024**. The record of trial was docketed with this Court on 9 January 2024. This Court acknowledged receipt of the record of trial on 31 May 2024. From the date of that receipt to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 21 – 22 April 2023 and 24 – 27 April 2023, a special court-martial convened at Hulbert Field, Florida, convicted Master Sergeant (MSgt) Jason R. Copp of three specifications of larceny in violation of Article 121, Uniform Code of Military Justice (UCMJ). (R. at 13, 729.) The members sentenced MSgt Copp to a reprimanded, to forfeit $1,000 pay per month for six months, and to perform hard labor without confinement for 30 days. (R. at 809.) The record of trial provided by the Government to undersigned counsel does not contain a copy of the entry of judgment or the convening authority decision on action.

The record of trial consists of seven volumes. The transcript is 812 pages. There are 29 prosecutions exhibits, two defense exhibits, and 74 appellate exhibits. MSgt Copp is not currently in confinement. MSgt Copp has been advised of his right to timely appellate review, as well as

the request for an enlargement of time. MSgt Copp has agreed to the request for an enlargement of time. Additionally, undersigned counsel has been in contact with MSgt Copp concerning the current status of the case and has updated him accordingly. Counsel asserts attorney-client privilege regarding the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its twelfth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.

2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its tenth enlargement of time. Counsel has completed an assignment of errors and preparing to submit to this Court.

3) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its eighth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Counsel continues to work on an assignment of errors in *United States v. Hilton* with civilian counsel. Additionally, counsel has been completing work on an assignment of errors for *United States v. Martinez*. Counsel has also dedicated considerable time to preparing for oral arguments before the Court of Appeals for the Armed Forces in *United States v. Saul*, which is taking place on 22 October 2024. These other priorities have prevented counsel from dedicating more time to Appellant's case. Accordingly, an enlargement of time is necessary for counsel to complete his review of Appellant's case and advise on potential errors.

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

Respectfully submitted,

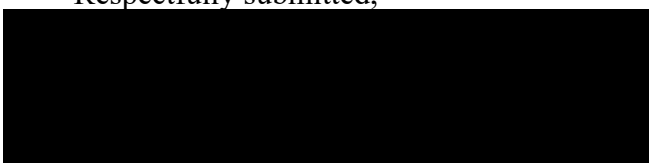
[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 21 October 2024.

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

22 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) JASON R. COPP, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24029 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 October 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7), **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM 24029
	)	20 November 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 December 2024**. The record of trial was docketed with this Court on 9 January 2024. This Court acknowledged receipt of the record of trial on 31 May 2024. From the date of that receipt to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 21 – 22 April 2023 and 24 – 27 April 2023, a special court-martial convened at Hulbert Field, Florida, convicted Master Sergeant (MSgt) Jason R. Copp of three specifications of larceny in violation of Article 121, Uniform Code of Military Justice (UCMJ). (R. at 13, 729.) The members sentenced MSgt Copp to a reprimanded, to forfeit $1,000 pay per month for six months, and to perform hard labor without confinement for 30 days. (R. at 809.) The record of trial provided by the Government to undersigned counsel does not contain a copy of the entry of judgment or the convening authority decision on action.

The record of trial consists of seven volumes. The transcript is 812 pages. There are 29 prosecutions exhibits, two defense exhibits, and 74 appellate exhibits. MSgt Copp is not currently in confinement. MSgt Copp has been advised of his right to timely appellate review, as well as

the request for an enlargement of time. MSgt Copp has agreed to the request for an enlargement of time. Additionally, undersigned counsel has been in contact with MSgt Copp concerning the current status of the case and has updated him accordingly. Counsel asserts attorney-client privilege regarding the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 11 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

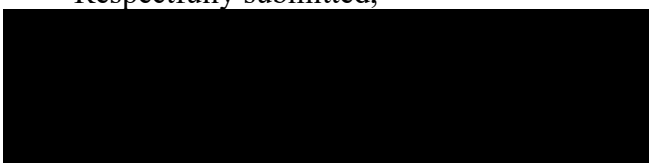
1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its thirteenth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.
2) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case is on its ninth enlargement of time.
3) *United States v. Titus*, ACM 40557 - The record of trial consists of four volumes. The transcript is 142 pages. There are five prosecution exhibits, five defense exhibits, 31 appellate exhibits, and five court exhibits. This case is on its eighth enlargement of time.

Through no fault of appellant, counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Counsel's top priorities include working towards completion of assignments of error in *United States v. Hilton* and *United States v. Jenkins*. Additionally, counsel is at a work on reply in *United States v. Martinez*. Accordingly, an

enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
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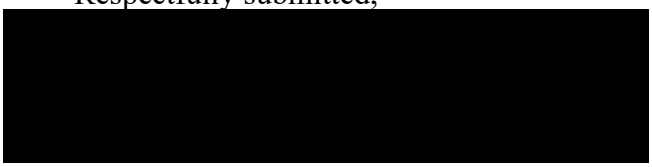
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 20 November 2024.

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
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22 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) JASON R. COPP, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24029 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 November 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7), **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM 24029
	)	20 December 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 January 2025**. This case was docketed with this Court on 9 January 2024. This Court acknowledged receipt of the record of trial with the verbatim transcript on 31 May 2024. Undersigned counsel received a copy of the verbatim transcript that same day. From the date of that receipt to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

Per this Court's order issued for Appellant's fourth request for enlargement of time, Appellant offers the following dates based on calculations from the date that this case was docketed with this Court. From the date of docketing until the present, 346 days have elapsed. From the date of docketing until the date requested, 383 days will have elapsed. Appellant asserts the correct date for triggering this case's lifespan for purposes of this request is the date that this Court received the record of trial with the verbatim transcript, and a copy was provided by the Government to undersigned counsel. This is consistent with the most recent version of the Joint Rules of Appellate Procedure which specify under Rule 18(d)(2) that the operative date is when

the Government provides "the Court a complete record, including a verbatim transcript" and provides "a copy to the defense." This Court acknowledged this rule as setting the timeline in *United States v. Norris*, No. ACM 24045 (A.F. Ct. Crim. App. December 20, 2024).

On 21 – 22 April 2023 and 24 – 27 April 2023, a special court-martial convened at Hulbert Field, Florida, convicted Master Sergeant (MSgt) Jason R. Copp of three specifications of larceny in violation of Article 121, Uniform Code of Military Justice (UCMJ). (R. at 13, 729.) The members sentenced MSgt Copp to a reprimanded, to forfeit $1,000 pay per month for six months, and to perform hard labor without confinement for 30 days. (R. at 809.) The convening authority took no action on the findings or sentence.

The record of trial consists of seven volumes. The transcript is 812 pages. There are 29 prosecutions exhibits, two defense exhibits, and 74 appellate exhibits. MSgt Copp is not currently in confinement. MSgt Copp has been advised of his right to timely appellate review, as well as the request for an enlargement of time. MSgt Copp has agreed to the request for an enlargement of time. Additionally, undersigned counsel has been in contact with MSgt Copp concerning the current status of the case, but does not have a substantive update at this time. Counsel asserts attorney-client privilege regarding the substance of those communications.

Undersigned counsel is currently assigned 17 cases; 8 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its fourteenth enlargement of time. Counsel has been working an assignment of errors with civilian counsel.

2) *United States v. Rodriguez*, ACM 40565 – The record of trial consists of two volumes. The transcript is 86 pages. There are two prosecution exhibits, six defense exhibits, and five appellate exhibits. This case is on its ninth enlargement of time.

3) *United States v. Sanger*, ACM S32773 – The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. This case is on its seventh enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters which has prevented him from completing an in-depth review of the record of trial. Counsel was occupied with the completion of an assignment of errors for *United States v. Jenkins*, which counsel worked on through the Thanksgiving weekend and submitted to this Court on 12 December 2024. Additionally, counsel has been working with civilian counsel in *United States v. Hilton*. Counsel has had to balance his work before this Court with other priorities before the Court of Appeals for the Armed Forces (CAAF). On 13 November 2024, counsel submitted a supplement for petition for review to the CAAF in *United States v. Bates*. This supplement addressed five issues. Additionally, counsel submitted a supplement for petition for review and a response to motion to dismiss to the CAAF in *United States v. Vargo* on 20 November 2024. Counsel worked through the weekend on 16 November 2024 in order to comply with the deadline set by the CAAF, while tending to a lingering illness that required him to go home from the office on multiple days. Additionally, counsel will be on leave between 21 – 28 December 2024. During that time, counsel anticipates working on *United States v. Hilton* and a supplement for petition for review before the CAAF in *United States v. Scott.* These circumstances and priorities have prevented counsel from being able to dedicate the time necessary for this case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case

and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 20 December 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

23 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) JASON R. COPP, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24029 Panel No. 2

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 December 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7), **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM 24029
	)	17 January 2025

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 February 2025**. This case was docketed with this Court on 9 January 2024.[1] This Court acknowledged receipt of the record of trial with the verbatim transcript on 31 May 2024. Undersigned counsel received a copy of the verbatim transcript that same day. From the date of that receipt to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed.

On 21 – 22 April 2023 and 24 – 27 April 2023, a special court-martial convened at Hulbert Field, Florida, convicted Master Sergeant (MSgt) Jason R. Copp of three specifications of larceny in violation of Article 121, Uniform Code of Military Justice (UCMJ). (R. at 13, 729.) The members sentenced MSgt Copp to a reprimanded, to forfeit $1,000 pay per month for six months, and to perform hard labor without confinement for 30 days. (R. at 809.) The convening authority took no action on the findings or sentence.

[1] From the date of docketing until the present, 374 days have elapsed. From the date of docketing until the date requested, 413 days will have elapsed.

The record of trial consists of seven volumes. The transcript is 812 pages. There are 29 prosecutions exhibits, two defense exhibits, and 74 appellate exhibits. MSgt Copp is not currently in confinement. MSgt Copp has been advised of his right to timely appellate review, as well as the request for an enlargement of time. MSgt Copp has agreed to the request for an enlargement of time. Additionally, undersigned counsel has been in contact with MSgt Copp concerning the current status of the case, but does not have a substantive update at this time. Counsel asserts attorney-client privilege regarding the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 10 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Rodriguez*, ACM 40565 – The record of trial consists of two volumes. The transcript is 86 pages. There are two prosecution exhibits, six defense exhibits, and five appellate exhibits. This case is on its ninth enlargement of time.
2) *United States v. Sanger*, ACM S32773 – The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. This case is on its seventh enlargement of time.
3) *United States v. Licea*, ACM 40602 - The record of trial consists of seven electronic volumes, and the transcript is 173 pages. There are 12 prosecution exhibits, five defense exhibits, 22 appellate exhibits, and one court exhibit. This case is on its sixth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters which has prevented him from completing an in-depth review of the record of trial. Counsel was occupied with the completion of an assignment of errors for *United States v. Jenkins*, which counsel worked on through the Thanksgiving weekend and submitted to this Court on 12

December 2024. Additionally, counsel worked through his leave over the Christmas holiday to complete work on an assignment of errors for *United States v. Hilton*, which was submitted to this Court on 27 December 2024. Counsel is also occupied with the completion of a supplement for petition for review for the Court of Appeals for the Armed Forces in *United States v. Scott* which counsel worked on through the New Year holiday in order submit on 7 January 2025. Accordingly, an enlargement of time is necessary for counsel to complete an in-depth review of the record of trial and advise MSgt Copp of potential errors.

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

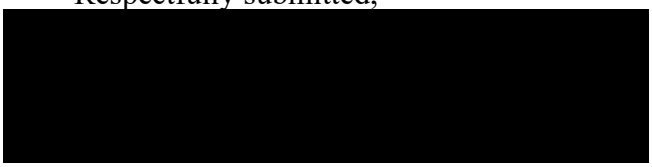
Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 17 January 2025.

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

21 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) JASON R. COPP, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24029 Panel No. 2

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 January 2025.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7), **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM 24029
	)	18 February 2025

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignments of Error (AOE).[1] Appellant requests an enlargement for a period of 30 days, which will end on **27 March 2025**. This case was docketed with this Court on 9 January 2024.[2] This Court acknowledged receipt of the record of trial with the verbatim transcript on 31 May 2024. Undersigned counsel received a copy of the verbatim transcript that same day. From the date of that receipt to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

On 21 – 22 April 2023 and 24 – 27 April 2023, a special court-martial convened at Hulbert Field, Florida, convicted Master Sergeant (MSgt) Jason R. Copp of three specifications of larceny in violation of Article 121, Uniform Code of Military Justice (UCMJ). (R. at 13, 729.) The members sentenced MSgt Copp to a reprimanded, to forfeit $1,000 pay per month for six months,

[1] Counsel originally submitted the seventh request for enlargement of time in this case on 13 February 2025. However, that request contained a miscalculation of the time elapsed between docketing and the date requested. Counsel respectfully withdraws that motion and submits this one instead.

[2] From the date of docketing until the present, 406 days have elapsed. From the date of docketing until the date requested, 443 days will have elapsed.

and to perform hard labor without confinement for 30 days. (R. at 809.) The convening authority took no action on the findings or sentence.

The record of trial consists of seven volumes. The transcript is 812 pages. There are 29 prosecutions exhibits, two defense exhibits, and 74 appellate exhibits. MSgt Copp is not currently in confinement. MSgt Copp has been advised of his right to timely appellate review, as well as the request for an enlargement of time. MSgt Copp has agreed to the request for an enlargement of time. Additionally, undersigned counsel has been in contact with MSgt Copp concerning the current status of the case. Counsel asserts attorney-client privilege regarding the substance of those communications.

Undersigned counsel is currently assigned 20 cases; 8 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

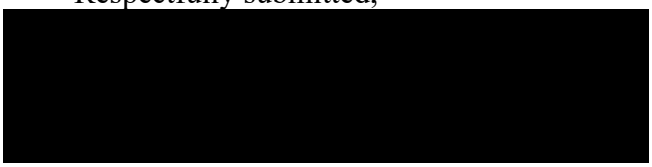
1) *United States v. Sanger*, ACM S32773 – The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. This case is on its ninth enlargement of time.
2) *United States v. Licea*, ACM 40602 - The record of trial consists of seven electronic volumes, and the transcript is 173 pages. There are 12 prosecution exhibits, five defense exhibits, 22 appellate exhibits, and one court exhibit. This case is on its seventh enlargement of time.
3) *United States v. Torres Gonzalez*, ACM 24001 – The record of trial consists of six volumes and a 608-page transcript. There are 46 prosecutions exhibits, eight defense exhibits, and 25 appellate exhibits. This case is on its eighth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters which has prevented him from completing an in-depth review of the record of trial.

Undersigned counsel has recently been detailed to *United States v. Cook*, a case which the C.A.A.F. granted for review on 29 January 2025. The grant brief and joint appendix are due for that case on 19 February 2025. Additionally, counsel has been hard at work on an Assignment of Errors in *United States v. Sanger*. That case has presented wide complexity, and counsel anticipates raising multiple errors before this Court. Counsel is also in preparations for oral argument before this Court in *United States v. Jenkins* which are taking place on 5 March 2025. These efforts have been strained by medical issues that one of counsel's close family members has experienced which has required counsel to drive to the Walter Reed Medical Center two days a week for treatment during hours of operation. Accordingly, an enlargement of time is necessary for counsel to continue reviewing the record of trial and to advise appellant on potential errors.

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

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 18 February 2025.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

18 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) JASON R. COPP, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24029 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 18 February 2025.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7), **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM 24029
	)	18 March 2025

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 April 2025**. This case was docketed with this Court on 9 January 2024.[1] This Court acknowledged receipt of the record of trial with the verbatim transcript on 31 May 2024. Undersigned counsel received a copy of the verbatim transcript that same day. From the date of that receipt to the present date, 291 days have elapsed. On the date requested, 330 days will have elapsed.

On 21 – 22 April 2023 and 24 – 27 April 2023, a special court-martial convened at Hulbert Field, Florida, convicted Master Sergeant (MSgt) Jason R. Copp of three specifications of larceny in violation of Article 121, Uniform Code of Military Justice (UCMJ). (R. at 13, 729.) The members sentenced MSgt Copp to a reprimanded, to forfeit $1,000 pay per month for six months, and to perform hard labor without confinement for 30 days. (R. at 809.) The convening authority took no action on the findings or sentence.

[1] From the date of docketing until the present, 434 days have elapsed. From the date of docketing until the date requested, 473 days will have elapsed.

The record of trial consists of seven volumes. The transcript is 812 pages. There are 29 prosecutions exhibits, two defense exhibits, and 74 appellate exhibits. MSgt Copp is not currently in confinement. MSgt Copp has been advised of his right to timely appellate review, as well as the request for an enlargement of time. MSgt Copp has agreed to the request for an enlargement of time. Additionally, undersigned counsel has been in contact with MSgt Copp concerning the current status of the case, but does not have a substantive update at this time. Counsel asserts attorney-client privilege regarding the substance of those communications.

Undersigned counsel is currently assigned 18 cases; 7 cases are pending initial AOEs before this Court. Undersigned military counsel's top priorities before this Court are as follows:

1) *United States v. Torres Gonzalez*, ACM 24001 – The record of trial consists of six volumes and a 608-page transcript. There are 46 prosecution exhibits, eight defense exhibits, and 25 appellate exhibits. This case is on its ninth enlargement of time
2) *United States v. Licea*, ACM 40602 – The record of trial consists of seven electronic volumes, and the transcript is 173 pages. There are twelve prosecution exhibits, five defense exhibits, twenty-two appellate exhibits, and one court exhibit. This case is on its ninth enlargement of time.
3) *United States v. Quinones Reyes*, ACM 40636 – The record of trial consists of seven volumes with a 199-page transcript. There are four prosecution exhibits, 19 defense exhibits, 25 appellate exhibits, and one court exhibit. This case is on its seventh enlargement of time.

Through no fault of appellant, undersigned counsel has been working on other assigned matters and has been unable to complete an in-depth review of the record of trial. During the previous enlargement of time, counsel was occupied with the completion of a grant brief before

the Court of Appeals for the Armed Forces in *United States v. Cook*, which counsel submitted on 19 February 2025. Counsel also submitted a reply brief to this Court in *United States v. Hilton* on 24 February 2025 and an assignment of errors to this Court for *United States v. Sanger* on 28 February 2025. Additionally, counsel was in preparation for oral arguments before this Court in *United States v. Jenkins* which was scheduled to take place on 5 March 2025. Counsel submitted a supplemental brief in that case on 12 March 2025. These various priorities have prevented counsel from being able to dedicate the time necessary to work on this case. Accordingly, an enlargement of time is necessary for counsel to fully review Appellant's case and advise on potential errors.

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

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 18 March 2025.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM 24029
	)	20 March 2025

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

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

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **JASON R. COPP** Master Sergeant (E-7) U.S. Air Force *Appellant.*	**ENTRY OF APPEARANCE** Before Panel 2 No. ACM 24029 25 March 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Pursuant to Rule 12 of this Court's Rules of Practice and Procedure, undersigned counsel enters her appearance.

Respectfully submitted,

[redacted]

JENNIFER M. HARRINGTON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
Office: (240) 612-4770
E-Mail: jennifer.harrington.1@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent to the Court and the Air Force Government Trial and Appellate Operations Division on 25 March 2025.

Michael J. Bruzik, Capt, USAF
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
Email: michael.bruzik@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Master Sergeant (E-7), **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM 24029
	)	27 March 2025

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

ASSIGNMENTS OF ERROR

I.

Whether MSgt Copp's convictions for larceny were factually and legally sufficient where a key witness unequivocally testified that the alleged stolen property had previously been abandoned.

II.

Whether the Government violated MSgt Copp's right to speedy trial under R.C.M. 707 by failing to arraign MSgt Copp within 120-days of preferral.

III.

Whether the military judge erred by failing to resolve the ambiguous findings that should have been interpreted as not guilty.

IV.

Whether the military judge abused his discretion by allowing the Government to recall R.H. as a witness.

V.

Whether the entry of judgment erroneously subjected MSgt Copp to criminal history indexing for a non-qualifying offense under 28 C.F.R. § 20.32 and Air Force Manual 72-102.

VI.

Whether MSgt Copp was denied his right to speedy appellate review after the Government took 312 days to complete the record of trial.

VII.

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

STATEMENT OF THE CASE

On 21-22 April 2023 and 24-27 April 2023, at Hurlbert Field, Florida, a special court-martial composed of officer members convicted Master Sergeant (MSgt) Jason R. Copp, contrary to his pleas, of three specifications of larceny in violation of Article 121, Uniform Code of Military Justice (UCMJ). (R. at 13, 729.) The members sentenced MSgt Copp to be reprimanded, to forfeit $1,000 pay per month for six months, and to perform hard labor without confinement for 30 days. (R. at 809.) The convening authority took no action on the findings or sentence.

STATEMENT OF FACTS

MSgt Copp served as a member of the Joint Special Operations Command (J.S.O.C.) program involved in the testing of cell phones and other electric devices for signal interception and targeting. (R. at 507-08.) This program involved testing the signal intercept capabilities of an airborne platform referred to as "T.O.N.T.O." (R. at 511.) These procedures were carried out at locations worldwide. (R. at 512.) The T.O.N.T.O. team conducted testing on a high volume of electronic devices including cell phones and laptops across various networks, both foreign and domestic. (*Id.*) After placing the devices at the test location, the T.O.N.T.O. system was deployed to measure its ability to intercept the different signals. (*Id.*)

[1] The defense raises this assignment of error for issue preservation purposes.

The results of these testing procedures were in high demand among national security agencies. (R. at 512.) The individual devices tested were supplied in large part by these entities including the National Security Agency, the Defense Intelligence Agency, the National Reconnaissance Office, and "every other Government organization." (R. at 519.) These organizations would approach the T.O.N.T.O. team with "boxes and boxes of cell phones" across a range of manufacturers and cellular networks for testing. (*Id.*) On other occasions, the agencies would show up with "bags and bags of cell phones." (R. at 520.) The high-volume nature of these tests was necessitated by the limited flight time for the system and the discrete nature of the testing locations. (R. at 520.) The team occasionally procured phones and devices on their own accord if there was gap in the testing devices supplied by the agencies. (R. at 513, 536.) The acquisition and inventory process for these devices was different than that used for issued equipment like a duty phone. (R. at 519, 520-21.) The team did not use hand-receipts or any other forms to document accountability. (R. at 520.) The devices were never labelled as government property or internally linked to the government. (R. at 496, 522.) The devices were activated using team members' personal credentials. (R. at 522.)

The division chief in charge of the program was Col K.H. (R. at 507.) K.H. interacted with MSgt Copp daily and highly regarded his role on the team. (R. at 509-10) ("you can send [MSgt Copp] into a meeting with a three-star general and not worry about it"). Members of the team also regarded MSgt Copp as a subject matter expert on signals like wi-fi, cellular, ultra-high frequency (U.H.F.), very-high frequency (V.H.F.), and Bluetooth. (R. at 564.) K.H. testified that following the testing procedures, the cell phones and other devices were essentially garbage. (R. at 530.) Devices tested at worldwide locations were often abandoned at the test site. (R. at 524.) For devices that remained in the United States, there was no point of contact to return the phones, and

the agencies never wanted them back. (*Id.*) In fact, because of the nature of the tests, they could not be used on a government network. (R. at 526.) After being exposed to foreign networks, the devices would often be infected with malicious code. (R. at 591-92.) Others were physically broken. (R. at 526.)

There was no written policy for disposal of the devices; they could not be requisitioned for further government usage and were not subject to normal disposal procedures because of the unique nature of the program. (R. at 528-29, 613.) Agency venders refused to take the devices back and left them for the T.O.N.T.O. team to deal with. (R. at 537.) K.H. considered the phones abandoned garbage after testing. (R. at 529, 531-32, 606.) This designation was within the discretion of K.H. (R. at 606.) This left the team with boxes of discarded devices that were "available if anybody wanted them," "kind of up for grabs," and available for personal use. (R. at 526, 592.)

The T.O.N.T.O. team was decommissioned around 2018 and 2019. (R. 524.) The program had boxes of abandoned devices left over from testing. (R. at 575.) The team attempted to return them to supplier agencies who still refused to take them. (R. at 576.) MSgt Copp was the last team member remaining, and was "left holding the bag" with the abandoned devices. (R. at 571.) K.H. testified that MSgt Copp was capable of discerning tested devices as abandoned, going so far as to say "if [MSgt Copp] had deemed them abandoned, then they were abandoned." (R. at 527.) Regarding the twelve devices that MSgt Copp was alleged to have stolen, K.H. explained that MSgt Copp was authorized to do whatever he wanted with them as abandoned property. (R. at 637.) MSgt Copp was charged with larceny after Air Force investigators uncovered records from the online trading website called Gazelle that allegedly showed MSgt Copp had sold some of the abandoned phones. (R. at 435.) Altogether he was charged with twelve specifications referring

to twelve separate electronic devices but without reference to serial numbers or any other identification. The panel only found MSgt Copp guilty in relation to three devices. (R. at 729.)

I.

MSgt Copp's convictions for larceny were factually and legally insufficient where the Government failed to prove beyond a reasonable doubt that the alleged property had not been abandoned.

Standard of Review

This Court reviews issues of factual sufficiency de novo. 10 U.S.C. § 866(c) (2018); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Factual sufficiency review is "limited to the evidence produced at trial." *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

Law & Analysis

Because all of the alleged offenses in this case preceded the effective date of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021's amendments to Article 66, U.C.M.J., Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612-13 (2021), the test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the Court is] convinced of [the Appellant's] guilt beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (quotation omitted). This Court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Id.* (quotation omitted).

A conviction for larceny under Article 121, U.C.M.J., cannot stand unless the following elements are proven beyond a reasonable doubt:

> [b.(1)](a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

Manual for Courts-Martial, United States (*MCM*) (2016 ed.), pt. IV, ¶ 46.

"The law of larceny treats abandoned, lost, and mislaid property differently." *United States v. Meeks*, 32 M.J. 1033, 1035 (A.F.C.M.R. 1991). Abandoned property cannot be the subject of criminal prosecution for larceny. *Morissette v. United States*, 342 U.S. 246, 271 (1952). Rather, a person who acquires abandoned property "is not a thief for he becomes the new owner of the property." *Meeks*, 32 M.J. at 1036. Moreover, "if the finder makes an honest mistake of fact that the property was abandoned, he would not have the necessary intent for larceny." *Id.* This is because where property has been abandoned, "The former owner has relinquished all right or title to and possession of the property with no intent to reclaim it." *United States v. Wiederkehr*, 33 M.J. 539, 541 (A.F.C.M.R. 1991).

The Government failed to prove that MSgt Copp committed larceny because the evidence did not demonstrate that the United States retained ownership of the devices. To the contrary, the evidence overwhelmingly showed that the devices had in fact been abandoned. Multiple witnesses testified that after the devices had been tested, they were essentially trash. (R. at 471, 529, 570, 606.) This was underscored by the fact that the devices had no further useful purpose, and that the supplying agencies did not want to take them back. This made them categorically different than issued equipment which requires documentation and accountability. Rather, the phones had a single purpose, which was to be tested, after which they were essentially discarded. K.H. explained

that the phones were abandoned, that MSgt Copp was able to make that determination, and that he essentially had his leadership's blessing to do what he wanted with them. In fact, by the time that the T.O.N.T.O. team was dissolved, a large stockpile of these abandoned phones remained at the testing sites.

The Government presented no evidence to show otherwise, as it was its burden to do. Nor did the Government present any evidence of disposal procedures or mandates which would have overridden K.H.'s authority to allow MSgt Copp and his team to do what they wanted with the devices. Even if such evidence was presented, K.H.'s testimony regarding the operational environment of the T.O.N.T.O. team demonstrated that MSgt Copp would have possessed a genuine mistake of fact that the devices were abandoned. The testimony at trial established that after the phones had been tested and discarded by the suppliers, they were either physically abandoned at the testing location or stored away without any further use. Lt Col J.G., one of the operations officers for T.O.N.T.O., described the devices as being "up for grabs." (R. at 565, 592.) K.H. testified that MSgt Copp was authorized to do whatever he wanted with them. Moreover, there simply did not exist a procedure to dispose of the unwanted devices. All of these circumstances demonstrate that the devices were either abandoned in fact, or at the very least that MSgt Copp genuinely believed they were. Put differently, the Government did not present evidence necessary to meet its burden to show that the devices remained the property of the United States. *United States v. Simpson*, 77 M.J. 279, 282 (C.A.A.F. 2018) (holding that the Government must prove that the property was stolen from a party with a superior possessory interest).

Here, *Morissette* is instructive. *Morissette*, 342 U.S. at 246. In that case, the appellant was charged with larceny after collecting spent bomb casings from an Air Force bombing field. *Id.* at 247. The casings were "dumped in heaps, some of which had been accumulating for four years or

upwards, [and] were exposed to the weather and rusting away." *Id.* The Supreme Court reversed the conviction due to the trial court's failure to consider the doctrine of abandonment. *Id.* at 276. This was because the appellant could not "have knowingly or intentionally converted property that he did now know could be converted, as would be the case if it was in fact abandoned." *Id.* at 271. While that case primarily dealt with the issue of instructions rather than factual sufficiency, the Court noted that "the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk" that supported acquittal. *Id.* at 276. Similarly, the indications that the devices MSgt Copp was charged with knowingly or intentionally converting were actually abandoned are ample. After testing, the supplying agencies discarded the devices resulting in large piles with no further use or claim by the United States. Moreover, K.H., the chief in charge of the T.O.N.T.O program, explicitly determined that the phones were abandoned. Accordingly, this Court should find that the evidence presented at trial was fatally defective because it did not show beyond a reasonable doubt that the property at issue had not been abandoned. This issue is even more problematic, considering that the Government did not specify the electronic devices through identification numbers or anything of the like. Yet the government presented no evidence to show that these particular devices had not been abandoned in spite of the fact all the devices tested by T.O.N.T.O. were generally considered garbage. MSgt Copp's convictions under specifications 5, 7, and 10 should be set aside and the charge and its specification dismissed with prejudice.

II.

The Government violated MSgt Copp's right to speedy trial under R.C.M. 707 by failing to bring the case to arraignment with 120-days of preferral of charges.

Additional Facts

The Government preferred charges against MSgt Copp on 18 December 2022. (Charge Sheet). Arraignment did take not place until 21 April 2023. (R. at 15-16.) From the time between preferral and arraignment, 124 days had elapsed. The record contains no exclusions of time that were granted by either the convening authority or the military judge. The offenses of which MSgt Copp was convicted included the following date ranges:

Specification	Date Range of Alleged Offense (on or about)	Time Elapsed From Alleged Offense to Preferral	Time Elapsed From Alleged Offense to Trial
5	4 Jan. 2018 – 24 Jan. 2018	1789 days	1913 days (5+ years)
7	9 Jan. 2018 – 25 Jan. 2018	1788 days	1912 days (5+ years)
10	29 Jan. 2018 – 8 Feb. 2018	1774 days	1898 days (5+ years)

Standard of Review

This Court reviews speedy trial claims de novo. *United States v. Guyton*, 82 M.J. 146, 151 (C.A.A.F. 2022). Where an R.C.M. 707 speedy trial issue is not raised before the court-martial, the issue is forfeited and reviewed for plain error. *United States v. McFadden*, No. ACM 38597, 2015 CCA LEXIS 520, at *19 (A.F. Ct. Crim. App. Nov. 18, 2015). Plain error occurs where it is shown that (1) there was error; (2) the error was plain and obvious; (3) the error materially prejudiced a substantial right of the appellant. *United States v. Clifton*, 71 M.J. 489, 491 (C.A.A.F. 2013).

Law & Analysis

MSgt Copp was entitled to be brought to trial within 120 days of preferral of charges, pursuant to R.C.M. 707. The Government's failure to do so was a plain and obvious error under the regulatory framework of the rule. R.C.M. 707(a) mandates that an "accused shall be brought to trial within 120 days after the earlier of: (1) Preferral of charges; (2) The imposition of restraint under R.C.M. 304(a)(2)-(4); or (3) Entry on active duty under R.C.M. 204." Being brought to trial

within the meaning of R.C.M. 707 occurs through the arraignment of the accused. R.C.M. 707(b)(1). Here, 124 days had elapsed between the preferral of charges and arraignment. While R.C.M. 707 contemplates that the speedy trial clock may be modified through exclusions of time and reasonable delays, the record of trial contains no such documentation. This renders the error plain and obvious.

This error materially prejudiced MSgt Copp's substantial right to be brought to trial within 120 days as required under R.C.M. 707. Moreover, plain error was evident due to the imminent lapsing of the statute of limitations. This Court has previously held that it is "plain error to proceed to trial . . . despite the violation of R.C.M. 707 where successive prosecution on the successor charges would almost certainly have been barred by the statute of limitations." *United States v. Vendivel*, 37 M.J. 854, 859 (A.F.C.M.R. 1993) (reversed on other grounds *United States v. Vendivel*, ACM 30284 (F REV), 1994 CMR LEXIS 207, at *1 (A.F.C.M.R. June 3, 1994)). The statute of limitations for each offense of which MSgt Copp was convicted would have tolled five years after it was allegedly committed. Article 43(b)(1), U.C.M.J., 10 U.S.C. § 843(b)(1). Had the specifications been dismissed at the time of arraignment, the Government almost certainly would have been barred from further prosecution. This prejudice demonstrates the plain error incurred by the Government's violation of MSgt Copp's speedy trial rights.

The appropriate remedy is dismissal of the specifications with prejudice. Whether to dismiss with prejudice is determined by the following factors: (1) the seriousness of the offense; (2) the facts and circumstances of the case that lead to dismissal; (3) the impact of a re-prosecution on the administration of justice; and (4) any prejudice to the accused resulting from the denial of a speedy trial. Each of these factors weighs in favor of the relief requested. The offenses that MSgt Copp was convicted of were not serious, but involved property devoid of any real value. In

fact, the evidence produced at trial showed that the devices were basically discarded trash. The absence of significant value is reflected in the panel's exceptions and substitutions that eliminated the dollar amount charged and replaced it with a vague finding of "some value." Second, the R.C.M. 707 violation was occasioned by apparent Government oversight. To comply with the rule, the Government only had to arraign MSgt Copp at least four days earlier. This apparent lack of urgency weighs in favor of dismissal with prejudice. *United States v. Dooley*, 61 M.J. 258, 263 (C.A.A.F. 2005). Third, re-prosecution would be harmful to the administration of justice because it would directly violate the statute of limitations prescribed by Congress in Article 43. Finally, MSgt Copp suffered prejudice due to the pending statute of limitations. This Court has previously held that an R.C.M. 707 violation constituted plain error where the remedial consequences of that violation bring the offenses outside of the statute of limitations. *Vendivel*, 37 M.J. at 859. For the trial to proceed in violation of this rule affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Accordingly, this Court should find that the violation of MSgt Copp's R.C.M. 707 rights was plain error, and that the appropriate remedy is to set aside and dismiss the specifications of which he was convicted with prejudice.

III.

The military judge erred by failing to correct the panel's ambiguous findings which amounted to acquittal.

Additional Facts

After deliberations, the panel completed a findings worksheet which indicated findings of not guilty as to specifications 1, 2, 3, 4, 6, 8, 9, 11, and 12. (App. Ex. LXIV at 2-3.) As for the remaining specifications, the panel indicated that it found MSgt Copp guilty, except for the value of alleged property. (*Id.*) The panel substituted the dollar amount listed for each specification with the phrase "some value." (*Id.*) However, the panel did not find MSgt Copp guilty of the

substituted language, because the panel crossed off the language "Of the substituted [word(s)] [figure(s)] [word(s) and figure(s)], GUILTY." (*Id.* at 3-4.) The panel also declined to find MSgt Copp guilty of the charge by crossing through the wording for "Of the Charge Guilty."

After receiving the worksheet, the military judge determined that:

> [T]he findings as to the charge is incongruent . . . we have findings as to some specifications as of guilt; however, the charge does not match those findings. So specifically . . . I instructed the members that if they find the accused guilty of any specifications, he needs to be found guilty of the charge. And the way that they're marked up the charge sheet is incongruent with that.

(R. at 713.) The military judge intended to resolve this by "re-advising on that particular portion," and declined to find the problem amounted to an impermissible reconsideration of findings. (*Id*.) Trial defense counsel objected and offered that the military judge should instead ask the members to clarify their ambiguous findings and avoid subjecting their findings to reconsideration. (R. at 716.) Trial defense counsel further expressed concern that simply repeating the findings instructions would force the panel to enter findings of guilty contrary to their intent as reflected by the worksheet. (R at 717) ("if this panel is confused and trying to vote not guilty and also saying it's a lower amount, I certainly don't want a finding of guilty by foot-stomping or highlighting anything"). Over this objection, the military judge advised the panel to review the procedural instructions and read the instruction stating "if you find the accused guilty of any specification under the charge, then the finding as to the charge must also be guilty." (R. at 719, 722.)

Roughly twenty minutes later, the panel returned with a new findings worksheet. The worksheet was filled almost identically to the first, but with the phrase "Of the Charge Guilty" not crossed out. (App. Ex. LXV.) The panel announced the findings in open court. (R. at 729.) Importantly, although the announcement included the substituted language in specifications 5, 7, and 10, the panel did not enter findings of guilty because it remained crossed out. (*Id.*) MSgt

Copp moved to set aside the members' verdict as ambiguous. (App. Ex. LXXII.) The military judge denied the motion, holding that the intent of the panel to find MSgt Copp guilty was evident. (App. Ex. LXXIV.)

Standard of Review

Whether a verdict is ambiguous is a question of law that this Court reviews de novo. *United States v. Ross*, 68 M.J. 415, 417 (C.A.A.F. 2010).

Law & Analysis

The military judge bears the responsibility of ensuring that ambiguities in the findings are clarified before the findings are announced. *United States v. Augspurger*, 61 M.J. 189, 193 (C.A.A.F. 2005). Where the findings worksheet presents ambiguity, the military judge is required to ask the members to clarify their findings. *Id.* at 192. This clarification is necessary to ensure the panel actually intends to find the accused guilty. *United States v. Ross*, 68 M.J. 415, 418 (C.A.A.F. 2010). Importantly, "[a] Court of Criminal Appeals cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not guilty." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). Double jeopardy prohibits a reviewing court from rehearing any incidents for which the accused was found not guilty. A finding of guilty as to a charge cannot be reconsidered "unless the records show a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of the code." R.C.M. 1104(c)(2). Findings of guilty by exceptions and substitutions are impermissible if the remaining language fails to state an offense punishable by court-martial. *United States v. Trew*, 68 M.J. 364, 367 (C.A.A.F. 2010).

The military judge erred by failing to resolve the panel's ambiguous findings in the initial worksheet, instead instructing the panel members to enter a finding of guilty as to the charge that

was unsupported by their findings for the specifications. The military judge did so by reading the instruction requiring the panel members to enter a finding of guilty on the charge if they found MSgt Copp guilty of any of the specifications. But the panel did not find MSgt Copp guilty of any of the specifications. This is because the offense of larceny required the panel to be convinced beyond a reasonable doubt that the devices had some value. *MCM* (2016 ed.), pt. IV, ¶ 46.b.(1)(a)(c). Rather than finding MSgt Copp guilty of this necessary element, the panel declined outright to do so. For the panel to then find MSgt Copp guilty of the charge was a violation of R.C.M. 1104(c)(2). This is because the panel's findings as to the specifications did not sufficiently establish a violation under the U.C.M.J. Put differently, the panel's exceptions to the element of the charged value without a finding of guilty as to the substituted language stripped the specification of actually stating an offense. Rather than resolve the ambiguity in the panel's findings, the military judge's instructions only seemed to create further confusion because the panel did not clarify the contradictory findings in the specifications. Without a finding of guilty as to the element of value, the panel essentially entered a finding of not guilty. This seemed to be reflected in the first version of the charge sheet which crossed out "Of the Charge guilty." This being so, the military judge invited reconsideration of the panel's acquittal, which was impermissible. This Court should remedy this grave error by setting aside the convictions and dismissing them with prejudice. *Augspurger*, 61 M.J. at 193.

VI.

The entry of judgment erroneously subjected MSgt Copp to criminal history indexing for a non-qualifying offense under 28 C.F.R. § 20.32 and Air Force Manual 72-102.

The 1st Indorsement to the entry of judgment (E.O.J.) erroneously subjected MSgt Copp to criminal indexing for a non-qualifying offense. The execution of criminal indexing represents

an error in the processing of the court-martial after the E.O.J. which this Court can and should correct under Article 66(d)(2). 10 U.S.C. § 866(d)(2) ("[This] Court may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record.").

An error in processing includes an incorrect notation on the 1st Indorsement of the E.O.J. *Cf. United States v. Williams*, 85 M.J. 121, 126-27 (C.A.A.F. 2024) (finding no processing error in the judgment of the court where incorrect notation on statement of trial results was corrected in the E.O.J.). Here, the 1st Indorsement to the E.O.J. subjects MSgt Copp to criminal indexing. MSgt Copp's sole conviction in this case was for larceny of property with an unspecified value in violation of Article 121, UCMJ. "Nonserious" offenses are excluded from the reporting requirement for criminal history indexing. Department of Defense Instruction 5505.11, *Fingerprint Reporting Requirements*, ¶ 1.2(d) (Oct. 31, 2019) (implementing 28 C.F.R. § 20.32's exclusion on the reporting of nonserious offenses). Air Force Manual (AFMAN) 71-102, *Air Force Criminal Indexing*, Attachment 5 (Jul. 21, 2020), lists specific offenses which are excluded. Wrongful appropriation in violation of Article 121 is among the excluded offenses when the value of the property is $1000 or less. MSgt Copp's conviction for larceny of non-military property with an unspecified value is a nonserious offense. This is highlighted by the maximum penalty of confinement for six months under the *MCM* (2016 ed.), which rendered it a petty offense. (R. at 778-79.) Accordingly, MSgt Copp's convictions were not subject to criminal history indexing.

This error occurred after the judgment was entered into the record. Air Force regulations require the "[Staff Judge Advocate] signs and attaches to the [E.O.J.] a first indorsement, indicating whether . . . criminal history record indexing is required under DoDI 5505.11." Department of Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 20.41 (Apr. 14,

2022). Criminal history record indexing explicitly happens *after* the E.O.J. is signed by the military judge pursuant to Article 60c, UCMJ. *Id.* Even if the indorsement is part of the E.O.J. by operation of R.C.M. 1111(b)(3)(F), the error—criminal history indexing for a non-qualifying offense—still occurs after the E.O.J. This is because the records indexing takes place after the E.O.J. when the first indorsement is entered on the record. *See* DAFI 51-201, at ¶¶ 29.35, 29.35.3 (Apr. 14, 2022) (explaining how the indexing requirement is executed after the E.O.J.). Given the posture of this error, it is reviewable by this Court under Article 66(d)(2). Additionally, it makes sense that the E.O.J. indorsement is the document the Court should review for post-trial processing error because it is the most recent notification to law enforcement entities about MSgt Copp's criminal history. *See id*. at ¶¶ 20.42, 29.6, 29.32, 29.33 (dictating when notifications are made through distribution of the EOJ and attachments).

To provide appropriate relief, this Court should modify the criminal indexing notation through its power under R.C.M. 1111(c). R.C.M. 1111(c) permits this Court to correct the E.O.J. "in performance of [its] duties." Article 66(d)(2), UCMJ, is one such "duty" defined by statute and the indorsement is part of the E.O.J. R.C.M. 1111(b)(3)(F); DAFI 51-201, at ¶ 20.41. Consequently, this Court can provide appropriate relief for this error via R.C.M. 1111(c). Alternatively, R.C.M. 1112(d)(2) allows this Court to send a defective record back to the military judge for correction. Because the indorsement is a required component of the E.O.J., albeit not part of the "findings" and "sentence," it can be corrected. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9); DAFI 51-201, at ¶ 20.41.

V.

The military abused his discretion by allowing the Government to call K.H. in rebuttal.

Additional Facts

During the defense case, Lt Col C.C. testified that the commander of the T.O.N.T.O. program could authorize members to take devices for personal use if they were no longer useful. (R. at 615.) After the defense rested, the Government requested to recall K.H. for rebuttal. (R. at 620.) The purpose was to elicit testimony from K.H. as to whether he authorized MSgt Copp to take any devices for personal use. (*Id.*) Trial defense counsel objected that K.H.'s testimony would not be a proper matter to rebut C.C.'s testimony. (R. at 620-21.) Trial defense counsel also expressed concern that the testimony would be needlessly cumulative. (R. at 627.) The military judge allowed K.H. to testify in rebuttal to "explain that basically unanswered question that defense put out through testimony" of whether or not K.H. "dictated what could happened to this property." (R. at 631.) The military judge did not conduct a Mil. R. Evid. 403 balancing test before making this determination.

In response to whether he was the commander of the program, K.H. testified that when he "was a division chief on two incidences . . . that program did fall under [him] twice." (R. at 636.) Trial counsel asked K.H. if he authorized MSgt Copp to take twelve items, referencing the types of devices described on the charge sheet, but not clarifying whether any of them were the actual devices charged. (R. at 636.) Trial counsel then sharpened the question after listing the devices by asking, "just to clean up that question, did you authorize MSgt Copp to take those 12 items, to take, sell, keep the proceeds for his own personal gain?" (*Id.*) K.H. replied "No." (*Id.*) On cross-examination, trial defense counsel asked K.H. "if you believed you had had the authority back then to do that, would you have authorized [MSgt] Copp to dispose of that property as he saw fit at that point?" K.H. answered:

> If I would have had the authority, if [MSgt] Copp had come to me and said he was going to dispose of items – the disposal of items that were abandoned, yeah – to

> take and sell on the internet, if they were abandoned items there would have been means to – I wouldn't have said sell them on the internet but I would have said they were abandoned items do with them what you want.

(R. at 637.)

Standard of Review

A military judge's decision to permit rebuttal evidence is reviewed for an abuse of discretion. *United States v. Saferite*, 59 M.J. 270, 274 (C.A.A.F. 2004). An abuse of discretion occurs where the military judge applies the law erroneously or clearly errs in making findings of fact. *United States v. Black*, 82 M.J. 447, 451 (C.A.A.F. 2022). An abuse of discretion may result from actions which are arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). A military judge's failure to conduct a Mil. R. of Evid. 403 balancing test precludes appellate courts from according deference to the military judge's decision to admit evidence. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

Law & Analysis

The military judge abused his discretion by allowing K.H. to testify in rebuttal by misapplying the law related to proper rebuttal, and by failing to conduct a balancing test pursuant to Mil. R. Evid. 403. The admission of this testimony was prejudicial because it allowed the Government to impermissibly re-open its case and confuse the issues. The scope of rebuttal is limited to matters raised by the opposing party and may not be used as a general vehicle to introduce evidence. *United States v. Partyka*, 30 M.J. 242, 246 (C.A.A.F. 1990). Rebuttal is not an opportunity for a party to reopen its case after resting, which may only occur in accordance with R.C.M. 913(c)(5). The evidence offered in rebuttal is permissible only if it can explain, repel, counteract, or disprove the evidence introduced by the opposing party. *United States v. Saferite*, 59 M.J. 270, 274 (C.A.A.F. 2004).

The evidence offered by the Government did not rebut any matter in evidence raised by the defense. While the military judge permitted K.H.'s testimony to explain the apparently "unanswered question" of whether K.H. directly authorized the "disposition of property," this was a topic unaddressed in the defense case. (R. at 631.) In fact, it stands to reason that if a question was unanswered, it is precisely because neither of the parties introduced evidence on that issue. For this reason, K.H.'s rebuttal testimony could not explain, repel, counteract, or disprove evidence introduced by the defense on the topic of specific authorization, because no evidence had been presented. Importantly, it was the Government's burden to prove its case before resting. If the Government had missed an important evidentiary topic during its case-in-chief, the only way to perfect its case would have been by reopening it with leave of the military judge under R.C.M. 913(c)(5). Permitting the Government to introduce K.H.'s testimony on such a basis impermissibly allowed the Government to side-step this limitation.

The military judge also erred by failing to conduct a Mil. R. Evid. 403 balancing test. This was necessary because trial defense counsel raised concerns about the potentially cumulative impact of K.H. being recalled, which is one of the forms of prejudice identified under the rule. The military judge's failure to do so deprives his ruling of deference from this Court. Moreover, the testimony of K.H. likely only confused the issues before the panel. The defense put on evidence tending to show that the allegedly stolen devices had in fact been abandoned. K.H.'s elicited testimony that he did not have a direct conversation with MSgt Copp, and the way that the Government framed the question, confused this salient point. This is so because it shifted the discussion away from whether the devices were genuinely or perceptively abandoned to whether K.H. personally spoke with MSgt Copp about any specific devices. It also confused whether K.H. had to personally declare the items abandoned for them to actually be so. This is highlighted by

K.H.'s follow-up response on cross-examination where he explained that if such a process was mandated, he would have told MSgt Copp to do with the phones as he pleased. (R. at 637.)

The Government's rebuttal case prejudiced MSgt Copp. The test for prejudice is based on consideration of "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018). Here the Government's case was weak and consisted largely of numerous documents. The Government offered little during its case about the unique mission that MSgt Copp was involved in, or the fleeting value of spent devices after testing. The Government did not call K.H., which is striking considering that he was the director of the program. Given this, the Government's case barely addressed the important threshold question of whether the United States maintained a superior property interest in the discarded devices. By contrast, the defense introduced tremendous evidence concerning the T.O.N.T.O. program, and testimony demonstrating that the allegedly stolen devices were essentially garbage. Yet, the materiality and quality of K.H.'s rebuttal testimony was such that could have easily confused the panel about this threshold question. Accordingly, the admission of the rebuttal evidence was impermissible and warrants setting aside the convictions.

VI.

MSgt Copp was denied speedy appellate review due to the Government's 312-day delay in producing the record of trial with the verbatim transcript.

Additional Facts

MSgt Copp was sentenced on 27 April 2023. (R. at 809.) On 12 October 2023, the Government delivered to MSgt Copp a partial record of trial along with a letter advising him of his right to file for appeal before this court within ninety days pursuant to Article 66, U.C.M.J., 10 U.S.C. § 866(c)(1)(A). This initial copy of the record of trial did not include a verbatim transcript.

The time between sentencing and the notice of right to appeal was 168 days. On 8 January 2024, MSgt Copp filed his notice of direct appeal with this Court. The Government provided a verbatim to this Court and the Appellate Defense Division on 31 May 2024. From the time between the notice of appeal and the furnishment of the complete record of trial, 144 days had elapsed. The combined time from sentencing to the 90-day letter and the time from MSgt Copp filing for direct appeal and the Government's provision of the complete record of trial is 312 days.

Standard of Review

This Court reviews claims challenging the due process right to a speedy post-trial review and appeal de novo. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law & Analysis

This Court should find that the 312-day occasioned entirely by matters within the control of the Government is a violation of MSgt Copp's due process rights.[2] This delay has interfered with MSgt Copp's ability to exercise his appellate rights, and has resulted in prejudice. Moreover, this Court should find a due process violation as the delay adversely affects the public's perception of the fairness and integrity of the military justice system. Finally, if this Court does not find a due process violation, it should still grant MSgt Copp relief because the Government acted with gross indifference, there was harm to MSgt Copp, and relief is consistent with the goals of both justice and good order and discipline.

[2] This 312-day calculation does not include the period between when the 90-day letter was sent to MSgt Copp and the filing of his notice of appeal. The 312-day delay is the sum of the two periods of time that the Government spent producing the record of trial and which was exclusively within the Government's control.

Whether an appellant has been deprived of their due process right to speedy appellate review is determined by balancing the four-factor test outlined in *Barker*. *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011). The *Barker* factors are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). When examining the reason for the delay this Court determines "how much of the delay was under the Government's control" and "assess[es] any legitimate reasons for the delay." *Anderson*, 82 M.J. at 86 (finding "no indication of bad faith on the part of any of the Government actors"). Analyzing these factors requires determining which factors favor the Government or the appellant and then balancing these factors. *Id.* No single factor is dispositive, and the absence of a given factor does not prevent this Court from finding a due process violation. *Id.*

A. A combined 312-days of delay is presumptively unreasonable because it exceeds the 150-day threshold.

The Government is accountable for 312-days of delay in MSgt Copp's appellate processing. This is based on the 168 days it took for the Government to deliver the partial record of trial after MSgt Copp was sentenced, combined with the subsequent 144 days that it took for the Government to provide a complete record of trial after this case was docketed with this Court. This combined set of delays is presumptively unreasonable because it more than doubles the 150-day threshold. *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020) (finding a "150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in *Moreno*"). When a case does not meet the 150-day standard, it triggers an analysis of the four non-exclusive factors set forth in *Barker*. *United States v. Jackson*, No. ACM 39955, 2022 CCA LEXIS 300, at *132 (A.F. Ct. Crim. App. 23 May 2022). This delay is more than 150 days greater than the 150-day

benchmark outlined in *Livak*. 80 M.J. at 633. Even if this Court were to find that these cases do not apply to non-automatic review cases in light the unpublished holding in *United States v. Boren* No. ACM 40296 (f rev), 2025 CCA LEXIS 103 (A.F. Ct. Crim. App. Mar. 19, 2025), the 312-day delay is excessive under Article 66(d)(2) and warrants further analysis and relief.

B. There is no justification for the lengthy delay.

The record of trial contains no explanation of why this case was subject to such a lengthy delay before MSgt Copp was provided the partial record of trial with notification of his right to direct appeal. The gap of time between sentencing and the creation of the partial record of trial appears to be due to normal case processing and the balancing of priorities experienced by the court reporters. (Record of Trial, Vol. 4, Court Reporter Chronology.) The Court Reporter Chronology marks 31 July 2023 as the date that the summarized transcript was completed. (*Id*.) But there is no explanation for the gap of time between completion of the summarized transcript and the date that MSgt Copp was notified of his right to appeal, 12 October 2023. Nor does the record contain any explanation of the 144-day gap between when this case was docketed with this Court and the Government's provision of the verbatim transcript.

Importantly, both of these delays were occasioned by matters completely within the Government's control. This is in contrast with the facts considered by this Court in *United States v. Boren*, No. ACM 40296 (f rev), 2025 CCA LEXIS 103 (A.F. Ct. Crim. App. Mar. 19, 2025). In *Boren*, this Court declined to extend relief on the basis that the delay in docketing was based on aspects of the appeal process that were controlled by the appellant. *Id.* at *48. This Court contrasted this with automatic appeals where the Government drives the process. *Id.* However, in this case, the particular delays were the result of matters that were entirely within the

Government's control, namely the production of a record of trial. This Court should find that the delays were attributable to the Government and without justification.

C. MSgt Copp asserts his right to speedy post-trial processing.

Third, MSgt Copp hereby asserts his right to timely appellate review. This factor does not weigh for or against MSgt Copp. It is through no fault of his own that undersigned counsel had cases to review prior to MSgt Copp's case. *United States v. Lampkins*, No. ACM 40135 (f rev), 2023 CCA LEXIS 465, at *13 (A.F. Ct. Crim. App. Nov. 2, 2023) (holding that this factor weighs neither for or against appellants who assert their right to speedy appellate review for the first time in their brief.) Additionally, no one factor is dispositive in the *Barker* analysis. *See also Moreno*, 63 M.J. at 138 ("While this factor weighs against Moreno, the weight against him is slight given that the primary responsibility for speedy processing rests with the Government and those to whom he could complain were the ones responsible for the delay.").

D. MSgt Copp suffered prejudice from the Government's delay.

Moreno identified three types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of a convicted person's grounds for appeal and ability to present a defense at a rehearing. 63 M.J at 138-39. "The anxiety and concern subfactor involves constitutionally cognizable anxiety that arises from excessive delay, and [the CAAF] require[s] an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Anderson*, 82 M.J. at 87 (internal quotation marks and citations omitted).

MSgt Copp has suffered particularized anxiety and concern based on his loss of employment opportunities while he awaits conclusion of this process. This loss of employment opportunities is directly tied to his outstanding convictions which have put his security clearance

into a limbo status, and has reduced his employability in his career field. This is similar to *Moreno* where the appellant's criminal registration status was found to constitute particular anxiety. 63 M.J. at 140. MSgt Copp's grounds for appeal would remediate these concerns. Moreover, MSgt Copp has faced the "impairment of [his] grounds for appeal." *Moreno*, 63 M.J at 138-39. Because of the 312 days of unreasonable delay—MSgt Copp was unable to petition this Court for relief sooner. Like the appellant in *United States v. Turpiano*, MSgt Copp has been "impeded in his ability to exercise his post-trial rights because of the actions, or more aptly delayed actions, of the Government." No. ACM 38873 (f rev), 2019 CCA LEXIS 367, at *19 (A.F. Ct. Crim. App. Sep. 10, 2019).

E. Even if this Court finds no *Barker* prejudice, the Government's delay adversely affects the public's perception of the military justice system.

Where an appellant does not show prejudice from the delay, there is no due process violation unless "in balancing the three other factors, the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson*, 82 M.J. at 87 (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)). Assuming this Court is unconvinced MSgt Copp was prejudiced by the Government's 312-day delay, this Court should consider its superior court's admonition when deciding if there is a due process violation: "delay in the administrative handling and forwarding of the record of trial and related documents to an appellate court [] is the least defensible of all and worthy of the least patience." *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). The reason this Court should have little patience with the Government is because "this stage involves no discretion or judgment; and, unlike an appellate court's consideration of an appeal, this stage involves no complex legal or factual issues or weighing of policy considerations." *Id*. This Court should find a due process violation because a member of the public could reasonably question the "integrity" of the military

justice system in this case. The military justice system failed to prevent MSgt Copp from being "subjected to inordinate and inexcusable delay after he has been tried." *Id.* at 70. In the aggregate, these delays communicate to the public that the Government does not care about expediently bringing military justice matters to resolution.

F. Even if this Court find no *Barker* prejudice, relief is proper under Article 66(d).

Should this Court find that MSgt Copp has not suffered prejudice as a result of the excessive delay, relief is still appropriate. This Court may provide appropriate relief for excessive delay in the post-trial processing under Article 66(d)(2), which does not require a showing of actual prejudice. This Court has identified a list of non-exclusive factors to consider in evaluating whether relief under Article 66, UCMJ, should be granted for non-prejudicial post-trial delay. *Gay*, 74 M.J. at 744. These factors include how long the delay exceeded appellate review standards, the reasons for the delay, whether the government acted with bad faith or gross indifference, evidence of institutional neglect, harm to the appellant or to the institution, whether relief is consistent with the goals of both justice and good order and discipline, and whether the court can provide any meaningful relief. *Id*. No single factor is dispositive, and this Court may consider other appropriate factors. *Id.*

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

As to the third factor, while there is no evidence the Government acted in bad faith, the Government's dilatory conduct reveals its indifference. On the issue of institutional neglect, it must be noted the Government consistently struggles to timely and accurately complete post-trial processing. *See United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223,

at *18 (A.F. Ct. Crim. App. June 7, 2024), *review granted*, No. 24-0208/AF, 2024 CAAF LEXIS 571 (C.A.A.F. Sept. 30, 2024) (citations omitted). The lengthy, yet non-exhaustive, list of cases with delays in post-trial processing this Court noted in *Valentin-Andino* should continue to vex this Court. Given the plethora of cases this Court has remanded for the same or similar issues in post-trial processing resulting in delays, the Government must be properly incentivized to abide by the law. This Court can and should provide that incentive in this case, wherein the interests of justice and "appropriateness" weigh in favor of granting MSgt Copp relief.

Looking at the fourth factor, relief is consistent with the dual goals of justice and good order and discipline. This is especially so given the institutional neglect in post-trial processing, of which this case is just one example among many. This Court has acknowledged the extent of this neglect in *Valentin-Andino* by citing numerous instances where post-trial processing errors have occurred with "alarming frequency." *Id.* at *17-18. The principles of justice demand that records of trial be assembled more expediently. This factor resolves in MSgt Copp's favor.

As to the remaining factors, they also resolve in MSgt Copp's favor. As outlined *supra*, allowing these delays harms the military justice system and the Air Force as an institution. The Government has repeatedly demonstrated gross indifference to post-trial processing. *Valentin-Andino*, 2024 CCA LEXIS 223, at *18. The Government is not "worthy" of this Court's continued "patience." *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). To the extent providing relief to MSgt Copp incentivizes the Government to do better, it is consistent with the goals of both justice and good order and discipline. This Court can still provide "meaningful relief" to MSgt Copp despite the passage of time. *Gay*, 74 M.J. at 744. In sum, while none of these factors are dispositive, the "essential inquiry" of the "appropriateness" of relief resolves in MSgt Copp's

favor. *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). This Court should therefore provide sentencing relief to MSgt Copp's by setting aside the forfeitures.

VII.

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

Additional Facts

The military judge instructed the members "A concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilt. Since we have four members, that means three members must concur on any finding of guilty." (R. at 672.) Also, "If you have at least three members of guilty on any offense, then that will result in a finding of guilty for that offense." (*Id.*) The announcement of findings and the findings worksheet leave no way of knowing whether the finding of guilty to any offense was unanimous or by 3-1 vote.

Standard of Review

The standard of review for a question of constitutional law is de novo. *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016).

Law & Analysis

In *United States v. Anderson*, the Court of Appeals for the Armed Forces held that non-unanimous findings of guilty do not violate a court-martial accused's constitutional rights. *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). MSgt Copp acknowledges that, absent intervening Court of Appeals for the Armed Forces or Supreme Court case law, this Court is bound by the *Anderson* opinion. Nevertheless, MSgt Copp maintains that *Anderson* was wrongly decided and expressly preserves this issue for further appellate review. This Court should remedy the violation of MSgt Copp's constitutional right to be found guilty only

upon a unanimous verdict by reversing the findings of guilty to the charge and specifications 5, 7, and 10, and the sentence while authorizing a rehearing at which MSgt Copp may be found guilty only upon a unanimous vote of the members.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 27 March 2025.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

DEPARTMENT OF THE AIR FORCE
U.S. AIR FORCE COURT OF CRIMINAL APPEALS
1500 WEST PERIMETER ROAD, SUITE 1900
JOINT BASE ANDREWS MD 20762-6604

1 April 2025

MEMORANDUM FOR APPELLATE DEFENSE DIVISION (ATTN: CAPTAIN MICHAEL J. BRUZIK, USAF)

FROM: HQ USAF/JAH

SUBJECT: Motion to Reconsider Interlocutory Order and Suggestion for *En Banc* Proceedings – Return with No Action

1. On 18 March 2025, Appellant, through you as counsel, filed a Motion for Enlargement of Time (Eighth). The Government opposed the motion, and on 21 March 2025, this court summarily denied Appellant's motion.

2. Later on 21 March 2025, Appellant, again through you as counsel, filed a motion titled "Motion to Reconsider Interlocutory Order and Suggestion for En Banc Proceedings" (hereinafter "reconsideration motion"). In this motion, Appellant moved this court to grant him "a[n] eighth enlargement of time to end on 26 April 2025," and "to provide clarity to appellants regarding the timelines and expectations for cases not subject to automatic review." On 25 March 2025, the Government generally opposed the motion.

3. On 27 March 2025, and before the court ruled on the reconsideration motion, Appellant, through you as counsel, timely filed his brief identifying assignments of error.

4. Your motion is being returned with no action for the following reasons. First, Appellant's filing of his assignments of error brief resolves his request for an eighth enlargement of time. Second, Rule 31.1 of this court's Rules of Practice and Procedure requires a motion for reconsideration state with particularity the interlocutory order the moving party seeks to have reconsidered. A.F. CT. CRIM. APP. R. 31.1. Appellant's reconsideration motion does not state with specificity which order by this court Appellant seeks to have reconsidered *en banc*; there is no 21 March 2024 order in this case. Moreover, Appellant's suggestion for reconsideration *en banc* of an order issued in Appellant's case in order to provide "clarity to [other] appellants" is vague.

5. Thus, your motion is returned with no action. *See* A.F. CT. CRIM. APP. R. 13.4.

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court
U.S. Air Force Court of Criminal Appeals

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION TO**
Appellee,	)	**RECONSIDER INTERLOCUTORY**
	)	**ORDER AND SUGGESTION FOR**
v.	)	***EN BANC* PROCEEDINGS**
	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
JASON R. COPP,	)	No. ACM 24029
United States Air Force,	)	
Appellant.	)	21 March 2025

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

Master Sergeant (MSgt) Jason R. Copp, Appellant, hereby moves this Court to reconsider the interlocutory order that was ordered in his case on 21 March 2024, with a suggestion for *en banc* proceedings. JT. CT. CRIM. APP. R. 27, 31; A.F. CT. CRIM. APP. R. 23.3(k), 31.1, and 31.3.

The Court of Appeals for the Armed Forces (CAAF) has not obtained jurisdiction of this case because no petition or certificate has been filed at the CAAF. A.F. CT. CRIM. APP. R. 31.1. Therefore, this Court may reconsider the interlocutory order it rendered. *Id*. There is good cause to reconsider this Court's order because it conflicts with previous orders from this Court, is in tension with Rule 18(d) of the Joint Rules of Appellate Practice, and would prejudice MSgt Copp's constitutional right to effective assistance of counsel on his first-level appeal as of right. *United States v. Brooks*, 66 M.J. 221, 223 (C.A.A.F. 2008). MSgt Copp suggests reconsideration *en banc* to provide clarity to appellants regarding the timelines and expectations for cases not subject to automatic review. JT. CT. CRIM. APP. R. 27(a)(1).

This Court should reconsider its denial of MSgt Copp's motion for an eighth enlargement of time because the timeline from the date of docketing does not accurately reflect counsel's opportunity to review the record of trial (ROT) and prepare a brief on behalf of

Appellant. Although this case was docketed with this Court on 9 January 2024, the Government did not provide this Court or counsel a complete copy of the ROT, including a verbatim transcript of the original proceedings, until 31 May 2024. This constitutes an exceptional circumstance where the complete ROT is not delivered until well after the date of docketing. As a practical matter, counsel is unable to meaningfully review the case until the complete ROT becomes available. This disconnect between the date of docketing and the receipt of the complete ROT is driven by the unique nature of non-automatic review cases. Non-automatic appeal cases are not docketed until requested by the appellant. Article 66, Uniform Code of Military Justice (UCMJ), 10 USC § 866(c)(1)(A). This request must be made within 90 days of the Judge Advocate General providing the appellant notice of the right to appeal. Article 65, UCMJ, 10 USC § 865(c)(1). Because no statutory authority requires the notice of right to appeal to be accompanied by a complete ROT, the notice of docketing may precede the appellant's opportunity to review the ROT. Such is the case here.

Earlier this week, a panel of this Court held that the standards for assessing reasonableness of post-trial delay are different for non-automatic appeals. *United States v. Boren*, No. 40296 (f rev), slip op. at 25-26, 2025 CCA LEXIS 103 (A.F. Ct. Crim. App. Mar. 19, 2025). The distinctions between appeals under Article 66(b)(1)(A) and Article 66(b)(3) that informed this Court's decision that the 150-day sentencing-to-docketing standard does not apply to the former also suggest that docketing is an unhelpful date from which to measure an appellant's briefing period.

The Joint Rules of Appellate Procedure for Courts of Criminal Appeal, amended 17 May 2024, resolve the timeline for filing an initial brief in non-automatic appeal cases by explaining: "As soon as practicable after the filing of a Notice of Appeal, the government shall provide the

Court a complete record, including a verbatim transcript, and provide a copy to the defense. An appellant's brief shall be filed no later than 60 days thereafter." JT. CT. CRIM. APP. R. 18(d)(2). This Court has recognized this rule as setting the operative timeline for non-automatic appeal cases such as this one. Order, *United States v. Norris*, No. ACM 24045, 20 December 2024. Today is 294 days from the date on which the Government provided the complete ROT to this Court and to Appellant's counsel.

Exceptional circumstances also exist because this was among those detailed to reservist personnel to help off-set the heavy workload faced by undersigned counsel, as well as the Appellate Defense Division as a whole. Maj Jennifer Harrington was assigned to this case during her two-week annual tour, which took place 20-31 January 2025. During that timeframe, Maj Harrington formed an attorney-client relationship with Appellant and reviewed a portion of the record of trial. Maj Harrington also arranged for the Appellate Defense Division's paralegals to mail her the record of trial so she could complete her reviewing and briefing of issues remotely. By the following Monday and Tuesday, 3 and 4 February 2025, in furtherance of the Presidential Memorandum on *Return to In-Person Work*, dated 20 January 2025, Air Force Reservists like Maj Harrington received guidance that initially sparked confusion about their ability to perform work away from a Department of the Defense facility and ultimately resulted in a direction to not perform any duty outside of a Department of Defense facility.

Maj Harrington does not have access to such a facility near where she lives, let alone one that would afford the ability to engage in privileged attorney-client communications as required to work on Appellant's case, and it was unclear if or when an exception to the in-person work requirement for performance of Reserve duties would be lifted. The prohibition that impacted Maj Harrington's ability to perform remote work on Appellant's case was not

lifted until Friday, 28 February 2025, but the record of trial still required time for shipment and was not sent during the time of Maj Harrington's current travel outside of the continental United States, which has limited her ability to be involved in this motion. It would be inadvisable to send the record of trial to Maj Harrington until she is present to receive it. This case is Maj Harrington's highest priority case before this Court, and undersigned counsel will coordinate with Maj Harrington to do everything possible to ensure completion of Appellant's assignment of errors during the requested enlargement period if reconsideration and the requested enlargement are granted, understanding that Appellant may require additional time to draft *Grostefon* issues he wishes to personally raise following the advice of counsel. The policies that have limited the performance of representational duties by a reserve appellate defense counsel with whom Appellant has formed an attorney-client relationship constitute exceptional circumstances warranting this Court's reconsideration of its denial of Appellant's request for an enlargement of time.

An enlargement of time is also appropriate because of the exceptional circumstances of undersigned counsel's tremendous workload. Undersigned counsel is currently assigned to represent eighteen service members; eight cases are pending initial AOEs before this Court. Undersigned counsel's priorities are as follows:

1) *United States v. Adams*, ACM 22018 – The record of trial consists of four volumes and a 299-page transcript. There are two prosecution exhibits, three defense exhibits, and seventeen appellate exhibits. This case is on its sixth enlargement of time. A brief is due to this Court on 9 April 2025.
2) *United States v. Torres Gonzalez*, ACM 24001 – The record of trial consists of six volumes and a 608-page transcript. There are forty-six prosecution exhibits, eight

defense exhibits, and twenty-five appellate exhibits. This case is on its ninth enlargement of time. A brief is due to this Court on 14 April 2025.

3) *United States v. Licea*, ACM 40602 – The record of trial consists of seven electronic volumes, and the transcript is 173 pages. There are twelve prosecution exhibits, five defense exhibits, twenty-two appellate exhibits, and one court exhibit. This case is on its ninth enlargement of time. A brief is due to this Court on 18 April 2025.

4) *United States v. Quinones Reyes*, ACM 40636 – The record of trial consists of seven volumes with a 199-page transcript. There are four prosecution exhibits, nineteen defense exhibits, twenty-five appellate exhibits, and one court exhibit. This case is on its seventh enlargement of time. A brief is due to this court on 21 April 2025.

Counsel reiterates the various tasks that he had to accomplish over the previous enlargement of time. Order, *United States v. Copp*, No. ACM 24045, 21 March 2025, at 2. Additionally, counsel anticipates having to file a reply brief before the Court of Appeals for the Armed Forces in *United States v. Cook* by 28 March 2025.

WHEREFORE, MSgt Copp respectfully request that this Court reconsider its denial of the eighth request for enlargement of time and grant a eighth enlargement of time to end on 26 April 2025.

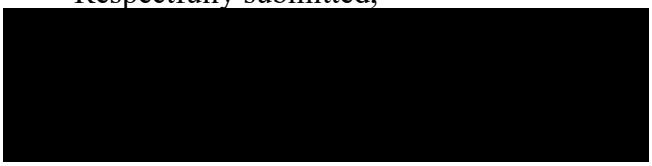
Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION TO RECONSIDER INTERLOCUTORY ORDER AND SUGGESTION FOR *EN BANC* PROCEEDINGS
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM 24029
	)	25 March 2025

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's motion to reconsider the interlocutory order and suggestion for *en banc* proceedings.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 25 March 2025.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO ATTACH**
v.	)	Before Panel No. 2
Master Sergeant (E-7), **JASON R. COPP,** United States Air Force, *Appellant.*	)	No. ACM 24029
	)	27 March 2025

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to attach the Appendix to this motion to Appellant's Record of Trial. The Appendix may be attached consistent with *United States v. Jessie*, because its consideration is necessary to "resolv[e] issues raised by materials in the record." 79 M.J. 437, 444 (C.A.A.F. 2020); *accord United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) ("In addition to permitting consideration of any materials contained in the 'entire record,' our precedents also authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record."). The Appendix totals two (2) pages in length and consists of the following:

Declaration of MSgt Jason R. Copp: A Declaration made under penalty of perjury and signed by MSgt Copp. This declaration is relevant and necessary in resolving the sixth assignment of error MSgt Copp has raised before this Court. In determining whether there has been a due process violation for post-trial delays, this Court is required to examine whether an appellant has suffered prejudice from the delay. *United States v. Anderson*, 82 M.J. 82, 87 (C.A.A.F. 2022). Even if this Court finds no due process violation, it can still determine whether an appellant was harmed by a delay and grant relief accordingly. *United States v. Jackson*, No. ACM 39955, 2022

CCA LEXIS 300, at *133 (A.F. Ct. Crim. App. 23 May 2022) (citing *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002)). In his Declaration, MSgt Copp outlines the prejudice he has suffered as a result in the Government's delay in producing the record of trial.

Consideration of the matters described above is necessary for this Court to resolve a matter already raised in the record itself. That is, whether MSgt Copp suffered prejudice as a result of the Government's delay in producing the record of trial.

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

Respectfully submitted,

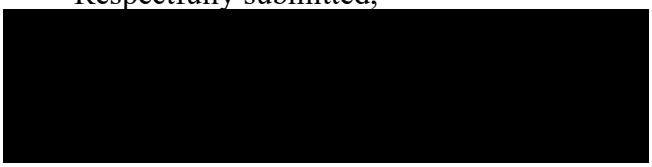
[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 27 March 2025.

Respectfully submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellant*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **JASON R. COPP,** United States Air Force, *Appellee.*	)	No. ACM 24029
	)	18 April 2025

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a five day enlargement of time to respond in the above captioned case. This case was docketed with this Court on 9 January 2024 after Appellant filed his Notice of Direct Appeal with this Court. Appellant filed his assignments of error on 27 March 2025. (App. Br. at 1.) The government's response is currently due 26 April 2025. This is the United States' first request for an enlargement of time. As of the date of this request, 465 days have elapsed since docketing with this Court. If the enlargement of time is granted, the United States' response will be due on 1 May 2025 and 479 days will have elapsed. Prior to filing his assignments of error, Appellant requested and received seven enlargements of time. Further, 143 days of the time that has elapsed since docketing with this Court was attributable to the need to produce a verbatim transcript.

There is good cause for the enlargement of time in this case. Undersigned counsel was assigned to this case on 28 March 2025 while he was on preapproved leave. Undersigned counsel began working this case when he returned to the office on 31 March 2025, but had

prescheduled leave from 1-4 April 2025. Capt Washburn is also currently assigned to United States v. Gale, an Article 62 appeal pending before this Court. That case is currently scheduled for oral argument before this Court on 24 April 2025. Moreover, Capt Washburn has been tasked by Colonel Matthew Talcott, Chief, Government Trial and Appellate Operations Division, to participate in filming of training modules for junior trial counsel as part of a mandatory TJAG directed initiative adapting the certification process. Filming for the training modules is scheduled for 21 and 25 April 2025 and is scheduled to last a full day for each day of filming. Further, during the time undersigned counsel has been assigned to this case the Air Force Appellate Operations Division has held 3 moot courts to prepare for oral argument at both CAAF and before this Court.

An extension of time is necessary to allow undersigned counsel adequate time to complete work in United States v. Gale, and then to prepare an adequate response to Appellant's seven assignments of error. In the time Capt Washburn has been assigned to this case, he has reviewed all 815 pages of the trial transcript, reviewed all 7 volumes of the record of trial. Counsel has reviewed Appellant's assignments of error and has begun drafting a response. There are no other appellate government counsel who would be able to file a brief sooner because the are also assigned briefs with similar due dates to this. In light of the above, a five day enlargement of time would be reasonable to allow undersigned counsel to prepare a through and responsive brief and to secure supervisory review.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for leave to file out of time.

[redacted]
TYLER L. WASHBURN, Capt, USAF

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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 18 April 2025.

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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
Master Sergeant (E-7) **JASON R. COPP,** United States Air Force *Appellant*.	)	No. ACM 24029
	)	1 May 2025

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 2
Master Sergeant (E-7) **JASON R. COPP,** United States Air Force *Appellant.*	)	No. ACM 24029 1 May 2025

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

ISSUES PRESENTED

I.

WHETHER APPELLANT'S CONVICTIONS FOR LARCENY WERE FACTUALLY AND LEGALLY SUFFICIENT WHERE A KEY WITNESS TESTIFIED THAT THE ALLEGED STOLEN PROPERTY HAD PREVIOUSLY BEEN ABANDONED.

II.

WHETHER THE GOVERNMENT VIOLATED APPELLANT'S RIGHT TO SPEEDY TRIAL UNDER R.C.M. 707 BY FAILING TO ARRAIGN APPELLANT WITHIN 120 DAYS OF PREFFERAL

III.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO RESOLVE THE AMBIGUOUS FINDINGS THAT SHOULD HAVE BEEN INTERPRETED AS NOT GUILTY.

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE GOVERNMENT TO RECALL [RH] AS A WITNESS.

V.

WHETHER THE ENTRY OF JUDGMENT ERRONEOUSLY SUBJECTED APPELLANT TO CRIMINAL HISTORY INDEXING FOR A NON-QUALIFYING OFFENSE UNDER 28 C.F.R. § 20.32 AND AIR FORCE MANUAL 72-102.

VI.

WHETHER APPELLANT WAS DENIED HIS RIGHT TO SPEEDY TRIAL APPELLATE REVIEW AFTER THE GOVERNMENT TOOK 312 DAYS TO COMPLETE THE RECORD OF TRIAL.

VII.

WHETHER APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED OF AN OFFENSE WITH NO REQUIREMENT THAT THE COURT-MARTIAL PANEL VOTE UNANIMOUSLY THAT HE IS GUILTY.

STATEMENT OF CASE[1]

On 21-22 April and 24-27 April 2023, a special court-martial convened at Hurlburt Field, Florida. (R. at 1, 96, 182, 280, 412, 651.) Appellant elected to be tried and sentenced by a panel composed of officer members and entered pleas of not guilty. (R. at 14-16.) Contrary to his pleas, the members found Appellant guilty of one charge and three specifications of larceny in violation of Article 121, UCMJ. (*Entry of Judgment*, dated 27 April 2023, ROT, Vol. 1.) Appellant was acquitted of 9 specifications of larceny, in violation of Article 121, UCMJ. (Id.) The members sentenced Appellant to a reprimand, forfeiture of $1,000 pay per month for six months, and hard labor without confinement for 30 days. (R. at 809.) After considering

[1] Unless otherwise noted, all references to the Manual for Courts-Martial, United States (MCM) refer to the 2019 edition.

Appellant's post-trial submissions, the convening authority took no action on Appellant's case. (*Convening Authority Decision on Action*, dated 1 June 2023, ROT, Vol. 1.)

STATEMENT OF FACTS

The Tonto Program

Prior to his court-martial, Appellant was assigned to a Joint Special Operations Command (JSOC) program called "TONTO" which specialized in signal interception and targeting testing. (R. at 507-508.) The program required testing of a multitude of electronic devices, including cell phones. (R. at 508.) The testing was conducted at various locations across the globe and involved both foreign and domestic telecommunications networks. (R. at 512.)

As part of this program, the National Security Agency (NSA) was responsible for acquiring the electronic devices that were required by JSOC for testing. (R. at 461.) MM, an NSA contract officer representative, worked with Appellant throughout the program and was responsible for acquiring testing materials for the TONTO program. (R. at 454-455, 459-460.) Appellant was the technical point of contact for JSOC who was responsible for communicating the unit's requirements and coordinating with the NSA for the acquisition process. (R. at 455, 467, 579.)

As part of the oversight process for the TONTO program, the unit had daily meetings to justify any procurement needs. (R. at 514.) The program was under heavy scrutiny from three and four-star oversight and their procurement was heavily scrutinized. (R. at 513-514.) As an additional layer of oversight, no member of the unit possessed a government purchase card and all purchases had to run through the approval process and through the NSA contracting office. (Id.)

As part of the acquisitions process, the NSA would order phones and other electronic devices from vendors such as Motorola on JSOC's behalf and have the items shipped directly to Appellant. (R. at 456-457, Pros. Ex. 1-19.) It was not uncommon to have the items shipped to Appellant's home due to operational concerns. (R. at 516-517.) Once the items ordered were received, a report was generated by the contractor and submitted to the government for review. (R. at 457.) Once the report was reviewed and approved by the contracting officer representative, the invoice was forwarded to accounts payable and the United States government would issue a voucher for payment to the contractor. (R. at 457-458.) JSOC provided the money for the equipment they purchased through the NSA contacting process and became the owners of the items purchased. (R. at 460.)

Once received by the government, the phones were accounted for by Appellant. (R. at 536.) Appellant would ensure that they had received everything they had ordered and verify it was all in working order for their testing requirements. (Id.) While Appellant was responsible for ensuring they received everything they had ordered, the unit did not issue hand receipts, create an inventory, or label the phones as government property. (R. at 492, 520.) The accountability within the unit was based on "trust" in Appellant. (R. at 580-581.) Due to the nature of their program, the unit required a wide array of cell phones in differing iterations because each phone contained a different processor that emitted different signals. (R. at 515.) The phones received under these contracts were not for personal use and were to be used solely for testing purposes. (R. at 531-531.) Once Appellant had verified the unit had what they needed, the phones and other electronic devices were used for testing purposes. (R. at 515-516.)

After testing, the phones would be assessed to determine whether they were viable for future testing. (R. at 524.) Due to the nature of some of the testing environments, some of the

phones would be broken or left behind at the testing locations. (R. at 523-524.) Viable phones would be used for follow-on testing. (R. at 524, 537.) The division chief—Colonel KH—testified that the internal components of the phones, such as lithium batteries, still retained value after testing. (R. at 529-530, 537-538.) Nonetheless, after the phones were used for testing, the unit did not have any program in place for recycling or any point of contact to return the testing phones to. (R. at 524, 530.) Because of this, when the TONTO program was decommissioned during the 2018-2019 timeframe, the unit possessed multiple boxes of cell phones. (R. at 524-525, 585-586.) Colonel KH was the disposal authority, but he never authorized Appellant to dispose of the phones in any way, and he did not authorize Appellant to sell them for his own personal gain. (R. at 606, 636.) As Colonel KH noted, he himself did not take any of the devices or sell them because they were not his personal property. (R. at 538.) Nor did any other member of the unit take any of the testing devices. (R. at 545.) Appellant was one of the last team members to PCS after the program was decommissioned. (R. at 570.)

Discovery of the Offense

At some point after the TONTO program was decommissioned, the Air Force Office of Special Investigations (OSI) was conducting an investigation into a separate matter involving the unit and discovered that equipment was missing. (R. 442.) OSI then obtained subpoena information showing Appellant's financial records. (R. at 436.) During their investigation, OSI discovered that Appellant had traded in several electronic devices to an online electronics marketplace called Gazelle. (R. at 436-437.) OSI subpoenaed Gazelle for information regarding Appellant's transactions and obtained a list of items Appellant had traded in for cash. (R. at 436-437, Pros. Ex. 21.) OSI cross-referenced the list of items provided by Gazelle with Apple and JSOC records and discovered that 12 items Appellant had sold to Gazelle matched items that had

been obtained and paid for by JSOC for testing purposes. (R. at 438-440, Pros. Ex. 1-23.) After discovering the sale of government property, OSI reached out to determine whether Appellant had any authorization to dispose of the items identified. (R. at 440-441.) OSI found no such authorization. (R. at 441.)

The specifications forming the basis of Appellant's convictions state:

(1) Specification 5: [Appellant] did within the Continental United States, between on or about 4 January 2018 and on or about 24 January 2018, steal an iPhone 8 cellular phone, of some value, the property of the United States.

(2) Specification 7: [Appellant] did within the Continental United States, between on or about 9 January 2018 and on or about 25 January 2018, steal an iPhone 8 cellular phone, of some value, the property of the United States.

(3) Specification 10: [Appellant] did within the Continental United States, between on or about 29 January 2018 and on or about 8 February 2018, steal an iPhone X cellular phone, of some value, the property of the United States.

The timetable of the three items of which Appellant was convicted is of note:

Item	Date Shipped to Vendor/ Purchased	Date Sold to Gazelle
Specification 5—iPhone 8	December 15, 2017	January 4, 2018
Specification 7—iPhone 8	December 15, 2017	January 9, 2018
Specification 10—iPhone X	December 29, 2017	January 29, 2018

(Pros. Ex. 11-12, 15-16, 22.) For the three items for which Appellant was convicted, he received a total of $1,220 from Gazelle. (Pros. Ex. 22.) Those three items were purchased and paid for by the United States Government. (Pros. Ex. 11-18.)

Testimony Regarding Abandonment

At trial, Colonel KH—Appellant's former supervisor—testified multiple times that he considered the phones that had been used for testing that the unit had accrued throughout the

course of the program as abandoned. (R. at 524, 525, 527, 551.) Specifically, he testified that if Appellant deemed the phones abandoned, then they were abandoned. (R. at 527.)

At the conclusion of Colonel KH's testimony, the military judge provided the following instruction to the members:

> Members, during Colonel [KH]'s testimony, counsel questioned him using the term "abandonment" and he gave answers in response to those questions. I'm going to instruct you as I did previously that your duty here today is to discern whether or not the accused is guilty or not guilty based on the evidence presented to you in court and the instructions I will give you. The final determination as to the weight of the evidence, the credibility of witnesses, and your ultimate decision in this case rests solely upon you. You are required to follow my instructions on the law and as a court member, it is your duty to hear the evidence and determine whether the accused is guilty or not guilty, and if required, adjudge an appropriate sentence. Once again, that determination rests solely with you.

(R. at 551-552.) The military judge then placed the Court in recess to discuss his instruction with counsel. The military judge explained that he provided the instruction because defense counsel's "questions as to abandonment and the witness' opinion as to whether [Appellant] thought they were abandoned or not came awfully close to the ultimate question in this case." (R. at 553.) The military judge then conferred with the parties regarding a more specific instruction for the members and gave the following instruction without objection:

> Members, during Colonel [KH]—and I want to clarify the instructions I gave you before I put you back in the deliberation room—during Colonel [KH]'s testimony, you heard him discuss whether he knew or believed the accused had the technical knowledge to distinguish whether devices could be used on some other program or were essentially garbage. You may consider that portion of his testimony on that subject. But also during his testimony, you heard him testify that if [Appellant], the accused, deemed devices abandoned, they were abandoned. You are going to disregard that portion of his testimony and you're not to consider it for any purpose. The facts of this case are for you to decide, and

> it's up to you, and you alone, who will determine what the facts are in this case and the ultimate questions presented to you.

(R. at 561.)

Findings Instructions

Prior to deliberations on findings, the military judge provided instructions to the members. (R. at 656.) The military judge properly instructed the members on the elements they were required to find beyond a reasonable doubt for each specification under a larceny by withholding theory. (R. at 657-663.) The military judge then instructed the members that withholding "means a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property, or it may arise a result of devoting property to a use not authorized by its owner. (R. at 664.) He then instructed that the withholding must be wrongful and that in "determining whether the withholding was wrongful, [the members] should consider all the facts and circumstances presented by the evidence. (Id.) Next, the military judge instructed the members on the defense of abandoned property:

> The evidence has raised the issue of whether the property was abandoned. In deciding this issue, you should consider, along with all the other evidence that you have before you, the place where and the conditions under which the property was found as well as how the property was marked. "Abandoned property" is property which the owner has thrown away, relinquishing all right and title to and possession of the property with no intention to reclaim it. One who finds, takes, and keeps abandoned property becomes the new owner and does not commit larceny. The burden is on the government to prove each and every element of larceny beyond a reasonable doubt. The accused cannot be convicted unless you are convinced beyond a reasonable doubt that the property was not abandoned.

(R. at 665.) The military judge then instructed the members on mistake of fact. (R. at 665.)

ARGUMENT

I.

APPELLANT'S CONVICTIONS FOR LARCENY OF GOVERNMENT PROPERTY ARE LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023) (citing United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

Factual and Legal Sufficiency

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2017). The term reasonable doubt, however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) aff'd 77 M.J. 289 (C.A.A.F. 2018). In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence in favor of the prosecution. United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F.

2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. King, 78 M.J. at 221.

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witness," this Court is "convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of the evidence is limited to the evidence admitted at trial. Article 66(d)(1), UCMJ[2]; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

In the performance of this review, "the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt." United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). While this Court must find that the evidence was sufficient beyond a reasonable doubt, it "does not mean that the evidence must be free of conflict." United States v. Galchik, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citations omitted).

Larceny

To sustain a conviction for larceny, as alleged in Specifications 5, 7, and 10 of the Charge and accounting for the exceptions and substitutions made by the panel, the government had to prove: (1) that Appellant wrongfully withheld property[3] from the possession of the United States; (2) that the property belonged to the United States; (3) that the property value was of

[2] Appellant's conviction stems from offense prior to 1 January 2021, therefore the previous version of Article 66(d)(1) applies.

[3] For Specifications 5 and 7 the property at issue was an iPhone 8 and for Specification 10, the property at issue was an iPhone X.

some value; and (4) that the withholding by Appellant was with the intent to permanently deprive the United States of the use of the property. MCM, pt. IV, para. 64.b.(1).

Analysis

Appellant challenges his conviction on the basis that the government failed to prove that the United States owned the phones at issue. (App. Br. at 6.) Specifically, Appellant asserts the government failed to overcome the defense of abandoned property. (App. Br. at 6-7.) This is unpersuasive because the government introduced evidence that established that Appellant sold the three phones at issue within a month of initial purchase. This quick turn from purchase to sale contradicts the notion that the phones were abandoned and is sufficient evidence from which a rational factfinder could have found the government proved each element of the offense beyond a reasonable doubt.

"Abandoned property is property that the owner has thrown away. The former owner has relinquished all right or title to, and possession of, the property with no intent to reclaim them." United States v. Meeks, 32 M.J. 1033, 1035 (A.F.C.M.R. 1991) (citations omitted). Having no owner, abandoned property cannot be stolen and one who finds it becomes its new owner and not a thief. Id. Because a larceny conviction requires an intent to steal, if Appellant had an honest belief that the property was abandoned, he had a complete defense. United States v. Turner, 27 M.J. 217, 220 (C.M.A. 1988) (internal quotation marks and citations omitted). But "intent to steal may be proved by circumstantial evidence." United States v. Gleiser, No. ACM 38155, 2013 CCA LEXIS 1112 (A.F. Ct. Crim. App. Nov. 26, 2013) (unpub. op.). Here, the evidence provided by the government demonstrated not only that the government still retained a possessory interest in the three phones, but also that Appellant sold the phones to Gazelle with the intent to steal.

The crux of the issue hangs on whether the property—the three phones—had been abandoned at some point by the United States government. The phones were not. Under Meeks, abandonment requires complete relinquishment of ownership with no intent to reclaim. 32 M.J. at 1035. Colonel KH's testimony that a number of the phones were essentially garbage and that the unit was the unit did not know how to get rid of them, does not meet this high threshold. (App. Br. at 6-7.) Similarly, while an honest belief in abandonment constitutes a defense, the evidence presented by the government negated the presence of such a belief.

First, Colonel KH testified that he *never* authorized Appellant to take the phones nor to sell them for his own personal gain. (R. at 606, 636.) This demonstrates two things: (1) Appellant never asked for the authority to dispose of these items and (2) Appellant had no reason to believe that he had any such authority. Reinforcing that point, the testimony at trial clearly established that no other member of the unit believed these phones were abandoned and converted them to their own personal use. (R. at 545, 538, 492.) This evidence contradicts Appellant's citation to Colonel KH's testimony that the "phones were abandoned, that MSgt Copp was able to make that determination, and that he essentially had his leadership's blessing to do what he wanted with them." (App. Br. at 7.) Appellant never had his leaderships blessing to do so. Colonel KH stated point blank that he had not given Appellant authority to take the phones or to sell them for personal gain. (R. at 606, 636.) More importantly, Appellant's citation to this "abandonment" testimony beclouds the facts. (App. Br. at 7.) That evidence was not before the members. The military judge specifically instructed the members to disregard the testimony related to Colonel KH's assertion that if Appellant deemed devices abandoned, they were abandoned." (R. at 561.)

Appellant attempts to analogize his case to the facts of United States v. Morissette, 342 U.S. 246 (1952) where a civilian's conviction for larceny was overturned because the court had not considered the potential defense of abandonment. But there are three important distinguishing factors between Appellant's case and Morissette: (1) the military judge here instructed the members on abandonment; (2) while Morissette was a civilian, Appellant was a long-serving military member with intimate knowledge of the very unit from which he withheld the phones; and (3) the Court in Morissette did not find that the defense of abandonment would have applied, merely that it was error not to consider the defense at all. As the Court noted, a jury "considering Morissette's awareness that [the casings taken] were on government property, his failure to seek any permission for their removal and his self-interest as a witness, might have disbelieved his profession of innocent intent." Id. at 276.

As the military judge instructed the members, the totality of the circumstances are to be considered when determining whether the withholding was wrongful. (R. at 664.) And here, the most damning fact against Appellant provides sufficient evidence to justify a reasonable finder of facts determination that Appellant did not honestly believe that these three phones were abandoned—the timing of the order and the sale by Appellant to Gazelle:

Item	Date Shipped to Vendor/ Purchased	Date Sold to Gazelle
Specification 5—iPhone 8	December 15, 2017	January 4, 2018
Specification 7—iPhone 8	December 15, 2017	January 9, 2018
Specification 10—iPhone X	December 29, 2017	January 29, 2018

(Pros. Ex. 11-12, 15-16, 22.) Less than one month after ordering each of these phones, Appellant was selling them for personal profit to Gazelle. The government barely had time to receive the

items—let alone use them for testing—before Appellant sold the phone on for a personal profit to him, and a loss the United States government. This timetable sets these three phones apart from all the others and perhaps explains why the members convicted Appellant of these offenses and not the other nine items for which he was charged. Moreover, the unit was still purchasing phones in April and July of 2018, which suggests that Appellant's January 2018 sale of phones purchased in December 2017 was not a situation where the unit was decommissioning and Appellant needed to find a way to get rid of excess phones. (Pros. Ex. 17-18.) The members were properly instructed by the military judge on the defense of abandoned property (R. at 665), but as the Court suggested could happen in Morissette, they did not believe him. Morrissette, 342 U.S. at 276.

Appellant had the opportunity due to a lack of any accountability beyond himself within the unit, and he took advantage of that opportunity in exchange for a personal profit. The evidence introduced at trial demonstrated that Appellant was the sole source of acquisition and accountability for the electronic devices used by the TONTO program. (R. at 454-455, 459-460, 536, 580-581.) While the phones were purchased through the NSA contracting office, the NSA had no ability to track or maintain accountability of the items once they were delivered to Appellant's home. (R. at 456-457, 516-517.) The unit trusted Appellant and believed that he could function as the sole point of accountability for government property. (R. at 580-581.) Yet, the unit had none of the usual means of property accountability such as hand receipts, property labels, or a functional inventory list. (R. at 492, 520.) These facts establish that Appellant had the opportunity to take advantage of the system if he wished to with little to no chance of detection due to the lack of oversight over the testing materials.

Importantly, the evidence also established that the testing materials, including the phones of which Appellant was convicted were purchased through the government and paid for by government funds. (R. at 457-460, Pros. Ex. 1-18.) Even Colonel KH acknowledged, they were property of the United States government, not personal property. (R. at 538.) The phones remained government property until they were "abandoned" or properly disposed of. Moreover, the evidence established that the devices could often be reused for testing and their internal components, such as lithium batteries, retained value even after testing. (R. at 529-530, 537-538, 524.) For the three phones Appellant was convicted of alone, Appellant received $1,220 from Gazelle. These facts demonstrate that the phones were property of the United States that retained some value.

Moreover, the record is devoid of any indication that the government had thrown the phones away, authorized the disposal of the phones, or that Appellant had even once tried to dispose of the phones through proper channels. The panel members are permitted to use their common sense and knowledge of the ways of the world in evaluating the evidence. United States v. Menard, 2025 CCA LEXIS 137, at *12 (A.F. Ct. Crim. App. Mar. 28, 2025). Those panel members would have known, like the witnesses in this case, that there are processes in place for the disposal of government property, and Appellant did not follow them. (R. at 492, 472.) For the defense of abandonment to apply, Appellant must have had an honest belief that the property was abandoned. 27 M.J. at 220. Appellant was a thirteen year Master Sergeant at the time of the offenses. (*Personal Data Sheet*, dated 20 April 2023, ROT, Vol. 1.) He had neither sought nor obtained permission to dispose of the phones by taking them into his personal possession. As a long-serving member of the military and as a senior NCO, he knew better. All told, the three phones upon which Appellant's convictions are based were purchased by the

United States government for the United States government in December 2017. Less than a month later Appellant sold those three phones to Gazelle for personal profit, a purpose not authorized by the property holder. The panel at Appellant's court-martial was convinced beyond a reasonable doubt that each element of the larceny specifications against Appellant were met and that these three phones were not abandoned property. This Court should likewise be convinced that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. Further, this Court, after weighing the evidence in the record of trial and making allowances for not personally observing the witnesses, should equally be convinced of Appellant's guilt beyond a reasonable doubt.

II.

APPELLANT'S RIGHT TO A SPEEDY TRIAL UNDER R.C.M. 707 WAS NOT VIOLATED.

Additional Facts

The Charges were preferred against Appellant on 18 December 2022. (*Charge Sheet*, ROT, Vol. 1.) On 30 December 2022, Colonel Matthew McCall, Chief Circuit Military Judge for the Eastern Circuit, signed the "Confirmation of 'Initial Trial Date'" memorandum in Appellant's case setting the "initial trial date" as 21 April 2023. (*Confirmation Memo*, dated 30 December 2022, ROT, Vol. 5.) In the Confirmation Memorandum, Colonel McCall excluded "[t]he time period from 1 [March] 23 to 20 [April] 23…from speedy trial computation [in accordance with R.C.M.] 707." (Id.) Per the Confirmation Memorandum, the government's ready date was 1 March 2023. (Id.) The Defense's ready date was 21 April 2023. (Id.) Appellant was arraigned on 21 April 2023 and entered pleas of not guilty. (R. at 1, 16.) Prior to his entry of pleas, Appellant did not file any motions or object on the grounds of a speedy trial violation.

Standard of Review

This Court reviews speedy trial claims de novo. United States v. Guyton, 82 M.J. 146, 151 (C.A.A.F. 2022) (first citing United States v. Wilder, 75 M.J. 135, 138 (C.A.A.F. 2016); and then citing United States v. Danylo, 73 M.J. 183, 186 (C.A.A.F. 2014)). But this Court reviews, "decisions granting delay under R.C.M. 707, thereby rendering that time excludable for speedy trial purposes, for an abuse of discretion." Guyton, 82 M.J. at 151 (citing United States v. Lazauskas, 62 M.J. 39, 41-41 (C.A.A.F. 2005). "[I]n the absence of an abuse of discretion by the officer granting the delay, there is no violation of R.C.M. 707." Lazauskas, 62 M.J. at 42. When an issue is forfeited by failure to raise it during the trial, it is subject only to plain error review. United States v. Harcrow, 66 M.J. 154, 156 (C.A.A.F. 2008). Under a plain error analysis, the Appellant must demonstrate that "(1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the [appellant]." United States v. Clifton, 71 M.J. 489, 491 (C.A.A.F. 2013). The appellant bears the burden of establishing plain error. United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007).

Law and Analysis

Appellant's right to a speedy trial under R.C.M. 707 was not violated. In relevant part, R.C.M. 707(a) establishes that an accused shall be brought to trial within 120 days of the preferral of charges. For purposes of R.C.M. 707, an "accused is brought to trial…at the time of arraignment." R.C.M. 707(b)(1). Applying the speedy trial provisions of R.C.M. 707(c) does not merely consist of calculating the passage of calendar days. After referral, the rule states that "[a]ll [] pretrial delays approved by a military judge…shall be…excluded" from the 120-day clock imposed by R.C.M. 707(a)(1). R.C.M. 707(c). The Discussion to R.C.M. 707 emphasizes that "[t]he decision to grant or deny a reasonable delay is a matter within the sole discretion

of…a military judge…based on the facts and circumstances then and there existing." R.C.M. 707(c)(1) Discussion.

Charges were preferred against Appellant on 18 December 2022, triggering the 120-day timeline. (*Charge Sheet*, ROT, Vol. 1.) The government was ready and willing to bring Appellant to trial on 1 March 2023. However, Appellant's defense team was not available for trial until 21 April 2023. Appellant acknowledges that R.C.M. 707 "contemplates that the speedy trial clock may be modified through exclusions of time and reasonable delays. (App. Br. at 10.) Despite Appellant's assertion that the record of trial contains no documentation of exclusions of time (App. Br. at 10), the Confirmation Memorandum reflects the exclusion of time between 1 March 2023 and 21 April 2023 for purposes of speedy trial computation. (*Confirmation Memo*, dated 30 December 2022, ROT, Vol. 5.) The exclusion of time ordered by the military judge appears to reflect the difference between the government's ready date and that of the defense. (Id.) Appellant was arraigned on 21 April 2023.

Accounting for the military judge's exclusion of time, Appellant was arraigned 73 days after preferral of charges on 18 December 2022—well within the 120 day limit established by R.C.M. 707. The government complied fully with the requirements of R.C.M. 707, as the time excluded was properly granted and documented by the military judge, and the total elapsed time before arraignment remained within the prescribed 120-day limit. Appellant's speedy trial rights were not violated. Accordingly, this Court should deny Appellant's request for relief.

III.

THE MILITARY JUDGE DID NOT ERR WHEN HE DID NOT INTEREPRET THE MEMBERS' FINDINGS AS "NOT GUILTY."

Additional Facts

Prior to deliberations, the military judge instructed the members on the law they were required to follow as they deliberated and voted on findings. (R. at 656-80.) One portion of the instructions explained, "[i]f you find the accused guilty of any specification under the charge, then the finding as to the charge must also be guilty." (R. at 671-72.) While another portion stated, "[y]ou may change the amount described in the specification and substitute any lesser specific amount as to which you have no reasonable doubt, or you may change the amount described in the specification and substitute one of the following phrases: more than $500.00, $500.00 or less, or **some value**." (R. at 666-67.) (emphasis added)

After deliberating for approximately five hours, the members indicated they had reached findings and their "findings were reflected on the findings worksheet." (R. at 709, 712.) On the findings worksheet, the members found Appellant guilty of Specifications 5, 7, and 10 of the Charge excepting the charged dollars amounts[4] and substituting for "some value." (App. Ex. LXIV.) However, on the findings worksheet, the members crossed out "Of the Charge Guilty." (Id.) Upon review, the military judge identified "we have findings as to some specifications as of guilt; however, the charge does not match those findings." (R. at 713.) The military judge

[4] Specifications 5 and 7 of the Charge alleged that Appellant wrongfully withheld iPhone 8 cellular phones, each valued at $832.00. (*Charge Sheet*, 20 December 2022, ROT, Vol. 1.) Specification 10 of the Charge alleged that Appellant wrongfully withheld an iPhone X cellular phone valued at $1,209.97. (Id.)

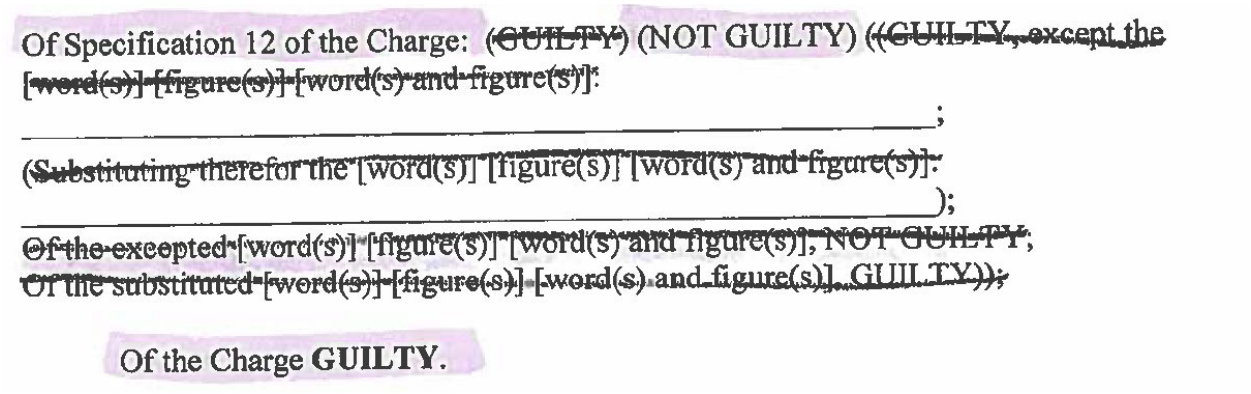
viewed it as a "technical error" and explained to the parties he intended to give the members a fresh findings worksheet and to re-advise them on that particular portion." (Id.)

Trial defense counsel objected to "any foot-stomping or highlighting to reach a certain finding." (R. at 717.) The military judge reiterated that would tell the members "to review the entire procedural instructions on findings prior to addressing the new findings worksheet," but he was not going to re-read the instructions in their entirety. (R. at 720.) The military judge then instructed the members:

> What I'm going to do is I'm going to send you back in your closed-session deliberations with the original findings worksheet and the replacement worksheet. . . Do not modify the original findings worksheet in any way. It is to remain as is. . . You will use the replacement worksheet to clarify your findings. So I ask that instead, you go back in the deliberation room and make your findings on the new worksheet. Prior to doing so, I ask that you reread the procedural instructions on findings that is in the instructions that you've been provided. I will note that by function of law, if the accused is found guilty of any specification under the charge, then the finding to the charge must also be guilty. Once again, I ask that before you tackle the new worksheet, that you read your procedural instructions on findings.

(R. at 722-23.)

Twenty-four minutes later the members returned with their verdict. (R. at 728.) After review, the military judge found the findings on the worksheet to be in proper form. (Id.) The only difference between the first findings worksheet and the second findings worksheet was the term "Of the Charge Guilty." (App. Ex. LXIV, LXVIII.) On the second findings worksheet it was no longer crossed out. (App. Ex. LXVIII.)


Of Specification 12 of the Charge: ~~(GUILTY)~~ (NOT GUILTY) ~~((GUILTY, except the [word(s)] [figure(s)] [word(s) and figure(s)]~~
_____;
~~(Substituting therefor the [word(s)] [figure(s)] [word(s) and figure(s)]:~~
_____);
~~Of the excepted [word(s)] [figure(s)] [word(s) and figure(s)], NOT GUILTY;~~
~~Of the substituted [word(s)] [figure(s)] [word(s) and figure(s)], GUILTY));~~

Of the Charge **GUILTY**.

The below findings were announced:

PRES: [Appellant], this court-martial finds you:

Of Specification 1 of the Charge: Not guilty;

Of Specification 2 of the Charge: Not guilty;

Of Specification 3 of the Charge: Not guilty;

Of Specification 4 of the Charge: Not guilty;

Of Specification 5 of the Charge: Guilty, except the figure "832" substituting therefor the words "some value";

Of Specification 6 of the Charge: Not guilty;

Of Specification 7 of the Charge: Guilty, except the figure "832" substituting therefor the words "some value";

Of Specification 8 of the Charge: Not guilty;

Of Specification 9 of the Charge: Not guilty;

Of Specification 10 of the Charge: Guilty, except the figures "$1,209.97"substituting therefor the words "some value";

Of Specification 11 of the Charge: Not guilty;

Of Specification 12 of the Charge: Not guilty;

Of the Charge: Guilty.

(R. at 729.)

The day after trial concluded, the military judge emailed both parties on an unrelated findings issue. (App. Ex. LXXIII, Attachment at 4.) He explained during his review of the Statement of Results of Trial, he recognized the members did not announce, "and of the substituted words, guilty" for Specifications 5, 7, and 10 of the Charge. (Id.) The military judge requested the parties' positions on whether this omission amounted to an ambiguous error and if it could be "cured with a post-trial session." (Id.) Trial defense counsel mistakenly believed this was related to their original objection during trial regarding the findings worksheet and maintained his objection. (Id.) In response, the military judge had both parties brief their positions. (App. Ex. LXXII, LXXIII.) In its brief, trial defense counsel again argued its' position regarding the findings worksheet discussed during trial and, for the first time, claimed the military judge was biased against the defense team. (App Ex. LXXII.)[5]

Focused on the findings worksheet, trial defense counsel argued the military judge's instructions were a "direction to find the accused guilty" and the military judge should have asked the members' "what they intended to do." (App. Ex. LXXII at 4.) In a written ruling, the military judge denied defense's request to set aside the verdict. (App. Ex. LXXIV.)

Standard of Review

Whether a verdict is ambiguous and, thus, precludes this Court from performing a factual sufficiency review is a question of law reviewed de novo. United States v. Ross, 68 M.J. 415, 417 (C.A.A.F. 2010).

[5] After the military judge received trial defense counsel's brief, he asked trial defense counsel, "[r]egarding your brief, I want to clarify, the issue I am identifying post-trial is the failure of the members to identify of the excepted words, not guilty, of the substituted words, guilty for specifications 5, 7, and 10 of the charge. Are you satisfied that your brief covers those issues?" (App. Ex. LXXIII, Attachment at 2.) Trial defense counsel replied he did not see this issue as an "ambiguous finding." (Id. at 1.) Ultimately, and without defense objection, the military judge determined the announcement was not an ambiguous finding. (App. Ex. LXXIV.)

Law & Analysis

The military judge "may . . . examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the findings." R.C.M. 921(d). The discussion section explains, "[o]rdinarily a findings worksheet should be provided to the members as an aid to putting the findings in proper form." This Court has reiterated that a "'worksheet is intended to be used by the members as *a guide* to putting their findings in proper form . . .'" United States v. Gerds, No. 37734, 2012 CCA LEXIS 450, * 4 (A.F. Ct. Crim. App. 29 Nov. 2012) (unpub. op.) (citing United States v. Barclay, 6 M.J. 785, 789 (A.C.M.R. 1978)) (emphasis in original). For the findings to be officially announced they must be "announced in the presence of all parties" by the president. R.C.M. 922(a) and (b).

Despite the function of the findings worksheet as only a guide, Appellant argues this Court should set aside his convictions for what he perceives as a "grave error." (App. Br. at 14.) Specifically, he creatively, but incorrectly, argues "the panel's findings as to the specifications did not sufficiently establish a violation under the U.C.M.J." (Id.) He claims that on the findings worksheet, when the members crossed out the terms, in Section III, "[figure(s)] [word(s) and figure(s)]" for Specification 5, 7, and 10 of the Charge there was no finding of guilty as to the element of value and, thus, "the panel essentially entered a finding of not guilty." (App. Br. at 14; App. Ex. LXIV, LXVIII.)

However, Appellant completely ignores that the members did not cross out the term "(Substituting therefor the [word(s)]" and added the term "some value," which shows the members determined that Appellant wrongfully withheld two iPhone 8 and one iPhone X cellular

phones worth "some value." (App. Ex. LXIV, LXVIII.) Moreover, both findings worksheets showed that the members, for Specifications 5 and 7 of the Charge, lined through the terms "Guilty", "Not Guilty" and kept "Guilty, except the figures $832.00 substituting the words "some value." (App. Ex. LXIV, LXVIII.) Specification 10 was identical except for the amount which was "$1,209.97." (Id.) Appellant also disregards the section of the worksheet that the members used. The findings worksheet had four sections to choose from and the first section was labeled "NOT GUILTY" and indicated it should be used "[i]f the accused is found not guilty of all specifications and the charge announce . . ." (App. Ex. LXIV, LXVIII.) The members crossed out this section on both findings worksheets. (Id.) While the third section, which was used by the members, was labeled "GUILTY OF PART OF A SPECIFICATION AND/OR BY EXCEPTIONS AND SUBSTITUTIONS" and indicated it should be used "[i]f the accused is found guilty of a specification and charge, by exception(s) or by exception(s) and substitution(s), write the excepted word(s) exactly as written on the flyer . . ." (App. Ex. LXIV, LXVIII.)

More importantly, Appellant overlooks the members' actual findings as they were announced; again, since the findings worksheet is just a guide. The announcement of the findings was unambiguous and in accordance with R.C.M. 922. Appellant was found guilty of Specifications 5, 7, and 10 of the Charge except the dollar amounts in the Charge with the substitution "some value." (R. at 729.) Like the findings in Gerds, each of the specifications of the charge "particularize[d] the actions, dates, and locations of the offenses with which the appellant was charged and [did] so in a way that would ensure the appellant [was] afforded full protection against subsequent prosecution for the same offenses." Gerds, 2012 CAAF LEXIS 450 at *6. Not only were the members properly instructed on each of the twelve specifications, but the members were also engaged in the trial process. Id. The members asked over ten

questions to the witnesses who testified, and this demonstrated their willingness to "'speak up' if and when they believed it appropriate to do so." Id. (R. at 431, 452, 468, 474, 495, 543, 548, 595, 614.) This inclination to engage in the process demonstrates that if they intended Appellant to be acquitted of all specifications as Appellant suggests, they would have spoken up. Yet not one member following the announcement of findings or any time thereafter did so.

Appellant also argues the military judge should have "resolve[d] the panel ambiguous findings in the initial worksheet, instead of instructing the panel members to enter a findings of guilty as to the charge." (App. Br. at 13.) Appellant and trial defense counsel rely on United States v. Augspurger, 61 M.J. 189, 193 (C.A.A.F. 2005) and United States v. Walters, 58 M.J. 391, 395 (C.A.A.F. 2003). However, this reliance is misplaced since both of those cases dealt with ambiguous findings in cases where the word "divers" was excepted from the specifications. Appellant's case is different because he was charged with twelve distinct allegations of larceny, not larceny on divers occasions. As a result, the ambiguity in Walters and Augspurger is inapplicable to his case.

Additionally, the military judge did not "instruct" the members to enter a finding of guilty. Instead, when the military judge realized a part of the form conflicted with the members' findings – specifically, the term "Of the Charge Guilty" in section III which was lined through despite the members finding Appellant guilty of Specifications 5, 7, and 10 of the Charge – he re-read the applicable portion of his instructions. (R. at 713, 722; App. Ex. LXIV.) That portion stated, "by function of law, if the accused is found guilty of any specification under the charge, then the finding to the charge must also be guilty." (R. at 722.) The military judge also advised the members to re-read the procedural instructions on findings. (R. at 722-23.) This was not an error; nor was it the military judge ordering the members to find Appellant guilty of the charge.

Instead, the members, having the opportunity to re-read the remainder of the instructions, kept everything the same on their new findings worksheet except the term "Of the Charge Guilty" in section III was no longer lined through. (App. Ex. LXVIII.)

Additionally, even if this Court believes there was an error on the second findings worksheet, it was an administrative error like that in Gerds. There, this Court found "the members' failure to strike through the parenthetical word 'all' . . . was an administrative error." Gerds, 2012 CAAF LEXIS 450 at *6.

Finally, if this Court determines the announcement in open court was error, Appellant was not prejudiced. While the announcement of findings in open court is a substantial right, "the presumption may yield to compelling evidence in the record that no harm actually resulted." United States v. Nichols, No. 39377, 2019 CCA LEXIS 72, *3 (A.F. Ct. Crim. App. 25 Feb. 2019). Here, as in Nichols, when looking at the entirety of the record to "determine the intent of the trial court with respect to announcement the findings" the members intended to find Appellant guilty. Id. Even though the members may have had difficulty announcing their findings, again, the intent of the members – to find Appellant guilty of Specifications 5, 7, and 10 of the Charge – was clear when the entire record is considered. Likewise in United States v. Jorell, a similar issue was brought before this Court and no prejudice was found. 73 M.J. 878 (A.F. Ct. Crim. App. 2014). There this, Court found that members' intent was clear despite the President announcing that the Appellant was "guilty of Specification 1 of Charge II except the words 'change date from 5 March to 6 March,'" when the "proper way to announce this finding would have been to except the words '5 March 2011' and substitute therefor the words '6 March 2011.'" Id. at 887 n.7. Likewise, here Appellant was not prejudiced.

The findings were unambiguous, and this Court should decline to set aside Appellant's convictions with prejudice.

IV.[6]

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY ALLOWING THE GOVERNMENT TO RECALL K.H.[7] AS A WITNESS.

Additional Facts

The first witness defense called during its' case in chief was Colonel KH, a Joint Special Operations Command (JSOC) director. (R. at 506.) During his direct examination, he was asked who had authority to dispose of the cellular phones. (R. at 528.) Colonel KH testified he did not know because it was "such a hodgepodge, I don't even know who owned what because they weren't on the JSOC purchase order, there weren't on a JSOC hand receipt." (Id.)

The defense also called Lt Col KC, who had previously been in the same unit as Appellant, to explain, generally, how cellular phones are traditionally disposed of following an operation. (R. at 602.) During Lt Col KC's direct testimony, trial defense counsel attempted to clarify who had the authority to dispose of the cellular phones. He first asked if the director at JSOC, who oversaw a program, would be the one to determine disposition of the cellular phones. (R. at 606.) Lt Col KC replied, "if they pay for funding, it seems like they would be the one." (Id.) Trial defense counsel also asked if it was "really commanders directing their subordinates on whether something . . . has value or not?" (R. at 607.) Lt Col KC stated, "Absolutely." (Id.) On cross-examination, when questioned about disposition authority, Lt Col KC reiterated that

[6] In the body of Appellant's brief, this Issue is mislabeled as "Issue V". (App. Br. at 1, 16.)

[7] Appellant mislabeled the name of the witness. In Appellant's brief he mistakenly refers to the witness as "RH" but the witness' first name begins with a "K", thus his initials are "KH". (R. at 506.)

"ultimately, it's the commander's decision, but below them some kind of property book owner or whoever the Corps is of the contract if it's a contract that bought the devices, they would make a call on what to do with the equipment based on its utility." (R. at 611.) On re-direct examination, trial defense counsel asked "when these devices come back over yeah, no one really knows whose decision it is. It sounds like you just listed three or four people when trial counsel asked you, who would make the decision how to dispose of it?" (R. at 612.) Lt Col KC agreed and said, "it just depends." (Id.)

At the end of his testimony, the military judge asked Lt Col KC, "[w]ould it be permissible for a commander to authorize a Government procured device for personal use?" (R. at 615.) Lt Col KC responded,

> [i]f a commander determined that a device was past its utility and it was essentially trash, and they and someone could use it and take it home, then it would become theirs to use for personal, whatever. Just like, you know, old kit of any sort. So yes, that could happen."

(R. at 615.)

Following Lt Col KC's testimony, Government trial counsel indicated they intended to call Colonel KH in rebuttal to ask if Colonel KH, as the director of JSOC, authorized Appellant "to take the specific devices that are charged and sell them, keep the money for personal gain." (R. at 621.) Over defense objection, the military judge ruled that he found the testimony of Colonel KH would explain

> whether he approved the accused to retain possession of these items or dispose of them, would effectively rebut the defense's case put on in their findings. Specifically, the testimony of [Lt Col KC] regarding one of the individuals that could 'okay' the disposition of property would be the commander. In this case, that commander is [Colonel RH] and his testimony as to whether or not he dictated what could happen to this property, to the accused specifically, would tend to explain that basically unanswered question that the defense put out through that testimony.

(R. at 631.)

Colonel RH was called in rebuttal and testified that he was the commander at the time in question, and he did not authorize Appellant to "take, sell, [and] keep the proceeds for his own personal gain." (R. at 636.)

Standard of Review

This Court reviews a "military judge's decision to admit rebuttal evidence for an abuse of discretion." United States v. Bavender, No. 39390, 2019 CCA LEXIS 340, *34 (A.F. Ct. Crim. App. 23 Aug. 2019) (citing United States v. Pagel, 40 M.J. 771, 781 (A.F. Ct. Crim. App. 1994). "A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." United States v. Olson, 74 M.J. 132, 134 (C.A.A.F. 2015).

The clearly erroneous standard is "a very high one" and is not rebutted by a suggestion that the military judge's findings are "maybe" or "probably wrong." United States v. Leedy, 65 M.J. 208, 213 n.4 (C.A.A.F. 2007) (citation omitted). "To reverse for 'an abuse of discretion involves far more than a difference in . . . opinion . . . The challenged action must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' in order to be invalidated on appeal.'" United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987). However, "in the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." United States v. Leiffer, 13 M.J. 337, 345 n.10 (C.M.A. 1982) (quoting Helvering v. Gowran, 302 U.S. 238, 245 (1937)) (internal quotation marks omitted).

"The abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004).

Law & Analysis

The function of rebuttal evidence is "to explain, repel, counteract or disprove the evidence introduced by the opposing party," and its scope is "defined by evidence introduced by the other party." United States v. Saferite, 59 M.J. 270, 274 (C.A.A.F. 2004) (quoting United States v. Banks, 36 M.J. 150, 166 (C.M.A. 1992)). After all, when an accused "opens the door, principles of fairness warrant the opportunity for the opposing party to respond, provided the response is fair and predicated on a proper testimonial foundation." United States v. Eslinger, 70 M.J. 193, 198 (C.A.A.F. 2011) (citing United States v. Blau, 17 C.M.R. 232, 244 (C.M.A. 1954)) (otherwise "an accused would occupy the unique position of being able to 'parade a series of partisan witnesses before the court'… without the slightest apprehension of contradiction or refutation"). Additionally, "[r]ebuttal evidence, like all other evidence, may be excluded pursuant to [Mil. R. Evid.] 403 if its probative value is substantially outweighed by the danger of unfair prejudice." United States v. Carroll, No. ACM 39530, 2020 CCA LEXIS 26, *13 (A.F. Ct. Crim. App. 28 January 2020) (citing Saferite, 59 M.J. at 274). But "less deference" will be given to a military judge "if they fail to articulate their balancing analysis on the record." United States v. Zapata, No. 40048, 2022 CCA LEXIS 583, *19 (A.F. Ct. Crim. App. 14 Oct. 2022) (citing United States v. Collier, 67 M.J. 347, 353 (C.A.A.F. 2009)).

Colonel KH's testimony was proper rebuttal evidence to Lt Col KC's testimony. Despite Appellant's claim that this was "an unaddressed topic in the defense case, trial defense counsel repeatedly introduced the question of who had authority to dispose of the charged cellular phones in its case-in-chief. Saferite, 59 M.J. at 274. (App. Br. at 19; R. at 602, 606-07, 612.) As a result, recalling Colonel KH to testify in rebuttal was necessary to explain this information, especially because during Colonel's KH's original testimony he indicated he had no idea who

had authority to dispose of the cellular phones. Id. (R. at 528.) Based on this, when Lt Col KC identified that Colonel KH would have been the disposition authority, the logical inference conveyed by this questioning was whether Colonel KH ever authorized Appellant to "take, sell, [and] keep the proceeds for his own personal gain." (R. at 636.)

Here the probative value of Colonel KH's testimony – dispelling the implication that Appellant had the authority to determine what property was abandoned and could do with it what he liked, including selling it online – far outweighed the danger of unfair prejudice. The military judge's failure to articulate a Mil. R. Evid. 403 balancing test on the record does not change the analysis. This did not "confuse the issues" as the Appellant suggest because Appellant is the one who introduced the question of who had the authority to dispose of the cellular phones. (App. Br. at 19; R. at 606-07.) Appellant cannot introduce a topic or muddy the waters and then cry foul when the Government addresses the same issue. In other cases, this Court and our superior court have found the probative value to be outweighed where the rebuttal evidence included uncharged misconduct or a contentious topic. See Saferite, 59 M.J. at 274 (rebuttal evidence "merely" alleged uncharged misconduct of conspiracy); United States v. Fierro, No. 39193, 2018 CCA LEXIS 292, *22 (A.F. Ct. Crim. App. 6 Jun. 2018) (unpub. op.) (rebuttal evidence of adultery and an abortion failed the Mil. R. Evid. 403 balancing test). However, Colonel KH's testimony was innocuous in this regard. The military judge properly admitted the rebuttal testimony of Col KH so that trial counsel could explain, through the witness' testimony, that even though Colonel KH was the disposition authority he did not actually grant Appellant the authority to take and sell the charged property.

Even considering the lesser deference afforded to the military judge, since he did not articulate his Mil. R. Evid. 403 balancing test on the record, he did not abuse his discretion in

allowing Colonel KH to testify in rebuttal. The United States respectfully requests that this Court deny Appellant's requested relief to set aside his conviction.

V[8].

THIS COURT LACKS THE AUTHORITY TO MODIFY THE STAFF JUDGE ADVOCATE'S INDORSEMENT TO THE ENTRY OF JUDGMENT.

Additional Facts

The Staff Judge Advocate's First Indorsement to the Statement of Trial Results (STR) and the Entry of Judgment (EOJ) in Appellant's case contains the following statements: "[t]he following criminal indexing is required… (1) "DNA processing under 10 U.S.C. § 1565 and DoDI 5505.14: Yes"; and (2) "Fingerprint Card and Final Disposition in accordance with DoDI 5505.11: Yes." (*STR* and *EOJ*, ROT, Vol. 1.)

Standard of Review

This Court has an independent obligation to satisfy itself of its own jurisdiction. M.W. v. United States, 83 M.J. 361, 363 (C.A.A.F. 2023). This Court reviews issues of jurisdiction de novo. United States v. Begani, 81 M.J. 273, 276 (C.A.A.F. 2021). Questions of statutory construction are reviewed de novo. United States v. Wilson, 76 M.J. 471, 474 (C.A.A.F. 2021) (citing United States v. Atchak, 75 M.J. 193, 195 (C.A.A.F. 2016)).

Law and Analysis

Appellant asserts that the First Indorsement to the EOJ "erroneously subjected [Appellant] to criminal indexing for a non-qualifying offense." (App. Br. at 14.) Appellant's argument is without merit and is a collateral matter beyond this Honorable Court's authority to

[8] This Assignment of Error is listed as Issue V in Appellant's Issues presented but appears as Issue IV in the body of Appellant's brief. (App. Br. at 1, 14.) This brief addresses the assignments of error in the order they appear in the issues presented for ease of review.

review. As an Article I Court, this Court's authority "is not only circumscribed by the constitution, but limited as well by the powers given to it by Congress." In re United Mo. Bank, N.A., 901 F.2d 1449, 1452 (8th Cir. 1990). Congress has not granted this Court the authority to act in this case, therefore this Court should decline Appellant's invitation to commit an ultra vires act.

A. This Court lacks the authority to modify the First Indorsement to the Entry of Judgment.

This Court recently held in its published opinion in United States v. Vanzant, that 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are beyond the scope of this Court's jurisdiction under Article 66, UCMJ. 84 M.J. 671, 681 (A.F. Ct. Crim. App. 2024). In accordance with this Court's holding in Vanzant, the DNA and fingerprint criminal indexing requirements are also collateral consequences of Appellant's conviction and are beyond the scope of this Court's jurisdiction.

B. The Statement of Trial Results and Entry of Judgment were prepared correctly in accordance with the applicable guidance.

Even if this Court has jurisdiction to review this issue, Appellant was still subject to criminal indexing requirements per Air Force and Department of Defense regulations. Fingerprints and criminal history record information (CHRI) are required to be collected and submitted to the Criminal Justice Information Services Division of the FBI for all "Service members who are investigated for all offenses punishable by imprisonment listed in the punitive article of Chapter 47 of Title 10, U.S.C., also known and referred to…as the Uniform Code of Military Justice." Department of Defense Instruction (DoDI) 5505.11, *Fingerprint Reporting Requirements*, para. 1.2(b)(1), (Oct. 31, 2019). Appellant is correct in his assertion that

"nonserious" offenses are excluded from the reporting requirements for criminal history indexing. (App. Br. at 15.) But Appellant misapprehends what qualifies as a "nonserious" offense.

Appellant was found guilty of three specifications of larceny, in violation of Article 121, UCMJ. (*EOJ*, ROT, Vol. 1.) DoDI 5505.11, para. 1.2(d), provides a list of "non-serious" offenses that are excluded from the fingerprint collection requirement: "drunkenness, vagrancy, disturbing the peace, curfew violation, loitering, false fire alarm, non-specific charges of suspicion or investigation, and [minor] traffic violations. Air Force Manual (AFMAN) 71-102, *Air Force Criminal Indexing*, Attachment 5 (Jul. 21, 2020), provides a list of additional offenses which are excluded from fingerprinting requirements per Air Force Regulation. Notably, Wrongful Appropriation of a value of $1000 or less in violation of Article 121 is excluded from fingerprinting requirements. (Id.) Larceny, on the other hand, is not listed as an excluded offense. Larceny and wrongful appropriation are different crimes requiring proof of different elements. *Compare* MCM, pt. IV, para. 46.c.(a)(1) and para. 46.c.(a)(2). By the plain language of AFMAN 71-102, Appellant's convictions for larceny are not excluded from criminal history indexing. Thus, the Staff Judge Advocate followed the appropriate Air Force regulations in signing the First Indorsement to the EOJ. DAFI 51-201, *Administration of Military Justice*, para. 29.19. If Appellant believes his criminal indexing was an error, the proper avenue for relief is filing for expungement pursuant to Chapter 9 of AFMAN 71-102.

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

VI.

APPELLANT IS NOT ENTITLED TO RELIEF FOR POST-TRIAL DELAY.

Additional Facts

Appellant was sentenced on 27 April 2023. (*Entry of Judgment*, ROT, Vol. 1.) On 13 October 2023, the government attempted to notify Appellant of his right to submit a Direct Appeal pursuant to Article 66, UCMJ. (*Notice of Right to Submit Direct Appeal*, dated 12 October 2023, ROT, Vol. 1.) The post office was unable to deliver the notice to Appellant. (*Email traffic between Appellant and AFSOC/JA*, dated 29 November 2023, ROT, Vol. 1.) A member of the AFSOC legal office emailed a copy of the notice to Appellant on 29 November 2023 and informed him of the attempted delivery via certified mail. (Id.) On 30 November 2023, Appellant acknowledged receipt of the notice via email. (Id.)

On 8 January 2024, Appellant filed his Notice of Direct Appeal with this Court. (*Notice of Direct Appeal*, dated 8 January 2024.) The next day, this Court docketed this case and ordered the government to forward a copy of the record of trial to this Court. (*Notice of Docketing*, dated 9 January 2024.) On 31 May 2024, the record of trial and a certified verbatim transcript was provided to this Court and the Appellate Defense Division. (*Receipt of Record of Trial*, dated 31 May 2024, ROT, Vol. 1; App. Br. at 21.)

After the certified verbatim transcript was delivered to this Court, Appellant requested and received seven enlargements of time, all of which were opposed by the government. On 18 March 2025, Appellant requested an eighth enlargement of time which was denied by this Court. (*Motion for Enlargement of Time (Eighth)*, dated 18 March 2025; *Order*, dated 21 March 2025.) Appellant submitted his brief on 27 March 2025, after 444 days had elapsed since docketing.

The government requested one five-day enlargement of time, which this Court granted. From docketing with this Court to the date of this filing, 479 days have elapsed.

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 appellant's 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 an appeal must be within 150 days. Id. at 633-634. Additionally, in Moreno the CAAF held that 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. 63 M.J. at 142.

When a case does not meet either the 150-day Livak standard or the 18-month Moreno standard, the delay is presumptively unreasonable. 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.

Article 66(d)(2) states "[i]n any case before the Court of Criminal Appeals…the Court *may* provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record." (emphasis added). Appropriate relief is not synonymous with meaningful relief. United States v. Valentin-Andino, __ M.J. __, No. 24-0208, 2025 CAAF LEXIS 248, at *9 (C.A.A.F. 31 Mar. 2025).

Analysis

A. *The 150-day Livak standard does not apply to direct appeals, and the 18-month Moreno standard has not yet been violated. Thus, Appellant is not yet entitled to the presumption of unreasonable post-trial delay.*

In assessing Appellant's claims, this Court must first determine whether the post-trial delay is facially unreasonable. Moreno, 63 M.J. at 136. Appellant argues the delay in this case was presumptively unreasonable under the specific time standard established in Livak. (App. Br. at 22). However, this Court recently held that the 150-day threshold established in Livak does not apply to direct appeals. United States v. Boren, No. ACM 40296 (f rev), 2025 CCA LEXIS 103, at *47 (A.F. Ct. Crim. App. Mar. 19, 2025) (unpub. op.). As this Court noted in Boren, on 23 December 2022, Congress amended Articles 66 and 69, UCMJ[9]. Boren, unpub. op. at 47. These statutory changes significantly altered the sequence of post-trial events in cases appealed under Article 66. "[U]nder the new procedures applicable to appeals under Article 66(b)(1), UCMJ (2024 MCM), an appellant is now in the driver's seat in determining whether post-conviction review is concluded under Article 65, UCMJ, or whether to seek appellate review from this [C]ourt." Boren, unpub. op. at 47-48. In Boren, this Court declined to establish new specific timeframes for a facially unreasonable delay to cover the period of time from sentencing

[9] National Defense Authorization Act for Fiscal Year 2023 (FY23 NDAA), Pub. L. No. 117-263, §544, 136 Stat. 2395 (Dec. 23, 2022).

to docketing in direct appeal cases. Boren, unpub. op. at 48. In Boren, this Court applied the 150-day Livak standard to the period of time between the filing of the appellant's notice of direct appeal and docketing with this Court in determining that there was no facially unreasonable delay under Livak. Boren, unpub. op. at 48. Here, only 145 day elapsed between Appellant filing his Notice of Direct Appeal and docketing of the record of trial with this Court. (*Notice of Direct Appeal*, dated 8 January 2024; *Receipt of Record of Trial*, dated 31 May 2024, ROT, Vol. 1.) Thus, consistent with this Court's opinion in Boren, the 150-day Livak standard was complied with and there was no facially unreasonable delay.

Appellant does not assert a violation of the 18-month standard established in Moreno. But this Court held in Boren that the 18-month standard from docketing to appellate decision applies to direct appeals. Boren, unpub. op. at 48-49. This case is still within the 18 month timeframe for appellate review established in Moreno, 63 M.J. at 142. That leaves enough time for this Court to meet its 18-month deadline under Moreno. Any prejudice to Appellant is speculative at this point. Thus, this Court should find that Appellant is not entitled to the presumption of unreasonable post-trial delay and deny this assignment of error.

B. *No due process violation has occurred, and Appellant has not been prejudiced by a post-trial delay.*

Even assuming a violation of the 18-month Moreno standard or the 150-day Livak standard, that does not end the inquiry. There was no due process violation under the Barker analysis.

Relevant to the second factor, much of the delay in this case is attributable to the unique mechanisms of direct appeals. Prior to Appellant filing his Notice of Direct Appeal, the government was not required by Air Force regulations to provide a verbatim transcript. Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial*, dated 21 April 2021,

para. 11.1.1. Upon Appellant filing his Notice of Appeal and docketing with this Court, the court reporter worked to produce an 815 page verbatim transcript. From the date this Court docketed Appellant's case to the date the verbatim transcript and ROT was provided to this Court and Appellate Defense Counsel, 144 days had elapsed. After this Court received the transcript, Appellant requested and received seven enlargements of time, resulting in 301 days elapsing from receipt of the transcript to Appellant filing his assignments of error. While Appellant asserts the government has caused unreasonable delay, he failed to mention the time attributable to his requests for enlargements of time. (App. Br. at 22.) And as discussed above, there is still approximately three months for this Court to conduct its Article 66, UCMJ, review within the 18-month deadline from docketing under Moreno. Thus, the second Barker factor weighs in favor of the government.

The third Barker factor favors neither the Appellant nor 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 asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight" in his favor. Id. (quoting Barker, 407 U.S. at 528). While Appellant has now asserted his right to timely review (App. Br. at 24), he has consented to seven enlargements of time to file his brief, all of which were opposed by the government. Admittedly, the government did request one five-day extension for filing its answer but Appellant did not oppose that request. Therefore, while by virtue of the fact Appellant has now asserted his right to speedy trial review, this factor should not weigh heavily in his favor.

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 to adequately prepare his case skews the fairness of the entire system." Id. Here, Appellant provided no indication of oppressive incarceration pending appeal, or impairment of a retrial. While Appellant asserts some generalized anxiety (App. Br. at 24-25), the law requires more. "The anxiety and concern subfactor involves constitutionally cognizable anxiety that arises from excessive delay and we require an appellant to show *particularized* anxiety or concerns that is distinguishable from the normal anxiety experienced by prisoners awaiting appellate review. United States v. Toohey, 63 M.J. 353, 361 (C.A.A.F. 2006) (internal quotation marks omitted) (quoting Moreno, 63 M.J. at 140). While Appellant references loss of employment and his reduced employability in his career field (App. Br. at 24-25), our superior court has held that an appellant's "unsupported allegations of employment prejudice have no impact under [this] totality of the circumstances review" unless he supports that claim with independent evidence or provides a valid reason for failing to do so. United States v. Bush, 68 M.J. 96, 100-101 (C.A.A.F. 2009); *see also* United States v. Allende, 66 M.J. 142, 145 (C.A.A.F. 2008). Appellant has provided no independent evidence of his loss of employment opportunities, nor has he provided an explanation for his failure to do so. Moreover, the generalized anxiety that Appellant describes is no different than the anxiety experienced by any other similarly situated appellant who has difficulty obtaining employment by virtue of their criminal convictions.

Further detracting from his prejudice argument, Appellant requested seven enlargements of time to file his appeal, resulting in an additional 301 days of delay from receipt of the verbatim transcript to filing of his assignments of error. To the extent that Appellant was "prejudiced" by any delay caused by the omissions from the record of trial, 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 to all four Barker factors 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 docketing of the appellant's appeal and the Navy-Marine Court of Criminal Appeals making their decision. 63 M.J. 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. 63 M.J. at 358. In contrast, this Court has not yet exceeded the 18-month threshold set in Moreno. Because no facially unreasonable delay has occurred and any prejudice to Appellant is speculative, a determination about the public's perception of the fairness and integrity of the military justice system is premature.

In summary, the presumption of post-trial delay has not yet been triggered, and Appellant has not experienced any prejudice. Thus, this Court should deny this assignment of error.

C. *Appellant is not entitled to relief under Tardif, nor under Article 66(d)(2).*

Appellant argues that, even if he is not entitled to relief pursuant to Moreno, the delay in this case still entitled him to have this Court provide relief under Article 66(d)(2), UCMJ. (App. Br. at 26.) In support of his argument, Appellant cites to United States v. Gay, 74 M.J. 736, 744

(A.F. Ct. Crim. App. 2015) where this Court provided a non-exhaustive list of factors to be considered when assessing whether relief was appropriate under United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002). But, on 31 March 2025, our superior court decided Valentin-Andino. 2025 CAAF LEXIS 248. In Valentin-Andino, CAAF stated that Tardif and its progeny have been superseded by Article 66(d)(2). 2025 CAAF LEXIS 248, at FN 4. Considering Valentin-Andino, it is unclear whether Gay remains good law and this Court has not yet provided guidance on what standards it will use to analyze whether relief is appropriate under Article 66(d)(2). To the extent this Court still finds the factors listed in Gay as persuasive for purposes of its analysis under Article 66(d)(2), relief is not appropriate in this case.

Article 66(d)(2) states this Court "*may* provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record." In Gay, this Court laid out a non-exhaustive list of factors to be considered in determining whether to grant relief:

> (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.

74 M.J. at 744. The facts and circumstances of this case do not meet any of the non-exhaustive Gay factors. First, the 18-month standard set forth in Moreno has not yet been violated. There is ample time for this Court to conduct its Article 66, UCMJ, review before its 18-month deadline under Moreno. There is no evidence up to this point, that there has been any harm to the Appellant or the institution. Moreover, the Air Force has since changed its policies to require verbatim transcripts in all general and special courts-martial with a finding of guilty, so the type of delay present in this case is unlikely to recur. Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 3 October 2024, para. 20.47.1. Given the lack of any delay violative of the Moreno standards, this Court granting relief would not be consistent with the dual goals of justice and good order and discipline, given the nature of the charges of which Appellant was convicted and the absence of governmental bad faith. Providing sentence relief without a showing of actual prejudice would not be *appropriate*. If this Court were to grant sentence relief, it would be rewarding Appellant for taking 301 days to file his brief after receipt of the verbatim transcript.

In this case, Appellant has not experienced any prejudice to date, and any future prejudice caused by this Court being unable to render a decision within 18 months is speculative. A remedy is not warranted, nor would one be appropriate given the totality of the circumstances. This Court should deny this assignment of error.

VII.

THE UNITED STATES DID NOT VIOLATE APPELLANT'S SIXTH OR FIFTH AMENDMENT RIGHTS IN NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURT-MARTIAL.

Standard of Review

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

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members in accordance with Article 52. (R. at 671-674.) Appellant made no objection to this at his trial which was completed on 27 April 2023. (R. at 812.) Appellant acknowledges that the Court of Appeals for the Armed Forces recently addressed this issue in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023) *cert. denied*, 144 S. Ct. 1003 (2024). (App. Br. at 28.) Appellant also acknowledges that Anderson's holding that non-unanimous findings do not violate a court-martial accused's constitutional rights, is controlling upon this Court. (App. Br. at 28.)

In Anderson, our superior Court reaffirmed that servicemembers do not have a Sixth Amendment right to a jury trial. 83 M.J. at 295. CAAF rejected the same claims Appellant raises now:

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

Id. at 298. CAAF held that Fifth Amendment due process does not require unanimous verdicts in courts-martial. Id. at 300. Further, our superior Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at 302. This Court should follow CAAF's binding precedent and deny Appellant's assignment of error.

CONCLUSION

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

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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 1 May 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**REPLY BRIEF ON BEHALF OF**
	)	**APPELLANT**
Appellee,	)	
	)	
v.	)	Before Panel No. 2
	)	
Master Sergeant (E-7),	)	No. ACM 24029
JASON R. COPP,	)	
United States Air Force,	)	8 May 2025
Appellant.	)	

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

Appellant, Master Sergeant (MSgt) Jason R. Copp, pursuant to Rule 18(d) of this Court's Rules of Practice and Procedure, files this Reply to the Government's Answer (Ans.), dated 1 May 2025. In addition to the arguments in his opening brief (Opening Br.), filed on 27 March 2025, MSgt Copp submits the following arguments for the issues below.

I.

The Government did not prove beyond a reasonable doubt that the United States had a superior possessory interest in abandoned property, and now attempts to overcome that by shifting the burden to MSgt Copp.

The Government failed to meet its burden of proving beyond a reasonable doubt that MSgt Copp had unlawfully withheld the electronic devices that he was convicted of stealing. Crucially, MSgt Copp could only be convicted of this offense if the Government proved that the United States had "superior right of possession." Manual for Courts-Martial, United States (2016 ed.), Part IV, ¶ c.(1).(c).(ii); *United States v. Castro*, 81 M.J. 209, 213 (C.A.A.F. 2021). As the Government concedes, the leadership of the T.O.N.T.O. program considered the electronic devices abandoned after they had been tested. (Ans. at 5.) This demonstrates that the United States did not have a superior possessory interest in the devices or, at the very least, is consistent with MSgt Copp's

genuine belief that they had been abandoned. The Government now attempts to overcome this defect in its evidence by shifting the burden onto MSgt Copp. It does so by describing abandonment as an affirmative defense carrying a "high threshold." (Ans. at 12.) But abandonment is not an affirmative defense; rather, it is an aspect of the element of a superior possessory interest by an aggrieved party. This is because a party that abandons property ceases to have a superior possessory interest. *United States v. Meeks*, 32 M.J. 1033, 1035 (A.F. Ct. Crim. App. 1991). It has always remained the Government's burden to prove that the United States had a superior possessory interest—a burden it did not carry in light of the overwhelming testimony showing that the electronic devices were abandoned and "essentially garbage." (Ans. at 12.)

The Government's insistence on MSgt Copp proving his innocence is contrary to the principles of appellate review under Article 66. This is demonstrated by *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002), a case relied upon in the Government's answer. (Ans. at 10.) In that case, the C.A.A.F. affirmed that during Article 66 review, "an appellant does not bear the burden of raising doubts about the trial-level finding of guilty." *Id.* at 400. But the Government asks this Court to do just that by referring to abandonment as a matter for which "evidence was not before the members." (Ans. at 12.) Acceptance of this hazardous position would result in an improper shifting of "the burden to appellant to raise doubts about his guilt, which would indicate 'application of an erroneous principle of law.'" *Id.* (quoting *United States v. Troutt*, 8 C.M.A. 436, 439 (1957)).

The matters contained in the record of trial defeat the Government's claim of having carried its burden of showing that the United States had a superior possessory interest in the electronic devices. While the Government makes the claim that "the record is devoid of any indication that the government had thrown the phones away," this is plainly contrary to the evidence. (Ans. at

15.) Elsewhere, the Government concedes that by way of K.H.'s testimony that the electronic devices were considered abandoned. (Ans. at 6-7.) Additionally, the Government concedes that "after the phones were used for testing, the unit did not have any program in place for recycling or any point of contact to return the testing [sic] phones to." (Ans. at 5.) No evidence was ever presented to explain how the spent devices should have otherwise been handled. Rather, the devices were "up for grabs" and MSgt Copp was authorized to do what he wanted with them. (R. at 565, 592.) Despite this massive hole in the prosecution case, the Government makes the baseless claim that "there are [sic] processes in place for the disposal of government property, and [MSgt Copp] did not follow them." (Ans. at 15.) The Government implores this Court to agree by relying on what the "panel members would have known," without citing to any evidence in the record. (*Id.*) The lack of actual disposal procedures was consistently addressed throughout the court-martial; the Government even argued during closing that it was MSgt Copp's responsibility to ascertain these unknown procedures that were apparently so mysterious that the Government itself could not produce any evidence of them. (R. at 700-01.)

Moreover, the Government's argument that the United States had a superior possessory interest was severely undermined by K.H.'s testimony that "if [MSgt Copp] deemed the phones abandoned, then they were abandoned." (Ans. at 7.) While the Government points out that the military judge limited this crucial evidence, it remains subject to this Court's factual sufficiency review as a matter contained in the entire record per Article 66(d)(1). K.H.'s sentiment was later echoed when he testified:

> [I]f [MSgt] Copp had come to me and said he was going to dispose of items – the disposal of items that were abandoned, yeah – to take and sell on the internet, if they were abandoned items there would have been means to – I wouldn't have said sell them on the internet but I would have said they were abandoned items do with them what you want.

(R. at 637.) It is the Government's burden to prove that the United States had a superior possessory interest, which implicitly includes the burden to demonstrate that the electronic devices had not been abandoned. But the testimony of K.H. strongly suggests otherwise, and the Government never presented any evidence to overcome this serious hurdle in its case. And K.H. was not alone in this. While the Government suggests that "no other member of the unit believed these phones were abandoned," that goes plainly against the record. In fact, multiple witnesses testified as to the abandoned nature of the devices. (R. at 529) (testimony of K.H. describing how tested devices were not subject to disposal procedures that that no Government agency wanted them); (R. at 570) (testimony of J.G. describing how after devices were tested "no one want them," and that "[MSgt Copp] ended up with a substantial amount of them because he was one of the last members of the team."); (R. at 605-06) (testimony of K.C. describing boxes of phones "that were essentially trash . . . we just didn't know what to do with them.").

Given the lack of evidence affirmatively showing that the devices were not abandoned, the Government urges this Court to speculate based on the proximate time between when the three devices at issue were procured and then sold by MSgt Copp. (Ans. at 13.) But such speculation does not comport with the Government's burden of proof. Multiple individuals from the T.O.N.T.O. program testified, but not a single one of them explained what the Government asks this Court to conjure up here – that the devices had not been tested before MSgt Copp assumed ownership over them. Had this been the case, the Government could have presented evidence showing that no testing had been conducted between 15 December 2017 and 29 January 2018. That it did not use its investigative and prosecutorial powers to do so should not result in a penalty against MSgt Copp. To the contrary, witness testimony established that devices were frequently ordered in-house by the T.O.N.T.O. team to fill in gaps for devices before testing sessions were

carried out. (R. at 513, 536.) For MSgt Copp to procure devices just before testing is in accord with this testimony, never mind the fact that it was never MSgt Copp's burden to prove anything.

II.

No justifiable basis existed to exclude time from the R.C.M. 707 speedy-trial calculation before arraignment in light of the statute of limitations under Article 43, U.C.M.J., 10 U.S.C. § 843.

The military judge's assignment of exclusion of time in the initial docketing order was unjustifiable under the circumstances of this case.[1] This is because the pending statute of limitations warranted arraignment at the earliest opportunity. Per Article 43, the Government would have almost certainly been barred from re-prosecuting MSgt Copp in light of the five-year statute of limitations had the charge and its specifications been dismissed under R.C.M. 707. Crucially, MSgt Copp's speedy trial rights under R.C.M. 707 would have been vindicated simply by holding an arraignment. This is a burden that the Government was required to bear. *United States v. Leahr*, 73 M.J. 364, 367 (C.A.A.F. 2014) ("It is incumbent upon the government to arraign the accused within 120 days after . . . preferral of charges."). Likewise, arraignment serves a protective function with regard to an accused's rights. *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). Despite this, the military judge gave no consideration to the necessity of arraignment, instead relying entirely on defense availability for trial for purposes of excluding time. This being so, there is no justification for delaying arraignment until after the R.C.M. 707 speedy trial clock had elapsed. In light of the pending statute of limitations, the military judge's exclusion of time was unusual and improper. *United States v. Guyton*, 82 M.J. 146, 153 (C.A.A.F.

[1] MSgt Copp acknowledges that the docketing memorandum did contain an exclusion of time between 1 March 2023 and 20 April 2023 and withdraws its argument in the opening brief that the record did not contain any exclusions. This oversight was the result of the short time frame that undersigned counsel had to complete the assignment of errors in light of this Court's denial of MSgt Copp's request for an 8th enlargement of time.

2022) (considering the unusual nature of factors influencing a delay for whether an exclusion of time is appropriate). The failure of the Government to arraign MSgt Copp as expediently as possible, and the failure of the military judge to temper any exclusion of time based on a party's availability for arraignment – rather than trial – is "too striking to have other than a serious effect on the reputation of these proceedings." *United States v. Vendivel*, 37 M.J. 854, 858 (A.F.C.M.R. 1993).

III.

The military judge disturbed the panel's findings of not guilty by instructing them to enter a contrary finding of guilty through substitutions and exceptions that resulted in a specification that did not state an offense.

The panel's initial findings worksheet unambiguously demonstrated the members' intent to find MSgt Copp not guilty of the charge and its specifications. It was only after the military judge's intervention that the panel returned a finding of guilty as to the charge, while still finding MSgt Copp not guilty of any cognizable offense under the Uniform Code of Military Justice. This is because the panel *never* found MSgt Copp guilty of stealing an item having some value. The Government obfuscates this by suggesting that the panel crossing out "Of the Charge Guilty" on the initial worksheet was contradicted by the panel's findings of guilty as to only some of the language found in specifications 5, 7, and 10. (Ans. at 25.) However, there was no conflict between the panel's findings as to the charge and each individual specification. This is because unless the panel found MSgt Copp guilty of the element of "some value" as to the allegedly stolen items, he could not be found guilty of the charge. Even after returning with a second findings worksheet the error still remained because the panel made no finding of guilty as to "some value." The Government attempts to obviate this by dismissing the worksheet as "just a guide" and explaining that the "announcement of findings was unambiguous." (Ans. at 24.) But the actual

announcement of findings contained the same error. The panel did not announce that MSgt Copp was guilty of any of the substituted language for "some value." (R. at 729.) This demonstrates that the panel may have found MSgt Copp guilty of the other elements of the offense of larceny, but that they did not believe the Government had proven that the devices had any value. For the panel to make this determination was consistent with the lack of evidence showing that the devices had any value after being tested. (R. at 605) (testimony of K.C. explaining the difficulty of determining whether the devices had any value after being tested, describing many of them as "essentially trashed."). Without this element, the finding of guilty as to the charge and specifications was invalid.

This type of situation was contemplated by the C.A.A.F. in *United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010). In that case, the C.A.A.F. recognized that a finding of guilty was invalid if exceptions and substitutions resulted in the specification no longer stating an offense. Such is what happened here, where the panel affirmatively declined to find MSgt Copp guilty of the element of "some value," leaving the remaining language of the specification without all of the required elements for larceny under Article 121, U.C.M.J. This is because that offense cannot be established unless "the property was of a certain value, or of some value." *MCM* (2016 ed.), pt. IV, ¶ 46.b.(1).(b). Importantly, "An exception by the court of part of a specification constitutes a finding that the accused is not guilty of what is alleged in the excepted language." *United States v. Nedeau*, 7 C.M.A. 718, 721 (1957). By excepting the value originally specified, the members had found MSgt Copp not guilty as to that charged language. After substituting the phrase "some value," the panel still declined to enter a finding of guilty as to that element. This left the remaining findings insufficient to state and offense. This case is analogous to *United States v. Smith*, 39 M.J. 448 (C.A.A.F. 1994). In that case the military judge entered an excepted finding of guilty as to a

specification for obstruction of justice. *Id.* at 451. However, the excepted language removed the means of obstruction which was an element of offense. *Id.* at 449. The C.A.A.F. held that the conviction could not be affirmed because the excepted specification did not state an offense. *Id.* at 451. Similarly, the panel's exception of the dollar amount alleged in the specifications without an accompanying finding of guilty as to "some value" rendered the conviction invalid. This is so regardless of whether the panel later acquiesced to the military judge's instructions by entering a finding of guilty to the overall charge. *See United States v. Ayalacruz*, 79 M.J. 747, 753 (N-M Ct. Crim. App. 2020) ("A finding of guilty to the overall charge, but not guilty to one of the elements of the charge through exceptions and **s**ubstitutions, amounts to a finding of not guilty.") (internal quotes removed).

The Government's citation to *United States v. Nichols*, No. ACM 39377, 2019 CCA LEXIS 72 (A.F. Ct. Crim. App. Feb. 25, 2019) is inapposite. (Ans. at 36.) That case dealt with ambiguity created by the panel's excepted findings for the word "leg" despite the fact that the word occurred twice in the specification and it was not clear which one had been excepted. *Id.* at *3. This Court resolved that ambiguity by ascertaining the intent of the panel based on the entire record. *Id.* Here there is no ambiguity created by the panel such that it would be necessary to examine anything other than the findings worksheets and the announcement of findings in open court. With both worksheets and during the announcement of findings, the panel declined to find MSgt Copp guilty of "some value." This was further reflected in the panel's initial determination that MSgt Copp was not guilty of the charge. The only ambiguity was what resulted from the military judge's intervention that amounted to coaching the panel into entering a finding of guilty as to the charge contrary to the panel's findings of not guilty of the specifications the necessary element of "some value."

V.

MSgt Copp should not have been subject to criminal history indexing because the offenses he was convicted of were nonserious.

The nonserious nature of the offenses that MSgt Copp was convicted of rendered them excluded from criminal history indexing. The Government suggests otherwise on the basis that the larceny is not explicitly listed as an excludable offense under Air Force Manual (AFMAN) 71-102, *Air Force Criminal Indexing* (July 21, 2020). However, this overlooks a crucial distinction. MSgt Copp was convicted of the offense of larceny as it existed in the 2016 version of the Manual for Courts-Martial. The punitive exposure that was assigned to this specific offense was based one larceny of "property other than military property of a value of $500 or less." (R. at 778) However, the sentencing range was modified with the with the passage of the 2019 Manual for Courts-Martial, which replaced it with larceny of "property other than military property of a value of $1000 or less." *MCM* (2019 ed.), pt. IV, ¶ 64.d.(1).(a). The newer version of Article 121, contemplated by AFMAN 71-102 which was published after the amendment, features a maximum penalty of a "Bad-conduct discharge, forfeiture of all pay and allowances and confinement for 1 year." *Id.* However, the version that MSgt Copp was convicted under carried a significantly lower level of severity regarding confinement with a maximum of only six months. *M.C.M.* (2016 ed.), pt. IV, ¶ 46.e.(1).(b). This lower punitive exposure renders the offense "nonserious" for purposes of criminal indexing.

All of the specifically mentioned non-indexable offenses in AFMAN 71-102 feature a maximum confinement of six months or less. This includes wrongful appropriation, which is the only offense under the 2019 version of Article 121 that has a maximum sentence of six months or less. However, because the AFMAN 71-102 was published after the 2019 M.C.M. went into effect, that explains why the 2016 offense that MSgt Copp was convicted was not included even though

it had a similarly low level of punitive exposure. Importantly, while AFMAN 71-102 provides specific instruction to Air Force authorities, it was subordinate to criminal indexing procedures under 28 C.F.R. § 20.32. AFMAN 71-102, ¶ 2.1.1. The federal regulation excludes "nonserious offenses" from criminal indexing. 28 C.F.R. § 20.32(b). The Supreme Court has held that an offense carrying a maximum confinement of six months or less is presumed to be a petty offense. *Blanton v. N. Las Vegas*, 489 U.S. 538, 543 (1989). The designation of non-serious offenses has been recognized by the C.A.A.F. in reference to articles carrying a low punitive exposure. *See United States v. Dunbar*, 31 M.J. 70, 72 (C.M.A. 1990) (citing *United States v. Clevidence*, 14 M.J. 17, 19 n.5 (C.M.A. 1982)). Accordingly, the offenses that MSgt Copp was convicted of were nonserious by virtue of the maximum potential confinement being six months or less. For this reason, he should not have been subject to criminal history indexing, and this Court should order modification of the entry of judgment to reflect that.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 8 May 2025.

Respectfully submitted,

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