# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM 40616** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Justin P. MITTON** | ) | |
| **Staff Sergeant (E-5)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 3** |

On 23 July 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. 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 24th day of July, 2024,

**ORDERED:**

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **2 October 2024.**

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

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

[redacted]
OLGA STANFORD, Capt, USAF
Commissioner

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **UNITED STATES,** | ) | **APPELLANT'S MOTION** |
| *Appellee,* | ) | **FOR ENLARGEMENT** |
| | ) | **OF TIME (FIRST)** |
| v. | ) | |
| | ) | Before Panel No. 3 |
| Staff Sergeant (E-5) | ) | |
| **JUSTIN P. MITTON,** | ) | No. ACM 40616 |
| United States Air Force, | ) | |
| *Appellant.* | ) | 23 July 2024 |

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **2 October 2024**. The record of trial was docketed with this Court on 4 June 2024. From the date of docketing to the present date, 49 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, 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 Air Force Government Trial and Appellate Operations Division on 23 July 2024.

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23 July 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Staff Sergeant (E-5)<br>JUSTIN P. MITTON, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40616<br><br>Panel No. 3 |

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

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

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

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

**CERTIFICATE OF FILING AND SERVICE**

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **UNITED STATES**<br>*Appellee* | ) | **MOTION FOR ENLARGEMT OF TIME (SECOND)** |
| v. | ) | Before Panel No. 3 |
| | ) | No. ACM 40616 |
| Staff Sergeant (E-5)<br>**JUSTIN P. MITTON**<br>United States Air Force<br>*Appellant* | ) | 19 September 2024 |

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

Under Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of thirty days, which would end on **1 November 2024**.

This case was docketed 107 days ago, on 4 June 2024. On the date requested, 150 days will have elapsed. Appellant is currently confined.

The prosecution's allegations against Appellant were tried by a military judge sitting alone as a general court-martial at Eielson Air Force Base, Alaska, 22 February 2024. R. at Vol. 1, *Entry of Judgment* at 1-2; Tr. at 1, 223. Consistent with his pleas, Appellant was convicted of one charge containing four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. R. at Vol. 1, *Entry of Judgment* at 1-2. The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, a total of sixteen months of confinement, and a bad-conduct discharge. Tr. at 223. The Convening Authority took no action on the findings, disapproved the adjudged

forfeitures, suspended the adjudged reduction, and waived automatic forfeitures for payment to Appellant's daughter. R. at Vol. 1, *Convening Authority Decision on Action*. Appellant is presently confined.

The record of trial is three volumes. It contains a 223-page transcript, four prosecution exhibits, nine defense exhibits, one court exhibit, and six appellate exhibits.

Undersigned counsel has completed review of the record and will be leading completion of Appellant's Assignments of Error. This is undersigned counsel's only case before any court. As Deputy Chief of the Appellate Defense Division, undersigned counsel is assigned to carry out a variety of duties over the duration of the requested enlargement beyond his own docket, to include administering the Military Justice and Discipline Directorate's annual climate survey of approximately 400 personnel, supervisory review of various briefs to be filed with this Court and the Court of Appeals for the Armed Forces, assisting Division counsel with preparation for at least two scheduled oral arguments before the United States Court of Appeals for the Armed Forces, leading the Judge Advocate General Corps' coordination with communications units at seven different installations across the Department of the Air Force in order to evaluate new legal research and writing software designed to accelerate and improve litigators' capabilities, teaming with other senior military justice practitioners within the Military Justice and Discipline Directorate to build a proposed continuing legal education program for judge advocates with less than six years of experience, and advising on the Air Force's response to a Government Accountability Office call for information on the Air Force's Career Litigation Development Program. Undersigned counsel also has scheduled leave 20-24 September 2024, 3 October 2024, and 15 October 2024, is scheduled to brief The Judge Advocate General on 10 October 2024, and will be attending the Joint Appellate Advocacy Training for the Department of Defense's

appellate counsel on 26-27 September 2024. The requested time will be used to further consult with Appellant and complete drafting of the Assignments of Error.

Appellant has been advised of his right to a timely appeal, counsel's progress on Appellant's case, and of this request for an enlargement of time. Appellant has provided limited consent to disclose his consent for the requested enlargement of time.

**WHEREFORE**, this Court should grant the requested enlargement of time.

Respectfully Submitted

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Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 September 2024.

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23 September 2024

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Staff Sergeant (E-5)<br>JUSTIN P. MITTON, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40616<br><br>Panel No. 3 |

**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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**CERTIFICATE OF FILING AND SERVICE**

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

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

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **BRIEF ON BEHALF OF APPELLANT** |
| v. | ) | Before Panel No. 3 |
| Staff Sergeant (E-5),<br>**JUSTIN P. MITTON**<br>United States Air Force<br>*Appellant* | ) | No. ACM 40616<br><br>31 October 2024 |

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

**Assignments of Error**

**I.**

**WHETHER AN ERROR IN THE REPRIMAND ON THE ENTRY OF JUDGMENT REQUIRES REMAND FOR CORRECTION.**

**II.**

**WHETHER THE APPLICATION OF 18 U.S.C. § 922 TO APPELLANT WARRANTS CORRECTION.**

**III.**

**WHETHER THE AIR FORCE'S APPLICATION OF 18 U.S.C. § 922 TO APPELLANT MERITS SENTENCE RELIEF.**

**Statement of the Case**

On 22 February 2024, the prosecution's allegations against Appellant, Staff Sergeant (SSgt) Justin P. Mitton, were tried by a military judge sitting alone as a general court-martial at Eielson Air Force Base, Alaska. Entry of Judgment (EOJ) at 1-2; R at 1, 223. The allegations spanned 26 June 2021 through 7 February 2023. EOJ at 1-2. Consistent with his pleas, Appellant was convicted of one charge containing four specifications of abusive sexual contact,

each without consent, to gratify his own sexual desire, and in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. EOJ at 1-2.

The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, a total of sixteen months of confinement, and a bad-conduct discharge. R. at 223. The Convening Authority took no action on the findings, disapproved the adjudged forfeitures, suspended the adjudged reduction, and waived automatic forfeitures for payment to Appellant's daughter. Convening Authority Decision on Action at 1.

**Statement of Facts**

Appellant is a United States citizen by birth. Pros. Ex. 1 at 1 ¶ 1; R. at 49. Prior to his court-martial, Appellant possessed multiple firearms—two handguns, two shotguns, and four rifles. Decl. of Appellant (Decl.) at 1. Appellant used firearms for hunting to feed his family. *Id.* One deer might provide enough meat to span family meals over four-to-five months. *Id.* After he completes his sentence, Appellant wishes to use the money saved from hunting after he completes his sentence to continue to support them. Decl. at 2.

On the day Appellant's offenses were reported to military law enforcement, he was required to give up possession of his firearms, which became permanent after his trial. Decl. at 1; *see also* Preliminary Hearing Officer Exhibit 6 at 5-8 (describing military law enforcement's oversight over the investigation). Specifically, the Statement of Trial Results (STR) and the EOJ, post-trial documents memorializing the outcome of Appellant's case, purport to make the loss of his firearms permanent, stripping Appellant of his constitutional right to bear arms for life. STR at 3 (citing 18 U.S.C. § 922); EOJ at 4 (citing 18 U.S.C. § 922); U.S. CONST. amend. II. This determination is on the First Indorsement to each post-trial document, which are consecutively paginated with a preceding portion previously signed by the military judge. STR

at 1-3; EOJ at 1-4. On the EOJ, the military judge listed the STR, to include the STR's First Indorsement containing the firearms prohibition, as an attachment. EOJ at 3; *see also* 10 U.S.C. 860c(1)(A) (2019) (requiring the military judge to include the STR in the EOJ).[1]

The EOJ also attempted to re-state the Convening Authority's reprimand. Specifically, the Convening Authority reflected on Appellant's esteem prior to the charged conduct: "As a noncommissioned officer, our nation's young men and women looked to you for guidance and mentorship." Convening Authority Decision on Action at 1. The EOJ incorrectly reflected the phrase "looked to you" as "looked at you." *Compare id., with* EOJ at 2.

At trial, the military judge received evidence through, among other things, a seventeen-page stipulation of fact and an inquiry with Appellant. Pros. Ex. 1; R. at 46-101. No evidence suggested or demonstrated that Appellant was a "fugitive from justice," an unlawful user of or addict to a controlled substance, "adjudicated as a mental defective," or "committed to a mental institution." *Compare id., with* 18 U.S.C. § 922(g)(2)-(4). Though available as part of the sentence, Appellant was not sentenced to a dishonorable discharge. *Compare* R. at 102, *with* R. at 223. Each specification was subject to a maximum of seven years of confinement. R. at 102. Reflecting what happened at trial, both the STR and EOJ note that Appellant was not convicted of a crime of domestic violence. STR at 3; EOJ at 4.

[1] As written by the military judge, the listed attachment is: "Statement of Trial Results, dated 22 February 2024, 3 pages." The military judge's delineation of three pages means the First Indorsement to the STR is included because it is the only content set out on what is "[p]age 3 of 3" of the STR.

## Argument

## I.

## AN ERROR IN THE REPRIMAND ON THE ENTRY OF JUDGMENT REQUIRES REMAND FOR CORRECTION.

### Standard of Review

Whether post-trial processing was properly completed is reviewed de novo. *United States v. Zegarrundo*, 77 M.J. 612, 613-14 (A.F. Ct. Crim. App. 2018) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)).

### Law and Analysis

Though not requested by the prosecution, the military judge determined a reprimand appropriate for Appellant's conduct and the Convening Authority effectuated that decision. R. 204, 223; Convening Authority Decision on Action. The reprimand in Appellant's EOJ was required to "contain the reprimand issued by the convening authority," R.C.M. 1111(b)(3)(D) (2024), because only the Convening Authority could dictate the reprimand's terms. R.C.M. 1003(b)(1), Discussion (2024). Yet the military judge's EOJ fails to comply with these provisions, inaccurately changing the phrase "looked to you" into "looked *at* you." *Compare* Convening Authority Decision on Action, *with* EOJ at 2 (emphasis added).

Because this Court may only affirm sentences that are "correct in law and fact," 10 U.S.C. § 866(d)(1) (2019) [2], the erroneous reprimand in the EOJ that deviates from the

[2] The citation to the 2019 version of 10 U.S.C. § 866(d) reflects the amendment to 10 U.S.C. § 866(d) found in the Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5330, 5542(a) (2016), rather than subsequent statutory amendments to other portions of 10 U.S.C. § 866. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §§ 542(a)-(b) (2021); National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 539E(d)(1), 539E(f) (limiting changes to this Court's authority to cases in which all findings of guilty are for offenses that, unlike Appellant's, occurred at least two years after the law was enacted). Citations to the provisions of 10 U.S.C. §§ 860c and 866(d) in this brief refer to those enacted in 2019.

Convening Authority's wording of choice may not be affirmed by this Court. At this juncture of the appeal, R.C.M. 1111(c) contemplates two ways to correct such an error.[3] One is to remand the case so a military judge may modify the judgment. R.C.M. 1111(c)(3). Alternatively, this Court may correct the EOJ on its own. R.C.M. 1111(c)(2).

This Court has taken both approaches. For example, in *United States v. Hinds*, No. ACM S32756, 2024 CCA LEXIS 315, at *4-6 (A.F. Ct. Crim. App. Jul. 31, 2024), this Court resolved mismatches found in multiple sentences of the EOJ. But this Court has also remanded similar cases for correction. *See, e.g.*, *United States v. Goldman*, No. ACM 39939 (f rev), 2022 CCA LEXIS 511, at *1-3 (A.F. Ct. Crim. App. Aug. 30, 2022) (order) (correcting, among other EOJ errors, the misspelling of "United States Air Force"); *United States v. Finco*, No. ACM S32063, 2020 CCA LEXIS 246, at *17-18 (A. F. Ct. Crim. App. Jul. 27, 2020) (applying case-specific considerations to remand a case for EOJ correction rather than the Court taking corrective action on its own).

While the error in the reprimand in Appellant's EOJ is small and does not alter the overall meaning conveyed by the reprimand, remand for correction is the appropriate course for this Court for three reasons. First, as set out in Issue II below, this is not the sole error in Appellant's EOJ. Both should be corrected in concert. *See, e.g.*, *United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43, at *17 (A.F. Ct. Crim. App. Jan. 20, 2022) (remanding for multiple errors in the EOJ). Second, small words—even one word—can make a huge difference in other contexts. *See, e.g.*, *Pulsifer v. United States*, 601 U.S. 124, 132-53 (2024) (discussing the meaning of "and" in construing a statute's meaning). And third, errors in the EOJ persistently arise. *E.g.*, *United States v. Wells*, No. ACM S32762, 2024 CCA LEXIS 15, at *1-4

[3] Appellant is not requesting this Court disapprove the reprimand, though it may do so. 10 U.S.C. § 866(d)(1).

(A.F. Ct. Crim. App. Jan. 18, 2024) (order remanding record for EOJ correction, among other errors); *United States v. Harnar*, No. ACM 40559, 2024 CCA LEXIS 39, at *1-3 (A.F. Ct. Crim. App. Jan. 31, 2024) (order remanding record for EOJ correction, among other errors); *United States v. Welsh*, No. ACM S32719 (f rev), 2023 CCA LEXIS 157, at *6 (A.F. Ct. Crim. App. Apr. 6, 2023); *United States v. Howell*, No. ACM 39949 (f rev), 2022 CCA LEXIS 551, at *8-11 (A.F. Ct. Crim. App. Sep. 28, 2022) (addressing failure to include forfeitures in the EOJ and noting "errors in the EOJ persist after this Court has ordered remedial action"); *United States v. Sayers*, No. ACM 40142, 2022 CCA LEXIS 565, at *2-6 (A.F. Ct. Crim. App. Sep. 27, 2022) (order remanding record for EOJ correction, among other errors); *United States v. Mock*, No. ACM 40072, 2022 CCA LEXIS 519, at *10-11 (A.F. Ct. Crim. App. Sep. 1, 2022) (modifying date errors in the EOJ); *United States v. Hepfl*, No. ACM 39829 (f rev), 2021 CCA LEXIS 491, at *3 n.6 (A.F. Ct. Crim. App. Sep. 24, 2021) (directing correction of the EOJ for dismissal with prejudice of three specifications); *United States v. Kubiak*, No. ACM S32659, 2020 CCA LEXIS 408, at *1-3 (A.F. Ct. Crim. App. Nov. 9, 2020) (order remanding record for EOJ correction).

These errors fall within a broader context of post-trial processing errors in cases before this Court, with "a systemic problem evincing institutional neglect," particularly with regard to the assembly of complete records of trial. *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, *16-19 (A.F. Ct. Crim. App. Jun. 7, 2024), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 571 (C.A.A.F. Sept. 30, 2024). Within such a tapestry of errors, the additional work imposed on the Government to correct even a small error like the one found in Appellant's reprimand is a fair consequence—among others, as set out in Issue III below—for the Government's recurring inattention to detail in post-trial processing.

**WHEREFORE**, this Court should remand the record to correct the EOJ's erroneous reprimand.

## II.

## THE APPLICATION OF 18 U.S.C. § 922 TO APPELLANT WARRANTS CORRECTION.

### Standard of Review

Whether post-trial processing was properly completed is reviewed de novo. *Zegarrundo*, 77 M.J. at 613-14 (citing *Kho*, 54 M.J. at 65). This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Vanzant*, 84 M.J. 671, 680 (A.F. Ct. Crim. App. 2024), *rev. granted*, USCA Dkt. No. 24-0182, ___ M.J. ___, 2024 CAAF LEXIS 640 (C.A.A.F. Oct. 17, 2024).

### Law and Analysis

The Courts of Criminal Appeals possess "limited jurisdiction, defined entirely by statute." *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) (citation omitted). In *United States v. Williams*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *12-13 (C.A.A.F. Sep. 5, 2024), the Court of Appeals for the Armed Forces recently rejected the authority of the Courts of Criminal Appeals to address the firearms prohibition in the STR under Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). But this Court remains empowered by statute to correct the unconstitutional deprivation of Appellant's Second Amendment right to bear arms through Article 66(d)(2), UCMJ. 10 U.S.C. § 866(d)(2) (2019); *see also Williams*, 2024 CAAF LEXIS 501, at *14-15 (considering relief under that statute but rejecting it only because of the unique procedural posture of the case).

Article 66(d)(2), UCMJ, authorizes this Court to "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the"

EOJ.[4] *Id.* Appellant meets each of the statutory thresholds: (1) an error, (2) raised by Appellant, (3) occurring after the entry of judgment under Article 60c, UCMJ. *Id.*; *Williams*, 2024 CAAF LEXIS 501, at *14-15. Because only one category of 18 U.S.C. § 922(g) could possibly apply to Appellant, and its reflection in his post-trial paperwork runs afoul of the superior protection found in the Second Amendment, this Court can and should direct correction, consistent with its authority under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

**1. Appellant has demonstrated error: the unconstitutional application of what appears to be 18 U.S.C. § 922(g)(1) to Appellant.**

Facially, one part of 18 U.S.C. § 922 could conceivably apply to Appellant: 18 U.S.C. § 922(g)(1)'s prohibition arising from a conviction of a crime punishable by imprisonment for a term greater than one year. Indeed, Appellant faced up to seven years of confinement for each offense and is serving a sixteen-month sentence. R. at 102, 223; EOJ at 2.

But that provision is the first and last under 18 U.S.C. § 922(g)'s nine categories to seem to apply to Appellant.

The second, found in 18 U.S.C. § 922(g)(2), does not apply because there is no evidence that Appellant is a fugitive from justice.

The third, found in 18 U.S.C. § 922(g)(3), does not apply because there is no evidence Appellant is or was an unlawful user of or addicted to any controlled substance.

[4] The statutory authority for this Court to act may differ from the authority of the Court of Appeals for the Armed Forces to address this issue under Article 67, UCMJ, 10 U.S.C. § 867, a question that may be resolved by the Court of Appeals for the Armed Forces in *United States v. Johnson*, No. ACM 40257, USCA Dkt. No. 24-0004/SF, 84 M.J. 343 (C.A.A.F. Mar. 29, 2024), *vacated and review of other issues granted*, ___M.J. ___, 2024 CAAF LEXIS 561 (C.A.A.F. Sep. 24, 2024). The military judge's inclusion of the STR and its First Indorsement—and the firearms prohibition therein—into the EOJ is one that Appellant asserts is a "decision, judgment, or order" that, for the same reasons articulated below in this brief, was "incorrect in law."

The fourth, found in 18 U.S.C. § 922(g)(4), does not apply because there is no evidence is or was adjudicated as a mental defective or committed to a mental institution.

The fifth, found in 18 U.S.C. § 922(g)(5), cannot apply because it only affects aliens, whereas Appellant is a United States citizen. *Compare* 18 U.S.C. § 922(g)(5), *with* Pros. Ex. 1 at 1 ¶ 1, Tr. at 49. For similar reasons, the seventh, found in 18 U.S.C. § 922(g)(7), cannot apply because Appellant has not renounced his citizenship. *Compare* 18 U.S.C. § 922(g)(7), *with* Pros. Ex. 1 at 1 ¶ 1, Tr. at 49.

The sixth category, found in 18 U.S.C. § 922(g)(6), does not apply because it only purports to foreclose those "discharged from the Armed Forces under *dishonorable conditions*" from owning and possessing firearms. (emphasis added). Appellant could have been sentenced to a dishonorable discharge. R. at 102. But the military judge declined to adjudge such a sentence. R. at 223.

The eighth category, found in 18 U.S.C. § 922(g)(8), does not apply because, as the Government agreed in Appellant's post-trial paperwork, Appellant's offenses did not constitute crimes of domestic violence.

The category-by-category elimination of applicable provisions of 18 U.S.C. § 922(g) matters in this case because of what it precludes. As discussed below, when the sole applicable provision is viewed through the lens of the absence of violence in Appellant's case, the purported statutory application of 18 U.S.C. § 922(g)(1) must yield to the superior protection afforded by the Constitution.

"The military has a hierarchical scheme as to rights, duties, and obligations." *United States v. Romano,* 46 M.J. 269, 274 (C.A.A.F. 1997). Above all is the Constitution, under which applicable statutes must fall in line. *See id.* "While a lower source on the hierarchy may grant

additional or greater rights than a higher source, those additional rights may not conflict with a higher source." *Id.* As applied to Appellant, the question then becomes: Does the purported application of the lifetime firearm ban enumerated in 18 U.S.C. § 922(g)(1) comport with the Second Amendment?

When evaluating that question, the Supreme Court of the United States has articulated the governing test:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The [G]overnment must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

*N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022) (quoting *Konigsberg v. State Bar of Cal.*, 336 U.S. 36, 49 n.10 (1961)).

Broadly speaking, and though not without limitation, the Second Amendment "confer[s] an individual right to keep and bear arms." *D.C. v. Heller*, 554 U.S. 570, 595, 626 (2008). As such, the Second Amendment plainly covers Appellant's right to keep and bear arms, even after his conviction. And, as *Bruen*'s test set out above makes clear, it then falls on the Government to show why its lifetime regulation of that right—here, purportedly through 18 U.S.C. § 922(g)(1)—comports with America's "historical tradition of firearm regulation." 597 U.S. at 17.

The Supreme Court most recently took up the contours of this assessment in *United States v. Rahimi*, 144 S. Ct. 1889 (2024). Concluding that 18 U.S.C. § 922(g)(8) "fits comfortably within [the Nation's historical] tradition," the Court employed a methodology considering whether the regulation at issue is "relevantly similar"—as opposed to identical—to those acceptable to the Nation's founding generation. *Id.* at 1897-98. The determination was clear under the facts specific to *Rahimi* because "the Government offer[ed] ample evidence that

the Second Amendment permits the disarmament of individuals who pose" what the Court described as "a clear threat of physical violence to another." *Id.* at 1898, 1901. But the Court cabined its approval, limiting its affirmance to temporary disarmament after a finding of a credible threat to physical safety and noting the vital nexus found between 18 U.S.C. § 922(g)(8) and the historical tradition of "banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." *Id.* at 1901 (citations omitted), *see also id.* at 1903 (rejecting the contention "responsible" is the governing principle in any situation).

Appellant presents no special danger of misuse because violence is the keystone to this analysis. *See id.* at 1901. Without it, 18 U.S.C. § 922(g)(1) cannot constitutionally apply to Appellant. Indeed, the distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition:

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

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 Harv. J.L. & Pub. Pol'y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not own or have in his possession or under his control, a pistol or revolver." *Id*. at 701, 704 (quotations omitted). A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking." *Id.* at 701 (quotations omitted). It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that

ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit adopted this logic last year to conclude that 18 U.S.C. § 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years of confinement. *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. 2023), *vacated and remanded*, 144 S. Ct. 2706 (Jul. 2, 2024). Evaluating 18 U.S.C. § 922(g)(1) in light of *Bruen*, the Third Circuit noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals." *Id.* at 104. It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103-05. The Third Circuit went beyond that, though, to also observe, "Founding-era laws often prescribed the forfeiture of the weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally." *Id*. at 105 (citations omitted). The Third Circuit stated that even if the appellant *had* used a gun, "[G]overnment confiscation of the instruments of crime (or a convicted criminal's entire estate) differs from a status-based lifetime ban on firearm possession," strongly calling into question the constitutionality of any lifetime firearm ban. *Id*.

On this analysis, the Government has not proven—and cannot prove—that such a ban as applied to Appellant is consistent with this country's history and tradition. Abusive sexual conduct in the manner charged here is not a crime of violence. *See United States v. Armstrong*, 77 M.J. 465, 471-72 (C.A.A.F. 2018) (determining "touching" is not "unlawful force or violence" as defined or typically charged). Likewise, Appellant's convictions did not involve

biting, beating, hitting, kicking, a weapon, or threats of violence of any kind. Pros. Ex. 1; R. at 46-101. While that does not excuse the criminality of his conduct, relief from responsibility for his conduct is also not what Appellant is seeking. Rather, he is seeking only the constitutionally required relief from the statutory firearms ban for life set out in his post-trial paperwork. Such relief is mandated by the Government's inability to satisfy the *Bruen* test through a historical analogue for a non-violent case like Appellant's. And such relief is within this Court's power to provide because, as discussed below, Appellant has demonstrated the erroneous application of the firearm prohibition occurred after entry of judgment.

**2. The error on the indorsement to the EOJ occurred after the entry of judgment.**

The alleged error is an "error . . . in the processing of the court-martial after the" entry of judgment. 10 U.S.C. § 866(d)(2). The applicable Air Force regulation required that "*[a]fter* the EOJ is signed by the military judge and returned to the servicing legal office, the [Staff Judge Advocate] signs and attaches to the [EOJ] a first indorsement, indicating whether . . . firearm prohibitions are triggered." Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, ¶ 20.41 (Jan. 24, 2024) (emphasis added) (DAFI 51-201). The firearm denotation on the First Indorsement that accompanies the EOJ into the record of trial explicitly happens *after* the EOJ is signed by the military judge pursuant to Article 60c, UCMJ. *Id*. That is just what happened here, with the First Indorsement to the EOJ digitally signed hours after the military judge's signature. *Compare* EOJ at 3, *with* EOJ at 4.

**3. Jurisdiction under Article 66(d)(1), UCMJ, is distinct from Article 66(d)(2), UCMJ.**

This Court's authorized "duties" are set out across the entirety of Article 66(d). As such, when an error occurring after entry of judgment is raised by an appellant, Article 66(d)(2), UCMJ, provides an independent jurisdictional basis. *Williams*, 2024 CAAF LEXIS 501, at *13-

14; *see also Valentin-Andino*, 2024 CCA LEXIS 223, at *16 (noting there is a "basis for relief under Article 66(d)(2), UCMJ, or *Tardif*,"[5] a case grounded in what is now Article 66(d)(1), UCMJ).

This Court's authority to review the erroneous firearm ban under Article 66(d)(2), UCMJ, is consistent with this Court's published opinion in *Vanzant*, 84 M.J. 671. In *Vanzant*, this Court determined it did not have authority to act on collateral consequences that are not a part of the findings or sentence under Article 66(d)(1), UCMJ. *Id*. at *23 ("Article 66(d), UCMJ, provides that a CCA 'may act only with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c].'"). The Court of Appeals for the Armed Forces agreed with this interpretation. *Williams*, 2024 CAAF LEXIS 501, at *11-13. But whereas *Vanzant* and *Williams* concern those matters leading up to the EOJ, Appellant is asking this Court to review an error in post-trial processing *after* the EOJ under Article 66(d)(2), UCMJ, which this Court did not analyze in *Vanzant*. *See Vanzant*, 84 M.J. 671, 680 (quoting the language of Article 66(d)(1), UCMJ, not (d)(2)).

*Vanzant* does not control review of this issue as raised under Article 66(d)(2), UCMJ. *But see United States v. Lawson*, No. ACM 23034, 2024 CCA LEXIS 431, at *2 (A.F. Ct. Crim. App. Oct. 17, 2024) (broadly summarizing *Vanzant* as standing for the proposition that "the 18 U.S.C. § 922 firearm prohibition notation included in the staff judge advocate's indorsement to the [EOJ] is beyond a Court of Criminal Appeals' statutory authority to review"). The characterization of *Vanzant* in *Lawson* is incorrect. The 18 U.S.C. § 922 firearm prohibition notation included in the First Indorsement to the EOJ is not beyond this Court's statutory authority to review under Article 66(d)(2), UCMJ. *See Williams*, 2024 CAAF LEXIS 501, at

[5] *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

*13 (calling Article 66(d)(2), UCMJ, the "error-correction authority"); *but see United States v. Pulley*, No. ACM 40438 (f rev), 2024 CCA LEXIS 442, at *3 (A.F. Ct. Crim. App. Oct. 24, 2024) (citing *Vanzant* and *Williams* for this Court's inability to correct the firearm prohibition, but without analyzing Article 66(d)(2), UCMJ). Article 66(d)(1), UCMJ, is distinct, and that section is all *Vanzant* analyzes.

Using the Court of Appeals for the Armed Forces' analysis in *Williams*, this Court should find jurisdiction under Article 66(d)(2), UCMJ, and ensure correction of the unconstitutional firearms error in post-trial processing tied to the facts of Appellant's court-martial. To effectuate any remedy, this Court should use its power under Rule for Courts-Martial 1112(d)(2), which permits this Court to send a defective record back to the military judge for correction. This is appropriate because the First Indorsement is a required component of the EOJ, albeit not part of the "findings" and "sentence," and the error materially affects Appellant's constitutional rights. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9) (2024); DAFI 51-201, at ¶ 20.41.

**WHEREFORE**, this Court should remand the record to correct the EOJ's unconstitutional firearm prohibition or grant other relief it deems warranted to effectuate the same.

## III.

## THE AIR FORCE'S SYSTEMIC APPLICATION OF 18 U.S.C. § 922 TO APPELLANT MERITS SENTENCE RELIEF.

### Standard of Review

Whether post-trial processing was properly completed is reviewed de novo. *Zegarrundo*, 77 M.J. at 613-14 (citing *Kho*, 54 M.J. at 65). This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim.

App. 2021). Sentence appropriateness is reviewed de novo. *United States v. McAlhaney*, 83 M.J. 164, 167 (C.A.A.F. 2023) (citing *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006)).

**Law and Analysis**

This Court "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [it] finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d)(1). The critical language here is the authority to approve only so much of the sentence as *should* be approved, and this applies here because of the dates of Appellant's offenses. *United States v. Cook*, No. ACM 40333, 2024 CCA LEXIS 276, *59 n.28 (A.F. Ct. Crim. App. Jul. 3, 2024), EOJ at 1-2. This Court should exercise such authority here because the inclusion of a firearms prohibition on Appellant's EOJ is not an outlier, but rather the result of the Air Force's systemic unconstitutional application of 18 U.S.C. § 922 during post-trial processing to frustrate servicemembers' Second Amendment right to bear arms.

There are three foundational questions underlying this issue. First, is something wrong with Appellant's EOJ? Second, how should this Court evaluate that wrong? And third, what sort of sentencing relief, if any, provides an appropriate remedy?

The nature of the error presents a threshold question that precedes the question of relief—without error, there is no relief. *United States v. Gay*, 75 M.J. 264, 267-68 (C.A.A.F. 2016). Post-trial processing is one basis for such relief. *Id.* at 269. The error here is addressed under Issue II above. Specifically, it is that the Air Force unconstitutionally deprived Appellant of his right to bear arms under the Second Amendment without appropriate justification grounded in the "Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17; *B.M. v. United States*, 84 M.J. 314, 317 (C.A.A.F. 2024) (emphasizing a court can only address claims where

there is an injury in fact, causation, and redressability); *see* EOJ at 4-5 (showing an arm of the Government, the Staff Judge Advocate, notified law enforcement Appellant could not own firearms); Decl. at 1-2 (showing the injury in fact to Appellant as a result of the Staff Judge Advocate's erroneous notation on the EOJ reported to law enforcement entities).

If this Court agrees that there is such an error, the next question becomes how to analyze it. Although this EOJ issue is distinct from the issue of post-trial delay, the later class of cases provides a useful analogy because, like in those cases, this Court remains "required to determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record." *Tardif*, 57 M.J. at 224. In the context of post-trial delay, this Court has enumerated factors to guide its analysis. *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). No single factor is dispositive. *Id.* While the *Gay* factors are highly focused on delay, the more recent case of *Valentin-Andino* illustrates the importance of asking whether there is an institutional problem underlying the error in Appellant's case. 2024 CCA LEXIS 223, at *15-19.

Just such an error is found here. Over twenty-five cases[6] have challenged the Air Force's systemic and institutionalized practice of codifying the disbarment of its members, DAFI 51-201,

[6] Of these cases, the eleven cited in-text are just those that have been granted by the Court of Appeals for the Armed Forces for questions of jurisdiction. The remainder include *United States v. Folts*, No. ACM 40322, 2024 CCA LEXIS 353 (A.F. Ct. Crim. App. Aug. 26, 2024); *United States v. Donley*, No. ACM 40350 (f rev), 2024 CCA LEXIS 228 (A.F. Ct. Crim. App. Jun. 11, 2024); *United States v. Clark*, No. ACM 23017, 2024 CCA LEIXS 378 (A.F. Ct. Crim. App. Sep. 6, 2024); *United States v. Douglas*, No. ACM 40324 (f rev), 2024 CCA LEXIS 254 (A.F. Ct. Crim. App. Jun. 27, 2024); *United States v. Van Velson*, No. ACM 40401, 2024 CCA LEXIS 283 (A.F. Ct. Crim. App. Jul. 12, 2024); *United States v. Bates*, No. ACM S32752, 2024 CCA LEXIS 333 (A.F. Ct. Crim. App. Aug. 13, 2024); *United States v. Block*, No. ACM 40466, 2024 CCA LEXIS 371 (A.F. Ct. Crim. App. Aug. 29, 2024); *United States v. Hollenbeck*, No. ACM 40481, 2024 CCA LEXIS 323 (A.F. Ct. Crim. App. Aug. 2, 2024); *United States v. Zhong*, No. ACM 40441, 2024 CCA LEXIS 344 (A.F. Ct. Crim. App. Aug. 21, 2024); *United States v. Jackson*, No. ACM S32757, 2024 CCA LEXIS 330 (A.F. Ct. Crim. App. Aug. 9, 2024); *United States v. Schneider*, No. ACM 40403, 2024 CCA LEXIS 288 (A.F. Ct. Crim. App. Jul. 16,

at ¶ 20.41, as violative of the Constitution. *E.g.*, *Vanzant*, 84 M.J. 671; *United States v. Fernandez*, No. ACM 40290 (f rev), 2024 CCA LEXIS 7 (A. F. Ct. Crim. App. Jan. 9, 2024), *rev. granted*, USCA Dkt. No. 24-0101, ___ M.J. ___ (C.A.A.F. Apr. 26, 2024); *United States v. Gubicza*, No. ACM 40464, ___ M.J. ___, 2024 CCA LEXIS 266 (A.F. Ct. Crim. App. Jul. 2, 2024), *rev. granted*, USCA Dkt. No. 24-0219, ___ M.J. ___, 2024 CAAF LEXIS 585 (C.A.A.F. Oct. 3, 2024); *United States v. Jackson*, No. ACM 40310, 2024 CCA LEXIS 9 (A.F. Ct. Crim. App. Jan. 11, 2024), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 390 (C.A.A.F. Jul. 8, 2024); *United States v. George*, No. ACM 40397, 2024 CCA LEXIS 224 (A.F. Ct. Crim. App. Jun. 7, 2024), *rev. granted*, ___ M.J. ___, 2024 CCA LEXIS 511 (C.A.A.F. Sep. 3, 2024); *United States v. Dominguez-Garcia*, No. ACM S32694 (f rev), 2024 CCA LEXIS 218 (A.F. Ct. Crim. App. May 31, 2024), *rev. granted*, USCA Dkt. No. 24-0183, ___ M.J. ___ (C.A.A.F. Oct. 3, 2024); *United States v. Denney*, No. ACM 40360, 2024 CCA LEXIS 101 (A.F. Ct. Crim. App. Mar. 8, 2024), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 197 (C.A.A.F. Mar. 29, 2024); *United States v. Saul*, No. ACM 40341, 2023 CCA LEXIS 546 (A.F. Ct. Crim. App. Dec. 29, 2023), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 114 (C.A.A.F. Feb. 26, 2024); *United States v. Maymi*, No. ACM 40332, 2023 CCA LEXIS 491 (A.F. Ct. Crim. App. Oct. 5, 2023), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 91 (C.A.A.F. Feb. 16, 2024); *United States v. Conway*, No. ACM 40372 (f rev), 2024 CCA LEXIS 290 (A.F. Ct. Crim. App. Jul. 19, 2024), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 528 (C.A.A.F. Sep. 12, 2024); *United States v.*

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2024); *United States v. Kershaw*, No. ACM 40455, 2024 CCA LEXIS 354 (A.F. Ct. Crim. App. Aug. 26, 2024); *United States v. Wood*, No. ACM 40429, 2024 CCA LEXIS 334 (A.F. Ct. Crim. App. Aug. 13, 2024); *United States v. Ramirez*, No. ACM 40373, 2024 CCA LEXIS 203 (A.F. Ct. Crim. App. May 9, 2024); *United States v. Williams*, No. ACM 40410, 2024 CCA LEXIS 317 (A.F. Ct. Crim. App. Jul. 31, 2024); *Lawson*, 2024 CCA LEXIS 431, at *2, *Pulley*, 2024 CCA LEXIS 442, at *3.

*Casillas*, No. ACM 40302, 2023 CCA LEXIS 527 (A.F. Ct. Crim. App. Dec. 15, 2023), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 329 (C.A.A.F. Jun. 14, 2024).

As a point of comparison to the twenty-nine cases set out above, the number of unpublished and published decisions by this Court, excluding those cases involving writs, totaled fewer than 100 in 2023.[7] These cases show that the error raising unconstitutional application of 18 U.S.C. § 922 is widespread and merits relief in light of the prejudice to Appellant's constitutional right to possess his firearms and provide for himself.

In terms of the relief this Court should grant, Appellant is confined and thereby unable to earn a living. Upon release, he would use his firearms to provide for himself and, in turn, save money to provide for his family, whom he adversely impacted through the conduct that was the subject of his court-martial. Decl. at 1-2. The appropriate sentencing relief that this Court may and should grant is to reduce Appellant's sentence to confinement so he can endeavor to start the next chapter of his life and earn a living as a contributing member of society again.

**WHEREFORE**, this Court should reduce Appellant's sentence to confinement.

[7] The source of this illustrative calculation is this Court's online listing of opinions and orders for 2023. United States Air Force Court of Criminal Appeals, https://afcca.law.af.mil/opinions_cnm_2023.html (last visited Oct. 10, 2024). It was included here to reflect a full one-year period of decisions by this Court, which overlaps with the timeframe of the decisions set out in this paragraph concerning 18 U.S.C. § 922. A similar count for 2024 to date would reflect seventy-seven decisions as of 10 October 2024, *see* United States Air Force Court of Criminal Appeals, https://afcca.law.af.mil/opinions.html (last visited Oct. 10, 2024), meaning that servicemembers' claims of unconstitutional firearm bans span close to a third of this Court's decisions this year.

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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 31 October 2024.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **APPELLANT'S MOTION FOR LEAVE TO FILE AND REPLY TO UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO ATTACH** |
| v. | ) | Before Panel No. 3 |
| Staff Sergeant (E-5)<br>**JUSTIN P. MITTON**<br>United States Air Force<br>*Appellant* | ) | Case No. ACM 40616<br><br>6 November 2024 |

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

Pursuant to Rule 23(d) of this Court's Rules of Practice and Procedure, Appellant moves for leave to file this reply to the Government's opposition to Appellant's motion to attach Appellant's declaration.

Contrary to the Government's opposition, Appellant's declaration and the facts contained therein are both relevant and necessary to the disposition of two of the issues raised before this Court. As the Government's motion for a first enlargement of time notes, Appellant raised three assignments of error in his initial brief. The latter two allege the unconstitutional application of 18 U.S.C. § 922[1] to Appellant, with the second assignment of error serving as an as-applied challenge, and the third assignment of error questioning whether sentence relief is warranted

[1] The Government's motion opposition appears to inadvertently miscite this statute as falling under Title 10 of the United States Code. Additionally, while the Government's opposition initially recites Appellant's convictions correctly as being for abusive sexual conduct, the second page twice misidentifies Appellant's convictions as being for sexual assault. Appellant was convicted of offenses under Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2019), which is titled, "Rape and Sexual Assault Generally." There was no such confusion at Appellant's trial, where the phrase "sexual assault" was never mentioned and the parties and military judge universally agreed that Appellant's offenses constituted abusive sexual contact. R. at 12, 60-61, 63-64, 71, 82, 89, 95, 204-06, 219.

based on the unconstitutional application of the firearms prohibition to Appellant. Appellant's Br. at 7-19.

These are two separate issues. Yet the Government's opposition only deals with Appellant's second assignment of error. Both of Appellant's challenges related to the firearms prohibition arise from matters already contained in the record. Statement of Trial Results (STR) at 1-3; Entry of Judgment (EOJ) at 1-4. And each challenge merits consideration of the facts set out in Appellant's declaration in light of the legal questions underlying each assignment of error.

For Appellant's second assignment of error, Appellant's declaration is relevant and necessary to adjudicate whether this Court even has the authority to grant the relief requested. In *United States v. Johnson*, the United States Court of Appeals for the Armed Forces specified review of a predicate issues related to the same firearms prohibition here. ___M.J. ___, 2024 CAAF LEXIS 561 (C.A.A.F. Sept. 24, 2024). One of the specified issues, which remains pending resolution, concerns whether review of the 18 U.S.C. § 922 prohibition on the Staff Judge Advocate's indorsement to the entry of judgment satisfies that Court's cases or controversies doctrine. *Id*. Addressing this boils down to a traditional assessment of standing: whether an injury in fact occurred, its causation, and its redressability. *B.M. v. United States*, 84 M.J. 314, 317 (C.A.A.F. 2024).

Given the parallel issues between Appellant's case and *Johnson*, the same question of standing would seem to apply to Appellant's case. *Compare* 2024 CAAF LEXIS 561 (where Issue III addresses the as-applied challenge to the firearms prohibition), *with* Appellant's Br. at 7-15 (setting out generally the same issue). The Government's opposition to the motion to attach neither acknowledges the possible pertinence of this standing issue, nor does the Government's opposition concede standing on Appellant's as-applied challenge. As such, pending resolution of

*Johnson* and the Government's answer brief here, standing appears to be an open matter of which this Court must be satisfied. *See B.M.*, 84 M.J. at 317.

Appellant's declaration is relevant and necessary to that analysis, as it provides this Court what would otherwise be unresolved material facts affecting the Court's resolution of the case. The party invoking federal jurisdiction bears the burden of establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To the extent standing is an open question before this Court, the record of trial does not answer it because it provides a general categorization without devoid of any specific impact on Appellant. Appellant's declaration provides the necessary answer.

Part of articulating such an answer requires showing that the impact of the firearms prohibition is, in essence, real as it applies to Appellant. For a case to be "ripe," it cannot be dependent on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump v. New York*, 592 U.S. 125, 131 (2020) (quoting *Texas* v. *United States*, 523 U. S. 296, 300 (1998) (internal quotation marks omitted in original). Military courts generally stick to this rule "and ordinarily decline to consider an issue that is 'premature.'" *United States v. Wall*, 79 M.J. 456, 459 (C.A.A.F. 2020) (quoting *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003)). The firearms prohibition itself is in the record. STR at 1-3; EOJ at 1-4. The real, non-speculative impact required to show standing is not. It would be premature for this Court to weigh in without some grounding in Appellant's actual or desired firearm possession.

Likewise, the record of trial raises the possibility of the requisite injury to Appellant but, again, without resolution. *See* STR at 1-3; EOJ at 1-4. The "injury" needed to establish standing must be "concrete and particularized" to the individual, as well as "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U. S. at 560. Without Appellant's declaration about

the in-fact deprivation of his constitutional right to bear arms, U.S. CONST. amend. II, the inquiry into injury is murky.

Taken together, assuming it is necessary to establish standing, the information needed to do so can only come from Appellant's post-trial declaration. Because the record of trial raises the issue but without these critical components that are pending scrutiny from the Court of Appeals for the Armed Forces, Appellant's declaration "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).

Specifically, Appellant's declaration outlines the particularized injury to Appellant as a result of the Government's 18 U.S.C. § 922 prohibition. It shows Appellant does, in fact, own firearms. It shows Appellant, in fact, no longer possesses those firearms because of the firearms prohibition. It shows, in fact, the further injury to Appellant in how the deprivation of these firearms impedes his ability to provide sustenance for his family. And, contrary to the Government's assertion, these facts critical to cementing Appellant's standing are nowhere to be found in the record because they were not established at trial and because the post-trial processing error at issue did not arise at trial; it arose after, at the end of post-trial processing. EOJ at 1-4.

For similar reasons, Appellant's declaration is relevant and necessary to resolving any relief warranted by Appellant's third assignment of error. Without an actual impact on Appellant, there would be little reason to think that sentencing relief would be warranted. Merely looking at the presence of the firearms prohibition on the Entry of Judgment, as the Government invites, only deals with the error. Any relief on that basis would amount to commentary on the Air Force's firearms prohibition policy, Department of the Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 20.41 (Jan. 24, 2024), and such policy

assessments are ordinarily not for this Court to address. *See Jessie*, 79 M.J. at 445. While Appellant would certainly accept the relief, it is a curious basis for the Government to seem to invite.

That said, given the extension of *United States v. Gay* and *United States v. Valentin-Andino* sought on this issue, Appellant's Br. at 17-19 (citing 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015); 2024 CCA LEXIS 223, *16-19 (A.F. Ct. Crim. App. Jun. 7, 2024), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 571 (C.A.A.F. Sept. 30, 2024), it remains to be determined how the direct and adverse impact to Appellant will weigh in this Court's analysis. Assuming some form of impact is required as a predicate for relief, the only document that provides that information is Appellant's declaration. It should be considered on that basis.

Foreclosing consideration of Appellant's declaration altogether as the Government requests is also not the limitation imposed by *Jessie*. *See* 79 M.J. at 444. Unlike *Jessie*, where "nothing in the record" raised the confinement policies at issue, *id.*, Appellant's case is predicated on documents in the record. STR at 1-3; EOJ at 1-4. Those documents evince the Government's policy to deprive Appellant of his right to bear arms. The Government's policy is different from actually doing so, as well as the resulting sentence that should be approved.

Appellant's declaration is therefore relevant and necessary to the resolution of standing and relief for two of Appellant's issues, neither of which could be resolved by the limited information in the record on this issue stemming from the very document marking the conclusion of the case, *see* 10 U.S.C. §§ 860c(a)(1), 865(a)(1). There was no other opportunity to establish these critical facts. This Court should consider Appellant's declaration.

**WHEREFORE**, this Court should grant this motion for leave to file, consider this reply to the Government's opposition to Appellant's motion to attach, and grant Appellant's motion to attach.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing and the Appendix were delivered by e-mail to the Court and served on the Government Trial and Appellate Operations Division on 6 November 2024.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**,<br>*Appellee,* | ) | **UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)** |
| v. | ) | Before Panel No. 3 |
| Staff Sergeant (E-5)<br>**JUSTIN P. MITTON**<br>United States Air Force<br>*Appellant.* | ) | No. ACM 40616<br><br>5 November 2024 |

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 14-day enlargement of time, to respond in the above captioned case. This case was docketed with the Court on 4 June 2024. Since docketing, Appellant has been granted two enlargements of time. Appellant filed his brief with this Court on 31 October 2024. This is the United States' first request for an enlargement of time. As of the date of this request, 154 days have elapsed. The United States' response in this case is currently due on 2 December 2024. If the enlargement of time is granted the United States' response will be due on 16 December 2024, and 195 days will have elapsed since docketing.

There is good cause for the enlargement of time in this case. On 4 November 2024, undersigned counsel was assigned to this case. Undersigned counsel is also assigned to United States v. Floyd, ACM S32784, and is preparing a response to Appellant's three assignments of error due on 18 November 2024. Undersigned counsel will be on a temporary duty status from 13 November to 17 November to Boston, Massachusetts for the Appellate Judges Education

Institute Summit. Additionally, undersigned counsel will be on leave for 10 days, from 27 November to 6 December 2024 for the Thanksgiving holiday and her son's birthday.

The trial transcript in this case is 226 pages and the record of trial consists of three volumes. Appellant has raised three assignments of error in a 21-page brief. Given undersigned counsel's workload, upcoming leave status, and Appellant's three assignments of errors raised a 14-day enlargement of time is warranted.

Due to office workload, there is no other appellate government counsel who could complete a brief sooner. The other counsel in the office all have assigned briefs and duties that restrict their availability, especially considering that the Court of Appeals for the Armed Forces has granted on 11 Air Force cases so far this term.

**WHEREFORE**, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

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

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **APPELLANT'S RESPONSE TO UNITED STATES' MOTION FOR FIRST ENLARGEMENT OF TIME** |
| v. | ) | Before Panel No. 3 |
| Staff Sergeant (E-5)<br>**JUSTIN P. MITTON**<br>United States Air Force<br>*Appellant* | ) | Case No. ACM 40616<br><br><br>6 November 2024 |

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

Pursuant to Rule 23.2(b) of this Court's Rules of Practice and Procedure, Appellant does not oppose the United States' motion for a first enlargement of time. Although Appellant does not oppose the motion, two points warrant clarification.

The first is that Appellant's assent should not be construed as a broader concurrence that an enlargement of time is warranted on any occasion when an appellant raises three—or any other specific number of—assignments of error. Based on the timeline set out in the Government's brief, it appears that the Government is only seeking around twenty calendar days to work on its response that are not otherwise dedicated to another case, temporary duty, and leave. Though the specific number of issues in Appellant's initial brief is cited by the Government as a basis for the extension, Rule 23.3(m) of this Court's Rules of Practice and Procedure makes clear that the determination rests on good cause and not a mechanical calculation tied to the number of issues presented. The fact that Appellant raised three issues does not, on its own, warrant the requested relief.

The second point concerns the accuracy of the Government's reliance on the number of cases granted review by the United States Court of Appeals for the Armed Forces. The Government's assertion that no other Government counsel are unavailable "especially considering" the grant of eleven uncited cases "so far this term" appears intended to reference only those cases in which briefing has been ordered and remain, in the current term, pending decision:

1) *United States v. Greene-Watson*, ___ M.J. ___, 2024 CAAF LEXIS 253 (C.A.A.F. May 7, 2024)

2) *United States v. Saul*, ___ M.J. ___, 2024 CAAF LEXIS 308 (C.A.A.F. Jun. 6, 2024)[1]

3) *United States v. Casillas*, ___ M.J. ___, 2024 CAAF LEXIS 329 (C.A.A.F. Jun. 14, 2024)

4) *United States v. George*, ___ M.J. ___, 2024 CAAF LEXIS 511 (C.A.A.F. Sept. 3, 2024)

5) *United States v. Csiti*, ___ M.J. ___, 2024 CAAF LEXIS 533 (C.A.A.F. Sept. 11, 2024)

6) *United States v. Valentin-Andino*, ___ M.J. ___, 2024 CAAF LEXIS 571 (C.A.A.F. Sept. 30, 2024)

7) *United States v. Roan*, ___ M.J. ___, 2024 CAAF LEXIS 545 (C.A.A.F. Sept. 19, 2024)

8) *United States v. Johnson*, ___M.J. ___, 2024 CAAF LEXIS 561 (C.A.A.F. Sept. 24, 2024)

9) *United States v. Arroyo*, ___ M.J. ___, 2024 CAAF LEXIS 592 (C.A.A.F. Oct. 7, 2024)

10) *United States v. Vanzant*, ___ M.J. ___, 2024 CAAF LEXIS 640 (C.A.A.F. Oct. 17, 2024)

[1] The citation to the Court of Appeals for the Armed Forces' grant of review on page 18 of Appellant's initial brief was inaccurate and should have referenced the citation included here.

11) *United States v. Navarro Aguirre*, ___ M.J. ___, 2024 CAAF LEXIS 624 (C.A.A.F. Oct. 21, 2024)

Two of these cases, *Greene-Watson* and *Saul*, have already been briefed and were argued after the current term began on 1 October 2024, and those cases would appear to no longer require work by counsel until the cases are decided. While the Government's motion includes these two largely completed cases, the Government's motion excludes from its count numerous cases that have been granted review without briefing by the Court of Appeals for the Armed Forces and remain pending a decision during the present term: *United States v. Fernandez*, No. ACM 40290 (f rev), 2024 CCA LEXIS 7 (A.F. Ct. Crim. App. Jan. 9, 2024), *rev. granted*, USCA Dkt. No. 24-0101, ___ M.J. ___ (C.A.A.F. Apr. 26, 2024); *United States v. Gubicza*, No. ACM 40464, ___ M.J. ___, 2024 CCA LEXIS 266 (A.F. Ct. Crim. App. Jul. 2, 2024), *rev. granted*, USCA Dkt. No. 24-0219, ___ M.J. ___, 2024 CAAF LEXIS 585 (C.A.A.F. Oct. 3, 2024); *United States v. Jackson*, No. ACM 40310, 2024 CCA LEXIS 9 (A.F. Ct. Crim. App. Jan. 11, 2024), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 390 (C.A.A.F. Jul. 8, 2024); *United States v. George*, No. ACM 40397, 2024 CCA LEXIS 224 (A.F. Ct. Crim. App. Jun. 7, 2024), *rev. granted*, ___ M.J. ___, 2024 CCA LEXIS 511 (C.A.A.F. Sep. 3, 2024); *United States v. Dominguez-Garcia*, No. ACM S32694 (f rev), 2024 CCA LEXIS 218 (A.F. Ct. Crim. App. May 31, 2024), *rev. granted*, USCA Dkt. No. 24-0183, ___ M.J. ___ (C.A.A.F. Oct. 3, 2024); *United States v. Denney*, No. ACM 40360, 2024 CCA LEXIS 101 (A.F. Ct. Crim. App. Mar. 8, 2024), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 197 (C.A.A.F. Mar. 29, 2024); *United States v. Maymi*, No. ACM 40332, 2023 CCA LEXIS 491 (A.F. Ct. Crim. App. Oct. 5, 2023), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 91 (C.A.A.F. Feb. 16, 2024); *United States v. Conway*, No. ACM 40372 (f rev), 2024 CCA LEXIS 290 (A.F. Ct. Crim. App. Jul. 19, 2024),

*rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 528 (C.A.A.F. Sept. 12, 2024). Altogether, the spread of cases set out above spans two terms, and the Government's assertion about "11 cases" might be better characterized as there being eleven unresolved cases that involve briefing on at least one granted issue, a likelihood of argument during the current term, and will likely result in a decision in the current term, even if two of those cases have already been briefed and argued.

Notwithstanding these two points of clarification, intended to ensure the accuracy of information before this Court as it makes its determination on the motion, Appellant does not oppose the Government's requested enlargement of time.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing and the Appendix were delivered by e-mail to the Court and served on the Government Trial and Appellate Operations Division on 6 November 2024.

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# APPENDIX

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40616** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Justin P. MITTON** | ) | |
| **Staff Sergeant (E-5)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 3** |

On 31 October 2024, Appellant moved this court to attach the following document to the record of trial: a sworn declaration from Appellant, dated 21 October 2024, averring that prior to his prohibition from possessing firearms (imposed as a function of 18 U.S.C. § 922 following his court martial conviction), Appellant "lawfully possessed several firearms registered to [him]," specifically utilizing his personal firearms for hunting deer to provide subsistence for his family. The Government opposed the motion, arguing that the declaration was barred by *United States v. Jessie,* 79 M.J. 437 (C.A.A.F. 2020).

On 6 November 2024, Appellant then filed a motion for leave to file a reply to the Government's opposition to Appellant's motion to attach, pursuant to Rule 23(d). JT. CT. CRIM. APP. R. 23(d). Appellant argues that the declaration was pertinent to his assignment of error that any "errors" in the first indorsement to the entry of judgment are justiciable by this court under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2), and his related assignment of error that we have authority to utilize our sentence appropriateness review powers to provide "appropriate relief" for any error resulting in "harm" to Appellant related to post-trial processing errors occurring after the entry of judgment.

The court has considered Appellant's motions, the Government's opposition, the applicable law, and this court's Rules of Practice and Procedure. The court grants Appellant's motion to attach his declaration of 21 October 2024; however, it specifically defers consideration of the applicability of *Jessie, supra,* and related case law to Appellant's declaration until it completes its Article 66, UCMJ, review of Appellant's entire case.

Accordingly, it is by the court on this 27th day of November, 2024,

**ORDERED:**

Appellant's Motion to Attach, dated 31 October 2024, is **GRANTED**.

Appellant's Motion for Leave to File and Reply to United States' Opposition to Appellant's Motion to Attach, dated 6 November 2024, are **GRANTED**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Deputy Clerk of Court

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **MOTION TO ATTACH DOCUMENT** |
| v. | ) | Before Panel No. 3 |
| Staff Sergeant (E-5)<br>**JUSTIN P. MITTON**<br>United States Air Force<br>*Appellant* | ) | Case No. ACM 40616<br><br><br>31 October 2024 |

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

Pursuant to Rule 17.2(b) and 23.3(b) of this Court's Rules of Practice and Procedure, Appellant hereby moves to attach the Declaration of the Appellant found at the Appendix to the Record of Trial. It is relevant to present factual bases and arguments for Appellant's assignments of error concerning his post-trial processing and possession of firearms arising from the Entry of Judgment and Statement of Trial Results presently in the record.

**WHEREFORE**, this Court should grant this motion to attach a document.

Respectfully Submitted,

[redacted]

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing and the Appendix were delivered by e-mail to the Court and served on the Government Trial and Appellate Operations Division on 31 October 2024.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**,<br>*Appellee,* | ) | **UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO ATTACH** |
| v. | ) | |
| | ) | Before Panel No. 3 |
| Staff Sergeant (E-5)<br>**JUSTIN P. MITTON,**<br>United States Air Force | ) | No. ACM 40616 |
| *Appellant.* | ) | 5 November 2024 |

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

Under Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, the United States opposes Appellant's motion to attach Appendix – his declaration dated 21 October 2024.

Appellant was found guilty, pursuant to his plea agreement, of one charge and four specifications of abusive sexual contact in violation of Article 120, UCMJ.

Appellant asserts that 10 U.S.C. § 922 (firearms prohibition) is unconstitutional as applied to him and warrants correction and sentence relief. (App Br. at 1). The crux of his argument is that this court has jurisdiction to invalidate the collateral consequence of the firearms prohibition through Article 66(d)(2), UCMJ. He claims that the collateral consequence is an "error … in the processing of the court-martial after the EOJ" based on the timing of the signing of the first indorsement and the alleged unconstitutionality of the prohibition. (App. Br. at 7-8)(citing Article 66(d)(2), UCMJ).

This Court requires a motion to attach filed under Rule of Practice and Procedure (Rule) 23.3 to set forth the basis for which the filing shall be permitted. Rule 23.3(b) further requires the proponent to state the "relevance and necessity to the case."

The record of trial contains the entry of judgement (EOJ) and all the facts supporting Appellant's finding of guilt for sexual assault in violation of Article 120, UCMJ in both the stipulation of fact and plea colloquy. (ROT Vol. 1, *EOJ; First Indorsement to EOJ*; Pros. Ex. 1, *Stipulation of Fact;* R. at 43-101).

Appellant's declaration does not address the legal argument of the court's jurisdiction or any information to support his claim that his sexual assault was not a crime of violence. It only explains how he would use his firearms to hunt for food before the prohibition.

**ANALYSIS**

This Court should deny Appellant's motion to attach Appendix because Appellant has failed to comply with this Court's rules and the declaration that Appellant would use his firearms to hunt is not "necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020).

Whether this Court has jurisdiction to invalidate the firearms prohibition collateral consequence, and whether the firearms prohibition is constitutional as applied to Appellant are "fully resolvable by the materials in the record." Jessie, 79 M.J. at 443. This Court need only to look to the law, the EOJ, stipulation of fact and transcript to evaluate the issues of jurisdiction and constitutionality of the firearms prohibition.

Appellant does not even claim that his declaration is necessary as required under this Court's rules and Jessie. Instead, he alleges only that it is "relevant to present factual bases and arguments" for his assignments of error. Mere relevance is not sufficient to allow extra-record affidavits under the exception to the strict language of Article 66(d). Even so, Appellant's declaration is not relevant. Whether Appellant possessed firearms or what he might do with those firearms is irrelevant to the question of whether this Court has jurisdiction to review the

firearms annotation under Article 66.

WHEREFORE, the United States respectfully requests this Court deny Appellant's motion to attach Appendix.

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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 5 November 2024.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**,<br>*Appellee,* | ) | ANSWER TO ASSIGNMENTS OF ERROR |
| v. | ) | Before Panel No. 3 |
| Staff Sergeant (E-5)<br>**JUSTIN P. MITTON**<br>United States Air Force<br>*Appellant.* | ) | No. ACM 40616<br><br>13 December 2024 |

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

## ISSUES PRESENTED

**I.**

**WHETHER AN ERROR IN THE REPRIMAND ON THE ENTRY OF JUDGMENT REQUIRES REMAND FOR CORRECTION.**

**II.**

**WHETHER THE APPLICATION OF 18 U.S.C. § 922 TO APPELLANT WARRANTS CORRECTION.**

**III.**

**WHETHER THE AIR FORCE'S APPLICATION OF 18 U.S.C. § 922 TO APPELLANT MERITS SENTENCE RELIEF**

## STATEMENT OF CASE

On 22 February 2024, Appellant was tried by military judge sitting alone as a general court-martial at Eielson Air Force Base, Alaska. (ROT Vol. 1, Entry of Judgment (EOJ)). Consistent with his pleas, Appellant was convicted of one charge and four specifications of abusive sexual contact in violation of Article 120, UCMJ. (Id.) Appellant was sentenced to a

reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, sixteen months of confinement, and a bad-conduct discharge. (Id.) The Convening Authority took no action on findings, disapproved the adjudged forfeitures, suspended the adjudged reduction, and waived automatic forfeitures for payment to Appellant's daughter. (ROT Vol. 1, Convening Authority Decision on Action Memorandum).

## STATEMENT OF FACTS

The victim of Appellant's abusive sexual contact was his daughter. Appellant viewed his daughter as someone who was "vulnerable" and trusted him. (ROT Vol. 1, Stipulation of Fact, para 11).

The first charged incident of Appellant sexually abusing his daughter occurred in 2021 when she was 16. She was not feeling well, and Appellant asked to cuddle with her. While cuddling, Appellant touched his daughter's breast under her shirt. Between 26 June 2021 and 7 February 2023, Appellant touched his daughter's breasts and buttocks without her consent approximately 6-8 times. (Id. at para. 8).

The final sexual abuse occurred in 2023. Appellant went to his daughter's room and again asked to cuddle. He got into bed, laid behind her, put his hand under her shirt and touched her bare breast. He then traced an outline of her left breast before cupping her breasts with his hand. After his daughter mumbled "No," he continued to touch her breasts for approximately five to six minutes. He told her not to tell her mother, apologized, and left the room. (Id. at para 7). All these sexual touchings were done without his daughter's consent. (Id.)

Appellant's abuse of his daughter caused her to live in fear of him continuing to do what he had done to her. Every time he would come into her room at night to cuddle, her body would

freeze, and her thoughts would race. She is now terrified of any adult male's affection and tenses up from even hugs from her mother or sisters. (ROT Vol. 2, Court Exhibit A).

## ARGUMENT

### I.

### THIS COURT SHOULD CORRECT THE SINGLE WORD TYPOGRAPHICAL ERROR IN THE ENTRY OF JUDGMENT

#### *Additional Facts*

Appellant received a reprimand as part of his sentence. (ROT Vol. 1, EOJ). On 28 March 2024, the Convening Authority provided the language for the reprimand. (ROT Vol. 1, Convening Authority Decision on Action Memorandum). Relevant to Appellant's assignment of error, the Convening Authority stated, "As a noncommissioned officer, our nation's young men and women looked *to* you for guidance and mentorship." (Id.) (emphasis added). In reflecting the Convening Authority's reprimand, the EOJ contains a typographical error by stating "As a noncommissioned officer, our nation's young men and women looked *at* you for guidance and mentorship." (ROT Vol. 1, EOJ) (emphasis added). Appellant did not file a post-trial motion for correction of the reprimand language.

#### *Standard of Review*

Proper completion of post-trial processing is reviewed de novo. United States v. Zegarrundo, 77 M.J. 612, 613-14 (A.F. Ct. Crim. App. 2018)(citing United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000)).

#### *Law and Analysis*

R.C.M. 1111(b)(3)(D) requires the EOJ to contain the reprimand issued by the convening authority. Only the Convening Authority may specify the terms of the reprimand. R.C.M.

1003(b)(1)(discussion). When there is an error in the EOJ, this Court can correct the error. R.C.M. 1111(c)(2). Post trial motions and proceedings may be initiated under R.C.M. 1104 to correct a computational, technical, or other clear error in the sentence as well as an error in the post-trial processing of the court-martial. R.C.M. 1104(b)(1)(C); 1104(b)(1)(E).

The terms of the Convening Authority's reprimand were not altered by the single word typo in the EOJ. The Government agrees with Appellant that the error in the EOJ is small and does not change the overall meaning conveyed by the reprimand. (App. Br. at 5). Although a single word can change the meaning of a sentence in some cases, it did not in Appellant's case. "Looked to[1]" and "looked at[2]" convey the same meaning – that airman viewed Appellant as a source of guidance and mentorship. Appellant's lack of objection, through a post-trial motion, to the minor typographical error further demonstrates that the meaning of the reprimand was not changed. Because the terms of the reprimand are what the convening authority conveyed, this court need not correct the typographical error. *See* United States v. Jackson, 2024 CCA LEXIS 330, n.3 (A.F. Ct. Crim. App. 9 August 2024) (noting a typographical error in the entry of judgment but finding no prejudice and not correcting the error).

Should this Court choose to correct the typographical error, such correction does not require a remand. First, as detailed in Issue II below, this is the sole error in Appellant's case. Second, this Court has corrected more consequential changes to EOJs without remand. *See* United States v. Hinds, 2024 CCA LEXIS 315, *5 (A.F. Ct. Crim. App. 31 July 2024)

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[1] "Looked to for" is a phrase mean meaning to rely on or expect someone to do something. Oxford Learner's Dictionary, *Look to for phrasal verb,* https://www.oxfordlearnersdictionaries.com/us/definition/english/look-to-for.

[2] "Looked at" in the context of Appellant's reprimand, means to view or consider something in a particular way or regard. Oxford Learner's Dictionary, *Look at phrasal verb,* 3, https://www.oxfordlearnersdictionaries.com/definition/english/look-at.

(correcting the EOJ where the judge deleted the last sentence of the convening authority's reprimand and added two new sentences); United States v. Schneider, 2024 CCA LEXIS 288, *30 (A.F. Ct. Crim. App. 16 July 2024)(correcting the EOJ to reflect that a specification was withdrawn and dismissed with prejudice rather than that Appellant was found not guilty).

The cases cited by Appellant where this court has remanded the case for correction are not similar to his case as he claims. (App. Br. at 5). Both cases involved multiple remands for corrections or substantive errors rather than a single typographical error as in Appellant's case. In United States v. Goldman, 2022 CCA LEXIS 511 (A.F. Ct. Crim. App. 30 November 2022), this Court remanded the case *twice* for *multiple, persistent* errors in the EOJ, omissions from the record of trial and the convening authority's failure to take action on the entire sentence. In United States v. Finco, 2020 CCA LEXIS 246 (A.F. Ct. Crim. App. 27 July 2020), this Court remanded after errors were identified in both the STR and the EOJ, and the convening authority failed to take action on the sentence.

Minor human error, like typographical errors, are bound to occur in post-trial processing. Congress has expressly enabled this Court to address those errors by correcting the record directly through R.C.M. 1111(c)(2). Appellant's argument that errors "persistently arise" is unpersuasive because the cases he has referenced involved errors continuing to arise after ordering remedial action or more significant errors than a minor typographical error. (App. Br. at 6). In the interest of judicial efficiency, where Appellant did not raise this typographical error through post-trial motion, this Court should find Appellant's case is more like Hinds and Schneider and exercise its authority to correct the typographical error in the reprimand on the EOJ.

## II.

## APPELLANT WAS CORRECTLY NOTIFIED OF THE APPLICABILITY OF 18 U.S.C. § 922 BASED ON HIS CRIME.

### *Additional Facts*

The first indorsement to the EOJ includes a notation that firearms prohibitions under 18 U.S.C. § 922 applies to Appellant. (ROT, Vol. 1, EOJ, pg. 4)

### *Standard of Review*

Jurisdiction is a question of law that courts review de novo. LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013).

### *Law and Analysis*

Appellant seeks "constitutionally required relief from the statutory firearms ban for life set out in his post-trial paperwork." (App. Br. at 13). This is beyond the Court's jurisdiction as Appellant lacks standing to challenge the constitutionality of 18 U.S.C. § 922 in this Court. While Appellant cloaks this extra-jurisdictional goal in a request for this Court to correct an alleged error in post-trial processing, the requested change necessitates an advisory opinion on the constitutionality of 18 U.S.C. § 922.

The EOJ was properly annotated in accordance with the federal law. Should Appellant wish to challenge the constitutionality of the application of that law, he must do so directly through federal district court.

**A. This Court lacks jurisdiction to decide the constitutionality of 18 U.S.C. § 922.**

"Every federal appellate court has a special obligation to satisfy itself…of its own jurisdiction." United States v. Wall, 79 M.J. 456, 458 (C.A.A.F. 2020) (quoting Randolph v. HV, 76 M.J. 27, 29 (C.A.A.F. 2017)).

The Constitution has limited the jurisdiction of Article III federal courts to "cases and controversies." Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Courts established under Article I of the Constitution have adopted this doctrine, termed the Cases and Controversies Doctrine, and generally adhere to prohibiting advisory opinions as a prudential matter. United States v. Chisholm, 59 M.J. 151 (C.A.A.F. 2003) (citing U.S. Const., Art III § 2; United States v. Clay, 10 M.J. 269 (C.M.A. 1981).

There are three elements to the Cases and Controversies Doctrine. First, the Appellant must have suffered an "injury in fact" through an invasion of a legal protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. This means that the injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Third, it must be "likely" as opposed to merely "speculative" that the injury will be redressed by a favorable decision. Lujan, 504 U.S. 555 (internal quotation and citations omitted).

**1. Injury**

Appellant has not had the criminal firearms prohibition of 18 U.S.C. § 922 enforced against him. The Supreme Court has found that a pre-enforcement challenge may be sufficient to satisfy the injury prong of standing if the appellant has shown "an intention to engage in a course of conduct arguably affected with a constitutional interest but, proscribed by a statute, and there exists a credible threat of prosecution thereunder." Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014). Appellant has established a pre-enforcement injury as he wishes to possess firearms but could be prosecuted for doing so under Section 922(g). (Appendix A, *Declaration of SSgt Mitton*).

**2. Causal Connection**

Appellant's firearms prohibition lacks a causal connection to the challenged action of Air Force and therefore fails the second prong of standing. The challenged action is the notation on the first indorsement to the EOJ. The application of 18 U.S.C. § 922 to Appellant is not caused by this notation. It is caused by Appellant's conviction and the independent action of third parties — the FBI and local law enforcement.

Appellant's conviction of an offense that could receive a year or more of confinement triggers the application of 18 U.S.C. § 922(g)(1). Third-party actions, by the Federal Bureau of Investigations (FBI) and local law enforcement, then effectuate the application of 18 U.S.C. § 922 against Appellant. Following his conviction, information beyond the EOJ is sent to the Federal Bureau of Investigation (FBI) for inclusion in the National Instant Criminal Background Check System (NICS). DAFI 51-201, *Administration of Military Justice,* para. 29.31.6, AFMAN 71-102, *Air Force Criminal Indexing,* Chapter 4. This includes the STR, Criminal History Record Information, Certification of Final Review which contain information about Appellant's conviction and sentence necessary for third-party determination about whether 18 U.S.C. § 922 applies. DAFI 51-201, Ch 27. The enforcement of 18 U.S.C. § 922 against Appellant is then determined by local and federal law enforcement if Appellant is found to be possession of a firearm.

The first indorsement to the EOJ does not even serve as notice to Appellant about his prohibition status for prosecution if he were to violate 18 U.S.C. § 922.[3] Appellant's knowledge

[3] The Supreme Court has found knowledge of a person's prohibited status is an essential element for prosecuting a violation of 18 U.S.C. § 922.The Supreme "express[ed] no view, however, about what precisely the Government must prove to establish a defendant's knowledge of status in respect to other §922(g) provisions not at issue here." Rehaif v. United States, 588 U.S. 225 (2019)(Section 922(g)(5) was the provision at issue).

that his crime was punishable by more than a year of confinement alone would be sufficient notification. (R at 102, 130). But the Air Force provides additional notice that does not include the first indorsement to the EOJ through the Air Force Form 177, *Notification of Qualification for Prohibiting of Firearms*, and a Certification of Final Review which he will be served after appellate review is complete. DAFI, 51-210, *Administration of Military Justice,* paras. 29.30.5 Note, 29.31.1.

The single notation of the applicability of the firearms prohibition to Appellant on the first indorsement to the EOJ is not the cause for enforcing the federal statute against Appellant. Because there is not a causal connection between the first indorsement to the EOJ and Appellant's pre-enforcement claim of injury, Appellant lacks standing to bring this issue before this Court. Therefore, this Court should decline to hear Appellant's second assignment of error.

**3. Redressability**

The Supreme court has found cases challenging "the particular programs agencies establish to carry out their legal obligations" to be rarely, if ever, appropriate for federal-court adjudication even when premised on allegations of several violations of law. Lijuan, 504 U.S. at 568 (quoting Allen v. Wright, 468 U.S. 737, 759-760). The Supreme Court has found challenges non-redressable when the court could only order relief by requiring a Secretary to revise his regulation but that decision would not bind the agencies who act outside the regulation. Lujan, 504 U.S. at 597-570. Similarly, Appellant's case is not redressable because the notation on the EOJ occurs because of internal regulation and this Court has no power to order other federal agencies like the FBI or local law enforcement to not enforce the firearms prohibition against Appellant.

Article I courts are creatures of statute and cannot act outside their statutory authority. Clinton v. Goldsmith, 526 U.S. 529 (1999); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988). This is unlike the broad, undefined, judicial power set out in Article III. The only remedy an Article I court could provide Appellant is a change to the first indorsement of the EOJ. It cannot issue an injunction, as an Article III court could, prohibiting the application of 18 U.S.C. § 922 to Appellant by state or federal law enforcement authorities. *See* Goldsmith, 526 U.S. 529 (holding that issuing an injunction by an Article I court to prevent the Secretary of the Air Force from dropping the appellant from the rolls beyond the court's authority). Because of this, there is no redressability for the core of Appellant's complaint – that he should be able to possess a firearm.

If this Court were to order a change to the first indorsement of the EOJ, as Appellant requests, that change does not bind state or federal law enforcement from holding Appellant criminally responsible for possessing a firearm in violation of 18 U.S.C. § 922. There are several points of notice and application of 18 U.S.C. § 922 beyond this Court's reach. The STR will still note that the firearms prohibition applies. The Air Force Office of Special Investigations will still accomplish the AF Form 177 to notify Appellant of his status. The FBI will still document his status in NICS in compliance with the Brady Handgun Violence Prevention Act of 1993. Ultimately Appellant may still be held criminally responsible should he violate the prohibition. Appellant seeks to have the *application* of the law invalidated, but removal of the notice on the first indorsement to the EOJ will not accomplish that. For these reasons, Appellant's claim is not redressable and therefore he lacks standing.

Appellant's second assignment of error seeks to push this court beyond its jurisdiction because any change to the first indorsement to the EOJ requires an advisory opinion on third

party enforcement of federal law. This Court should adhere to the Cases and Controversies Doctrine and decline to opine on the constitutionality of 18 U.S.C. § 922 as applied to Appellant.

Should this Court choose to issue an opinion on Appellant's second assignment of error, it must be limited to whether the Staff Judge Advocate erred in noting that on its face, 18 U.S.C. § 922 applied to Appellant because of his conviction. The Staff Judge Advocate did not err. The plain language of Section 922(g)(1) addresses Appellant's conviction as he was convicted of a crime punishable by a term exceeding one year. Because there was no error, this Court should decline to amend the first indorsement to the EOJ.

**B. 18 U.S.C. § 922, as applied to Appellant, is Constitutional.**

Should this Court disagree and find it has jurisdiction to opine on the constitutionality of 18 U.S.C. § 922, it should find that it is constitutional as applied to Appellant. The crime Appellant committed is a crime of violence and aligns with this nation's historical tradition of firearms regulation.

Appellant faced 28 years of confinement for his one charge and four specifications of abusive sexual contact in violation of Article 120, UCMJ. Seven years for each specification. (R. at 102). As a result, Appellant's conviction causes 18 U.S.C. § 922(g)(1) to apply.

Appellant's claim that this law conflicts with the Second Amendment is incorrect. Prohibitions on the possession of firearms by felons are presumptively lawful. United States v. Rahimi, 144 S. Ct. 1889, 1902 (2024) (citing District of Columbia v. Heller, 554 U.S. 570, 626 - 627, n26.) As the Supreme Court noted in Rahimi, "Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." 144 S. Ct. at 1896. Like Rahimi, Section 922(g)(1) fits comfortably within that tradition under the facts of Appellant's case.

"When legislation and the Constitution brush up against each other, a court's task is to seek harmony, not to manufacture conflict." Rahimi, 144 S. Ct. at 1903, (citing United States v. Hansen, 599 U.S. 762, 781 (2023)(internal quotation omitted)). This Court must be considering circumstances under which Section 922(g)(1) is most likely to be constitutional. Id.

Rahimi focused on the domestic violence provision of Section 922, but the historical analogues were more broad than domestic violence alone. These comparisons covered harm to others generally. For example, the Court examined surety laws which "could be invoked to prevent *all* forms of violence." Rahimi, 144 S. Ct. at 1900 (emphasis added). The Court itself adopted this general concern for harm stating that when an individual poses a clear threat of *physical violence* to another, the threatening individual may be disarmed. Id. at 1901.

Appellant saw his daughter as vulnerable and took advantage of his fatherly authority position to sexually touch his daughter's breasts and buttocks multiple times without her consent. He is a clear threat of physical violence to another.

This Court should reject Appellant's assertion that his repeated sexual touching of his daughter was not violent because he did not bite, beat, hit, kick or use a weapon. (App. Br. at 12-13). Sexual violence is physical violence. Violence is the use of physical force to injure, abuse, damage or destroy. Miriam-Webster Dictionary, *Violence*, https://www.merriam-webster.com/dictionary/violence. Force is the use of power, violence, or pressure directed against a person or thing. Black's Law Dictionary, 787 (11th ed.). Just because Appellant did not strike his daughter when he repeatedly groped her without her consent does not mean his actions were not violent. He used his power against a person he viewed as vulnerable to grab her sexually, and ultimately injure and abuse her.

Appellant's attempt to distinguish his case from Rahimi by noting that his firearms restriction is "permanent" rather than temporary is unpersuasive because Rahimi applied 18 U.S.C. § 922(g)(8) which disarms a person following a restraining order. Appellant was disarmed after a conviction under 18 U.S.C. § 922(g)(1). The lower standard of proof at a restraining order hearing drives the limited disarmament. This Court should decline to find a more permanent restriction to be unconstitutional where it is applied only after a commission of a serious offense is proved beyond a reasonable doubt.

Appellant's repeated sexual abuse of his daughter is physical violence. Prohibitions on the possession of firearms by felons are presumptively lawful and Appellant's case is not distinguishable from the historical analogues of physical violence detailed in Rahimi. Therefore, this Court should find the application of 18 U.S.C. § 922(g) to Appellant to be constitutional.

## III.

## NOTIFICATION OF A COLLATERAL CONSEQUENCE DOES NOT MERIT SENTENCE RELIEF.

### *Standard of Review*

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

### *Law and Analysis*

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

Appellant is not entitled to sentence relief because there was no error. As he correctly highlighted, without error, there is no relief. (App. Br. at 16)(citing United States v. Gay, 75 M.J. 264, 267-268 (C.A.A.F. 2016)). As explained above, the first indorsement to the EOJ

correctly noted that 18 U.S.C. § 922 applied to Appellant because he was convicted of crime punishable by more than a year of confinement.

Should this Court disagree and rule the notation on the first indorsement to the EOJ was an error, appropriate remedy is correction to the first indorsement to the EOJ. Appellant's claim that he is entitled to sentencing relief because there is an "institutional problem" underlying the error in Appellant's case is unpersuasive. He cobbles together twenty-five factually unrelated cases to manufacture and institutional issue. These cases cover a range of offenses from sexual abuse, drug use, assault consummated by a battery, and possession of child pornography. His claim that these drastically factually different cases, some of which would apply different sections of 18 U.S.C. § 922 from his case, show that the Air Force inappropriately notes the EOJ at a Constitutional magnitude disregards the factual analysis needed for different firearms restrictions. Should this Court find error, it is not an institutional problem and correction of the first indorsement is enough to correct the error.

## CONCLUSION

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

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 13 December 2024.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **MOTION TO STRIKE** |
| v. | ) | Before Panel No. 3 |
| Staff Sergeant (E-5)<br>**JUSTIN P. MITTON**<br>United States Air Force<br>*Appellant* | ) | Case No. ACM 40616<br><br><br>15 December 2024 |

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

Pursuant to 23.3(p) of this Court's rules of practice and procedure, Appellant moves to strike the last paragraph of the Statement of Facts set out on pages 2 and 3 of the Government's Answer brief. The basis for this request is good cause, namely, that the impact on the named victim described in that paragraph is irrelevant to the issues presented. [1]

The Government's answer brief exceeds the bounds of facts authorized by this Court's rules. Both an Appellant's initial brief assigning error and the Government's Answer brief must comport to the same format. A.F. CT. CRIM. APP. R. 18.1, 18.3, Appendix A. Each brief shall "set forth all facts *pertinent to the issues raised*." *Id.* at Appendix A (emphasis added). Despite this mandate that the issues drive the facts, the Government's brief goes beyond that fundamental constraint by focusing this Court on victim impact. Answer (Ans.) at 2-3.

The Government's failure to comply with this Court's rules is evident for two reasons and the appropriate remedy is to strike it.

[1] Though responsive to the Government's Answer brief, this motion does not constitute Appellant's reply brief. The reply brief will be filed separately.

First, the impact of Appellant's actions on the named victim are not relevant to any of the issues presented. Relevance matters because the term from Appendix A of this Court's rules—"pertinent"—is defined to relevance: "having a clear and decisive relevance to the matter at hand." MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/pertinent (last visited Dec. 15, 2024). And relevance, like the definition for "pertinent," demands among other requirements that "the fact is of consequence in determining the action." *Id.*; Military Rule of Evidence 401(b). As such, this Court's rules make clear that the facts need to be more than just pertinent to the case but to the actual controversies in it through the narrowing of pertinent matters "to the issues raised." A.F. CT. CRIM. APP., Appendix A.

Yet the issues presented reveal no such connection and their resolution is unaffected by the presence or absence of victim impact. Victim impact is not relevant to the erroneous wording in the reprimand in the Entry of Judgment. *See* Appellant's Br. at 4-7. Victim impact is not relevant to whether Appellant should be barred from possessing firearms. *See* Appellant's Br. at 7-15. Nor is victim impact relevant to whether relief is warranted for institutionalized violations of constitutional protections in post-trial paperwork. *See* Appellant's Br. at 15-19.

Second, the Government's own brief impliedly admits the lack of relevance. In twelve pages of argument that follow the Statement of Facts, the Government's brief presents neither argument nor even passing reference to the impact of Appellant's actions on the named victim. Ans. at 3-14. If the impacts were "pertinent to the issues raised," the Government's brief would have addressed them. The Government's brief does not, and that is because this information is irrelevant. Where Appellant did not raise any issue that would invite consideration of the impacts on the named victim, there is no basis for the Government to publish those impacts for

all the world to see through publicly searchable court filings. *See* Article 140a(a)(4), Uniform Code of Military Justice, 10 U.S.C. § 940a(a)(4).

**WHEREFORE**, this Court should grant this motion and strike the last paragraph of the Statement of Facts in the Government's answer brief.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was delivered by e-mail to the Court and served on the Government Trial and Appellate Operations Division on 15 December 2024.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**,<br>*Appellee,* | ) | GOVERNMENT OPPOSITION TO DEFENSE MOTION TO STRIKE |
| v. | ) | Before Panel No. 3 |
| Staff Sergeant (E-5)<br>**JUSTIN P. MITTON**<br>United States Air Force<br>*Appellant.* | ) | No. ACM 40616<br><br>16 December 2024 |

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

Pursuant to Rule 23(c) of this Court's Rules of Practice and Procedure, the United States enters its opposition to Appellant's Motion to Strike.

First, striking any part of the government's argument is unnecessary. If Appellant does not believe this Court should consider one of the government's arguments, he can explain why in his reply brief. There is no need for an extra filing.

Second, reference to the victim's impact is proper because it is pertinent to Appellant's second assignment of error. A.F. Ct. Crim. App. R. Appendix A. Appellant claims in his second assignment of error that "violence is the keystone to" the constitutional analysis of his firearms restriction and that his abusive sexual contact against his daughter were not violent. (App. Br. at 11-13). Assuming this Court even has jurisdiction to consider this issue, the lasting impact to his victim is a fact of consequence for this Court to consider when determining whether Appellant's crime involved physical force to injure or abuse and was therefore violent.

Finally, despite Appellant's assertion otherwise, the injury to his daughter is noted in the analysis of whether Appellant's actions were violent because the injury is relevant for this Court's consideration in determining violence. (Ans. at 12). While the victim impact statement

is not specifically cited in the analysis, it is not required to be referenced directly to be a fact relevant for the Court's consideration. The ultimate injury and abuse are analyzed with the foundational facts established in the final paragraph of the statement of facts. This analysis further supports the relevance to the Court's evaluation of Appellant's second assignment of error.

**WHEREFORE**, this Court should deny Appellant's motion to strike the last paragraph of the Statement of Facts in the Government's answer brief.

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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 16 December 2024.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **REPLY TO APPELLEE'S ANSWER TO ASSIGNMENTS OF ERROR** |
| v. | ) | Before Panel No. 3 |
| Staff Sergeant (E-5)<br>**JUSTIN P. MITTON**<br>United States Air Force<br>*Appellant* | ) | Case No. ACM 40616<br><br><br>20 December 2024 |

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

## Argument

The most notable aspects of the Government's brief are the things it lacks and concedes. Faced with arguments grounded in the details of both subparagraphs of Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d) (2019), the Government's brief declines to discuss the statute beyond a single passing reference. *Compare* Appellant's Br. at 7-8, 13-16, *with* Answer (Ans.) at 13. Faced with an argument to apply this Court's recent decision in *United States v. Valentin-Andino*, the Government's brief declines to engage in any legal analysis on the topic. *Compare* Appellant's Br. at 17 (citing *Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *16-19 (A.F. Ct. Crim. App. June 7, 2024), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 571 (C.A.A.F. Sept. 30, 2024)), *with* Ans. at 13-14. As discussed further below, each of the Government's concessions and omissions weigh in favor of Appellant, and this Court should grant the requested relief.

## II.

## THE APPLICATION OF 18 U.S.C. § 922 TO APPELLANT WARRANTS CORRECTION.

In mixing up two discrete judicial requirements—standing and jurisdiction—and then limiting its opposition to only the former, the Government's brief should be construed as recognizing this Court's jurisdiction to resolve Appellant's claim.[1]

In relevant part, this Court's *jurisdiction* over the issue presented stems from Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). That basis for jurisdiction is addressed in detail in Appellant's initial brief. Appellant's Br. at 7, 13-15. The Government's brief offers no competing interpretation and seems to yield to the plain-language notion that an error such as this one, following entry of judgment, is within this Court's purview to correct. *See* 10 U.S.C. § 866(d)(2).

The Government's brief is not silent when it comes to "jurisdiction," albeit using that label to reference a different legal concept altogether: standing. *See* Ans. at 6-11. Indeed, the second sentence of the Government's argument asserts this Court lacks "jurisdiction as Appellant lacks standing." *Id.* at 6. But this argument blurs "the distinction between two principles" where the Supreme Court "has kept these two strands separate." *United States v. Windsor*, 570 U.S. 744, 756-57 (2013) (citations omitted); *see also In re AG*, Misc. Dkt. No. 2024-05, 2024 CCA LEXIS 256, at *13 (A.F. Ct. Crim. App. Jun. 28, 2024) (discussing standing and jurisdiction as two separate requirements the petitioner failed to establish).

[1] This is not to suggest that the Government must address every single argument raised by Appellant, nor that Appellant somehow accedes to any of the Government's arguments by declining to take up each and every contour of them here. Appellant's positions on matters not addressed in this brief are sufficiently set out in Appellant's initial brief.

Standing has to do with the requirement that there be a case or controversy, *Windsor*, 570 U.S. at 757 (citations omitted), and its nexus to the issue presented is the subject of ongoing litigation before the United States Court of Appeals for the Armed Forces. In *United States v. Johnson*, the court specified review of whether judicial scrutiny of the 18 U.S.C. § 922 prohibition on the Staff Judge Advocate's indorsement to the Entry of Judgment (EOJ) satisfies that Court's cases or controversies doctrine. ___M.J. ___, 2024 CAAF LEXIS 561 (C.A.A.F. Sept. 24, 2024). Addressing this boils down to the traditional assessment of standing invoked in the Government's brief: whether an injury in fact occurred, its causation, and its redressability. Ans. at 6-11; *B.M. v. United States*, 84 M.J. 314, 317 (C.A.A.F. 2024).

The most straightforward of those three requirements to resolve is injury because the Government's brief concedes it. Ans. at 7. Notwithstanding this concession[2]—Appellant bears the responsibility to establish standing as the party seeking relief from this Court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The "injury" needed to establish standing must be "concrete and particularized" to the individual, as well as "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 560.

To the extent it is considered—the basis for which Appellant has addressed in separate motion litigation—Appellant's declaration outlines the particularized injury to Appellant stemming from the Government's 18 U.S.C. § 922 prohibition. Beyond what the Government's brief concedes, it shows Appellant does, in fact, own firearms. *Compare* Decl. of Appellant at 1, *with* Ans. at 7. Beyond what the Government's brief concedes, it shows Appellant, in fact, no

[2] Because the concession in the Government's brief on this point relies on Appellant's declaration, Ans. at 7 (citing Decl. of Appellant), this would also seem to favor resolving the question of whether to substantively consider that declaration this Court's Order, dated October 31, 2024, in Appellant's favor.

longer possesses those firearms because of the firearms prohibition. *Compare* Decl. of Appellant at 1-2, *with* Ans. at 7. Beyond what the Government's brief concedes, it shows, in fact, the further injury to Appellant in how the deprivation of these firearms impedes his ability to provide sustenance for his family. *Id.* And, as the Government concedes, Appellant "wishes to possess firearms but could be prosecuted for doing so under [18 U.S.C. §] 922(g)." Ans. at 7. Taken together, there is no doubting the injury to Appellant when assessing his standing before this Court.

This injury can be traced to the Government's reporting as its redressable cause. The steps are straightforward. First, the Air Force is required to document Appellant's firearm prohibition, regardless of whether that prohibition runs afoul of constitutional protections. Second, this prohibition is then made official by regulation-required forwarding of that determination to relevant authorities. Indeed, per Department of the Air Force regulation, "Reporting of persons qualifying for [National Instant Criminal Background Check System (NICS)] prohibition is an immediate denial of the individual's right to exercise his or her constitutional right to possess a firearm." Department of the Air Force Manual (DAFMAN) 71-102, *Air Force Criminal Indexing*, at ¶ 4.4 (Jul. 21, 2020).

The Department of the Air Force Criminal Justice Information Cell (DAF-CJIC) is responsible for DAF criminal indexing. DAFMAN 71-102, at ¶ 1.4. DAF-CJIC oversees all Air Force NICS entries and removals. DAFMAN 71-102, at ¶ 1.4.2. The DAF is required to report to DAF-CJIC the members convicted at a general court-martial of a crime punishable by a term of imprisonment exceeding one year. DAFMAN 71-102, at ¶¶ 4.3.1.2, 4.4.3. To effectuate this reporting, the Staff Judge Advocate is responsible for "disposition documentation" distribution. DAFMAN 71-102, at Table 1.1, ¶¶ 1.5.3, 4.3.1.4. The "required disposition documentation"

following a court-martial is the EOJ and the "first indorsement." *Id*. The "first indorsement" contains the required firearm prohibition. Department of the Air Force Instruction 51-201, *Administration of Military Justice*, at ¶ 20.41 (Jan. 24, 2024). The EOJ and indorsement are distributed to local military law enforcement and DAF/CJIC. *Id.*, at ¶¶ 29.19.3-29.19.4.

If an individual wants to purchase a firearm lawfully —and it is clear Appellant wants to obtain at least the firearms he previously possessed, Decl. of Appellant at 1-2, if not others—a seller must run a NICS background check. 18 U.S.C. §§ 922(s), (t)(1)(A). NICS determines whether the seller may proceed with the transaction. 28 C.F.R. § 25.6(c)(2014). A "proceed" response will occur if no disqualifying information is found in the NICS. 28 C.F.R. § 25.6. Because sellers must run a NICS background check before lawfully transferring a firearm, erroneous reporting during the DAF post-trial processing will deprive individuals of their right to bear arms.

But for the indorsement stating "Yes" next to "Firearm Prohibition Triggered Under 18 U.S.C. § 922," Appellant could purchase a firearm from a federally licensed firearm seller. The Federal Gun Control Act, codified at 18 U.S.C. §§ 922(a)(1)(A) and 923(c), requires that any person engaged in the business of dealing in firearms be licensed by the Bureau of Alcohol, Tobacco, Firearms and Explosives. To lawfully purchase a firearm, Appellant would need to buy from a federally licensed firearm seller, who is obligated to use NICS. *See* ABOUT NICS, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/about-nics (last visited Dec. 16, 2024) (showing all states use NICS in some form).

As it stands, NICS would show Appellant is prohibited from owning or possessing a firearm due to the SJA indorsement reporting as such to DAF-CJIC. Consequently, there is a

sufficient causal connection between Appellant's denial of his Second Amendment rights and the indorsement on the EOJ.

That is a connection this Court may redress through the requested correction. Appellant is seeking a correction to the firearm bar by challenging 18 U.S.C. § 922 as applied to him. Raising an error occurring after entry of judgment, *see* 10 U.S.C. § 866(d)(2), has the impact of adjudicating whether 18 U.S.C. § 922 constitutionally applies to him. The practical effect of this correction is two-fold: (1) Appellant can lawfully purchase a firearm, and (2) the Government could not meet the intent element in a later prosecution.

First, correction of Appellant's record will remove him from NICS because the DAF informs NICS whether a prohibiting category exists. *See* NICS INDICES, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/nics-indices (last visited Dec. 16, 2024) (noting it is the contributing agency's responsibility to remove an individual from NICS Indices if their prohibitor is no longer valid). The DAF will also transmit "[a]ny actions taken as the results of appellate review . . . to DAF-CJIC." DAFMAN 71-102, at ¶ 4.4.3.1. Without a NICS prohibitor, Appellant would be able to purchase a firearm.

Second, because the requested correction requires adjudication of whether Appellant has a qualifying status under 18 U.S.C. § 922, he could lawfully purchase a firearm knowing his status does not qualify. He could likewise repossess the firearms he previously possessed. Decl. of Appellant at 1-2. This secondary effect about knowledge of status is the other key to redressability because to convict an individual under 18 U.S.C. § 922(g) and 18 U.S.C. § 924, "the Government . . . must show that the defendant knew he possessed a firearm and also that he *knew he had the relevant status when he possessed it*." *Rehaif v. United States*, 588 U.S. 225, 227 (2019) (emphasis added). Knowing that his status is not wrongful—and the statute

purporting otherwise must yield to his superior constitutional right to bear arms, *United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997)—would affect that status.

This Court can modify the EOJ through R.C.M. 1111(c) as part of its duties. Even though the Statement of Trial Results contains an indorsement as well, the operative indorsement is the one on the EOJ. DAFI 51-201, at ¶ 29.33.1. The EOJ and indorsement are the "final disposition." *Id*. Changing the firearm prohibition on the EOJ therefore corrects the unlawful denial through NICS and the unconstitutional status bar.

**WHEREFORE**, this Court should remand the record to correct the EOJ's unconstitutional firearm prohibition or grant other relief it deems warranted to effectuate the same.

## III.

## THE AIR FORCE'S SYSTEMIC APPLICATION OF 18 U.S.C. § 922 TO APPELLANT MERITS SENTENCE RELIEF.

The Government's observation related to Issue I provides an apt frame of reference for this issue: "Minor human error, like typographical errors, are [sic] bound to occur in post-trial processing."[3] Ans. at 5. Except the Government's brief declines to assert that what is happening in the Air Force's post-trial processing regarding the firearms prohibition is "minor human error." Rather, as the Government's argument on Issue II and the discussion above demonstrate, the Air Force's application of 18 U.S.C. § 922 is systematic and institutionalized by regulation.

[3] "[T]ypos happen," *Longoria v. Kodiak Concepts LLC*, 2021 U.S. Dist. LEXIS 55039, at *34 n.10 (D. Ariz. Mar. 23, 2021), and at least one such error can be found in Appellant's initial brief, where the citation to *United States v. Clark*, No. ACM 23017, 2024 CCA LEXIS 378 (A.F. Ct. Crim. App. Sep. 6, 2024), misspelled "LEXIS" as "LEIXS."

*See* Ans. at 8-9. The question presented asks whether that across-the-board policy violates the Constitution, both to Appellant and on a more widespread scale.

As articulated in Appellant's initial brief, the recent case of *Valentin-Andino*, 2024 CCA LEXIS 223, at *15-19, offers a useful framework for extending the principles articulated in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015) to answer this question. Appellant's Br. at 16-19. The Government's brief declines to acknowledge this argument or the import of *Valentin-Andino*.

Instead, the Government's brief laments factual differences between the offenses in Appellant's case and those listed in Appellant's initial brief. *Id.*; Ans. at 14. Without explaining how those differing convictions and underlying facts involved an application of 18 U.S.C. § 922 within constitutional bounds, consistent with its burden under *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022), the Government's answer amounts to a claim of there being too much to analyze.

But this Court's methodology in *Valentin-Andino* shows this Court may conduct that sort of analysis and hold the Government accountable for its responsibility for causing the complained-of problem in Appellant's case. Appellant invites this Court to do the same here, assessing whether the Government's systematic application of 18 U.S.C. § 922 violates the Constitution in each of those cases.[4]

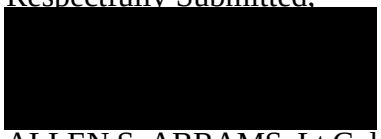
Although the cited opinions tend not to reach the merits of the issue, the requested analysis remains feasible. *See, e.g.*, *Clark*, 2024 CCA LEXIS 378, at * 2-3 (declining to reach the merits of the firearms prohibition based on the determination this Court lacks the authority to

[4] Another of these cases can be added to those cited on pages 17-19 of Appellant's initial brief: *United States v. Moore*, No. ACM 40600, slip op. at 2 (A.F. Ct. Crim. App. Dec. 18, 2024).

do so); *United States v. Folts*, No. ACM 40322, 2024 CCA LEXIS 353, at *2-3 (A.F. Ct. Crim. App. Aug. 26, 2024) (same). The decisions themselves set out the offense, and this Court can assess whether those convictions bear the required hallmark of violence to warrant the application of the firearms prohibition. And if that support is not enough, this Court should also consider the recitation of facts and arguments of the parties in each of the cited cases, which this Court has published to the public. *See* Article 140a(a)(4), 10 U.S.C. § 940a(a)(4) (2019); United States Air Force Court of Criminal Appeals, https://afcca.law.af.mil/opinions_cnm_2023.html (last visited Dec. 20, 2024); United States Air Force Court of Criminal Appeals, https://afcca.law.af.mil/opinions.html (last visited Dec. 20, 2024). Without repeating the arguments of each of those other cases here, they collectively illustrate that the Air Force mandates firearm prohibitions without consideration of the constitutional mandate described in *Bruen*, 597 U.S. at 17, and *United States v. Rahimi*, 602 U.S. 680, 698 (2024). Relief is therefore warranted under Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1).

**WHEREFORE**, this Court should reduce Appellant's sentence to confinement.

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 20 December 2024.

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# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40616** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **NOTICE OF** |
| **Justin P. MITTON** | ) | **PANEL CHANGE** |
| **Staff Sergeant (E-5)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | |

It is by the court on this 17th day of January, 2025,

**ORDERED:**

The record of trial in the above styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review.

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

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
ORTIZ, ANTHONY D., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**<br>*Appellee* | ) | **MOTION TO CITE SUPPLEMENTAL AUTHORITY** |
| v. | ) | Before a Special Panel |
| Staff Sergeant (E-5)<br>**JUSTIN P. MITTON**<br>United States Air Force<br>*Appellant* | ) | Case No. ACM 40616<br><br><br>8 April 2025 |

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

Pursuant to Rule 23.3(d) of this Court's Rules of Practice and Procedure, Appellant moves to cite as supplemental authority the decision by the United States Court of Appeals for the Armed Forces in *United States v. Valentin-Andino*, __ M.J. __, No. 24-0208/AF, 2025 CAAF LEXIS 248 (C.A.A.F. Mar. 31, 2025). The decision in *Valentin-Andino* is relevant to the resolution of both Issues II and III because of how that decision guides this Court's analytical framework.

With regard to Issue II, *Valentin-Andino* reaffirms this Court's expansive authority to grant relief that is both "appropriate," as used in Article 66(d)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d)(2), as well as meaningful to remedy post-trial errors of the kind alleged in this case. 2025 CAAF LEXIS 248, at *9. Because Appellant initially requested relief through correction of Appellant's Entry of Judgment or "other relief [this Court] deems warranted," this Court can—and, for the reasons set out in Appellant's earlier briefs, should—grant other "appropriate" relief to address the unconstitutional lifelong prohibition of Appellant possessing a firearm if it is not inclined to order correction of the Entry of Judgment.

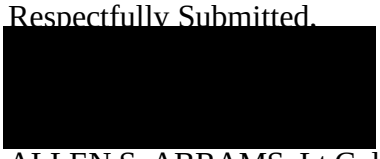
As for Issue III, *Valentin-Andino* suggests but does not dispositively settle that Article 66(d)(2) may be the more appropriate statutory mechanism for the relief requested by Appellant. In finding error in this Court's exercise of its authority under Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) to grant relief, the Court of Appeals for the Armed Forces determined that Article 66(d)(2) exclusively governs "post-trial delay." *Valentin-Andino*, 2025 CAAF LEXIS 248, at *9 n.4. Though silent as to the question presented here concerning a post-trial "error," as opposed to a "post-trial delay," the *Valentin-Andino* decision could be read to similarly constrain this Court's statutory pathway to granting relief under Issue III to Article 66(d)(2). Appellant maintains that relief should be afforded under Article 66(d)(1) because relief through that provision would not be used "to nullify or to trump" the more "specific provision" of Article 66(d)(2). *Valentin-Andino*, 2025 CAAF LEXIS 248, at *9 n.4 (quoting *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1013 (9th Cir. 2000)). Instead, as discussed in Appellant's earlier pleadings, Article 66(d)(1) offers a complementary basis for relief grounded in well-established case law. Assignment of Error Br. at 17 (discussing the applicability of these authorities); Reply Br. on Behalf of Appellant at 8-9 (analyzing these authorities).

To the extent this Court reads *Valentin-Andino* as constraining its authority to address post-trial errors in the same way its authority is limited to address post-trial delay, the impact on Issue III would be that the proper avenue for the relief requested would be through Article 66(d)(2). Appellant therefore specifically requests reduction of his sentence to confinement as "appropriate relief" for reasons in accord with those presented under Issue III. 10 U.S.C. § 866(d)(2). One notable difference, however, in light of *Valentin-Andino*, is that the applicability

of *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), and *United States v. Gay*, 75 M.J. 264, 267-68 (C.A.A.F. 2016), would be diminished from controlling to, at most, persuasive authorities to guide this Court's analysis. *See Valentin-Andino*, 2025 CAAF LEXIS 248, at *9 n.4 ("*Tardif* and its progeny have been superseded by Article 66(d)(2)."); Assignment of Error Br. at 17 (discussing the applicability of these authorities pre-*Valentin-Andino*); Reply Br. on Behalf of Appellant at 8-9 (analyzing these authorities pre-*Valentin-Andino*). Despite this shift, nothing in *Valentin-Andino* precludes this Court from considering the institutionalized constitutional violation of which Appellant complains, an approach that is supported by *Gay*. 74 M.J. at 744. The Government's systemic and systematic violation of the rights of Appellant and a significant number of other service members under the Second Amendment, U.S. CONST. amend. II, remains the central basis for this Court to reduce Appellant's sentence to confinement as "appropriate relief" under Article 66(d)(2). This Court should do so.

**WHEREFORE**, this Court should grant this motion.

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 8 April 2025.

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