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.	)	
Airman First Class (E-3), **ALEJANDRO E. GRAY,** United States Air Force, *Appellant.*	)	No. ACM XXXXX
	)	13 September 2023

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

On 19 April 2023, at Seymour Johnson Air Force Base, NC, a military judge sitting as a general court-martial convicted Airman First Class (A1C) Alejandro Gray, contrary to his pleas, of one charge and one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928.[1] R. at 125. The military judge sentenced A1C Gray to be reduced to the grade of E-2 and to forfeit $1,000 of his pay for one month. R. at 131.

On 22 August 2023, via certified mail, the Government mailed A1C Gray the required notice of his right to appeal within 90 days. The notice itself was date stamped 21 August 2023. Pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A) (2022), A1C Gray files his notice of direct appeal with this Court.

[1] Consistent with his pleas, the miliary judge acquitted A1C Gray of one charge and two specifications of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920, and one charge and one specification of dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892. R. at 125.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
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Email: samantha.castanien.1@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 Appellate Government Division on 13 September 2023.

SAMANTHA M. CASTANIEN, Capt, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Alejandro E. GRAY	)	**DOCKETING**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

On 13 September 2023, 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 4th day of October, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 1.

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**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Alejandro E. GRAY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 13 September 2023, Appellant filed a "Notice of Direct Appeal Pursuant to Article 66(b)(l)(A), UCMJ," with this court. The above-styled case was docketed on 4 October 2023 and the court ordered the Government to "forward a copy of the record of trial to the court forthwith." Over 120 days have elapsed and, to date, the record has not been provided to the court.

Accordingly, it is by the court on this 5th day of February, 2024,

ORDERED:

Government appellate counsel will inform the court in writing not later than **29 February 2024** of the status of this case with regard to this court's 4 October 2023 order.

FOR THE COURT

[redacted]

FLEMING E. [redacted], Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	UNITED STATES' NOTICE OF STATUS OF COMPLIANCE
v.	)	Before Panel No. **1**
Auman Fii·st Class (E-3) **ALEJANDRO E. GRAY,** USAF *Appellant*	)	No.ACM
	)	29 Febrnaiy 2024

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

Pursuant to this Court's 5 Febrnaiy 2024 order, the United States hereby provides notice of status of compliance.

On 4 October 2023, the above-styled case was docked with this Court On the same date the Comt ordered the Government to "fo1ward a copy of the record of trial to the comt fo1thwith." *(Notice of Docketing,* 4 October 2023.) On 5 Febrnaiy 2024 this Comt ordered the Government to "infonn the comt in writing not later than 29 Febrnaiy 2024 of the status of this case with respect to this comt's 4 October 2023 order." (*Order,* 5 Febrnaiy 2024.)

As of the date of this notice, days one through three of trial have been transcribed. The comt repo1ter anticipates that the transcription will be completed by 13 Mai·ch 2024.

WHEREFORE, the United States requests this Honorable Comt accept this filing as confnmation of the government's compliance with its 5 Febrnaiy 2024 order.

[redacted]

ZACHARY T. EYTALIS, Col, USAF
Ap e ate Go rmne t Counsel
Government Trial and Appellate Counsel Division
Militaiy Justice and Discipline Dii·ectorate
United States An· Force
(808) 372-7022

MARY ELLEN PAYNE
Associate Chief
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Military Justice and Discipline Directorate
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(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I ce1iify that a copy of the foregoing was delivered to the Comi and to the Appellate Defense Division on 29 Febmaiy 202 4.

[redacted]

Z Y . Y IS, Col, USAF
A P. Hate G ernm t Counsel
Go emment Trial and Appellate Counsel Division
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No.ACM**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Alejandro E. **GRAY**	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

This court ordered the Government to "inform the court in writing not later than 29 February 2024 of the status of this case with respect to this court's 5 February 2024 order."

In its response on 29 February 2024, the Government stated "[t]he court reporter anticipates that the transcription will be completed by 13 March 2024." Nearly 120 days have elapsed since the Government's response and, to date, the record has not been provided to the court.

Accordingly, it is by the court on this 25th day of June, 2024,

ORDERED:

Not later than **25 July 2024,** Government will forward a copy of the record of trial to the court.

Should the record of trial not be provided by 25 July 2024, the court reporter, or an appropriate designee, shall provide a memorandum for record stating the status of the processing of the record of trial in this case not later than **26 July 2024** to the Government to submit to this court in a motion to attach. *See* AF. Ct. Crim. App. R. 23.3(b). Until the record of trial is returned to the court, such a memorandum of record will be prepared and submitted to the court every seven days thereafter.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No.ACM 40648**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Alejandro E. GRAY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 9 September 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposes the motion.

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

Accordingly, it is by the court on this 10th day of September 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED.** Appellant shall file any assignments of error not later than **20 November 2024.**

Each request for an enlargement of time will be considered on its merits. Appellant's counsel is advised that anysubsequent 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.

[redacted]
OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	
	)	Before Panel No. 1
Airman First Class (E-3) **ALEJANDRO E. GRAY,** United States Air Force, *Appellant.*	)	No. ACM 40648
	)	9 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 (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time (EOT) to file Assignments of Error (AOE). Pursuant to Rule 23.3(m)(2), Appellant requests an enlargement for a period of 60 days, which will end on **20 November 2024**.

Appellant's direct appeal was docketed with this Court on 4 October 2023. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. *Notice of Docketing*, dated 4 October 2023. After two orders for compliance, dated 5 February 2024 and 25 June 2024, respectively, the Government delivered the record of trial to the Court on 23 July 2024, **293 days** after docketing. Sixty days from 23 July 2024 is 21 September 2024, the deadline for Appellant's AOE brief, absent any EOTs. A.F. Ct. Crim. App. R. 18(d).

From the date of docketing (4 Oct. 2023) to the present date, 341 days have elapsed. From the date this Court received the record of trial (23 Jul. 2024) to the present date, 48 days have elapsed. On the date requested, 120 days will have elapsed from the date the Court received the record of trial and 413 days will have elapsed since docketing.

On 19 April 2023, at Seymour Johnson Air Force Base, North Carolina, a military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of one charge and one

specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ). R. at 1, 9, 122, 124, 379.[1] The military judge acquitted Appellant of one charge and two specifications of Article 120, UCMJ, and one charge and one specification of dereliction of duty in violation of Article 92, UCMJ. R. at 9, 379. The military judge sentenced Appellant to be reduced to the grade of E-2 and to forfeit $1,000 of his pay for one month. R. at 399. The convening authority took no action on the findings or the sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. A1C Alejandro E. Gray*, dated 5 May 2023.

Without the verbatim transcript, the record of trial is four volumes consisting of seven Prosecution Exhibits, nine Defense Exhibits, and 20 Appellate Exhibits. The verbatim transcript is 399 pages. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 33 cases; 20 cases are pending before this Court (14 cases are pending AOEs); 12 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF); and one case is pending a petition to the United States Supreme Court. This is Appellant's first request for an EOT, which comes after a 293-day Government-driven delay to produce the 399-page transcript. Appellant's docketing date has been taken into consideration for prioritization. Nevertheless, to date, six cases have priority over the present case:

1. *United States v. Casillas*, No. 24-0089/AF – Undersigned counsel is currently researching and drafting the Reply Brief for a four-issue appeal to the CAAF, due 16 September

[1] Citations to the record are citations to the verbatim transcript.

2024. Undersigned counsel anticipates oral argument for this case will be later this year, which will likely impact her ability to review Appellant's case.

2. *United States v. Leipart*, No. 23-0163/AF – The CAAF issued a decision in this case on 1 August 2024. Undersigned counsel anticipates filing a petition of certiorari to the United States Supreme Court within 90 days, barring any extensions.

3. *United States v. Folts*, No. ACM 40322 – On 26 August 2024, this Court issued an opinion in this appellant's case. Undersigned counsel is working with civilian appellate defense counsel on next steps, including drafting a petition and supplement to the CAAF.

4. *United States v. Giles*, No. ACM 40482 – This AOE was submitted on 5 September 2024. Upon receipt of the Government's Answer Brief, undersigned counsel will assess whether a Reply Brief is warranted and then draft any such Reply.

5. *United States v. Singleton*, No. ACM 40535 (EOT 8) – The trial transcript is 1,738 pages long and the record of trial is comprised of twelve volumes containing six Prosecution Exhibits, 17 Defense Exhibits, one Court Exhibit, and 89 Appellate Exhibits. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

6. *United States v. Kim*, No. ACM 24007 (EOT 5 requested) – The record of trial for this direct appeal is five volumes consisting of five Prosecution Exhibits, three Defense Exhibits, 27 Appellate Exhibits, and one court exhibit. The transcript is 421 pages. This appellant is not currently confined. Counsel has not yet completed her review of this appellant's record.

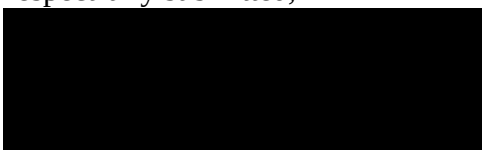
Additionally, military appellate defense counsel took on eight cases from departing military appellate defense counsel. Three of these cases are now pending petitions and supplements to the CAAF; their timing may impact Appellant's case. The remaining cases are

awaiting a decision from this Court and the CAAF. Depending on timing and next steps, these other cases may be prioritized over Appellant's case.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

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

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 9 September 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
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9 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEJANDRO E. GRAY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40648 Panel No. 1

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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(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 9 September 2024.

JENNY A. LIABENOW, Lt Col, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 1
Airman First Class (E-3)	)	
ALEJANDRO E. GRAY,	)	No. ACM 40648
United States Air Force,	)	
Appellant.	)	6 November 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **20 December 2024**.

Appellant's direct appeal was docketed with this Court on 4 October 2023. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. *Notice of Docketing*, dated 4 October 2023. After two orders for compliance, dated 5 February 2024 and 25 June 2024, respectively, the Government delivered the record of trial to the Court on 23 July 2024, **293 days** after docketing.

From the date of docketing (4 Oct. 2023) to the present date, 399 days have elapsed. From the date this Court received the record of trial (23 Jul. 2024) to the present date, 106 days have elapsed. On the date requested, 150 days will have elapsed from the date the Court received the record of trial and 443 days will have elapsed since docketing.[1]

[1] This request for an enlargement of time is being filed well in advance to avoid any issues while the Court is closed and while undersigned counsel are on leave or traveling for oral argument during the next two weeks.

On 19 April 2023, at Seymour Johnson Air Force Base, North Carolina, a military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of one charge and one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ). R. at 1, 9, 122, 124, 379.[2] The military judge acquitted Appellant of one charge and two specifications of Article 120, UCMJ, and one charge and one specification of dereliction of duty in violation of Article 92, UCMJ. R. at 9, 379. The military judge sentenced Appellant to be reduced to the grade of E-2 and to forfeit $1,000 of his pay for one month. R. at 399. The convening authority took no action on the findings or the sentence. Convening Authority Decision on Action – *United States v. A1C Alejandro E. Gray* (May 5, 2023).

Without the verbatim transcript, the record of trial is four volumes consisting of seven Prosecution Exhibits, nine Defense Exhibits, and 20 Appellate Exhibits. The verbatim transcript is 399 pages. Appellant is not currently confined.

Captain Joyclin Webster was recently detailed to take over this case after considering new developments to Capt Castanien's docket and the length of time Appellant's case has been docketed with this Court. Captain Castanien has not moved to withdraw as counsel yet. Both undersigned counsel's priority lists are below. Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provide the following information.

Captain Webster is currently assigned 18 cases; 17 cases are pending before this Court (16 cases are pending AOEs). Her only priority before Appellant's case after considering his docketing date is *United States v. Menard*, No. ACM 40496, which is scheduled for oral argument. After argument, she anticipates being able to turn to Appellant's case.

[2] Citations to the record are citations to the verbatim transcript.

Captain Castanien is currently assigned 38 cases; 22 cases are pending before this Court (17 cases are pending AOEs), 14 cases are pending before the Court of Appeals for the Armed Forces (CAAF), and two cases are pending petitions to the United States Supreme Court. To date, six cases have priority over the present case:

1. *United States v. Casillas*, No. 24-0089/AF – On 29 October 2024, the CAAF ordered additional briefing in this case. Briefs are currently due 28 November 2024.

2. *United States v. Leipart*, No. 24A288 – The CAAF issued a decision in this case on 1 August 2024. Undersigned counsel will file a petition of certiorari to the United States Supreme Court by 29 December 2024..

3. *United States v. Johnson*, No. 24-0004/SF – Capt Castanien filed this two-issue Grant Brief, on 4 November 2024. Any reply brief will be due after the Government's answer, sometime in early December.

4. *United States v. Wells*, No. 23-0219/AF – The CAAF issued a decision in this case on 24 September 2024. Undersigned counsel anticipates filing a petition of certiorari to the United States Supreme Court by 23 December 2024, barring any extensions.

5. *United States v. Folts*, No. ACM 40322 – On 26 August 2024, this Court issued an opinion in this appellant's case. As this Court denied the motion for reconsideration, undersigned counsel is now working with civilian appellate defense counsel on drafting the petition and supplement to the CAAF, due in early December.

6. *United States v. Singleton*, No. ACM 40535 – Captain Castanien anticipates withdrawing from this case to allow a more available appellate defense counsel to take over. The trial transcript is 1,738 pages long and the record of trial is comprised of twelve volumes containing six Prosecution Exhibits, 17 Defense Exhibits, one Court Exhibit, and 89 Appellate Exhibits. This

appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel have been unable complete their review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Court grant the requested enlargement of time for good cause shown.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 6 November 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
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7 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEJANDRO E. GRAY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40648 Panel No. 1

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

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

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

[redacted]

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 7 November 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 WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 1
Airman First Class (E-3) **ALEJANDRO E. GRAY,** United States Air Force, *Appellant.*	)	No. ACM 40648 13 November 2024

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Undersigned counsel is withdrawing to allow a more available appellate defense counsel take over Appellant's case. Undersigned counsel currently has six cases prioritized over Appellant's, which are delaying review of Appellant's case (docketed for over 400 days). Captain Joyclin Webster has been detailed substitute counsel in undersigned counsel's stead, and she made a notice of appearance in accordance with Rule 12.4 on 6 November 2024. Appellant's Motion for Enlargement of Time (Second). A thorough turnover of the record between counsel has been completed.

Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

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

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 Air Force Government Trial and Appellate Operations Division on 13 November 2024.

[redacted]

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40648**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Alejandro E. GRAY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 26 November 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Appellate Exhibits XII, XIII, XIV, and XIX; transcript pages 81–116, and the audio recording of the closed session relating to the Mil. R. Evid. 412 motion raised at Appellant's court-martial. All requested materials were reviewed by trial and defense counsel at Appellant's court-martial.

Upon review of the audio recording of the closed session on the Mil. R. Evid. 412 motion, we note that the envelope containing the disc was not properly sealed as ordered by the military judge.[1] Therefore, the Clerk of Court will ensure this envelope is properly sealed in the Appellant's record of trial.

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

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

Accordingly, it is by the court on this 3d day of December, 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view

---

[1] The court has determined that there is good cause for the envelope containing the disc of the audio recording of the closed session be sealed pursuant to Mil. R. Evid. 412. *See also* Rule for Courts-Martial 1113(a), Discussion ("Upon request or otherwise for good cause, a military judge may seal matters at his or her discretion." (2024 *MCM*)).

Appellate Exhibits XII, XIII, XIV, and XIX, transcript pages 81-116, and **the audio recording of the closed session** relating to the Mil. R. Evid. 412 motion, subject to the following conditions:

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

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

It is **further ordered:**

The Government shall take all steps necessary to ensure all copies of the audio recording of the closed Mil. R. Evid. 412 session is sealed.[2]

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Deputy Clerk of the Court

[2] The base legal office may maintain a sealed copy in accordance with Department of the Air Force Manual 51-203, *Records of Trial*, **,i** 9.3.6 (21 Apr. 2021).

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**CONSENT MOTION**
Appellee	)	**TO EXAMINE SEALED**
	)	**MATERIALS**
v.	)	
	)	Before Panel No. 1
Airman First Class (E-4)	)	
ALEJANDRO E. GRAY,	)	No. ACM 40648
United States Air Force	)	
Appellant	)	26 November 2024

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

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

- Appellate Exhibits XII – Defense Motion *in Limine*: Admit Evidence in Accordance with Mil. R. Evid. 412
- Appellate Exhibit XIII – Government Response to Defense Motion *in Limine* to Admit Evidence in Accordance with Mil. R. Evid. 412
- Appellate Exhibit XIV – Victim Counsel Response to Defense Motion to Admit Evidence Under Mil. R. Evid. 412
- Appellate Exhibit XIX – Ruling and Order: To Admit Mil. R. Evid. 412, Evidence
- Transcript pages 81 to 116 – closed hearing on the Mil. R. Evid. 412 motion
- Audio of the closed session on the Mil. R. Evid. 412 motion

All parties at trial reviewed the above listed exhibits and attended the closed session. R. at 117. In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibit is necessary to conduct a

complete review of the record of trial and be in a position to advocate competently on behalf of Appellant.

Moreover, a review of the entire record of trial[1] is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed material referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id.* Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill their duties of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

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

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

Respectfully submitted,

JOYCLIN N. WEBSTER, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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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 26 November 2024.

Respectfully submitted,

JOYCLIN N. WEBSTER, Capt, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 1
Airman First Class (E-3) **ALEJANDRO E. GRAY,** United States Air Force, *Appellant.*	)	No. ACM 40648
	)	10 December 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **19 January 2025**.

Appellant's direct appeal was docketed with this Court on 4 October 2023. At the time of docketing, the Court had not received the record of trial and ordered it delivered forthwith. *Notice of Docketing*, dated 4 October 2023. After two orders for compliance, dated 5 February 2024 and 25 June 2024, respectively, the Government delivered the record of trial to the Court on 23 July 2024, **293 days** after docketing.

From the date of docketing (4 October 2023) to the present date, 433 days have elapsed. From the date this Court received the record of trial (23 July 2024) to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed from the date the Court received the record of trial and 473 days will have elapsed since docketing.

On 19 April 2023, at Seymour Johnson Air Force Base, North Carolina, a military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of one charge and one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of

Military Justice (UCMJ). R. at 1, 9, 122, 124, 379.[1] The military judge acquitted Appellant of one charge and two specifications of Article 120, UCMJ, and one charge and one specification of dereliction of duty in violation of Article 92, UCMJ. R. at 9, 379. The military judge sentenced Appellant to be reduced to the grade of E-2 and to forfeit $1,000 of his pay for one month. R. at 399. The convening authority took no action on the findings or the sentence. Convening Authority Decision on Action – *United States v. A1C Alejandro E. Gray* (May 5, 2023).

Without the verbatim transcript, the record of trial is 4 volumes consisting of 7 Prosecution Exhibits, 9 Defense Exhibits, and 20 Appellate Exhibits. The verbatim transcript is 399 pages. Appellant is not currently confined.

The undersigned counsel is currently assigned 20 cases; 17 cases are pending before this Court (16 cases are pending AOEs). To date, no case has priority over the present case. Undersigned counsel has reviewed roughly 90% of the ROT in this case.

Appellant was advised of his right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable complete her review of Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise him regarding potential errors.

[1] Citations to the record are citations to the verbatim transcript.

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

Respectfully submitted,

JOYCLIN N. WEBSTER, Capt, USAF
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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
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12 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ALEJANDRO E. GRAY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40648 Panel No. 1

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

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

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

[redacted]
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 12 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,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Airman First Class (E-3) **ALEJANDRO E. GRAY,** United States Air Force, *Appellant.*	)	No. ACM 40648
	)	21 January 2025

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

Assignments of Error

I.

The Government presented no evidence that Airman First Class Gray touched MM in the manner charged. Is his conviction for assault consummated by a battery legally and factually insufficient?

II.

Whether the sentence is inappropriately severe.

III.

Whether the unreasonable post-trial delay in the delivery of the record of trial constitutes error warranting relief.

Statement of the Case

On 19 April 2023, at Seymour Johnson Air Force Base, North Carolina, a military judge sitting as a general court-martial convicted Airman First Class (A1C) Gray, contrary to his pleas, of one charge and one specification of assault consummated by a battery, in violation of Article

128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928.[1] R. at 1, 9, 122, 124, 379.[2] The military judge acquitted A1C Gray of one charge and two specifications of Article 120, UCMJ, 10 U.S.C. § 920, and one charge and one specification of dereliction of duty in violation of Article 92, UCMJ, 10 U.S.C. § 892. R. at 9, 379. The military judge sentenced A1C Gray to be reduced to the grade of E-2, to forfeit $1,000 of his pay for one month, and a reprimand. R. at 399. The convening authority took no action on the findings or the sentence. Convening Authority Decision on Action – *United States v. A1C Alejandro E. Gray* (May 5, 2023).

On 13 September 2023, a notice of direct appeal was filed with this Court. Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), Sept. 13, 2023. This Court docketed this case on 4 October 2023. Notice of Docketing, Oct. 4, 2023.

Statement of Facts

The Work Environment and Prior Relationship Between MM and A1C Gray

At the time of the allegation, MM and A1C Gray were part of a group of four individuals assigned to painting duties. R. at 204 and 209. Because paint could spill on their clothing, they were instructed to wear civilian clothes that they would not mind getting paint on. R. at 209. BW oversaw the group, and there was a camera in the room. *Id*.

Until these allegations surfaced, MM regularly received rides to work from A1C Gray. R. at 208.

[1] Unless otherwise noted, all references to the UCMJ, the Military Rules of Evidence (Mil. R. Evid.), and the Rules for Courts-Martial (R.C.M.) are to the version in the *Manual for Courts-Martial, United States* (2023 ed.) (*MCM*).
[2] Citations to the record are citations to the verbatim transcript.

The Nature of MM's Allegation, Its Disclosure, and the Absence of Physical Evidence

On 20 May 2022, prior to making any allegation against A1C Gray, MM was confronted by EK, her project supervisor, regarding MM's attire. R. at 213 and 290. EK told MM that she needed to dress more modestly, citing the Air Force's concerns about sexual assault. R. at 213. EK described their exchange as a "one-on-one girl conversation," focusing on MM's top, which EK considered low-cut and with very thin straps. R. at 213–14, 292. Both EK and a female Lieutenant believed MM's outfit was inappropriate for the workplace. R. at 292.

When EK entered the room to address MM's clothing, she saw several individuals were present, including AD, BW, A1C Gray, and two to three others. R. at 293. EK pulled MM aside to discuss her attire; in response MM disclosed for the first time that A1C Gray had allegedly struck her on the back with her bra strap. *Id*. MM did not show EK any mark on her back, nor did she mention any stinging sensation or redness. *Id*.

Later that same day, MM's supervisors "cornered" her, advising her to make a formal report against A1C Gray. *Id*. According to MM, she was taken to Security Forces by her supervisors that day. *Id*. Contrary to her courtroom testimony, and despite this allegation, MM did not document or disclose any mark or injury on her back. *Compare* R. at 212, *with* 293.

MM's Account of the Alleged Incident

According to MM, while taking a break from painting, she was seated in an office chair with her phone in hand, her back facing the rest of the room. R. at 205 and 210. MM testified:

> Airman Gray comes up behind me -- walks up behind me, and pulls on my bra strap and releases it. I feel a sharp sting, and I turn around to make eye contact with Airman Gray, who says nothing. Just shocked, I say nothing, and he just smiles and walks away after that interaction."

R. at 206.

MM speculated that A1C Gray "would physically have to move the strap of my tank top to get underneath my bra to pull it fully, like extend it back, to flick it." *Id*. She did not recall feeling anyone's hand on her back and did not testify that A1C Gray placed his hand on her shoulder. R. at 210. During cross-examination, MM clarified, "My testimony was that he potentially, I honestly could not see it, moved my tank top to pull on my bra strap. He did not hold on to my bra strap, just simply let it go." R. at 211 (emphasis added).

MM could not recall whether anyone else was in the room at the time but allowed there was a "slim possibility" that other people were present. R. at 213. She stated that, after the alleged incident, A1C Gray left the room, at which point EK entered. R. at 213 and 290.

Witness Testimonies Contradict MM's Account

BW, in contrast to MM's account, testified that he saw A1C Gray place his hand on MM's shoulder "for [. . .] a split-second." R. at 261 and 265. MM, however, denied that A1C Gray ever touched her shoulder. R. at 210. Approximately ten minutes later, BW stated that MM approached him and said she was uncomfortable with A1C Gray. R. at 262. BW did not see A1C Gray touch MM's bra strap or hear it snap. R. at 268.

AD, another individual assigned to the painting project, was initially unaware of any alleged incident between MM and A1C Gray. R. at 281–82. About a week later, he learned of the allegation from MM. R. at 282. AD recalled that MM was wearing a revealing tank top and "short shorts or booty shorts." R. at 283. He noted that MM was never alone with A1C Gray and did not observe any contact with her bra strap or hear it snap. *Id*.

Sentencing Phase and Supporting Evidence

During sentencing, the Government introduced evidence of a prior administrative demotion for failing a physical fitness test. R. at 384, Prosecution Ex. 7. Trial Defense Counsel

argued this demotion demonstrated A1C Gray's rehabilitative potential, emphasizing that he eventually regained his rank. R. at 395.

The Defense also presented letters from friends, family, and fellow Airmen, portraying A1C Gray as dedicated and hardworking. R. at 386, Def. Ex.'s F-H. These letters described him as caring, supportive of friends, and consistently willing to serve his community. *Id*. A1C Gray's mother also testified, highlighting her son's compassionate nature, his potential for rehabilitation, and his resolve to move forward in his life. R. at 389.

Additional facts are included in the Argument section below.

Argument

I.

The Government presented no evidence that A1C Gray touched MM in the manner charged. His conviction for assault consummated by a battery is legally and factually insufficient.

Standard of Review

This Court reviews issues of factual and legal sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

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

The UCMJ specifies this Court "may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i). Factual sufficiency review requires this Court

to conduct its own assessment of the evidence while giving "appropriate deference" to the factfinder's observations of witnesses. Article 66(d)(1)(B)(ii), 10 U.S.C. § 866(d)(1)(B)(ii). If "the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding."[3] Article 66(d)(1)(B)(iii), 10 U.S.C. § 866(d)(1)(B)(iii). As clarified by *Harvey*, Article 66(d)(1)(B), UCMJ, grants this Court authority to weigh evidence, determine controverted questions of fact, and set aside a conviction if it is "clearly convinced" the verdict is against the weight of the evidence. *United States v. Harvey*, __ M.J. __, 2024 CAAF LEXIS 502, (C.A.A.F. 2024).

But this statutory change does not alter the burden of proof which the evidence must support: beyond a reasonable doubt. *Id*. at *10-12. While some contours of this factual sufficiency review remain subject to further judicial determination, *see*, *e.g.*, *United States v. Csiti*, __ M.J. __, No. 24-0175/AF, 2024 CAAF LEXIS 533 (C.A.A.F. Sep. 11, 2024) (mem.), *Harvey* made clear the determination required to overturn a conviction once factual sufficiency review is triggered: "First, the CCA must decide that the evidence, *as the CCA has weighed it*, does not prove that the appellant is guilty beyond a reasonable doubt. Second, the CCA must be clearly convinced of the correctness of this decision." *Harvey*, 2024 CAAF LEXIS 502, at *12.

A. The Evidence is Legally Insufficient

The Government relied exclusively on MM's testimony that she felt an unexpected snap on her back and, upon turning, saw A1C Gray standing behind her. Crucially, however, no witness testified that A1C Gray grabbed MM's bra strap and snapped it on her back. Even when viewing

[3] This standard does not require an appellant to show a total lack of evidence supporting an element, which would be redundant with legal sufficiency review. *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *18 (A.F. Ct. Crim. App. Apr. 29, 2024), *rev. granted*, __ M.J. __, No. 24-0175, 2024 CAAF LEXIS 533 (C.A.A.F. Sept. 11, 2024).

evidence in the light most favorable to the prosecution, the Government did not provide sufficient evidence to establish A1C Gray's guilt.

The elements of assault consummated by a battery are: (1) that the accused did bodily harm to another person; (2) that the bodily harm was done unlawfully; and (3) the bodily harm was done with force or violence. *MCM*, pt. IV, ¶ 77.b.(2). "A battery is an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm." *MCM*, pt. IV, ¶ 77.c.(3)(a). "If bodily harm is inflicted unintentionally and without culpable negligence, there is no battery. It is also not a battery to touch another to attract the other's attention or to prevent injury." *MCM*, pt. IV, ¶ 77.c.(3)(d). Therefore, the Government had to prove beyond a reasonable doubt that A1C Gray struck MM on the back with her bra strap, such action was unlawful, and A1C Gray used force or violence in the commission of the act. Charge Sheet. It failed to do so.

The inescapable deficiency in the prosecution's proof arises from the layers of speculation constituting MM's testimony. She did not see anyone pull her bra strap. R. at 206. She never even saw A1C Gray's hand touch her bra strap. R. at 211. Nor did she ever feel him make any other physical contact. R. at 210. She felt something, glanced back, and assumed that it had to be him. This presumption was not supported by any direct observation, and it failed to account for the real possibility of some kind of clothing mishap or snag, or that something improper did happen but that she erroneously leapt to point the finger at the nearest person.

Without testimony placing A1C Gray's hand on MM's bra strap—let alone pulling it—and given the conflicting accounts about whether A1C Gray even touched MM's shoulder, there even when viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could not have found the essential elements beyond a reasonable doubt. In essence, the Government's entire case rests on MM's unverified assumption that A1C Gray "had to be" the

culprit and that it was intentional despite introducing no evidence on intentionality. This speculation, unsupported by direct or corroborative evidence and contradicted by other witnesses' statements, does not satisfy the high burden of proof required. A1C Gray's conviction should be set aside because no rational factfinder could conclude, beyond a reasonable doubt, that A1C Gray pulled MM's bra strap when the only proof is her subjective guess about what happened and who did it, unverified by any eyewitness or physical evidence. This is especially true when her perception is contrary to the other witnesses' testimony.

B. The Evidence Is Factually Insufficient

A1C Gray's conviction must also be set aside as factually insufficient. MM's assumption that A1C Gray must have been the culprit is an inference that falls short of clearly establishing guilt. This testimony, which boils down to a momentary sensation followed by MM's guess, is insufficient to exclude the reasonable possibility of mistake or misperception. Critically, MM's account is contradictory to every other witnesses' account. MM could not be sure who if anyone else was in the room at the time the alleged assault occurred. R. at 213. But she knew that EK entered the room as A1C Gray was leaving directly after the alleged assault. *Id*. Yet, EK unequivocally able to name multiple witnesses who were in the room when she entered the room to confront MM about her revealing clothing. R. at 293. This Court should be clearly convinced that the finding of guilty was against the weight of the evidence.

Here, the factual dispute hinges on credibility and inference. While this Court must "appropriate[ly] defer[]" to the factfinder's opportunity to view MM's demeanor, 10 U.S.C. § 866(d)(1)(B)(ii), it should also recognize the inherent weakness of a claim like the one in this case. With MM surrounded by others, no one saw the offense. Nor did anyone here it. Nor did anyone see any physical redness on MM that would support that the act she claimed happened at

all. Where the claim could reasonably be expected to draw on corroboration but must, by its facts, rest on the word of one reporting witness, there should not be much further to go for this Court to be clearly convinced that the conviction does not measure up to the lofty standard of beyond a reasonable doubt. *See Harvey*, 2024 CAAF LEXIS 502, at *12. Therefore, this Court should be clearly convinced that the finding of guilty was against the weight of the evidence.

Additionally, the structure and design of the chair where MM was seated are crucial elements further undermine the credibility of the Government's allegations against A1C Gray. It is clear that the Government recognized the importance of this information, as they argued in their closing that it was a "high back chair." R. at 354. However, no such information ever came out during the trial regarding the design of the chair other than it was a desk chair that rolled. R. at 209. The prosecution failed to introduce any photographic evidence, diagrams, or a thorough description of the chair during the proceedings. We know generally that office chairs like this have some kind of base and back and that office chairs can have various characteristics, such as high backs, armrests, and other design features that can limit access to the back of a person seated in them. *See All Hail the Chairmen: Jonathan Olivares's "Taxonomy of Office Chairs,"* Loss Angeles Review of Books (Apr. 18, 2012), https://lareviewofbooks.org/article/all-hail-the-chairmen-jonathan-olivaress-taxonomy-of-office-chairs/; and Heather Murphy, *The Quest for the Perfect Office Chair*, Slate (May 30, 2012, 6:44 AM), https://www.slate.com/articles/life/design/2012/05/ergonomic_office_chairs_a_visual_history_photos_.html. This absence of detailed evidence regarding the chair's dimensions or overall construction forces the Court to rely on conjecture regarding A1C Gray's ability to reach MM's bra strap from his alleged position.

In light of the factors discussed, it is evident that A1C Gray's conviction is unsupported by a solid evidentiary foundation and should be set aside and dismissed. The proof presented by the Government falls far below the necessary threshold for factual sufficiency. The only evidence suggesting A1C Gray's involvement was MM's speculation that he must have been the individual who caused a fleeting tug on her bra strap. BW's testimony was directly contradicted by MM's. And both BW and MM were contradicted by every other witness, none of whom saw or heard anything like the act charged, let alone that A1C Gray did it. Therefore, MM's guess alone is insufficient to support guilt beyond a reasonable doubt, nor can it endure the scrutiny required under Article 66(d)(1)(B) for factual sufficiency.

A1C Gray requests that this Honorable Court set aside the findings of guilty to Charge II, dismiss the charge, and set aside the sentence.

II.

The sentence is inappropriately severe.

Standard of Review

Issues of sentence appropriateness are reviewed de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law and Analysis

Article 66(d)(1), UCMJ, "provides that [this Court] 'may affirm only . . . the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.'" *United States v. Flores*, __ M.J. __, 2024 CAAF LEXIS 162, at *8-9 (C.A.A.F. 2024). Fundamentally, this means that this Court must "determine whether it finds the sentence to be appropriate." *Id.* at *9 (citation omitted).

This Court has "broad discretion to determine whether a sentence 'should be approved,' a power that has no direct parallel in the federal civilian sector." *United States v. Behunin*, 83 M.J. 158, 161 (C.A.A.F. 2023) (quoting 10 U.S.C. § 866(d)(1)). And, while this Court may not grant relief merely as a matter of clemency, *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc), it is empowered to "do justice." *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010). In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." *Sauk*, 74 M.J. at 606 (cleaned up). This Court also takes into consideration "uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

A1C Gray's sentence is inappropriately severe. Although the trier of fact found A1C Gray not guilty of more serious misconduct concerning an unrelated complaining witness, the adjudged sentence nonetheless included a reduction in rank, forfeitures of $1,000 per month for one month, and a reprimand. This combination of punishments is inappropriately severe under the totality of the circumstances and warrants relief.

The social stigma and career impact of a reduction in rank, combined with substantial financial penalties, is more than necessary to address the goals of justice, discipline, and deterrence. *See* 10 U.S.C. § 856(c)(1). The appellate courts in the military justice system must ensure that a service member's sentence is fair and in line with the proven offense. Even when a sentence is within the bounds of the UCMJ, it still must be fair and proportionate. Imposing overly severe punishments for relatively minor offenses can jeopardize both A1C Gray's rights and the public trust in the military justice system. *See, e.g.*, *United States v. Healy*, 26 M.J. 394 (C.M.A 1988) (underscoring the power of appellate courts to reduce sentences that are inappropriately

severe even if they are within the legal limits), *United States v. Lacy*, 50 M.J. 286 (C.A.A.F. 1999) (emphasizing proportionality in sentence to preserve confidence in the military justice system), *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006) (highlighting the duty appellate courts have to ensure justice is done).

A1C Gray respectfully requests this Honorable Court to set aside A1C Gray's reduction in rank.

III.

The unreasonable post-trial delay in the delivery of the record of trial constitutes an error warranting relief.

Additional Facts

A1C Gray was sentenced on 19 April 2023. R. at 399. This case was docketed with this Court on 4 October 2023, 168 days after A1C Gray was sentenced, thereby triggering the Government's duty to provide a complete and verbatim record of trial for appellate review. Notice of Docketing, Oct. 4, 2023.

On 5 February 2024, 292 days after A1C Gray was sentenced and 122 days after previously ordering the Government to submit a copy of the record of trial to this Court without any response, this Court instructed the Government's appellate counsel to provide a written update on the status of the case by 29 February 2024, in accordance with the prior order. Order, Feb. 5, 2024. On 29 February 2024, the Government Appellate Counsel notified this Court that only the transcripts for days one through three of the trial had been completed. Notice of Status of Compliance, Feb. 29, 2024. The court reporter anticipated finishing the remaining transcripts by 13 March 2024. *Id*.

Despite this assurance, the record or trial still was not delivered to the Court by the anticipated date. As a result, on 25 June 2024, this Court issued another order, 265 days after the

case was docketed and 104 days after the expected completion date of 13 March 2024, directing the Government to submit a copy of the trial record to the Court no later than 25 July 2024. Order, June 25, 2024. Ultimately, the transcript was delivered on 21 July 2024, 293 days after docketing. The transcript is 399 pages. R. at 399.

Standard of Review

This court conducts a de novo review to determine if an appellant's due process rights have been violated due to post-trial delays, as established in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). If no due process violation is found, the court then assesses whether relief from excessive post-trial delay is justified, in accordance with its authority under Article 66(d)(2), 10 U.S.C. § 866(d)(2), and *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). *See United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016); *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223 (A.F. Ct. Crim. App. Jun. 7, 2024), *rev. granted*, __ M.J. __, 2024 CAAF LEXIS 571 (C.A.A.F. 2024).

Law and Analysis

Under Articles 59 and 66, UCMJ, 10 U.S.C. §§ 859, 866, and Rules for Courts-Martial (R.C.M.) 1112 and 1114, the Government bears the responsibility to compile and submit a verbatim record of trial without undue delay. "[C]onvicted servicemembers have a due process right to the timely review and appeal of courts-martial convictions." *Moreno*, 63 M.J. at 135. Pursuant to its Article 66, UCMJ authority, this court may "grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), [UCMJ] if it deems relief appropriate under the circumstances." *Tardif*, 57 M.J. at 224; *see also* Article 66(d)(2) stating 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 under section 860c of this title (article 60c).").

In *Moreno,* the Court of Appeals for the Armed Forces (CAAF) established guidelines for determining whether a post-trial delay is unreasonable. *Moreno*, 63 M.J. at 135. These guidelines include the length of delay, reasons for the delay, whether the accused demanded speedy post-trial processing, and the resulting prejudice. *Id.* Although there is no rigid deadline for transcript production for direct appeals like this one, the stark length of delay in this case, coupled with the necessity of two orders from the Court, demonstrates a lack of reasonable diligence.

A. A1C Gray is entitled to relief under Moreno *and* Toohey

When reviewing whether an appellant has been denied the right to speedy post-trial review and appeal, *Moreno* adopted the four-factor test found in *Barker v. Wingo*, 407 U.S. 514, (1972). *Moreno*, 63 M.J. at 135. The factors to consider are: (1) the length of delay, (2) reasons for the delay, (3) the defendant's assertion of his right to a timely review and appeal, and (4) prejudice to the defendant—offers a useful framework for evaluating post-trial delay as well. *Id*. First, the length of the delay in this case is manifestly excessive. Second, the Government has offered no compelling reason for failing to comply promptly with the Court's orders. Third, although not asserted, A1C Gray's interest in a timely appeal is self-evident; the Court's repeated directives also underscore the significance of this right. Fourth, the prejudice to A1C Gray. The application of *Barker v. Wingo* thus reinforces that this delay was neither necessary nor justified under the circumstances.

1. The Length of Delay

Despite explicit judicial mandates, the Government's delivery of the record of trial was inexplicably slow, triggering the very concerns that *Moreno* sought to prevent: the erosion of trust and fairness in military proceedings. As noted above, the Notice of Docketing was filed 168 days

after A1C Gray was sentenced. Worst, yet, despite explicit judicial mandates, the Government's delivery of the record of trial was inexplicably slower. The Government took until 23 July 2024 to deliver the record of trial to this court, 461 days after A1C Gray was sentenced and 293 days after docketing.

The *Moreno/Livak* standard of 150 days from sentence to docketing has been run afoul in this case. *United States v. Livak,* 80 M.J. 631 (A.F. Ct. Crim. App. 2020). In *Livak*, this court noted that the 150-day threshold was an appropriate time frame to allow the Government to accomplish the actions required to complete the record of trial prior to docketing. Importantly, the delay in *Livak* was only 82 days. *Id*. at 634.This case took nearly six-fold that to get from sentencing to delivery of a complete record to this Court. And even if this Court decided to use the date of docketing as its starting point in the analysis—which it should not—the Government's inactions in this case still led to the 150-day metric falling only one week shy of being double. Therefore, this factor should weigh heavily in favor of A1C Gray.

2. The Reasons for the Delay

When looking at the reasons for the delay, courts "look at the Government's responsibility for any delay, as well as any legitimate reasons for the delay, including those attributable to an appellant." *Moreno* at 136. According to the Government's Notice of Status of Compliance, the main reason for the delay seems to be the delay in the Government receiving the complete verbatim transcript from the court reporter in this case. Notice of Status of Compliance, Feb. 29, 2024. In the Notice of Status of Compliance, the Government stated that the transcript was expected to be completed by 13 March 2024. *Id*. Yet, it took another 130 days and an additional order from this court for the Government to deliver the record of trial to this Court. *Id*. Further, the Government

took no steps to inform this Court as to why the transcript, and thereby the record of trial, were not delivered on 13 March 2024.

The protracted nature of this delay is particularly egregious, given that two explicit court orders were necessary to secure the record. Therefore, the court should weigh this factor in A1C Gray's favor.

3. A1C Gray's Assertion of Right to a Timely Review and Appeal

A1C Gray has not asserted of his right to a timely review and appeal. In line with *Moreno,* even if this factor weighs against A1C Gray, 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." *Id*. at 138.

4. Prejudice To A1C Gray

Although A1C Gray has not shown a particularized anxiety or concern that is distinguishable from the normal anxiety experienced by others awaiting an appellate decision, and even if that leads this Court to decline to grant relief under *Moreno,* A1C Gray remains entitled to relief under *Toohey*. "[W]here there is no finding of *Barker* prejudice, we will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey,* 63 M.J. at 362. This court may grant relief to an appellant even if the post-trial delay was not "most extraordinary." *Id*.

The unreasonably lengthy delay and the lack of justifiable reasons for the delay weigh heavily in favor of A1C Gray. Further, when coupled with this Court's multiple attempts to spur the Government to act, yet it failed to do so, should lead to the conclusion that the delay in

A1C Gray's case is egregious. In sum, while none of these factors is dispositive, the "essential inquiry" of the "appropriateness" of relief resolves in A1C Gray's favor. *Toohey,* 63 M.J. at 362.

B. A1C Gray is entitled to relief under Tardif

Even if this Court finds that there is no due process violation, pursuant to its Article 66, UCMJ authority, a service court of criminal appeals (CCA) may "grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), [UCMJ,] if it deems relief appropriate under the circumstances." *Tardif*, 57 M.J. at 224; *see also* Article 66(d)(2) stating "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 under section 860c of this title (article 60c).")

This Court has identified a list of factors to consider in evaluating whether relief under Article 66, UCMJ, should be granted for post-trial delay. *Gay*, 74 M.J. at 744. These factors include: (1) how long the delay exceeded appellate review standards; (2) the reasons for the delay and whether the government acted with bad faith or gross indifference; (3) harm to the appellant or to the institution; (4) whether the delay has lessened the effect of the sentence and whether relief is consistent with the goals of both justice and good order and discipline; (5) evidence of institutional neglect; and (6) whether this Court can provide any meaningful relief. *Id*. No single factor is dispositive, and this Court may consider other appropriate factors. *Id*.

Although there is no evidence the Government acted with bad faith in its repeated failures to timely produce the record of trial, the Government's conduct should nevertheless be viewed by this court as gross indifference and continued harm to the institution. To the extent providing relief to A1C Gray incentivizes the government to do better, it is consistent with the goals of both justice and good order and discipline. Further, this Court can still provide "meaningful relief" to A1C Gray by restoring his rank despite the passage of time. *Gay*, 74 M.J. at 744. Providing relief to

A1C Gray would thus serve the twin goals of justice and good order and disciple by incentivizing timely completion of records of trial and reinforcing respect for appellate deadlines.

Furthermore, prejudice arises from such unreasonable delays. The integrity and reputation of the military justice system depend upon swift and efficient processing. As noted by this Court in *Valentin-Andino*, there is a "systemic problem indicating institutional neglect" in the Air Force leading to post-trial processing errors. *See Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17. Conversely, in *United States v. Atencio*, this court stated:

> Although we find some evidence of a lack of urgency or indifference concerning timely post-trial processing in this particular case, and this court has noted that errors in records of trial have been a systemic problem indicating institutional neglect, [. . .] we have not found that *delays* in transcribing and assembling the record have become an institutional problem.

United States v. Atencio, No. ACM S32783, 2024 CCA LEXIS 543, at *9 (A.F. Ct. Crim. App. Dec. 20, 2024). However, in *Atencio*, the transcription took thirteen days. *Id*. Here, the delay in producing the transcription lasted over nine months. Long, unexplained delays diminish public confidence, suggesting that justice is neither timely nor assured. The extraordinary delay here contravenes both the letter and spirit of the law. As a result, this Court should find that the Government's conduct was not only detrimental to A1C Gray's personal interests but also harmful to the perception and operation of military justice overall.

A1C Gray requests this Honorable Court set aside A1C Gray's reduction in rank.

Respectfully submitted,

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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 21 January 2025.

Respectfully submitted,

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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. 1
Airman First Class (E-3) **ALEJANDRO E. GRAY** United States Air Force *Appellant.*	)	No. ACM 40648 20 February 2025

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

ISSUES PRESENTED

I.

IS APPELLANT'S CONVICTION FOR ASSAULT CONSUMATED BY A BATTERY LEGALLY AND FACTUALLY INSUFFICENT BECAUSE THE GOVERNMENT PRESENTED NO EVIDENCE THAT AIRMAN FIRST CLASS GRAY TOUCHED M.M. IN THE MANNER CHARGED?

II.

WHETHER THE SENTENCE IS INAPPROPRIATELY SEVERE.

III.

WHETHER THE UNREASONABLE POST-TRIAL DELAY IN THE DELIVERY OF THE RECORD OF TRIAL CONSTITUTES ERROR WARRANTING RELIEF.

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case. However, Appellant's sentence did not include a reprimand. (ROT, Vol 1). Appellant was sentenced to reduction to Airman and forfeiture of $1,000 pay per month for one month.

STATEMENT OF FACTS

For M.M.'s first assignment with the United States Air Force, she was assigned to Seymour-Johnson Air Force Base, NC, in April of 2022. (R. at 202). M.M. was part of the weapons career field. (R. at 201). One of the first people M.M. met at Seymour-Johnson was Appellant. (R. at 203). Appellant was another member of M.M.'s shop. (Id.). M.M. and he shared friends in common. (Id.). M.M. rarely socialized with Appellant outside of work, and when she did it was with other people present. (Id.). On occasions when M.M. needed a ride to work, Appellant was one of three coworkers she would ride in with. (Id.). Appellant gave M.M. a ride once or twice. (R. at 208).

On 20 May 2022, Appellant gave M.M. a ride into work. (R. at 207). M.M. was working with Appellant, A.D, and another airman that day. (R. at 204). They were painting a room in a building near the flight line. (R. at 204). For this job, they were instructed not to wear their Operational Camouflage Pattern (OCP) due to the risk of paint spilling on them. (R. at 204). Instead, they were instructed to wear civilian clothes that they "did not mind [getting] ruined from the paint." (R. at 204). In compliance with this instruction, M.M. was wearing a tank top and jeans. (R. at 204).

After completing some painting, M.M. and her three coworkers took a lunch break. (R. at 205). M.M. testified that A.D. and the other airman left the room. (R. at 205). M.M. was "sitting on a chair" in front of a door toward the end of the room. (R. at 205). M.M.'s back was "towards the rest of the room" and the front of her body was facing the door. (R. at 205). M.M. was looking at her phone. (R. at 205).

M.M. testified that someone, later discovered to be Appellant, came up behind her while she was sitting in the chair. (R. at 206). She felt someone pull on her bra strap and release it.

(R. at 206). M.M. felt "a sharp sting." (R. at 206). M.M. turned around and made eye contact with Appellant. (R. at 206). M.M. speculated that Appellant would have needed to move her tank top to reach her bra strap, but she wasn't certain. (R. at 206, 211). While M.M. did not "physically see" Appellant's actions, she still felt "the sting behind [her], and physically having [her] bra strap pulled." (R. at 212). M.M. was "just shocked" and didn't say anything. (R. at 206). Appellant then smiled at M.M. and walked away. (R. at 206). There was no one else "standing right there" in the room. (R. at 207). M.M. clarified that Appellant never placed his hand on her shoulder, and she did not see him lean over her to see what she was doing on her phone. (R. at 210).

M.M. thought the snap from the bra strap left "maybe a little red mark," but she did not take a picture. (R. at 212). M.M. demonstrated in court the approximate sound made by snapping her bra strap against her skin, but said it was "not that loud." (R. at 212). M.M. testified that she did not believe anyone was in the room when Appellant snapped her bra strap, (R. at 212), but she said there was a "very slim possibility" "there was someone in the room." (R. at 213).

After Appellant left the room, E.K., another coworker, came in to talk to M.M. (R. at 213). E.K. had a "one-on-one girl conversation" with M.M. about dressing more modestly because "the military has had issues with sexual assault." (R. at 213). During this conversation, M.M. told E.K. that Appellant had just snapped her bra strap. (R. at 214). E.K. told their supervisors. (R. at 214).

M.M. could not recall precisely when she reported the incident to security forces. While she testified that the incident occurred on 20 May 2022, her statement to security forces was dated 23 May 2022. (R. at 217). M.M. could recall that her supervisors came to talk to her

about reporting the incident to security forces. (R. at 214-215). M.M.'s Flight Chief and another supervisor took her to security forces when she reported the incident. (R. at 218). M.M. did not recall all the details of her report with perfect clarity because it "was a year ago, so [her] memory and recollection of the whole state of events [was] kind of scattered." (R. at 218). After filing the report, M.M. believed she went back to the shop to continue painting, but she was not certain. (R. at 219-220). M.M. could remember going home with a different coworker, B.W., afterwards because she was uncomfortable with what Appellant had done. (R. at 225, 261).

B.W. recalled seeing Appellant and M.M. painting that day, and he saw Appellant's hand on M.M.'s shoulder. (R. at 261). About ten minutes later, M.M. told B.W. she was "uncomfortable with [Appellant]." (R. at 261). M.M. was "freaked out" and "weirded out" when she spoke to B.W. about this. (R. at 261). B.W. testified that he had Appellant get M.M.'s bag out of his car and put it in B.W.'s car. (R. at 262). B.W. took M.M. home that day. (R. at 262).

On cross-examination, B.W. denied telling security forces that he didn't see Appellant touch M.M. (R. at 265). When provided his statement, trial defense counsel confirmed that his written statement said "[E.K.] approached me and asked if I had known about or had seen [Appellant] touch [M.M.], by grabbing her bra strap on any of the days that we're painting. I had not witnessed any such actions." (Def. Ex. B; R. at 267). B.W. reiterated he was only saying he didn't see Appellant touch M.M.'s bra strap rather than not seeing him touch her at all, and had "just seen his hand up on her should for like a split-second." (R. at 267). B.W. also confirmed he did not hear the bra strap snapping. (R. at 268). M.M. and Appellant would have been about 15 feet from B.W. at the time of the incident. (R. at 269).

The day of the incident, E.K. was assisting with the painting and would "pop in and out" to ensure the room was being painted. (R. at 290). M.M. and Appellant were both assigned to paint that day. (R. at 291). E.K. recalled M.M. was wearing a tank top that day with "spaghetti straps." (Id.). E.K. wasn't "entirely comfortable" with M.M.'s outfit in the workplace, and was told by her leadership that she could have a "girl-to-girl conversation" with M.M. about it. (R. at 292). Several airmen were in the room when E.K. went to talk to M.M. (R. at 293). E.K. pulled M.M. away for a private conversation. (Id.) When speaking to E.K. about the alleged bra snap, M.M. did not mention a red mark on her back or show E.K. any mark. (Id.). However, E.K. did not look for a red mark on M.M.'s back, ask her about one, or ask if the bra snapping "stung" her. (R. at 295). E.K.'s primary concern in that conversation was to make "sure [M.M.] knew what resources she had." (Id.).

ARGUMENT

I.

APPELLANT'S CONVICTION OF ASSAULT CONSUMMATED BY BATTERY IS LEGALLY AND FACTUALLY SUFFICIENT.

Additional Facts

P.G., Appellant's mother, testified during findings that Appellant is 6'3". (R. at 307).

A.D. testified that Appellant was "socially awkward," and his interactions with others were "brief." (R. at 279).

Standard of Review

Issues of legal sufficiency are reviewed *de novo*. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

"The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B)." 10 U.S.C. § 866(d)(1)(A). Factual sufficiency is reviewed using the following standard if every finding of guilty is for an offense occurring on or after 1 January 2021[1]:

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

10 U.S.C. § 866(d)(1)(B).

Law

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

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

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 of record 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.

To obtain a conviction for assault consummated by a battery, the Government must prove: (1) That the accused did bodily harm to a certain person; (2) that the bodily harm was done unlawfully; and (3) that the bodily harm was done with force or violence. Manual for Courts-Martial (MCM), pt. IV, ¶ 77.b.(2) (2019 ed.)

"Bodily harm" means an offensive touching of another, however slight. Id. at 77.c.(1)(a).

"Findings may be based on direct or circumstantial evidence." RCM 918(c).

Analysis

A. Appellant has not shown a deficiency of proof in the Government's case to trigger a factual sufficiency review.

Much of Appellant's factual insufficiency argument rests precariously on the premise that no one saw Appellant grab M.M.'s bra strap and snap it against her back. (App. Br. at 8). However, this was not a deficiency of proof given the Government's other evidence.

M.M. felt someone snap her bra strap from behind. (R. at 206). She turned around and saw Appellant standing behind her. (Id.). There was no one else standing behind her. (R. at 207).

Appellant smiled at M.M. and then walked away. (R. at 206-07). This was circumstantial evidence that Appellant was the one to snap M.M.'s bra strap.

Our sister services have found that a "general disagreement with a verdict" or with a conclusion of a fact finder is insufficient to establish a deficiency of proof. *See* United States v. Valencia, ___ M.J. ___, 2024 CCA LEXIS 515, at *12-13 (N-M Ct. Crim. App. Dec. 5, 2024). "[M]inor inconsistencies in the victim['s] testimony" likewise does not "establish a specific deficiency of proof." United States v. Brassfield, ___ M.J. ___, 2024 CCA LEXIS 497, *12-13 (A. Ct. Crim. App. 20 November 2024). While M.M. did not recall seeing other people present in the room (R. at 205), she clearly articulated that Appellant was the one standing behind her. (R. at207). She also recalled speaking to E.K. about the incident shortly after it happened. (R. at 214). It is not incredible that M.M. would only remember the presence of the people involved in the incident. From her perspective, that was Appellant and E.K. Lastly, while B.W. did not recalling seeing Appellant snap M.M.'s bra strap, he did recall seeing Appellant's hand at M.M.'s shoulder. (R. at 267). The act of reaching up to snap a bra strap would take a couple of seconds, and so the other people present in the room would have had to look up at exactly the right moment to see Appellant do it. The testimony of these three witnesses contained only minor inconsistencies typical of eyewitness testimony and should not be considered enough to establish a deficiency of proof.

This Court should follow our sister services and find that Appellant has failed to establish a specific showing of a deficiency in proof by merely disagreeing with the fact-finder's conclusion on elements.

B. The government provided evidence for each element of the offense demonstrating that Appellant committed assault consummated by battery on M.M.

If this Court finds that Appellant did allege a deficiency in proof, it still should not grant Appellant relief. The government presented evidence beyond a reasonable doubt to show that Appellant snapped M.M.'s bra strap against her shoulder.

While the Government has a heavy burden of persuasion, it need not prove its case to a mathematical certainty." United States v. Kloh, 27 C.M.R. 403, 406 (C.M.A. 1959). The Government may meet its burden of proof with direct or circumstantial evidence. *See generally* United States v. Maxwell, 38 M.J. 148, 150-51 (C.M.A. 1993). Military jurisprudence has long held that "direct evidence of a crime or its elements is not required for a finding of guilty; circumstantial evidence may suffice." United States v. Hart, 25 M.J. 143, 147 (C.M.A. 1987) (affirming a conviction based on circumstantial evidence); *see also* United States v. Davis, 49 M.J. 79, 83 (C.A.A.F. 1998) (finding sufficient evidence of premeditation based on circumstantial evidence of intent). And the Supreme Court has "never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003); *see* Holland v. United States, 348 U.S. 121, 140 (1954) ("Circumstantial evidence … is intrinsically no different from testimonial evidence.").

Turning to the first element, the Government proved beyond a reasonable doubt that Appellant did bodily harm to M.M. On the day of the incident, M.M. was wearing civilian clothes because her assigned duty for the day was painting. (R. at 204). M.M. felt someone snap her bra strap against her shoulder while she sat in a chair. (R. at 206). She turned around and Appellant was the only person standing behind her. (Id.). M.M. couldn't recall anyone else present in the room or close enough to her to have snapped her bra strap. (R. at 207). Appellant

smiled at her and then walked away without saying anything. (R. at 206). On the day the group was painting together, B.W. saw Appellant with his hand at M.M.'s shoulder while M.M. was sitting in a chair. (R. at 261). Appellant was the only person who could have snapped M.M.'s bra strap, which was an offensive touching to M.M.

To the second and third elements, the Government also proved that Appellant snapped M.M.'s bra strap with unlawful force. M.M. had spent very little time with Appellant up until this point, and she did not say he could snap her bra strap. (R. at 203). Since Appellant smiled and walked away after the bra strap, there is no evidence that he touched her to get her attention or something similar, which could have been offered as a defense for the touching. While A.D. testified that Appellant is socially awkward, no amount of social awkwardness could justify reaching out to snap the bra strap of a woman he barely knew.

There was no legal justification for Appellant to snap M.M.'s bra strap, and Appellant used some force in lifting M.M.'s bra strap so that it would snap back down on her shoulder. (R. at 206). While there is no set amount of force required, M.M. testified that the bra strap was lifted enough that she "felt a sharp sting" when it hit her shoulder. (Id.). Based on this circumstantial evidence, the Government proved beyond a reasonable doubt that it was Appellant who reached out, took up M.M.'s bra strap, and snapped it against her shoulder without justification. There was no one else present who could have done it, and there was no evidence that M.M.'s bra strap could have caught on the chair she was sitting in. (App. Br. at 9). Appellant's own mother testified that he is 6'3", which would be plenty tall enough to reach around or over a chair back to snap M.M.'s bra strap. (R. at 307).

M.M.'s version of events was corroborated more than it was contested. She told B.W. that Appellant had made her uncomfortable the same day as the bra snap, and had B.W. give her a

ride home that day despite riding in with Appellant. (R. at 207, 262). M.M. told E.K. about the bra snap while they were discussing work appropriate attire and sexual assault in the military (R. at 214, 293). From her disclosure, it is apparent that when E.K. brought up sexual assault in the military, M.M. drew a connection between that and Appellant snapping her bra strap. This bolsters M.M.'s testimony that she did not consent to Appellant forcefully snapping her bra strap, because a consensual touching would not have drawn a connection between the bra strap snap and sexual assault in M.M.'s mind.

This Court should not be clearly convinced that the weight of the evidence was against the finding of guilt and should not set aside Appellant's conviction.

Because Appellant's conviction is factually sufficient, it meets the lower standard for legal sufficiency. A rational factfinder could have found all the elements of assault consummated by battery beyond a reasonable doubt, as the military judge did in this case. Therefore, Appellant is unentitled to relief and this Court should deny this assignment of error.

II.

APPELLANT'S SENTENCE IS NOT INAPPROPRIATELY SEVERE.

Additional Facts

During the presentencing hearing, M.M. gave an unsworn victim impact statement. (R. at 385). She explained that Appellant's actions have made her uncomfortable around people and more [wary] of her coworkers. (Id.). She said Appellant's actions "eroded any trust" she'd had in "wingmen." (Id.).

The Government introduced a demotion record where Appellant was previously demoted from Airman First Class to Airman for failing to meet fitness standards. (Pros. Ex. 7).

During their sentencing argument, the Government requested that Appellant receive a bad conduct discharge, one month in confinement, reduction to Airman Basic, and a reprimand. (R. at 391). The Government highlighted that Appellant had grabbed "an intimate piece of clothing" of his "coworker." (R. at 391). The Government argued that Appellant had shown he did not meet the standards of an Airman First Class and should be demoted to Airman Basic because "[n]o one should look up to him." (R. at 392).

Trial defense counsel argued that this proposed sentence was "an excessive punishment." (R. at 392). They argued that a reasonable sentence in Appellant's case would "not include confinement or a punitive discharge." (Id.). Trial defense counsel specifically listed other punishments "like a reprimand or reduction in rank, or forfeitures" as more appropriate for Appellant's case. (R. at 394).

Appellant was sentenced to forfeiture of $1,000 and reduction to Airman. (R. at 399).

Standard of Review

This Court reviews the appropriateness of an appellant's sentence *de novo*. *See* United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023).

Law and Analysis

Pursuant to Article 66(d), UCMJ, this Court "may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d). The purpose of such review is "to ensure 'that justice is done and that the accused gets the punishment he deserves.'" United States v. Joyner, 39 M.J. 965, 966 (A.F.C.M.R. 1994) (quoting United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)).

In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." United States v. Hamilton, 77 M.J. 579, 587 (A.F. Ct. Crim. App. 2017) (citations omitted). "The power to review the entire record includes the power to consider the allied papers, as well as the record of trial proceedings." United States v. Hutchison, 57 M.J. 231, 234 (C.A.A.F. 2002). The Court also considers the "limits of the [plea agreement] that the appellant voluntarily entered into with the convening authority." United States v. Fields, 74 M.J. 619, 626 (A.F. Ct. Crim. App. 2015).

Although this Court has discretion to determine whether a sentence is appropriate, it has "no power to 'grant mercy.'" 77 M.J. at 587 (citing United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)); *see also* United States v. Walters, 71 M.J. 695, 698 (A.F. Ct. Crim. App. 2012) ("[W]e are not authorized to engage in exercises of clemency."). Thus, as long as a sentence is not inappropriately severe, this Court may affirm it even if it is not what this Court would have adjudged:

> By affirming a sentence, we do not necessarily mean that it is the sentence we would have adjudged had we been the sentencing authority. The numerous permutations and combinations of sentencing alternatives available to the sentencing authority are so broad that, normally, there will not be only one sentence that is appropriate for a particular appellant. Thus, it may be more fitting for this Court to find that a particular sentence "is not inappropriate," rather than "is appropriate."

United States v. Joyner, 39 M.J. 965, 966 (A.F.C.M.R. 1994).

The maximum punishment for Appellant's conviction of assault consummated by battery at a general court-martial was a bad conduct discharge, forfeiture of all pay and allowances, and confinement for six months. (MCM, pt. IV, para. 77.d.(2)(a)) (2019 ed.). However, the military judge adjudged no confinement nor a punitive discharge. (R. at 399).

Despite trial defense counsel's argument that forfeitures, reductions in rank, and a reprimand would be more fitting in Appellant's case, Appellant now argues his sentence is too severe. Nothing Appellant offers is compelling extenuation or mitigation evidence. (App. Br. at 11). Rather, Appellant merely recited the law regarding sentence severity and argues that his sentence generally jeopardized his rights and the public's faith in the military justice system. (Id.).

Appellant's argument that his misconduct was "minor" dismisses the severity of what he did and the effect it had on M.M. Appellant walked up to a female coworker and snapped her bra strap without saying a word to her and without having any reason to think it was acceptable. M.M. stated in her unsworn statement that Appellant's actions will affect her for the rest of her life and have broken her trust in people and coworkers. (R. at 385). While Appellant's action in snapping M.M.'s bra strap was the work of only a second, it will have lasting consequences for her.

If Appellant's rank meant so much to him and he had already lost it once, then he should have been on his best behavior to ensure he did not jeopardize it again. But as seen with his conviction, that is not what Appellant did.

Appellant does not deserve to be an Airman First Class when he did not respect the bodily autonomy of his coworkers. As the Government said in their sentencing argument, no one should look up to Appellant after his behavior. Despite this, the military judge already only reduced Appellant to an Airman rather than an Airman Basic. The military judge also gave Appellant the opportunity to reclaim his rank by declining to adjudge him a punitive discharge from the military.

Appellant's sentence was not inappropriately severe, and therefore this Court should not grant sentencing relief under this assignment of error.

III.

APPELLANT SHOULD NOT RECEIVE RELIEF FOR HIS POST-TRIAL DELAY.

Additional Facts

On 23 December 2022, Congress amended Articles 66 and 69, UCMJ[2]. As amended, Article 66 expanded the CCA's jurisdiction to any judgment of a court-martial, irrespective of sentence, that includes a finding of guilty. Art. 66(b)(1)(A) (2022).

At the time of Appellant's trial, verbatim transcripts were not required for all findings of guilt. Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial*, dated 21 April 2021, para. 11.1.1. With respect to Appellant's conviction, a verbatim transcript would only have been required if his sentence had included death, dismissal, punitive discharge, or confinement for more than six months. Id. at 11.1.1.1. Since it did not, the court reporter prepared and completed the summarized transcript on 24 July 2023. (ROT, Vol 3, *Report's Chronology*).

On 13 September 2023, Appellant filed with this Court a "Notice of Direct Appeal Pursuant to Article 66(b)(1)(A)." (*Notice of Appeal*, dated 13 September 2023). This Court docketed Appellant's case on 4 October 2023 while awaiting a verbatim transcript. (*Notice of Docketing*, 4 October 2023). Twenty-two days elapsed between the notice of direct appeal and notice of docketing.

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

The court reporter first received a 30-day notice to complete the verbatim transcript on 26 December 2023, 105 days since Appellant's notice of direct appeal. (ROT, Vol 3, *Reporter's Chronology*). They did not meet this deadline, and this Court ordered government appellate counsel to provide an update on the record of trial by 29 February 2024. (*Order*, 5 February 2024). The Government did so and anticipated that the verbatim transcript would be completed by 13 March 2024. (*United States' Notice of Status of Compliance*, 29 February 2024). The court reporter was unable to meet this projection and sent the transcript to government and trial defense counsel on 30 March 2024 with a request that the review be "rush[ed]" as the transcript was overdue. (ROT, Vol 3, *Reporter's Chronology*; *TSgt Brandon Weaver Declaration*, 20 February 2025). Government and trial defense counsel returned their review to the court reporter on 3 April 2024. (*Id.*). The court reporter certified the transcript and sent the document to the government for post-trial processing on 5 April 2024. (ROT, Vol 3, *Reporter's Chronology*). The government e-mailed the verbatim transcript to JAJM on 16 April 2024, 217 days since the notice of direct appeal. (*TSgt Brandon Weaver Declaration*, 20 February 2025).

Government appellate counsel became aware that the Court had not received the verbatim transcript on 25 June 2024 when this Court issued a second order for the record of trial no later than 25 July 2024. (*Order*, 25 June 2024). On 15 July 2024, the court reporter contacted Seymour Johnson legal office regarding the transcript. (*TSgt Brandon Weaver Declaration*, 20 February 2025). Seymour Johnson legal office contacted JAJM regarding the transcript emailed on 16 April 2024. (*Id.*). JAJM informed Seymour Johnson that "they never saw the email" and "it must have been deleted." (*Id.*). Seymour Johnson legal office mailed a hard copy of the transcript to JAJM that same day. (*Id.*). This Court received a copy of the transcript on 23 July 2024. (ROT, Vol 1).

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 and Analysis

CAAF established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision more than 18 months after the case is docketed with the court. United States v. Moreno, 63 M.J. 129, 142-143 (C.A.A.F. 2006). Since Moreno, post-trial processing has changed to include the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633. This Court now applies an aggregate standard threshold of 150 days from the day an appellant was sentenced to docketing with this Court. Id.

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

CAAF has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for

appeal and defenses, in case of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id. "The anxiety and concern subfactor involves constitutionally cognizable anxiety that arises from excessive delay and we 'require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.'" United States v. Toohey, 63 M.J. 353, 361 (C.A.A.F. 2006) (citing Moreno, 63 M.J. at 140). To find a due process violation when there is no prejudice under the fourth Barker factor, a court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." Id. at 362.

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 specific time standards established in Moreno, 63 M.J. at 142. (App. Br. at 46.) However, the Moreno time standards are inapt to non-automatic appeals under Article 66(b)(1), UCMJ (2022), such as this one, which is procedurally different from automatic appeals and did not exist at the time of Moreno.

The proper trigger point for the Moreno clock in cases involving non-automatic appeals should be the date of the filing of the notice of appeal. While awaiting the verbatim transcript for the record of trial, the case was docketed with this Court twenty-two days after Appellant filed his notice of appeal. A verbatim transcript had not been prepared because prior to Appellant's filing his notice of appeal, the Government had no cause to prepare a verbatim transcript in his case under the guidance in DAFMAN 51-203, para. 11.1.1.1.

Assuming this Court adopts the notice of appeal as the starting point for appellate review, this case is still within the eighteen-month timeframe for appellate review established in Moreno, 63 M.J. at 142. There is still time for this Court to meet its 18-month deadline under Moreno until 13 March 2025. Any prejudice to Appellant is speculative at this point.

The complete record of trial was provided to this Court on 23 July 2024, which was 314 days after Appellant filed his notice of appeal. While this is past the 150-day benchmark set by Livak, this delay is not so unreasonable as to warrant sentencing relief. CAAF previously found that a delay of nearly 500 days was not so great a delay as to cause public doubt on the "military justice system's fairness and integrity." *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.")

Moreover, although the delay is presumptively unreasonable, the delay alone is not sufficient to justify relief—it only triggers a due process analysis. And there was no due process violation under the Barker analysis.

Regarding the reasons for the delay, much of the delay in this case is attributable to the unique circumstances involving the amendment to Article 66 and the expansion of the right to appellate review. The summarized transcript was completed on 24 July 2023 and the case was docketed on 4 October 2023. The complete verbatim transcript was provided to this Court on 24 July 2024, but three months of that delay came from the technological error when JAJM did not receive the original email with the verbatim transcript in April 2024. (*TSgt Brandon Weaver Declaration*, 20 February 2025). While these delays are attributed to the government, and this

factor should weigh in Appellant's favor, this Court should not weigh it heavily against the government.

The third Barker factor favors the Government. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay. Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (quoting Barker, 407 U.S. at 528). Appellant acknowledged that he *did not* assert his right to speedy appellate review (App. Br. at 16). Appellant has further consented to three enlargements of time to file a brief. Therefore, this factor should weigh in favor of the government.

The prejudice factor also favors the Government. The Supreme Court has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in cases of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id. Here, Appellant has not alleged particularized anxiety or impairment of a retrial. (App. Br. at 16). Appellant is likewise not incarcerated as he was not sentenced to any term of confinement, nor is he waiting for a punitive discharge to be executed. (ROT, Vol 1). Therefore, this factor should weigh in favor of the government.

Because there is no prejudice in Appellant's case, the Court then turns to the analysis under Toohey to determine if the delay is "so egregious that tolerating it would adversely affect

the public's perception of the fairness and integrity of the military justice system." 63 M.J. at 362. The Court looks at all four Barker factors considering the public perception standard. Id. In Toohey, the Navy-Marine Court of Criminal Appeals took 47 months between docketing and their decision. 63 M.J. at 357. This 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. But here, this Court has not even 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.

An appellant may be entitled to relief without a showing of actual prejudice. In United States v. Tardif, CAAF determined that an appellant may be entitled to relief under Article 66, UCMJ, because it allows courts "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' if it deems relief appropriate under the circumstances." 57 M.J. 219, 224 (C.A.A.F. 2002). But the existence of a post-trial delay does not *necessitate* relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225.

This authority to grant appropriate relief is "for unreasonable *and* unexplained post-trial delays." Id. at 220 (emphasis added). Relief is not required, but the court may "tailor an appropriate remedy, if any is warranted, to the circumstances of the case." Id. at 225. Further, relief under Article 66, UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Id. In deciding whether to invoke Article 66, UCMJ, to grant relief as a "last recourse," this Court laid

out a non-exhaustive list of factors to be considered, including:

> (1) How long the delay exceeded the standards set forth in Moreno;
>
> (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;
>
> (3) Whether there is some evidence of harm (either to the appellant or institutionally) caused by the delay;
>
> (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;
>
> (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing; and
>
> (6) Given the passage of time, whether the court can provide meaningful relief.

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015).

Considering the Gay factors, this Court should not grant Appellant sentencing relief. While the delay may have exceeded the clock set forth in Moreno and Livak, that does not require this Court to grant Appellant relief. Contrary to Appellant's assertions, there was no gross indifference or evidence of institutional neglect in processing Appellant's case. Per the chronology, the court reporter was diligently working on Appellant's case in addition to her other assigned cases from January to March 2024. (ROT, Vol 3, *Reporter's Chronology*). While this Court ordered the government to provide the completed record on two different occasions, the second order on 25 June 2024 can be explained with a technological failure, not gross indifference to post-trial processing or institutional neglect. The government believed JAJM had received the verbatim transcript on 16 April 2024 and therefore didn't realize anything was amiss

until this court issued the second order. While certainly not Appellant's fault, that doesn't arise to the level of gross indifference or institutional neglect.

Further, this delay resulted from an unexpected amendment to Article 66 and the Air Force not yet having instituted procedural guidelines to produce verbatim transcripts for all cases that might be eligible for Article 66 review. The Air Force has since changed its policies to require verbatim transcripts in all general and special courts-martial with a finding of guilty, and so this type of delay is unlikely to reoccur. Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 3 October 2024, para. 20.47.1.

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. A balancing of the six Gay factors weighs in the Government's favor, and no egregious or prejudicial delay yet exists requiring post-trial sentencing relief from this Court. This Court should deny this assignment of error.

However, if this Court should conclude that some relief is appropriate in Appellant's case, it should not restore his rank. Appellant grabbed an intimate piece of clothing on his coworker's body and snapped it against her shoulder. He should not be restored to Airman First Class in light of those actions. At most, this Court should only consider returning some of Appellant's forfeitures to him. This will ensure his fellow airmen see that he is still an Airman, *not* an Airman First Class, and force Appellant to earn back his rank for a second time after losing it for failing to meet standards.

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 20 February 2025.

REGINA HENENLOTTER, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 1
Airman First Class (E-3) **ALEJANDRO E. GRAY,** United States Air Force *Appellant.*	)	No. ACM 40648
	)	20 February 2025

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

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

- Appendix – *TSgt Brandon Weaver Declaration*, dated 20 February 2025, with attachment (6 pages)

Appellant's third assignment of error asserts that he is entitled to relief due to post-trial processing delays. Appellant was found guilty on 19 April 2023 and filed a notice of direct appeal on 13 September 2023. This case was docketed with this Court on 4 October 2023, and a verbatim transcript was provided on 23 July 2024.

The attached declaration is responsive to Appellant's third assigned error. TSgt Weaver is the Noncommissioned Officer in Charge of Military Justice with the 4th Fighter Winger at Seymour-Johnson Air Force Base, NC. After reviewing DCMS and emails between his office and the court reporter assigned to the above captioned case, TSgt Weaver prepared the attached declaration to provide a chronology of the steps taken by the legal office to process Appellant's case post-trial.

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). The issue of prejudicial post-trial delay was directly raised by materials in the record because they show, but do not fully explain, the delays in the post-trial processing of Appellant's case. These documents are relevant and necessary to resolve Appellant's claims of error and prejudice from a processing delay.

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

[redacted]
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CERTIFICATE OF FILING AND SERVICE

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

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40648**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Alejandro E. GRAY	)	**PANEL CHANGE**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 26th day of February, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review.

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

ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

[redacted]
C D, SrA, USAF
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**REPLY TO APPELLEE'S ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Special Panel
Airman First Class (E-3) **ALEJANDRO E. GRAY** United States Air Force *Appellant*	)	No. ACM 40648 27 February 2025

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

ARGUMENT

I.

THE GOVERNMENT PRESENTED A CASE THAT WAS FACTUALLY INSUFFICIENT.

A. Factual Sufficiency Has Not Been Established

The Government presented a case that was factually insufficient to sustain Airman First Class (A1C) Alejandro E. Gray's conviction. In this case, the Government's own witnesses' accounts did not align with the theory that the Government now puts forth. *Compare* Answer Brief (hereinafter Gov. Ans.) at 8, *with* R. at 207, 210, 212, 261, 264, 265, 267. MM was unsure who else was in the room, R. at 213, while other testimony points to multiple airmen being around, R. at 293. MM maintained that A1C Gray never put a hand on her shoulder, R. at 210, yet for the first time at trial, BW claimed he saw A1C Gray place a hand on MM's shoulder then conceded that he never heard or saw MM's bra being snapped. R. at 261, 264, 265, 267. These conflicts cast serious doubt on MM's claim. Further, contrary to the Government's contention that BW stated that A1C Gray's hand was "*at*" MM's shoulder, BW testified that A1C Gray's hand was "*on*"

MM's shoulder. *Compare* Gov. Ans. at 8, *with* R. at 261, 264, 265, 267. This distinction is important. It stands to reason that if A1C Gray's hand was "*on*" MM's shoulder, as BW testified, MM would have felt the pressure of his hand on her body. However, as stated above, MM denied A1C Gray placing his hand on her shoulder. R. at 210. However, the Government's characterization of BW's testimony as A1C Gray's hand being "*at*" MM's shoulder could theoretically create an opportunity for A1C Gray to commit the charged offense as alleged by the Government. Ultimately, the Government's argument creates a false narrative that would incorrectly harmonize BW and MM's facially contradictory testimony.

That doubt is critical here because the Government rested its case on MM. Perhaps the Government could have charted a pathway to navigate this divided evidence through some corroborative evidence but provided none. MM pinpointed the exact corroboration the Government might introduce, claiming she *may* have had a little red mark arising from the charged conduct. R. at 212. But MM's testimony on that point was on an island, with no other witness having seen the purported mark nor any photographic evidence to memorialize it. Despite talking to EK right after the alleged incident, MM never mentioned a red mark. R. at 293. If her bra strap truly was snapped hard enough to leave a mark, some corroboration would be expected. Here, none exists. Rather than a witness scenario in which the lone account is both corroborated and consistent, *cf. United States v. Hart*, 25 M.J. 143, 147 (C.M.A. 1987), MM's account is both uncorroborated and inconsistent. As such, this Court should be "clearly convinced that the finding of guilty was against the weight of the evidence." Article 66(d)(1)(B)(iii), 10 U.S.C. § 866(d)(1)(B)(iii); *United States v. Harvey*, __M.J. __, No. 23-0239, 2024 CAAF LEXIS 502, at *12 (C.A.A.F. 2024).

Such speculation on the Government's part is erroneous, and impedes the sufficiency of the evidence, because MM's memory was so weak. As noted above, this charged event was fleeting, unseen, and unverified; therefore, MM's recollection of the event is the only evidence the Government has to build its case around. However, MM's testimony contains inconsistencies that are fundamentally flawed to the Government's case. *Compare* R. at 212, 213, 214, 217, 220, *with* R. at 206, 207, 211, 225, 283, 291. The best the Government can do is attribute MM's inconsistent recall to the passage of time, but that only weakens its claim that her version of events is reliable. R. at 354; Gov. Ans. at 8. The Government's argument ignores the clear fact that MM's discrepancies are material inconsistencies that directly contradict the Government's supposedly supporting witness. R. at 210, 213, 261, 264, 267, 345, 376.

When viewed holistically, there are two constants in this case: 1) MM's story is riddled with contradictions, and 2) no one ever actually observed the alleged snap of her bra strap. R. at 212, 267, 283, 293. Coupled with potential embarrassment over being confronted about her attire or other motivations to fabricate, MM's testimony falls short of establishing that A1C Gray intentionally snapped her bra strap beyond a reasonable doubt. R. at 291-293, 373. The Government cites *United States v. Davis*, 49 M.J. 79, 83 (C.A.A.F. 1998), to argue that a single witness can support a conviction if believed beyond a reasonable doubt. Gov. Ans. at 9-10. That makes sense in a case where a sole witness's account remains consistent and credible. Here, however, MM's inconsistent and contradicted account should leave this Court "clearly convinced that the finding of guilty was against the weight of the evidence." Article 66(d)(1)(B)(iii), 10 U.S.C. § 866(d)(1)(B)(iii); *Harvey*, 2024 CAAF LEXIS 502, at *12.

B. Circumstantial Evidence Must Still Surpass the Reasonable Doubt Threshold

The fundamental problem in the Government's case is that the Government relies on MM's unconfirmed assumption that A1C Gray essentially 'must have been the one' to snap her bra strap. Yet, as noted above, no witness saw or heard the snap, there are conflicting statements about who else stood by, and there is no photograph or contemporaneous record of any supposed red mark. MM's allegations are particularly suspect because she made them only after she was confronted by her supervisor about her wardrobe. R. at 293. Regardless of MM's motives, her bare assertion is not enough to prove A1C Gray guilty beyond a reasonable doubt, nor can it leave this Court clearly convinced of the correctness of the trial court's decision. *See Harvey*, 2024 CAAF LEXIS 502, *at *12.*

Circumstantial evidence can indeed sustain a conviction. *See Holland v. United States*, 348 U.S. 121 (1954). As stated in the Discussion of RCM 918(c), "'[c]ircumstantial evidence' is evidence which tends directly to prove not a fact in issue but some other fact or circumstance from which, either alone or together with other facts or circumstances, one may reasonably infer the existence or non-existence of a fact in issue." Put another way, circumstantial evidence involves a logical web of related facts that together point to the conclusion that the accused committed the act. Here, the record falls drastically short of that standard.

In the absence of a credible central witness or corroboration to support her, the Government insists that circumstantial evidence places A1C Gray close enough to snap MM's bra strap. Gov. Ans. at 7-8. Yet that evidence fails to justify that arguement because of the lack of information to support the inferences the Government suggests. For example, the record lacks any clarity about how high the chair was or how close MM and A1C Gray would have been relative to each other at the time of the allegation. R. at 206, 207, 210, 212. Simply describing an act as something that

"happens in less than a second" or in a "blink of an eye" does not relieve the Government of its duty to prove each element of the offense beyond a reasonable doubt. R. at 354-355. And the speculative nature of MM's claim failed to do so, as well.

The Government's reliance on circumstantial evidence in this case veers towards speculation. Gov. Ans. at 10. Merely showing that A1C Gray happened to be an undetermined distance behind MM moments after she felt a stinging sensation on her back, on its own, is not enough to prove a fact or circumstance that would lead this Court to be convinced of the correctness of the trial court's decision. Especially considering MM stated that "there was nobody," directly near her when she heard the bra strap snap. R. at 212. True circumstantial evidence should not rely exclusively on one person's assumption that the closest individual must be guilty. Indeed, that is mere conjecture, not a reasonable inference.

The Government's case should leave this Honorable court clearly convinced that the finding of guilty was against the weight of the evidence and, therefore, factually insufficient under Article 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B). As A1C Gray's conviction is factually insufficient, there is no need for this court to address legal sufficiency. However, A1C Gray maintains his conviction was neither factually nor legally sufficient.

A1C Gray asks this Honorable Court to set aside the findings of guilt as to Charge II and set aside the sentence.

III.

THE UNREASONABLE POST-TRIAL DELAY IN THE DELIVERY OF THE RECORD OF TRIAL CONSTITUTES ERROR WARRANTING RELIEF.

The inordinate delay in finalizing and transmitting the record of trial in this case violated A1C Gray's due process rights and contravened the standards outlined in *United States v. Moreno*,

63 M.J. 129 (C.A.A.F. 2006). The Government attributes the delay to logistical issues, from court-reporter workloads to evolving statutory requirements, but the fact remains that more than one order from this Court was necessary before the record was finally produced, which left A1C Gray's direct appeal stalled for an unacceptably prolonged period. Gov. Ans. at 15-16.

Under the *Barker/Moreno* framework, courts consider the length and reasons for the delay, the accused's assertion of the right to timely review, and any resultant prejudice. *See Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006).

While the Government points to transcription backlogs and statutory changes under Article 66, these excuses do not sufficiently explain why, after the first court order, it took so long to rectify the record's deficiencies or to inform the Court of ongoing issues. Gov. Ans. at 16. This type of administrative standstill undermines the core principle of prompt appellate review, diminishing public confidence in military justice and infringing on A1C Gray's right to a timely appeal. That two court orders were needed to spur the Government to provide the record demonstrates an institutional shortfall. Producing a complete record for appellate review should not require repeated interventions by this Court. Appellant Brief at 14-15.

A. Relief Under Article 66(d)(2), 10 U.S.C. § 866(d)(2), Is Warranted Even Absent Specific Prejudice.

Regardless of whether the delay caused quantifiable prejudice, such as lengthy confinement pending appeal, this Court is empowered to grant relief for "excessive [post-trial] delay" under Article 66(d)(2). *See United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015) (en banc), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016). In this case, the principal harm is the extensive time between sentencing and the Court's receipt of the finalized record. Whether measured from the date of sentencing or the Government's proposed date, the filing of the notice of direct appeal,

this sluggish administrative process undermines not only efficiency but also public faith in our justice system.

B. A Meaningful Remedy Underscores the Importance of Timely Post-Trial Processing

To deter such delays from becoming routine, this Court possesses the discretion to craft appropriate relief. *See United States v. Livak*, 80 M.J. 631, 634 (A.F. Ct. Crim. App. 2020). Whether by setting aside findings or awarding sentence relief, the Court can underscore that lax post-trial administration is intolerable. Beyond addressing A1C Gray's specific delay, this remedial action would demonstrate the Court's strong commitment to swift appellate processing for every service member.

A1C Gray respectfully requests this Honorable Court set aside his reduction in rank as a remedy for the excessive post-trial delay.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were delivered by e-mail to the Court and served on the Government Trial and Appellate Operations Division on 27 February 2025.

Respectfully submitted,

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