No. _____

IN THE

Supreme Court of the United States

ROBERT D. SCHNEIDER, *ET. AL.*,

Applicants,

v.

UNITED STATES OF AMERICA,

Respondent.

Application to the Hon. John G. Roberts, Jr. for Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PARTIES TO THE PROCEEDINGS

The applicants, Robert D. Schneider, Ian J.B. Cadavona, Matthew R. Denney, Brian W. Gubicza, Kris A. Hollenback, DeQuayjan D. Jackson, Bradley D. Lampkins, Douglas G. Lara, S'hun R. Maymi, Justin P. Mitton, Austin J. Van Velson, Brandon A. Wood, and Benjamin C. York, were convicted in separate courts-martial and appealed their convictions. The respondent in all thirteen cases is the United States.

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United States Court of Appeals for the Armed Forces**

Pursuant to Supreme Court Rules 13.5, 22, and 30, Applicants, thirteen military servicemembers, request an extension of time, to and including December 14, 2025, to file a Petition for a Writ of Certiorari. Unless an extension is granted, the deadline for filing the Petition for a Writ of Certiorari will be October 15, 2025. This Application is being filed more than 10 days before that date.

In support of this application, Applicants state the following:

1. The Court of Appeals for the Armed Forces (CAAF) rendered its decision on July 17, 2025, for Applicant Lara, which is the earliest CAAF decision among Applicants. This Court has jurisdiction over all Applicants under 28 U.S.C. § 1259(3).

A copy of the CAAF's orders denying review or summarily affirming the lower court, of which Applicants seek review, are attached to this application. Applicants intend to jointly file a Petition for a Writ of Certiorari, under Rule 12.4.

2. Following their convictions, Applicants appealed to the Air Force Court of Criminal Appeals (AFCCA). Applicants raised, among other legal errors, that the Air Force's application of 18 U.S.C. § 922 firearm prohibitions post-conviction was erroneous, and that the AFCCA has jurisdiction to correct that error and provide relief. The AFCCA declined to find jurisdiction for the issue. Applicants petitioned the CAAF to review the AFCCAs' decision. On June 24, 2025, the CAAF decided *United States v. Johnson*, __ M.J. __, No. 24-0004/SF, 2025 CAAF LEXIS 499 (C.A.A.F. June 24, 2025), holding that military courts of criminal appeals (including the AFCCA) do not have jurisdiction to correct the 18 U.S.C. § 922 indication error. Between July 17, 2025, and August 21, 2025, the CAAF denied Applicants' petitions or summarily affirmed the AFCCA's decision in their cases.

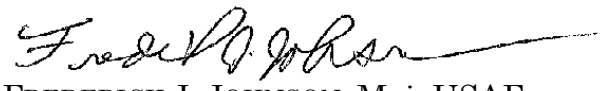
3. The printer previously used by the Air Force Appellate Defense Division has gone out of business. The Division has identified a new printing service, but this change has caused delays. The printing process required for Applicants' petition must be processed through a federal government agency (the Air Force), which has payment and processing requirements a private firm does not. The procurement process for a printing job cannot be forecasted with certainty, often has delays, and cuts approximately two weeks out of undersigned counsel's time to finalize the

Petition for a Writ of Certiorari. The close of the fiscal year, federal agency budgetary limitations, and the government shutdown are also adding to the normal delays and constraints associated with processing printing through the Air Force.

4. Applicants thus request an extension not exceeding sixty days for counsel to prepare a petition that fully addresses the issues raised by the decisions below and frames those issues in a manner that will be most helpful to the Court.

For the foregoing reasons, Applicants respectfully request that an order be entered extending the time to file a Petition for a Writ of Certiorari up to, and including, December 14, 2025.

Respectfully submitted,



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October 1, 2025

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Robert D. Schneider,
Appellant

USCA Dkt. No. 24-0228/AF
Crim.App. No. 40403

O R D E R

On further consideration of the granted issue, 85 M.J. 265 (C.A.A.F. 2024), and in view of *United States v. Johnson*, __ M.J. __ (C.A.A.F. 2025), it is, by the Court, this 22nd day of July, 2025,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Bruzik)
Appellate Government Counsel (Kaufman)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40403

UNITED STATES
Appellee

v.

Robert D. SCHNEIDER
Technical Sergeant (E-6), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 16 July 2024

Military Judge: Elijah F. Brown.

Sentence: Sentence adjudged 27 October 2022 by GCM convened at Hill Air Force Base, Utah. Sentence entered by military judge on 3 January 2023: Bad-conduct discharge, confinement for 12 months, reduction to E-1, and a reprimand.

For Appellant: Major Jenna M. Arroyo, USAF; Captain Michael J. Bruzik, USAF.

For Appellee: Colonel Steven R. Kaufman, USAF; Lieutenant Colonel J. Peter Ferrell, USAF; Major Olivia B. Hoff, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, GRUEN, and WARREN, *Appellate Military Judges*.

Chief Judge JOHNSON delivered the opinion of the court, in which Judge GRUEN and Judge WARREN joined.

JOHNSON, Chief Judge:

A general court-martial composed of a military judge alone found Appellant guilty, in accordance with his pleas pursuant to a plea agreement, of eight specifications of making false official statements in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907.[1] The military judge sentenced Appellant to a bad-conduct discharge, confinement for 12 months, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings or sentence.

Appellant raises four issues on appeal, which we have partly rephrased: (1) whether the military judge erred by considering impermissible matters included in victim impact statements; (2) whether the sentence is inappropriately severe; (3) whether illegible portions of the record of trial require sentencing relief or remand for correction; and (4) whether the Government can prove the 18 U.S.C. § 922 firearms prohibition is constitutional as applied to Appellant and whether this court has jurisdiction to decide that issue. In addition, although not raised by the parties, we address certain errors in the post-trial processing of Appellant's court-martial.

We have carefully considered issue (4) and conclude it warrants neither discussion nor relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987); *United States v. Vanzant*, ___ M.J. ___, No. ACM 22004, 2024 CCA LEXIS 215, at *23–25 (A.F. Ct. Crim. App. 28 May 2024) (holding the 18 U.S.C. § 922 firearm prohibition notation included in the staff judge advocate's indorsement to the entry of judgment is beyond a Court of Criminal Appeals' statutory authority to review). As to the remaining assignments of error, we find no error that materially prejudiced Appellant's substantial rights. However, as explained below, we do find an error in the entry of judgment that warrants correction, and we take corrective action in our decretal paragraph.

I. BACKGROUND[2]

In July 2017, Appellant was assigned to a recruiting squadron focusing on recruiting health care professionals to the Air Force and was stationed in Nebraska. Beginning in January 2019, Appellant "was issued a series of [three]

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[1] Unless otherwise indicated, all references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] The information in this section is drawn primarily from the stipulation of fact, and quotations are from the stipulation.

Letters of Reprimand [LORs] for willfully lying to applicants about the status of their applications, inputting false information into the Air Force Recruiting Information Support System [(AFRISS)] . . . , and failing to make reports altogether, in violation of standing and direct orders." In conjunction with the third of these LORs, in December 2019 Appellant's commander informed Appellant he was "to no longer perform recruiting duties;" in addition, Appellant's flight chief told Appellant he was "not to have any further contact with any applicants."

In spite of these directions, Appellant "continued to communicate with applicants" and "proceeded to tell several applicants that they had been admitted into the Air Force, when in fact they had not." Appellant was subsequently charged for false statements he made to eight applicants after December 2019.

EH initially came into contact with Appellant in April 2018 and provided Appellant numerous documents related to his application to join the Air Force. Beginning in October 2019, Appellant told EH he was scheduled for a series of interviews and appointments; in each case Appellant subsequently told EH the interviews or appointments were cancelled for one reason or another. In October 2020, Appellant sent EH a text message informing EH he had been admitted to the Air Force. In January 2021, Appellant met EH in person in order for EH to sign papers "pertaining to the health profession and loan repayment;" Appellant then "took [EH] on base to purchase uniforms." In reality, Appellant had input almost no information about EH into AFRISS and had not submitted an application on behalf of EH. Appellant's actions with EH came to light in February 2021 after EH contacted Officer Training School (OTS) in Montgomery, Alabama, in anticipation of attending training. Appellant was subsequently charged with making a false official statement to EH in October 2020 that EH was selected to attend OTS.

Appellant initially made contact with IB in December 2019 after IB used the Air Force recruiting website. Appellant told IB multiple times that IB would be commissioned into the Air Force, culminating in October 2020 when Appellant falsely told IB he had been selected for OTS and would be stationed at Scott Air Force Base (AFB), Illinois. Appellant told IB he could sell his current house and look for a house near Scott AFB, which IB proceeded to do. IB and his wife had sold their house, paid earnest money on a new house in Saint Louis, Missouri, and were on their way to OTS in Alabama when

they learned IB had in fact not been selected to attend OTS.[3] Appellant was charged with making a false official statement to IB in October 2020 that IB was selected to attend OTS.

Appellant contacted JD on a regular basis beginning in early 2020. In February 2021, Appellant falsely told JD that he had been selected to attend OTS later that month. Appellant directed JD to stop by Omaha, Nebraska, on his way to Alabama in order to receive a copy of his orders in person. After JD arrived in Omaha, he was contacted by Appellant's commander and flight chief who informed JD that he had not been selected for OTS, and in fact Appellant had never submitted JD's application or other paperwork.[4] Appellant was charged with making a false official statement to JD in February 2021 that JD was selected to attend OTS.

Appellant initially contacted JH in December 2019. JH worked with Appellant to apply to be an officer and health professional in the Air Force, including providing medical records and other documents related to obtaining a waiver for a medical issue. In December 2020, Appellant falsely told JH he had been selected to attend OTS. When Appellant subsequently stopped responding to JH, JH contacted the recruiting office and learned he had not been selected for OTS and Appellant had never submitted JH's application or waiver. Appellant was charged with making a false official statement to JH in December 2020 that JH had been selected to attend OTS.

Appellant initially contacted AC in late 2018 or early 2019. Through Appellant, AC attempted to apply for the Health Professions Scholarship Program. In January 2021, Appellant falsely told AC she was selected as an alternate to attend OTS.[5] In fact, Appellant never submitted AC's application and she was never selected as an alternate. Appellant was charged with making a false official statement to AC in January 2021 that AC had been selected as an alternate to attend OTS.

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[3] When Appellant initially made contact with IB, IB was an enlisted member of the Air National Guard. By the time of Appellant's court-martial, IB had been commissioned as an Air Force officer.

[4] By the time of Appellant's court-martial, JD had been commissioned as an Air Force officer.

[5] At one point the stipulation of fact states Appellant told AC this in January 2020. Neither the parties nor military judge commented on this apparent discrepancy. However, in the context of the entire stipulation of fact and Appellant's statements during the military judge's guilty plea inquiry it is clear this is a typographical error, and this statement by Appellant in fact occurred in January 2021.

Appellant began communicating with SN in March 2018. In April or May 2020, Appellant falsely told SN she had been selected as an alternate for OTS. When SN received no further information from Appellant, she contacted him again in October 2020 when he told her "she was no longer needed." SN later learned Appellant had never submitted her application to the Air Force. Appellant was charged with making a false official statement to SN in April or May 2020 that SN had been selected as an alternate to attend OTS.

Appellant began communicating with MM between August and October 2019. In January or February 2021, Appellant falsely told MM she had been selected as an alternate to attend OTS and he had scheduled her for a Military Entrance Processing Station (MEPS) appointment, which he subsequently claimed was cancelled. In fact, Appellant never submitted MM's application and she had not been selected as an alternate to attend OTS. Appellant was charged with making a false official statement to MM in January or February 2021 that MM had been selected as an alternate to attend OTS.

Appellant initially made contact with MJ in early 2020. In February 2020, MJ began sending Appellant various transcripts and other documents. In January 2021, Appellant told MJ that he had a MEPS appointment for a physical at a facility that was an approximately four hour and forty-five minute drive from MJ's residence. Approximately one hour after MJ began the drive, Appellant sent him a message stating the appointment needed to be rescheduled. In reality, Appellant never submitted any documents to the Air Force on behalf of MJ and there never had been a MEPS appointment. Appellant was charged with making a false official statement to MJ in January 2021 that MJ had a MEPS appointment and the appointment was cancelled, or words to that effect.

When Appellant was interviewed by security forces in April 2021, he acknowledged lying to and misleading applicants and stated he felt "disgusted" by his actions. Appellant was subsequently diagnosed "with severe alcohol abuse disorder and adjustment disorder with mixed anxiety and depressed mood."

II. DISCUSSION

A. Victim Impact Statements

1. Additional Background

During presentencing proceedings, the Government called EH, IB, IB's spouse EB, JD, SN, and MJ to testify as witnesses. After the Government rested, seven of the named victims (EH, IB, JD, AC, SN, MM, and MJ) offered written unsworn statements pursuant to Rule for Courts-Martial (R.C.M.) 1001(c). Four of the named victims (EH, IB, JD, and SN) also pro-

vided oral unsworn statements, reading their written statements to the military judge. Appellant asserts the military judge erroneously allowed portions of four of the unsworn statements.

a. EH's Statement

The Defense objected to two portions of EH's statement. The first objection related to a paragraph describing the "significant financial impact" Appellant's conduct had on EH's life. EH described how, *inter alia*, he was required to travel to Offutt AFB, Nebraska, multiple times at his own expense; purchased uniforms and other items relating to attending OTS; "sacrificed [his] position in a loan repayment program, giving up a $62,500 reimbursement" when he left his existing employment in anticipation of joining the Air Force; and went without employment for 15 weeks, losing "over $20,000" in wages. In addition, when EH resumed civilian employment he was "unable to maintain [his] previous salary" and had moved to a location with increased living expenses. The paragraph concluded, "While all calculations cannot be exactly monetized due to the length of time our communication has spanned, my financial loss due to [Appellant's] actions [is] in excess of 100 thousand dollars." The Defense, citing Mil. R. Evid. 403, objected specifically to this final sentence, describing it as a "conclusionary remark" not based on "detailed financial accounting" which was "not exceedingly probative" but "very prejudicial." The military judge overruled the objection, stating, "[b]ecause of the prefatory clause there that indicates that calculations can't be exactly monetized[,] I view this as an estimation by [EH] and will give it an appropriate weight as a result."

The Defense's second objection was to a sentence in a paragraph of EH's statement describing the "mental and psychological" and "emotional" impact of Appellant's conduct. Trial defense counsel objected specifically to the following sentence: "However, after enduring continual changes with information and schedules the relationship [with EH's romantic partner] ultimately ended due to her interpretation of [EH's] character throughout this process and the inability to marry into an erratic life." Trial defense counsel characterized this purported impact as "incredibly speculative," "incredibly attenuated," and not "directly related to or resulting from" Appellant's conduct. Trial defense counsel also cited Mil. R. Evid. 403, contending the statement was "prejudicial" and not "probative." The military judge overruled the objection, explaining:

> I think this is essentially [EH] expressing an opinion as to a factor that caused his relationship to come to an end. . . . I think I can give that the appropriate weight. It is what this witness believes contributed to the loss of that relationship,

> which is something that he believes was directly related to this particular offense.

b. IB's Statement

The Defense objected to two portions of IB's unsworn statement. First, trial defense counsel objected to the following:

> Within a week of [my wife and I] finding out about [Appellant's] scheme, we were notified that our identities were stolen. To this day, we do not know if he was in on it. For months after we found out, my wife asked if we were safe. Honestly, I didn't have a truthful answer. I had no idea of his freedom to roam or the extent of his connections.

Trial defense counsel argued this portion of the statement was speculative and did not reflect impact directly related to or resulting from Appellant's offense. The military judge overruled the objection, explaining:

> I understand your objection, [d]efense counsel, and I also understand there has been no evidence provided to this court that [Appellant] had anything to do with [IB's] identity being stolen. Whoever stole his identity though is different from, the sort of fear or wondering or concern that this victim has expressed.
>
> So, I don't read this as asserting, that [Appellant] was in anyway responsible. Instead, I view it as, this particular victim saying that, in light of the particular offense, and then this other thing happening to him--his identity being stolen--it just made him wonder if it could have been related.
>
> And so, it's really the impact, I think, of feeling betrayed or feeling that he's been lied to, so he wonders, well, if this person lied to me about this, what else could they have done. So, I see that there is a distinction there. I certainly am not going to read this as, asserting that [Appellant] actually did anything of the sort and considering the [Mil. R. Evid.] 403-balancing test, I find that I can make that distinction appropriately and so, the--any danger of unfair prejudice, doesn't substantially outweigh the probative value of the evidence.

Trial defense counsel also objected to the following passage about IB's reluctance to seek counseling to cope with the impact of Appellant's offense:

> There remains a stigma about seeking help for this sort of thing in the military. Even if I could without fear, I would not go to a uniformed counselor. Private counseling is something I would be open to receiving, but at this time, I do not want to

> dig an unwanted challenge or accumulate any more expenses over this trial.

Trial defense counsel objected on the basis that whether there is a stigma or the perception of a stigma in the military for receiving counsel was not "fairly attributable" to Appellant's actions. The military judge overruled the objection, explaining that he viewed this passage as IB explaining how he might "deal with the consequences of this offense," and not attributing the possible existence of a stigma to Appellant.

c. SN's Statement and MJ's Statement

SN's unsworn statement included the following: "Allowing [Appellant] to continue to serve in any capacity or receive any benefits provided from the Air Force is an insult to those who genuinely serve or have served our country." Trial defense counsel did not object to this portion of SN's statement. Trial defense counsel did object to another portion of SN's unsworn statement, and the military judge sustained that objection. After the military judge ruled on that objection, he asked the Defense whether there were "any additional objections" to the statement. Trial defense counsel responded, "No, Your Honor."

MJ's unsworn statement included the following: "It sickens me that this individual has also been getting paid at a [technical sergeant] pay level since he was found out, being allowed to collect his pay and allowances. Because of all this[,] a lesser punishment would not be appropriate." Trial defense counsel did not object to this portion of MJ's statement. Trial defense counsel did object to an earlier portion of the statement wherein MJ asserted Appellant "should get the maximum penalty allowed;" the military judge sustained that objection. The military judge then asked whether the Defense had "any additional objections" to MJ's unsworn statement. Trial defense counsel responded, "No, Your Honor."

2. Law

We review a military judge's decision to accept a victim impact statement offered pursuant to R.C.M. 1001(c) for an abuse of discretion. *See United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022). "A military judge abuses his discretion when his legal findings are erroneous, or when he makes a clearly erroneous finding of fact." *Id.* (citing *United States v. Eugene*, 78 M.J. 132, 134 (C.A.A.F. 2018); *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018)).

R.C.M. 1001(c) provides that during presentencing proceedings, the victim of a non-capital offense of which the accused has been found guilty has the right to make a sworn statement, an unsworn statement, or both. *See also* 10 U.S.C. § 806b(a)(4)(B) (stating the victim of an offense under the UCMJ has a

right to be reasonably heard at a court-martial sentencing hearing). Such statements "may only include victim impact and matters in mitigation;" they "may not include a recommendation of a specific sentence." R.C.M. 1001(c)(3). For purposes of the rule, "victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001 (c)(2)(B).

We "consider[ ] four factors when deciding whether an error substantially influenced an appellant's sentence: '(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.'" *Edwards*, 82 M.J. at 247 (quoting *Barker*, 77 M.J. at 384 (additional citations omitted)). "[A]n error is more likely to have prejudiced an appellant if the information conveyed as a result of the error was not already obvious from what was presented at trial." *Id.* (citing *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007)).

"Whether an accused has waived [or forfeited] an issue is a question of law we review de novo." *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citation omitted). "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). Appellate courts generally review forfeited issues for plain error, but "a valid waiver leaves no error to . . . correct on appeal." *Id.* (citation omitted). However, the applicable version of Article 66, UCMJ, 10 U.S.C. § 866, empowers a Court of Criminal Appeals to decline to apply forfeiture or waiver in order to address a legal error at trial, if warranted. *See United States v. Hardy*, 77 M.J. 438, 442–43 (C.A.A.F. 2018) (citations omitted).

3. Analysis

Appellant asserts the military judge erred by failing to exclude and by considering the portions of EH's, IB's, SN's, and MJ's unsworn statements quoted above. We address each statement in turn below.

However, as an initial matter we note that trial defense counsel and, at one point, the military judge purported to apply Mil. R. Evid. 403 to their analyses of the challenged unsworn statements. Mil. R. Evid. 403 expressly applies to "evidence." Unsworn victim impact statements offered pursuant to R.C.M. 1001(c) are not "evidence," and Mil. R. Evid. 403 is inapplicable when determining whether such statements may be properly received by the court-martial. *See United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021); *United States v. Hamilton*, 77 M.J. 579, 586 (A.F. Ct. Crim. App. 2017) (en banc). Ac-

cordingly, the references to Mil. R. Evid. 403 were inapposite. However, it is evident Mil. R. Evid. 403 was not determinative to any of the rulings Appellant challenges on appeal, and to the extent the military judge erred by applying Mil. R. Evid. 403 at one point, we find no material prejudice to Appellant's substantial rights from the error. *See* 10 U.S.C. § 859(a).

a. EH

We find the military judge did not abuse his discretion by overruling the defense objection to EH's statement that his financial loss resulting from Appellant's offense was "in excess of 100 thousand dollars." EH was describing his assessment of the financial impact resulting from the false official statement that EH had been selected for OTS and would be joining the Air Force, of which Appellant had been convicted in accordance with his plea. This "financial . . . impact on the crime victim directly relating to or arising from the offense" of which Appellant had been convicted was squarely within the scope of R.C.M. 1001(c). That EH offered an estimated minimum amount rather than a precise calculation was not disqualifying. Moreover, EH's itemization of the types of costs he endured as a result of Appellant's deception add significant context and substantiation to the estimate.

We also find the military judge did not abuse his discretion by overruling the objection to EH's statement regarding the loss of a romantic relationship. EH described this event as one of the psychological impacts directly arising from and relating to Appellant's offense. What is more, he did not simply assert it was a consequence; he explained how the uncertainty caused by Appellant's conduct affected the relationship. The military judge explained he understood EH was describing his "opinion as to a factor that caused his relationship to come to an end." A psychological impact may be directly related to an offense without the offense being the sole cause of the impact. Whether the military judge found this information persuasive or significant as a sentencing consideration is a separate question; but the military judge's explanation of his ruling and comment that he could give the statement "the appropriate weight," coupled with the presumption that military judges know and apply the law absent evidence to contrary, convince us the military judge received and understood EH's unsworn statement in the appropriate light. *See United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citation omitted) ("Military judges are presumed to know the law and to follow it absent clear evidence to the contrary.").

b. IB

We find the military judge did not abuse his discretion by overruling the defense objection to IB's comments about his and his wife's identities being stolen. In explaining his ruling, the military judge carefully distinguished an

implication that Appellant had stolen their identities—which IB did not allege and the military judge had no evidence of—from the exacerbation of the "fear or wondering or concern" IB felt after the theft due to Appellant's misconduct. This psychological impact was derived from Appellant's offense as well as the identity theft itself, and in that sense was "directly related to or resulting from" the offense.

Assuming *arguendo* the military judge erred by admitting this portion of the statement, after considering the four factors set forth in *Edwards*, 82 M.J. at 247, we find no material prejudice to Appellant's substantial rights. Several considerations lead us to this conclusion. First, IB also briefly referred to the identity theft during his testimony as a sentencing witness, which the Defense did not object to at trial or challenge on appeal. In addition, the military judge indicated he would consider the statement in a specific and limited way. Also, the challenged sentences are a very small fraction of IB's relatively lengthy impact statement that spanned over three single-spaced pages of text. Moreover, the stipulation of fact, the testimony of IB and his wife, and IB's unsworn statement describe more direct and dramatic negative consequences of Appellant's offense, including *inter alia* inducing IB to sell his house, move to Saint Louis and attempt to buy a new house there, turn down employment opportunities, and drive to Alabama with his wife and infant son in anticipation of attending OTS. IB's feelings about the identity theft, as interpreted by the military judge, pale in comparison. Furthermore, we note the military judge adjudged a 12-month sentence to confinement for Specification 2, Appellant's offense against IB, which was concurrent with all other sentences to confinement. The military judge also adjudged concurrent 12-month sentences for Specifications 1 and 3, the offenses against EH and JD respectively. As described in the stipulation of fact, witness testimony, and unsworn statements, Specifications 1, 2, and 3, involving EH, IB, and JD, had the most severe victim impact of the eight offenses of which Appellant was convicted. Even if the military judge had excluded IB's reference to the identify theft from IB's unsworn statement, we are confident the military judge would still have sentenced Appellant to confinement for 12 months for Specification 2, in addition to the other elements of the sentence.

We also find the military judge did not abuse his discretion by overruling the defense objection to IB's statements regarding his reluctance to seek counseling after Appellant's offense. The military judge made clear he understood IB was not blaming Appellant for the existence of any "stigma" from counseling. Instead, the military judge understood IB was explaining what ameliorative measures he chose to pursue or forego to cope with the impact of Appellant's misconduct IB had already described. In that sense, this part of the statement directly related to Appellant's offense and its impact.

c. SN and MJ

We find Appellant waived his objections to the portions of SN's and MJ's unsworn statements that he challenges on appeal. In each case, trial defense counsel objected to other portions of the statements, and the military judge sustained those objections. But when the military judge asked whether there were any additional objections, trial defense counsel said "no." The United States Court of Appeals for the Armed Forces has held that "under the ordinary rules of waiver, [an a]ppellant's affirmative statements that he had no objection to [the] admission [of evidence] also operate to extinguish his right to complain about [its] admission on appeal." *Ahern*, 76 M.J. at 198 (citations omitted). Similarly, we conclude trial defense counsel's assertion that the Defense had no further objections to these statements amounted to waiver.

Cognizant of our authority to pierce waiver in order to correct a legal error, we find no cause to do so in this case. Military judges are presumed to know and apply the law, absent evidence to the contrary. *Erickson*, 65 M.J. at 225. To the extent either statement challenged on appeal might be interpreted as an improper recommendation for a specific sentence, we presume the military judge did not consider them so.

B. Sentence Severity

1. Law

We review issues of sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (footnote omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(d), UCMJ, 10 U.S.C. § 866(d). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (alteration in original) (citation omitted). Although the Courts of Criminal Appeals are empowered to "do justice[ ] with reference to some legal standard," we are not authorized to grant mercy. *United States v. Guinn*, 81 M.J. 195, 203 (C.A.A.F. 2021) (quoting *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010)).

2. Analysis

Appellant contends his sentence is inappropriately severe. He asserts that at the time of the offenses he was experiencing a mental health crisis and severe alcohol abuse disorder which ultimately required in-patient treatment and lengthy rehabilitation. Appellant contends he "did not appear to be acting maliciously" when he committed these offenses, nor did he personally profit from them. He highlights his excellent service record prior to 2019, and

that after he received treatment he cooperated with law enforcement, paid some financial compensation to a victim, pleaded guilty to the offenses, and showed great contrition for his actions. Appellant asks this court to set aside his bad-conduct discharge.

Based on his guilty pleas alone, Appellant might have been sentenced to a dishonorable discharge, confinement for 40 years, total forfeitures, and reduction to the grade of E-1. Appellant made a plea agreement with the convening authority that capped his term of confinement for each of the eight specifications of false official statement to 365 days, with each term to run concurrently. Appellant received concurrent sentences to confinement of between 3 and 12 months, in addition to a bad-conduct discharge, reduction to the grade of E-1, and a reprimand.

We do not find Appellant's sentence is inappropriately severe. After Appellant had already been repeatedly disciplined for lying to applicants and other misconduct, and was instructed not to have contact with applicants, he engaged in an extensive pattern of making false statements to health care professionals who wanted to apply to the Air Force. Most of the victims submitted unsworn statements and several testified to explain how Appellant's offenses had negatively affected their lives and their perception of the Air Force. Certain victims experienced significant financial loss, disruption to their lives and careers, and particularized feelings of anxiety and betrayal due to Appellant's crimes. The motivation for Appellant's actions may be difficult to understand, but he was certainly aware his victims were relying on, and impacted by, his false official statements. Having given individualized consideration to Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all other matters contained in the record of trial, we conclude Appellant's sentence is not inappropriately severe.

C. Legibility of the Record of Trial

1. Law

A complete record of the proceedings, including all exhibits, must be prepared for any general court-martial that results in a punitive discharge or more than 12 months of confinement. Article 54(c)(1), UCMJ, 10 U.S.C. § 854(c)(1); R.C.M. 1103(b)(2). Whether a record of trial is complete is a question of law we review de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014) (citation omitted).

"[A] substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the [G]overnment must rebut." *United States v. Harrow*, 62 M.J. 649, 654 (A.F. Ct. Crim. App. 2006) (citation omitted), *aff'd*, 65 M.J. 190 (C.A.A.F. 2007). However, "[i]nsubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's

characterization as a complete one." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). We approach the question of what constitutes a substantial omission on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999) (citation omitted). "In assessing either whether a record is complete . . . the threshold question is 'whether the omitted material was "substantial," either qualitatively or quantitatively.'" *Davenport*, 73 M.J. at 377 (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)) (additional citation omitted).

2. Analysis

Without objection, the military judge admitted Prosecution Exhibit 3, a 34-page document composed of Appellant's performance reports and their attachments. Appellant contends that pages five and six of the exhibit, representing Appellant's referral performance report from 1 December 2018 through 30 November 2019, are "illegible." He further contends page eight, the indorsement to the referral memorandum, is "blurry and does not legibly show whether [Appellant] elected to respond" to negative information in the performance report.[6] Accordingly, Appellant reasons the record contains a substantial omission and requests this court either reassess the sentence to disapprove the bad-conduct discharge, or remand the record to correct the omission.

We are not persuaded any correction is required. The essential flaw in Appellant's reasoning is that we have no indication anything is missing from the original record of trial. It appears the Prosecution Exhibit 3 contained in the record is the same Prosecution Exhibit 3 the military judge received and reviewed during sentencing proceedings. Although we agree with Appellant that page 5 in particular is blurry and partially illegible, so far as the record discloses, this is simply the state of the evidence that was before the court-martial. Accordingly, we find no substantial omission and no relief warranted.

D. Post-Trial Errors

1. Deferment Requests

The convening authority's decision on action memorandum indicates Appellant requested deferment of his confinement, the reduction in grade, and

[6] Although we agree with Appellant that page eight is not clearly marked, by our own observation there is some indication the indorsement reflects Appellant "did not" submit matters in response to the performance report. This conclusion is consistent with the absence of such a response from Prosecution Exhibit 3.

the automatic forfeitures of pay and allowances. The convening authority expressly denied the deferments of the reduction in grade and automatic forfeitures, citing "the nature of the offenses of which [Appellant] was convicted and the effect of deferment on good order and discipline in the command." However, the convening authority did not grant or deny in writing Appellant's request to defer his confinement, nor state the reasons for doing so. The record discloses no indication the Defense objected or moved for correction of the convening authority's failure to address the request to defer confinement.

We review a convening authority's denial of a deferment request for an abuse of discretion. *United States v. Sloan*, 35 M.J. 4, 6 (C.M.A. 1992), *overruled on other grounds by United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018); R.C.M. 1103(d)(2). "When a convening authority acts on an [appellant]'s request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the [appellant]) and must include the reasons upon which the action is based." *Id*. at 7 (footnote omitted); *see also* R.C.M. 1103 (providing procedures for deferment). "A motion to correct an error in the action of the convening authority shall be filed within five days after the party receives the convening authority's action." R.C.M. 1104(b)(2)(B).

Because Appellant did not object or move to correct an error in the convening authority's decision on action, we review the convening authority's decision on action for plain error. *See Ahern*, 76 M.J. at 197 (citations omitted) (noting appellate courts review forfeited issues for plain error). Under the longstanding precedent of *Sloan*, the convening authority's failure to act on the confinement deferment request in writing and state the reasons was an error. *See* 35 M.J. at 7. For purposes of our analysis, we assume without holding the error was clear or obvious. However, under the circumstances of this case, we find no material prejudice to Appellant. Appellant bore "the burden of showing that the interests of [himself] and the community in deferral outweigh[ed] the community's interests in imposition of the punishment on its effective date." R.C.M. 1103(d)(2). However, Appellant's clemency request only impliedly requested deferment of his confinement and offered no specific justification for it. Moreover, Appellant not only forfeited the issue at the time, but he has not alleged on appeal prejudicial error by the convening authority. Furthermore, the convening authority denied Appellant's other deferment requests with a consistent rationale, and also denied Appellant's request to waive automatic forfeitures for the benefit of his dependents pursuant to Article 58b, UCMJ, 10 U.S.C. § 858b. In the absence of any indication the convening authority entertained an improper rationale for denying deferment of confinement, we find Appellant's material rights were not substantially prejudiced by the convening authority's failure to deny the deferment in writing and state the reasons for the denial.

2. Statement of Trial Results and Entry of Judgment

The Specification of Charge I alleged Appellant had on divers occasions willfully disobeyed a lawful command from his squadron commander in violation of Article 90, UCMJ, 10 U.S.C. § 890. The Statement of Trial Results (STR), prepared after the court-martial pursuant to R.C.M. 1101, correctly reflected Appellant had pleaded "not guilty" to this Specification, and that the Specification was "[w]ithdrawn and dismissed with prejudice in accordance with the plea agreement." The STR also correctly indicated Appellant had pleaded "not guilty" to Charge I, but it incorrectly stated he had been found "not guilty" of Charge I when in fact it also had been dismissed with prejudice. The entry of judgment prepared pursuant to R.C.M. 1111 repeats this error, stating Appellant was found "not guilty" of Charge I rather than it was dismissed with prejudice in accordance with the plea agreement. We find it appropriate to modify the entry of judgment to ensure it correctly reflects the disposition of the charges and specifications in this case, and we take corrective action in our decretal paragraph. *See* R.C.M. 1111(c)(2).

III. CONCLUSION

The entry of judgment is modified as follows: for Charge I, the finding is modified by excepting "NG" and substituting therefor "Withdrawn and dismissed with prejudice in accordance with the plea agreement." The findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Ian J.B. Cadavona,
Appellant

USCA Dkt. No. 25-0114/AF
Crim.App. No. 40476

O R D E R

On further consideration of the granted issues, __ M.J. __ (Daily Journal May 9, 2025), and in view of *United States v. Johnson*, __ M.J. __ (C.A.A.F. 2025), it is, by the Court, this 22nd day of July, 2025,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Johnson)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40476

UNITED STATES
Appellee

v.

Ian J. B. CADAVONA
Airman Basic (E-1), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 16 January 2025

Military Judge: Matthew P. Stoffel (arraignment, motions); Christopher D. James (trial).[1]

Sentence: Sentence adjudged 27 October 2022 by GCM convened at Kadena Air Base, Japan. Sentence entered by military judge on 6 December 2022: Dishonorable discharge, 21 months' confinement, and a reprimand.

For Appellant: Major Frederick J. Johnson, USAF.

For Appellee: Colonel Steven R. Kaufman, USAF; Lieutenant Colonel J. Peter Ferrell, USAF; Mary Ellen Payne, Esquire.

Before ANNEXSTAD, DOUGLAS, and PERCLE, *Appellate Military Judges*.

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[1] The trial judge for the arraignment and motions hearing stated on the record that Article 30a, Uniform Code of Military Justice, 10 U.S.C. § 830a, proceedings had taken place on 5 November 2021 and on 18 November 2022. However, the record does not contain any information about the Article 30a, UCMJ, judge, or any documentation related to the proceedings. Appellant does not assign error, and we find none as neither Rules for Courts-Martial 1112(b) nor 1112(f) require it.

Judge DOUGLAS delivered the opinion of the court, in which Senior Judge ANNEXSTAD and Judge PERCLE joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

DOUGLAS, Judge:

A general court-martial composed of a military judge convicted Appellant, contrary to his pleas, of one specification[2] of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[3] The military judge sentenced Appellant to a dishonorable discharge, 21 months' confinement, and a reprimand. The convening authority took no action on the findings and approved the sentence in its entirety.[4]

Appellant raises four issues on appeal which we have reworded: whether (1) the prosecution of this offense constitutes plain error because the Government knew about the evidence of the underlying misconduct prior to Appellant's first court-martial; (2) Appellant was denied effective assistance of counsel when his trial defense counsel withdrew an objection to a change in the specification of the charge; (3) a 224-day appellate docketing delay warrants relief; and (4) 18 U.S.C. § 922 is constitutional as applied in Appellant's case. We also considered an additional issue, not raised by Appellant, that was identified during this court's Article 66(d), UCMJ, 10 U.S.C. § 866(d), review: (5) whether Appellant is entitled to relief for facially unreasonable appellate delay in accordance with *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), or *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

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[2] The military judge merged two specifications—both alleging possession of child pornography but during different timeframes—into one specification. *See* Section II.B. *infra*.

[3] Unless otherwise noted, all references to the UCMJ and to the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[4] The convening authority referred two specifications of possession of child pornography, alleging possession occurred both before 1 January 2019 and on or after 1 January 2019. Pursuant to R.C.M. 902A, and before arraignment, Appellant elected sentencing rules in effect on 1 January 2019. This election remained in effect after the trial judge merged the two offenses for findings purposes.

We have carefully considered Appellant's contention in issue (4) and find that it does not require discussion or warrant relief. *See United States v. Matias,* 25 M.J. 356, 361 (C.M.A. 1987). As to the remaining issues, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and the sentence.

I. BACKGROUND

Appellant joined the Air Force in 2016 and was assigned to Kadena Air Base (AB), Japan. By late 2019, law enforcement was investigating him for indecent recording and broadcasting of an adult. As part of that investigation, the Air Force Office of Special Investigations (OSI) searched and seized Appellant's electronic devices. Unrelated to the indecent recording and broadcasting allegations, OSI agents found suspected child exploitive material (CEM). They obtained additional search warrants, including one for Appellant's iCloud account. This account was used as back-up storage for one or more of Appellant's devices. In Appellant's iCloud account, OSI discovered dozens of videos of child pornography, which became the basis for the Article 134, UCMJ, conviction.

II. DISCUSSION

A. Failure to Try All Known Charges at a Single Court-Martial

For the first time, on appeal, Appellant asserts the Government intentionally prosecuted him in successive courts-martial when it knew of all offenses before the start of the first court-martial. As evidence of this argument, Appellant directs us primarily to the OSI preliminary report, dated 8 September 2020, which lists the discovered child pornography videos, with names and source paths. The report explains that the videos were contained in the Apple search return for Appellant's iCloud account. The summary of the findings stated it was a preliminary analysis and that the videos were sent to the National Center for Missing and Exploited Children (NCMEC) portal for further analysis. As a consequence of being tried in two successive courts-martial, Appellant argues, he was prejudiced because the Government punished him unnecessarily by forcing consecutive sentences. The Government disagrees with Appellant's contentions and submits that it was not prepared to prove the Article 134, UCMJ, offense of child pornography possession at the time of the first court-martial. We find the Appellant has not met his burden on this issue we and find no error.

1. Additional Background

Investigation into Appellant began in late 2019 and continued into 2020. During that time, Appellant was investigated for indecent recording and

broadcasting. On 25 March 2021, at Kadena AB, he was found guilty, contrary to his pleas, at a general court-martial, comprised of a military judge alone, of two specifications of indecent recording and broadcasting in violation of Article 120c, UCMJ, 10 U.S.C. § 920c, and one specification of obstruction of justice in violation of Article 131b, UCMJ, 10 U.S.C. § 131b. He was sentenced to a bad-conduct discharge, seven months' confinement, and reduction to the grade of E-1. On 23 September 2022, the Air Force Court of Criminal Appeals affirmed the findings of guilty and the sentence. *See United States v. Cadavona*, No. ACM 40129, 2022 CCA LEXIS 545, at *15 (A.F. Ct. Crim. App. 23 Sep. 2022) (unpub. op.), *rev. denied*, 83 M.J. 249 (C.A.A.F. 2023).

After release from confinement, Appellant was prosecuted at Kadena AB, for possession of child pornography. On 27 October 2022, he was found guilty at a general court-martial of the one specification before this court: possession of child pornography in violation of Article 134, UCMJ. He was sentenced to a dishonorable discharge, 21 months' confinement, and a reprimand.

During the presentencing phase of his second court-martial, Appellant, in his unsworn statement, explained, "I have known a second court-martial is [sic] coming since before my first court went to trial." Appellant's trial defense counsel, during presentencing argument, repeated Appellant's assertion, "He already knew that this court-martial was coming before he even went to trial the first time." Appellant pleaded not guilty to a charge of violating Article 134, UCMJ, at this trial. He did not object or move to dismiss for any reason.

2. Law

a. Standard of Review

The lack of a motion or objection at trial forfeits the issue, absent waiver. Rule for Courts-Martial (R.C.M.) 905(e). Forfeited issues are reviewed for plain error. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citing *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). For this court to grant relief under a plain error standard of review, Appellant bears the burden of establishing: "(1) there was error; (2) the error was clear and obvious; and (3) the error materially prejudiced a substantial right." *United States v. Gomez*, 76 M.J. 76, 79 (C.A.A.F. 2017) (citing *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014)). "As all three prongs must be satisfied . . . the failure to establish any one of the prongs is fatal to a plain error claim." *Id.* (omission in original) (quoting *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006)).

b. Joinder

"The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. I, Preamble, ¶ 3.

"Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under [Chapter 47, UCMJ,] triable in courts-martial . . . may be prescribed by the President by regulations which shall . . . apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States . . . ." Article 36(a), UCMJ, 10 U.S.C. § 836(a).

"Charges and specifications alleging all known offenses by an accused *may* be preferred at the same time. Each specification shall state only one offense. What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4) (emphasis added). "Ordinarily, all known charges should be tried at a single court-martial." R.C.M. 906(b)(10), Discussion.

> In the discretion of the convening authority, two or more offenses charged against an accused *may* be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless [of] whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without the consent of the accused.

R.C.M. 601(e)(2) (emphasis added). "The military justice system encourages the joinder of all known offenses at one trial." *United States v. Simpson*, 56 M.J. 462, 464 (C.A.A.F. 2002) (footnote omitted) (citing R.C.M. 601(e)(2), *Manual for Courts-Martial*, *United States* (2000 ed.)). This preference does not create an entitlement. *See United States v. Booker*, 62 M.J. 703, 707 (A.F. Ct. Crim. App. 2006).

Article 33, UCMJ, 10 U.S.C. § 833, addresses non-binding guidance for decisionmakers when it comes to making charging decisions:

> The President shall direct the Secretary of Defense to issue . . . non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect

> to disposition of charges and specifications in the interest of justice and discipline . . . .

This policy of the non-binding disposition guidance outlines several factors for decision makers to consider "and to further promote the purpose of military law." *See MCM*, App. 2.1, ¶ 1.1.a, at A2.1-1 (where this appendix supplements the *MCM* and provides disposition factors for decision makers to consider, "but does not require a particular disposition decision or other action in any given case").

3. Analysis

Appellant advances the argument that he is entitled to joinder of offenses at one court-martial. We analyze this issue for plain error, because Appellant did not object or move to dismiss on the basis of having been tried for other offenses while this offense was known by the Government. According to his unsworn statement in his second presentencing hearing, Appellant knew he was under investigation for possession of child pornography before his first court-martial. If he had wanted to be tried for possession of child pornography videos at the time when he was tried for indecent recording and broadcasting, the best time to articulate that perspective would have been prior to arraignment at his first trial. But that trial result and the appellate review are now final and are not before us.

Here, the Government chose not to prefer or refer all known offenses to the same court-martial. *See* R.C.M. 307(c)(4); R.C.M. 601(e)(2). From a review of the record, it appears the Government had not completed its investigation into the Article 134, UCMJ, offense at the time other charges were referred to Appellant's first court-martial. In order to convict Appellant of possession of child pornography, as charged in this case, the Government was required to prove that at or near Kadena AB, Japan, between 17 February 2017 and on or about 31 March 2020: (1) Appellant knowingly and wrongfully possessed child pornography; and (2) under the circumstances, the conduct was of a nature to bring discredit upon the armed forces. *See* 10 U.S.C. § 134; *MCM*, pt. IV, ¶ 95.b.(1). Appellant may not be convicted of possession of child pornography "if he was not aware that the [videos] were of minors, or what appeared to be minors, engaging in sexually explicit conduct. Awareness may be inferred from circumstantial evidence, such as the name of a computer file or folder . . . and the number of [videos] possessed." *MCM*, pt. IV, ¶ 95.c.(5). Further, "[A]ny facts or circumstances that show that a visual depiction of child pornography was unintentionally or inadvertently acquired are relevant to wrongfulness . . . ." *MCM*, pt. IV, ¶ 95.c.(12). The Government knew of the potential offense of possession of child pornography, but, evidently, was not

prepared to prove at that time that Appellant knew that he possessed child pornography and knew it was wrongful beyond a reasonable doubt.

Furthermore, the known offense of possession of child pornography videos was not an offense that was substantially one transaction with the convicted offenses of indecent recording and broadcasting of a specific adult in Appellant's first court-marital. *See* R.C.M. 307(c)(4). Appellant's possession of child pornography videos was discovered as a result of the investigation into allegations of indecent recording of an adult, but the child pornography videos were independent from that original investigation.

The purposes of military justice and discipline include promoting efficiency and effectiveness. *MCM*, Pt. I, Preamble, ¶ 3. The Government could have waited until the investigation into the possession of child pornography videos was completed before referring all charges to the same court-martial. *See Simpson*, 56 M.J. at 464. However, there is no requirement the Government do so. *See Booker*, 62 M.J. at 707; *see also* R.C.M. 307(c)(4) (stating "[c]harges and specifications alleging all known offenses by an accused *may* be preferred at the same time" (emphasis added)). Further, the record before us does not indicate whether "all necessary procedural requirements concerning the additional charges [had] been complied with" for joinder of offenses. R.C.M. 601(e)(2). Finally, we do not find evidence in the record indicating the Government intentionally delayed prosecuting Appellant for the purpose of conducting a separate trial in order to increase its chances of obtaining a greater sentence.

Therefore, we do not find the Government plainly erred in this case by referring the Article 134, UCMJ, charge to a court-martial separate from the offenses tried at his previous court-martial. Thus, Appellant failed to meet the first prong of the plain error analysis. *Gomez*, 76 M.J. at 79 (citation omitted). This failure is fatal to the remainder of his plain error claim. *Id.*

B. Ineffective Assistance of Counsel

Appellant asserts his trial defense counsel were ineffective when they withdrew an objection to the Government striking the words "within his iCloud account" from the merged specification. The Government disagrees. After thoroughly reviewing this issue anew, we find Appellant has not met his burden. Appellant's trial defense counsel were not ineffective.

1. Additional Background

Initially, Appellant was charged with two specifications of possession of videos of child pornography in violation of Article 134, UCMJ. The primary difference between the two specifications was the charged timeframe. The first specification (Specification 1) included possession "between on or about

17 February 2017 and on or about 31 December 2018." The second specification (Specification 2) included possession "between on or about 1 January 2019 and on or about 22 October 2019." After arraignment, but prior to Appellant's pleas, the trial defense counsel moved to merge the specifications for findings.[5] The Government did not oppose. The trial judge then granted the defense motion for merger for purposes of findings. At this point, the merged specification incorporated the entire charged timeframe from both Specifications 1 and 2.

The Government then moved to make four changes to the merged specification. Of the four proposed changes, the Defense had no objection to three. First, the Government moved to strike "on or about" before the first date of the charged timeframe, 17 February 2017. Second, the Government moved to strike the end date, "22 October 2019," and replace it with a new end date, 31 March 2020. Third, the Government moved to make singular the word "minors" to instead reflect the words "a minor, or what appears to be a minor." With no objection from the trial defense counsel, the military judge granted these government changes to the merged specification.

The Government's fourth requested change was to strike through the words "within his iCloud account." The Defense objected on the basis that this change was not a minor change. The following exchange then occurred between the military judge (MJ) and the circuit defense counsel (CDC).

> MJ: Okay. Let me ask you a couple of questions.
>
> CDC: Yes, Your Honor.
>
> MJ: First question, do you agree, if I was to agree with you, that the [G]overnment could then come back and recharge your client without that language and it would not be double jeopardy,[6] because as it is right now it's specific as far as it's within the iCloud account. So[,] I have no clue what's going to happen in this court, but let's say for whatever reason[,] I was to find your client not guilty. They have chosen to charge him specifically ["]within his iCloud account.["] If they chose to charge him without that[,] what is your position on that? And do you need a moment? And do you need a recess?

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[5] The Government's bill of particulars identified that the same evidence would be used to prove up both specifications of violating Article 134, UCMJ.

[6] U.S. CONST. amend. V.

After a short recess, the parties reconvened and the Defense answered the trial judge's questions as follows:

> CDC: Defense is not objecting -- withdraws its objection to the proposed change by the [G]overnment.

Based on Appellant's claim that his trial defense counsel were ineffective when they did not object to the change in the specification, and in response to the Government's motion to compel declarations from trial defense counsel, this court, on 29 August 2024, ordered trial defense counsel to provide declarations responsive to this claim. On 20 September 2024, the court attached two declarations to the record.[7] Major (Maj) SH was the circuit defense counsel and Maj EJ was the area defense counsel. Both represented Appellant at his second court-martial. Their declarations are substantively the same and explain the strategic reasoning behind their decision to withdraw the objection.

Maj SH explained that the withdrawal of the objection was made after full discussion with Appellant, and with his consent. The location of the files did not change the theory of their case, which was that the possession was unknowing. Further, the withdrawal "ensured finality." If acquitted, Appellant's acquittal "would increase the likelihood that double jeopardy would fully attach to the entirety of the evidence in the possession of the United States." Finally, Maj SH explained, due to the consultation with their confidential expert consultant, the trial defense team was aware of evidence the Government possessed which was "inflammatory and extremely inculpatory." If the Government had more time to prepare, and potentially charge this offense again, "a guilty finding was all but a foregone conclusion with greater sentencing exposure." Maj EJ's declaration was consistent with Maj SH's. She added, "Since this was already the [G]overnment's second prosecution of [Appellant], there appeared to be a risk that the [G]overnment could try again under a different theory if it did not like the findings or sentencing outcome of the court-martial."

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[7] Statute directs the court to review "the entire record" when fulfilling its duties. Article 66(d)(1), UCMJ; 10 U.S.C. § 866(d)(1). Our superior court has recognized the court's ability to supplement the record in resolving issues raised in the record, but not fully resolvable, including claims of ineffective assistance of counsel (IAC). *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020). We consider the trial defense counsel's declarations to help us resolve Appellant's claims of IAC, accordingly.

2. Law

a. Standard of Review

We review claims of ineffective assistance of counsel (IAC) de novo. *United States v. Palik*, 84 M.J. 284, 288 (C.A.A.F. 2024) (citing *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007)).

b. Ineffective Assistance of Counsel

To prevail on a claim of IAC, Appellant must demonstrate: "(1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Id.* (quoting *United States v. Captain*, 75 M.J. 99, 101 (C.A.A.F. 2016)). Appellant must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

We use a three-part test to analyze whether a claim of IAC has overcome this presumption of competence:

> (1) [Is] Appellant's allegation[ ] true; if so, "is there a reasonable explanation for counsel's actions;"
>
> (2) If the allegation[is] true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers?" [and]
>
> (3) If defense counsel [were] ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

Palik, 84 M.J. at 289 (omission in original) (quoting *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)) (additional citation omitted).

c. Changes to Charges and Specifications

"A major change is one that adds a party, an offense, or a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged." R.C.M. 603(b)(1). "A minor change in a charge or specification is any change other than a major change." R.C.M. 603(b)(2). "Minor changes include those necessary to correct . . . slight errors." R.C.M. 603(b)(2), Discussion.

"After referral, a major change may not be made over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew." R.C.M. 603(d)(1). After arraignment, the trial judge "may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced." R.C.M. 603(e).

In one case, our superior court found a major change where "it altered the means of committing the offense and that change was not fairly included in the original specification." *United States v. Reese*, 76 M.J. 297, 300 (C.A.A.F. 2017). However, under the right circumstances, "changing the means by which a crime is accomplished may also constitute a slight error." *Id.* (citation omitted)

3. Analysis

Applying the three-part test to Appellant's assignment of error, we start with the first part: is Appellant's allegation true? That is, did his trial defense counsel withdraw an objection to the Government's striking of the words "within his iCloud account?" The record reflects Appellant's trial defense counsel did, in fact, withdraw an objection to the Government's proposed change to the merged specification before arraignment. Trial defense counsel's objection was articulated as an objection based upon the theory that the Government's proposed edit was a major change. Without ruling on the Government's proposed edit, or trial defense counsel's objection, the trial judge asked the trial defense counsel a question. The trial judge offered that if he agreed with the Defense, and sustained the objection, what did trial defense counsel believe might be the Government's next move? Instead of specifically answering that question, the defense team requested a recess, which the trial judge granted. Upon reconvening, the trial defense counsel withdrew their objection.

Finding the allegation is in fact, true, we turn to the remainder of the first part: is there a reasonable explanation for counsel's actions? We consider the attached trial defense counsel declarations because the record does not expose trial defense counsel's rationale behind their decision. The declarations of Appellant's trial defense counsel explain their strategic decisions behind the withdrawal of their objection to this change by the Government. First, they fully discussed this issue with Appellant, and ensured he understood their advice, and consented to the withdrawal of the objection. Second, they explained that whether the Government was required to prove the location of the evidence, within the iCloud account, did not impede their theory of the case, which was to attack the Government's ability to prove an essential element of the offense: knowing and wrongful possession. Third, and finally, they explained that they were aware the Government possessed additional evidence that would have proven challenging to Appellant's theory of defense that he did not know about the child pornography possession. Had the Government been aware of this additional evidence they already had, explained trial defense counsel, the Government could have and probably would have charged him again. This appears to have been a calculated risk assessment they, and Appellant, believed was in Appellant's favor. His trial defense

counsel's strategic decision has multiple reasonable explanations. We find the first part of the three-part test is met, in counsel's favor.

Concluding the first part is met, subsequent analysis is not required. Nonetheless, we address the second part of the three-part test: if Appellant's allegation is true, as we have determined, did trial defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? Quite the opposite. We find the calculated risk assessment counsel made, with the advice and consent of their client, was intended to protect Appellant from potential future prosecution, compounding evidence of guilt and sentencing. Regardless of whether double jeopardy would have attached, we find the trial defense counsel's level of advocacy was exactly where it needed to be: zealously advocating for their client's best interests. They did not fall below the performance ordinarily expected of competent defense counsel. We find the second part of the three-part test is also satisfied, in trial defense counsel's favor.

We conclude counsel's performance was reasonable and fell within the performance ordinarily expected of trial defense counsel. *See Palik*, 84 M.J. at 289. Because Appellant has not met his burden on the first two parts of the three-part test, we need not address the third part, prejudice.[8] Because we do not find trial defense counsel erred, we do not consider prejudice. Trial defense counsel were not ineffective. *Id.* at 288.

C. Delay in Forwarding Appellant's Record to this Court

Appellant seeks relief due to the Government's "unexplained" delay in forwarding the record of trial (ROT) to this court by asking us to reduce his dishonorable discharge to a bad-conduct discharge. The Government disagrees the ROT processing delay is unexplained or was delayed such that relief should be granted. We find that no relief is warranted.

1. Additional Background

Appellant's charge of violating Article 134, UCMJ, was referred to a general court-martial on 22 March 2022. Appellant's sentence was announced on 27 October 2022. His appeal was docketed with this court on 8 June 2023. Consequently, 224 days transpired from sentencing to docketing.

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[8] Whether the Government's motion to strike through the words "within his iCloud account" was a major or minor change, was not determined at the trial level. Whether this change altered the means of committing the offense is not before us.

On 17 November 2022, the convening authority signed the decision on action memorandum. On 6 December 2022, the trial judge signed the entry of judgment. On 4 January 2023, the court reporter certified the record of trial (ROT). On 22 March 2023, Appellant was served the ROT.

On 15 October 2024, the court granted the Government's Motion to Attach Declarations responsive to Appellant's claim of an "unexplained" docketing delay. The court attached two declarations, one from Captain (Capt) JH, the Chief of Legal Operations, assigned to the 18th Wing legal office (18 WG/JA), and one from Maj KB, the Chief of Military Justice, assigned to the 5th Air Force legal office (5 AF/JA) advising the general court-martial convening authority.[9] The declaration from 18 WG/JA included a chronology from sentencing to docketing.

Capt JH declared the assembly of the ROT took place between 5 January 2023 and 10 April 2023, which was 95 days. Initially, 18 WG/JA was creating a hardcopy ROT, but were then instructed to assemble an electronic ROT, which necessitated starting a new process. The office also spent a portion of this time attempting to obtain two sealed exhibits from OSI. Although 18 WG/JA was instructed to create an electronic ROT, the 5 AF/JA wanted a hard copy version for their quality review, which 18 WG/JA provided.

In her declaration, Maj KB explained that the ROT was forwarded by mail to 5 AF/JA on 10 April 2023 and then shipped back to the installation on 4 May 2023. 18 WG/JA mailed the ROT on 9 May 2023 to the Appellate Records section of the Department of the Air Force's Military Justice Law and Policy division, located at Joint Base Andrews, Maryland. Appellate Records received it on 31 May 2023, conducted their review, and forwarded the ROT to the court on 8 June 2023.

2. Law

We review "de novo whether an appellant's due process rights are violated because of post-trial delay." *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing *Moreno*, 63 M.J. at 135).

Livak established an aggregate sentence-to-docketing standard threshold of 150 days for facially unreasonable delay in cases like Appellant's, that were referred to trial on or after 1 January 2019. *Id.* (citing *Moreno*, 63 M.J.

[9] We consider the Government's declarations to help us resolve Appellant's claim of docketing delay, which is not fully resolvable by the record. *See Jessie*, 79 M.J. at 445.

at 142). This threshold "appropriately protects an appellant's due process right to timely post-trial . . . review and is consistent with our superior court's holding in *Moreno*." *Id.*

Moreno applied four factors to consider whether there was a due process violation: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135 (citations omitted). Prejudice stems from three interests: (1) "prevention of oppressive incarceration pending appeal;" (2) "minimization of anxiety and concern;" and (3) impairment of the ability to present a defense at a rehearing. *Id.* at 138–39 (citations omitted).

Where an appellant has not shown prejudice from the delay, we cannot find a due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

3. Analysis

We have applied the *Livak* standard in Appellant's case de novo. *Livak*, 80 M.J. at 633. The *Livak* standard is one part of the total *Moreno* standard. If a case does not make the *Livak* aggregate sentence-to-docketing threshold of 150 days, this period constitutes a facially unreasonable post-trial delay. *Id.*

We considered the four factors identified in *Moreno*. First, we find there is a delay that exceeds the 150-day threshold by 74 days, which weighs in Appellant's favor.

Second, the reasons for the delay are varied. The convening authority's decision on action memorandum was signed 28 days after sentencing. The court reporter certified the record of trial 68 days after sentencing. Appellant received the ROT 146 days after sentencing. This processing is efficient and in line with the 150-day sentencing-to-docketing threshold. However, the Government's declarations and chronology indicate 95 days were taken to assemble two versions of the ROT, a hard copy and an electronic copy. They also indicate that 5 AF/JA performed a review of the hard copy after it was mailed to them. After taking almost 30 days to perform the review, they mailed it back to 18 WG/JA. After making the requisite corrections, 18 WG/JA mailed the ROT to the Appellate Records section. This portion of the timeline could have been more efficient. We find it weighs in Appellant's favor.

Third, not until Appellant's initial brief to this court does he assert timely *Livak* review, which weighs against him. His argument for prejudice is, in part, predicated on his first assignment of error, that he was unnecessarily

prosecuted in a second court-martial, foreclosing the possibility of concurrent confinement terms. Appellant also advocates particularized anxiety and concern in his brief, by pointing to his unsworn statement at trial. These arguments are not persuasive, and weigh against Appellant.

On balance, we do not find a due process violation. *Livak*, 80 M.J. at 633. Further, we do not find the delay egregious. *Toohey*, 63 M.J. at 362.

Recognizing our authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d), we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. *See Tardif*, 57 M.J. at 224 (citation omitted). After considering the factors enumerated in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude it is not.

D. Timeliness of Appellate Review

1. Law

"[C]onvicted service members have a due process right to timely review and appeal of courts-martial convictions." *Moreno*, 63 M.J. at 135 (citing *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004)); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37–38 (C.A.A.F. 2003)). Whether an appellant has been deprived of his due process right to speedy post-trial and appellate review, and whether constitutional error is harmless beyond a reasonable doubt, are questions of law we review de novo. *United States v. Arriaga*, 70 M.J. 51, 56 (C.A.A.F. 2011) (citing *Moreno*, 63 M.J. at 135).

A presumption of unreasonable delay arises when appellate review is not completed, and a decision is not rendered within 18 months of the case being docketed. *Moreno*, 63 M.J. at 142. A presumptively unreasonable delay triggers an analysis of the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135 (additional citations omitted). *Moreno* identified three types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of a convicted person's grounds for appeal and ability to present a defense at a rehearing. *Id.* at 138–39 (citations omitted).

"We analyze each factor and make a determination as to whether that factor favors the Government or the [A]ppellant." *Id.* at 136 (citation omitted). Then, we balance our analysis of the factors to determine whether a due process violation occurred. *Id.* (citing *Barker*, 407 U.S. at 533 ("Courts must still engage in a difficult and sensitive balancing process.")). "No single factor is required for finding a due process violation and the absence of a given fac-

tor will not prevent such a finding." *Id.* (citation omitted). However, where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362.

"[A] Court of Criminal Appeals has authority under Article 66[, UCMJ, 10 U.S.C. § 866,] to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), [UCMJ, 10 U.S.C. § 859(a),] if it deems relief appropriate under the circumstances." *Tardif*, 57 M.J. at 224 (citation omitted).

The following factors are to be considered to determine if relief under *Tardif* is appropriate:

> 1. How long did the delay exceed the standards set forth in [*Moreno*]?
>
> 2. What reasons, if any, has the government set forth for the delay? Is there any evidence of bad faith or gross indifference to the overall post-trial processing of this case?
>
> 3. Keeping in mind that our goal under *Tardif* is not to analyze for prejudice, is there nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay?
>
> 4. Has the delay lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline?
>
> 5. Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation?
>
> 6. Given the passage of time, can this court provide meaningful relief in this particular situation?

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015) (citations omitted), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016). In consideration of the above factors, "no single factor [is] dispositive, and a given case may reveal other appropriate considerations for this court in deciding whether post-trial delay has rendered an appellant's sentence inappropriate." *Id.* (footnote omitted).

2. Analysis

Appellant's case was docketed with the court on 8 June 2023. The delay in rendering this decision after 8 December 2024 is presumptively unreasonable. The reasons for the delay include the time required for Appellant to file his brief on 13 August 2024, the Government to file its answer on 15 October

2024, and Appellant to file his reply brief on 22 October 2024.[10] Appellant has made no specific assertion of the right to timely appellate review, nor claim of prejudice on this issue, and we find none. Because we find no particularized prejudice, and the delay is not so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system, there is no due process violation. *See id.*

We also conclude there is no basis for relief under Article 66(d)(2), UCMJ, or *Tardif*, in the absence of a due process violation. *See Gay*, 74 M.J. at 744. Considering all the facts and circumstances of Appellant's case, we decline to exercise our Article 66(d), UCMJ, authority to grant relief for the delay in completing appellate review.

III. CONCLUSION

The findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).

Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

[10] Appellant filed 12 motions for enlargement of time (the last enlargement request was for 12 days), all of which were opposed by the Government. Appellant's claim of ineffective assistance of counsel led the Government to request an order for defense counsel declarations, which we granted. In conjunction with their motion for defense counsel declarations, the Government also filed a motion for an enlargement of time, which we granted.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Matthew H. Denney,
Appellant

USCA Dkt. No. 24-0111/AF
Crim.App. No. 40360

O R D E R

On further consideration of the granted issues, 84 M.J. 342 (C.A.A.F. 2024), and in view of *United States v. Johnson*, __ M.J. __ (C.A.A.F. 2025), it is, by the Court, this 22nd day of July, 2025,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Blyth)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40360

UNITED STATES
Appellee

v.

Matthew R. DENNEY
Master Sergeant (E-7), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary[1]

Decided 8 March 2024

Military Judge: Dayle P. Percle.

Sentence: Sentence adjudged 7 July 2022 by GCM convened at Shaw Air Force Base, South Carolina. Sentence entered by military judge on 22 August 2022: confinement for 12 months and reduction to E-4.

For Appellant: Major Matthew L. Blyth, USAF.

For Appellee: Colonel Steven R. Kaufman, USAF; Lieutenant Colonel J. Peter Ferrell, USAF; Major Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, DOUGLAS, and WARREN, *Appellate Military Judges*.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

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[1] Appellant appeals his conviction under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A), *Manual for Courts-Martial*, *United States* (2019 ed.) (2019 *MCM*), having been sentenced to more than six months' confinement.

PER CURIAM:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one specification of distribution of child pornography in violation of Article 134, Uniform of Code Military Justice (UCMJ), 10 U.S.C. § 934.[2] After accepting Appellant's plea, the military judge sentenced Appellant to confinement for 12 months, reduction to the grade of E-4, and a reprimand. The convening authority disapproved the reprimand and, in accordance with the plea agreement, waived automatic forfeitures for six months.

Appellant raises one issue: whether as applied to this case, reference to 18 U.S.C. § 922 in the staff judge advocate's indorsement to the entry of judgment is unconstitutional because the Government cannot demonstrate that barring his possession of firearms is "consistent with the nation's historical tradition of firearm regulation"[3] when he stands convicted of distribution of child pornography. We have carefully considered this issue, and find no discussion or relief is warranted. *See United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987)).

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

[2] All references to the UCMJ are to the 2019 *MCM*.

[3] Citing *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 24-0219/AF
Crim.App. No. 40464

v.

O R D E R

Brian W. Gubicza,
Appellant

On further consideration of the granted issue, 85 M.J. 186 (C.A.A.F. 2024), and in view of *United States v. Johnson*, __ M.J. __ (C.A.A.F. 2025), it is, by the Court, this 22nd day of July, 2025,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Golseth)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40464

UNITED STATES
Appellee

v.

Brian W. GUBICZA
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 2 July 2024

Military Judge: Colin P. Eichenberger; Dayle P. Percle (entry of judgment).

Sentence: Sentence adjudged 23 January 2023 by GCM convened at Beale Air Force Base, California. Sentence entered by military judge on 16 March 2023: Dishonorable discharge, confinement for 36 months, reduction to E-1, and a reprimand.

For Appellant: Major Samantha P. Golseth, USAF.

For Appellee: Lieutenant Colonel J. Peter Ferrell, USAF; Major Olivia B. Hoff, USAF; First Lieutenant Deyana F. Unis, USAF; Mary Ellen Payne, Esquire.

Before ANNEXSTAD, DOUGLAS, and MASON, *Appellate Military Judges*.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

PER CURIAM:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one specification of wrongful possession of child pornography and one specification of

wrongful distribution of child pornography in violation of Article 134, Uniform of Code Military Justice (UCMJ), 10 U.S.C. § 934.[1] The military judge sentenced Appellant to a dishonorable discharge, confinement for 36 months, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings but deferred all automatic forfeitures until the military judge signed the entry of judgment, and waived automatic forfeitures for six months.

Appellant raises one issue on appeal: whether as applied to this case, reference to 18 U.S.C. § 922 in the staff judge advocate's indorsement to the entry of judgment is unconstitutional because the Government cannot demonstrate that barring his possession of firearms is "consistent with the nation's historical tradition of firearm regulation"[2] when he stands convicted of possession and distribution of child pornography. We have carefully considered this issue and find Appellant is not entitled to relief. *See United States v. Lepore,* 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc) (holding a Court of Criminal Appeals lacks the authority to direct modification of the 18 U.S.C. § 922(g) prohibition noted on the staff judge advocate's indorsement); *see also United States v. Vanzant*, __ M.J. __, No. ACM 22004, 2024 CCA LEXIS 215, at *24 (A.F. Ct. Crim. App. 28 May 2024) (concluding "[t]he firearms prohibition remains a collateral consequence of the conviction, rather than an element of findings or sentence, and is therefore beyond our authority to review").

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

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[1] All references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Citing *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 24-0235/AF
Crim.App. No. 40481

v.

O R D E R

Kris A. Hollenback,
Appellant

On further consideration of the granted issues, __ M.J. __ (Daily Journal January 8, 2025), and in view of *United States v. Johnson*, __ M.J. __ (C.A.A.F. 2025), it is, by the Court, this 22nd day of July, 2025,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Castanien)
Appellate Government Counsel (Wright)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40481

UNITED STATES
Appellee

v.

Kris A. HOLLENBACK
Major (O-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 2 August 2024

Military Judge: Thomas A. Smith.

Sentence: Sentence adjudged 31 January 2023 by GCM convened at Minot Air Force Base, North Dakota. Sentence entered by military judge on 28 March 2023: Dismissal and confinement for 3 years.

For Appellant: Major Spencer R. Nelson, USAF.

For Appellee: Lieutenant Colonel J. Pete Ferrell, USAF; Major Brittany M. Speirs, USAF; Captain Kate E. Lee, USAF; Mary Ellen Payne, Esquire.

Before: JOHNSON, ANNEXSTAD, and GRUEN, *Appellate Military Judges*.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

PER CURIAM:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one specifica-

tion of wrongful possession of child pornography and one specification of wrongful viewing of child pornography in violation of Article 134, Uniform of Code Military Justice (UCMJ), 10 U.S.C. § 934.[1] The military judge sentenced Appellant to a dismissal and three years' confinement. The convening authority took no action on the findings or the adjudged sentence. Further, the convening authority waived automatic forfeitures for six months for the benefit of Appellant's two dependent children.

Appellant raises one issue on appeal: whether as applied to Appellant, reference to 18 U.S.C. § 922 in the Statement of Trial Results and entry of judgment is unconstitutional where the Government cannot demonstrate that barring his possession of firearms is constitutional[2] when he was not convicted of a violent offense.[3]

After carefully considering this issue and for the reasons explained in *United States v. Vanzant*, __ M.J. __, No. ACM 22004, 2024 CCA LEXIS 215, at *24 (A.F. Ct. Crim. App. 28 May 2024), and *United States v. Lepore,* 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), we find Appellant is not entitled to relief.

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

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[1] All references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Citing *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

[3] Appellant personally raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

DeQuayjan D. Jackson,
Appellant

USCA Dkt. No. 24-0106/AF
Crim.App. No. 40310

O R D E R

On further consideration of the granted issues, 85 M.J. 91 (C.A.A.F. 2024), and in view of *United States v. Johnson*, __ M.J. __ (C.A.A.F. 2025), it is, by the Court, this 22nd day of July, 2025,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Nelson)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40310

UNITED STATES
Appellee

v.

DeQuayjan D. JACKSON
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 11 January 2024

Military Judge: Shad R. Kidd.

Sentence: Sentence adjudged 15 March 2022 by GCM convened at Tinker Air Force Base, Oklahoma. Sentence entered by military judge on 18 April 2022: Bad-conduct discharge, confinement for 350 days, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

*For Appellan*t: Major Spencer R. Nelson, USAF.

For Appellee: Colonel Naomi P. Dennis, USAF; Lieutenant Colonel Thomas J. Alford, USAF; Captain Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, CADOTTE, and MERRIAM, *Appellate Military Judges*.

Judge MERRIAM delivered the opinion of the court, in which Senior Judge RICHARDSON and Senior Judge CADOTTE joined.

MERRIAM, Judge:

A general court-martial composed of a military judge sitting alone convicted Appellant, in accordance with her pleas and pursuant to a plea agreement,[1] of one specification of failing to obey a lawful general regulation, in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892,[2] and one specification of wrongful distribution of marijuana, one specification of wrongful distribution of cocaine, one specification of wrongful distribution of alprazolam (a Schedule IV controlled substance), one specification of wrongfully aiding others' manufacture of cocaine, and one specification of wrongfully aiding others' distribution of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged sentence was a bad-conduct discharge, confinement for 350 days,[3] forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand.

Appellant raises three issues on appeal: (1) whether the military judge erred when he admitted uncharged misconduct under the "continuous course of conduct doctrine" during the pre-sentencing hearing; (2) whether the firearms prohibition in 18 U.S.C. § 922 referenced in the staff judge advocate's indorsement to the Statement of Trial Results is constitutional when Appellant was convicted of non-violent offenses; and (3) whether Appellant's sentence is inappropriately severe.[4]

Finding no error materially prejudicial to Appellant's substantial rights, we affirm the findings and sentence.

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[1] Among other provisions in her plea agreement, Appellant agreed that a bad-conduct discharge "must" be adjudged, that a minimum total of 205 days and maximum total of 490 days of confinement for all specifications of which she was convicted "must" be adjudged, and that a reprimand, rank reduction, and forfeiture of all pay allowances "may" be adjudged. Additionally, the plea agreement stated that a dishonorable discharge "may not" be adjudged and further required that five additional specifications to which Appellant pleaded not guilty be dismissed with prejudice after announcement of sentence.

[2] All references in this opinion to the UCMJ, the Military Rules of Evidence, and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] Appellant received 10 days for violation of the Article 92, UCMJ, specification, and 45 days, 75 days, 50 days, 90 days, and 80 days, respectively, for violation of the five Article 112a, UCMJ, specifications, with each period of confinement to run consecutively.

[4] Appellant raises this third issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

I. BACKGROUND

Over a few months in the summer and fall of 2021, Appellant distributed cocaine, alprazolam (commonly known by the brand name Xanax), and marijuana. Most, if not all, of this illegal distribution of controlled substances was on behalf of, or in association with, members of the criminal gang known as the Crips.

Appellant's distribution of marijuana was to another active duty Airman, Airman First Class (A1C) JJ. This "hand to hand" transaction occurred in the public parking lot of an off-base hospital while A1C JJ was in uniform standing outside Appellant's car. On another occasion Appellant sold 40 tablets of alprazolam to A1C JJ.

On approximately 25 occasions, Appellant drove gang members in her car to various locations for the purpose of selling cocaine. Appellant also aided gang members' manufacture of their cocaine product by permitting gang members to "cook" the cocaine in her off-base residence, using her microwave, kitchen utensils, and water.

Though Appellant was not a member of the Crips, she associated with several members on a regular basis, allowed them to use her home, frequently "threw" (displayed with her hands) gang signs associated with the Crips as a "sign of respect" to the gang members, assisted their criminal drug-selling enterprise on dozens of occasions, and on at least one occasion suggested to gang members that they make the aforementioned sale of alprazolam to A1C JJ.

II. DISCUSSION

A. Continuous Course of Conduct

1. Additional Background

During the pre-sentencing hearing following acceptance of Appellant's guilty pleas, trial counsel moved to admit Prosecution Exhibit 4, a disc containing two video clips from law enforcement's interview of Appellant as matters in aggravation.

One of the video clips (Clip One) was two minutes and thirty-one seconds in length. The military judge admitted Clip One over trial defense counsel's objection, but Appellant does not now assert this was error and Clip One is not addressed further here. The second video clip (Clip Two) was four minutes and forty-six seconds long. In Clip Two, Appellant described to law enforcement agents how she was the "middle man" for a sale of alprazolam "bars" to Mr. D at the intersection of "15th Street and High Avenue." Appellant told law enforcement that Mr. D had asked her for "pain pills," that she

did not have any, and that she then approached a gang member to provide some that she could sell to Mr. D. Appellant continued to tell law enforcement that Mr. D called a gang member, who then provided two alprazolam tablets to Appellant, which she then sold to Mr. D for $20.00 and gave the money to the gang member. She told law enforcement she made the transaction in August or late July of 2021.

Trial defense counsel objected to Clip Two on Mil. R. Evid. 403 grounds, and further argued that the uncharged sale of alprazolam to which Appellant confessed in Clip Two was not proper evidence in aggravation because the misconduct discussed was not directly resulting from or directly related to the offenses of which Appellant had been convicted, but was rather improper propensity evidence. Trial counsel agreed Clip Two was uncharged misconduct, but argued it was a "continuous course of conduct from [Appellant]" with regard to selling alprazolam. Trial counsel argued that it was close in time to the wrongful distribution of approximately 40 tablets of alprazolam of which Appellant had just been convicted and was part of a continuous course of conduct in selling illegal drugs. Trial counsel stated the evidence was not offered under Mil. R. Evid. 404(b), but strictly as aggravating evidence under Rule for Courts-Martial (R.C.M.) 1001(b)(4).

The military judge determined Clip Two was admissible aggravation evidence under R.C.M. 1001(b)(4). The military judge noted Appellant had pleaded guilty to distribution of cocaine to Mr. D and of distribution of alprazolam to A1C JJ and that the uncharged misconduct referenced in Clip Two was "in the charged time frame." The military judge found that this case was similar to "a number of cases" where an accused pleaded guilty to some instances of misconduct and additional instances of the same or similar type of misconduct were held to be admissible under R.C.M. 1001(b)(4) because the aggravation evidence was part of a continuous course of conduct. The military judge determined that Clip Two provided "context to understand the overall course of conduct," and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Regarding this Mil. R. Evid. 403 analysis, the military judge found that the danger of unfair prejudice was significantly mitigated by the fact that it was a judge-alone case, that he was aware Appellant could "only be sentenced for the crimes for which she has been accused," and that he would not consider the evidence for propensity purposes.

2. Law

This court reviews a military judge's admission or exclusion of evidence, including sentencing evidence, for an abuse of discretion. *United States v. Carter*, 74 M.J. 204, 206 (C.A.A.F. 2015) (citation omitted); *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009) (citations omitted). A military

judge abuses their discretion when their legal findings are erroneous or when they make a clearly erroneous finding of fact. *Id.* (citations omitted). To be overturned on appeal, the military judge's ruling must be "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Taylor*, 53 M.J. 195, 199 (C.A.A.F. 2000) (internal quotation marks omitted) (citing *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). For a ruling to be an abuse of discretion, it must be more than a mere difference of opinion. *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013) (citing *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009)).

"[A]dmission of aggravation evidence necessarily involves a contextual judgment." *United States v. Moore*, 68 M.J. 491 (C.A.A.F. 2010) (mem.) (citations omitted); *see also United States v. McCrary*, 2013 CCA LEXIS 387, *12 (A.F. Ct. Crim. App. 7 May 2013) (unpub. op.) (uncharged misconduct can be admitted as aggravation evidence, which may be used to "inform the sentencing authority's judgment regarding the charged offense and put[ ] that offense in context").

Article 56(c)(1), UCMJ, 10 U.S.C. § 856(c)(1), states:

> In sentencing an accused under [Article 53, UCMJ, 10 U.S.C. § 853], a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—(A) the nature and circumstances of the offense and the history and characteristics of the accused; (B) the impact of the offense on—(i) the financial, social, psychological, or medical well-being of any victim of the offense; and (ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense; [and] (C) the need for the sentence—(i) to reflect the seriousness of the offense; (ii) to promote respect for the law; (iii) to provide just punishment for the offense; (iv) to promote adequate deterrence of misconduct; (v) to protect others from further crimes by the accused; (vi) to rehabilitate the accused; and (vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service[.]

R.C.M. 1001(b)(4) states:

> Trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or

> entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.

"The meaning of 'directly related' under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted." *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). Uncharged misconduct may be directly related to the charged misconduct when part of a "continuous course of conduct." *See, e.g.*, *United States v. Shupe*, 36 M.J. 431, 436 (C.M.A. 1993) (holding testimony about uncharged misconduct was proper aggravation under R.C.M. 1001(b)(4), because it showed "'the continuous nature of the charged conduct'" (quoting *United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1992))); *Ross*, 34 M.J. at 187 (stating "the continuous nature of the charged conduct and its full impact on the military community are proper aggravating circumstances"); *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990) (holding admissible uncharged misconduct that consisted of "a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs"); *United States v. Silva*, 21 M.J. 336, 337 (C.M.A. 1986) (uncharged misconduct was admissible when it was an "integral part of [the accused's] criminal course of conduct").

Aggravation evidence admitted under R.C.M. 1001(b)(4) must also satisfy Mil. R. Evid. 403. *Hardison*, 64 M.J. at 281. Under that rule, a military judge may exclude evidence if its probative value is substantially outweighed by such considerations as its tendency to result in unfair prejudice, confuse the issues, or mislead the members. A military judge has "wide discretion" in applying Mil. R. Evid. 403, and we exercise "great restraint" in reviewing such applications when the military judge articulates his or her reasoning on the record. *United States v. Humpherys*, 57 M.J. 83, 91 (C.A.A.F. 2002) (citation omitted). On the other hand, appellate courts "give[ ] military judges less deference if they fail to articulate their [Mil. R. Evid. 403] balancing analysis on the record, and no deference if they fail to conduct the [Mil. R. Evid.] 403 balancing." *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citation omitted).

A military judge is assumed "to be able to appropriately consider only relevant material in assessing sentencing." *Hardison*, 64 M.J. at 284 (citation omitted).

3. Analysis

Appellant contends the military judge improperly admitted aggravation evidence through what Appellant calls the "continuous course of conduct doc-

trine," under which uncharged misconduct may be admitted during presentencing as evidence in aggravation when the charged and uncharged misconduct are part of a continuing course of conduct. Appellant's argument in support of this assignment of error asserts several theories in the alternative: (1) the United States Court of Appeals for the Armed Forces (CAAF) implicitly overruled the continuous course of conduct doctrine *sub silentio* in *United States v. Hardison*; (2) the continuous course of conduct doctrine conflicts with Article 56(c), UCMJ, 10 U.S.C. § 856(c), and/or R.C.M. 1001(b)(4); and (3) under the circumstances of this case, the military judge improperly applied the doctrine when he admitted uncharged misconduct under R.C.M. 1001(b)(4) during the pre-sentencing hearing.

We reject Appellant's characterization of the CAAF's decision in *Hardison*, 64 M.J. at 281–83, as constituting a *sub silentio* overturning of its prior decisions that a continuous course of conduct can demonstrate uncharged misconduct is "directly related" to the charged offenses under R.C.M. 1001(b)(4). In *Hardison*, the CAAF did not implicitly overturn its prior precedent; it explicitly embraced it.[5] In determining that pre-service drug use was not "directly related" to the charged misconduct, the CAAF cited positively two prior cases—*Shupe*, 36 M.J. 431, and *Mullens*, 29 M.J. 398—in which the CAAF and its predecessor, the Court of Military Appeals (CMA), found that a continuous course of conduct meant the uncharged misconduct was directly related to the charged offenses and thus admissible under R.C.M. 1001(b)(4). *Hardison*, 64 M.J. at 282. In *Shupe*, the appellant had confessed during the plea providence inquiry to one wrongful distribution of ten doses of LSD. 36 M.J. at 436. The CMA upheld admission of aggravation evidence that the appellant had engaged in five additional transactions totaling 180–200 doses of LSD to "numerous buyers" over several months because the five uncharged instances of drug distribution were "not isolated" from the single distribution to which the appellant had pleaded guilty, but rather were part of a single "extensive and continuing scheme to introduce and sell [drugs]." 36 M.J. at 436. And in *Hardison*, the CAAF explicitly observed that "[t]he 'continuous nature of the charged conduct' was *important to our conclusion*" in *Shupe*. 64 M.J. at 282 (emphasis added) (quoting *Shupe*, 36 M.J. at 436). Appellant further contends the CAAF did not apply the continuous course of conduct doctrine in *Hardison*. In fact, the CAAF did evaluate whether there was a con-

[5] We also note the CAAF has instructed that "'overruling by implication is disfavored.'" *United States v. Tovarchavez*, 78 M.J. 459, 465 (C.A.A.F. 2019) (quoting *United States v. Pack*, 65 M.J. 381, 383 (C.A.A.F. 2007)) (additional citation omitted).

tinuous course of conduct similar to *Shupe* and *Mullens* and simply concluded "[t]here was no similar connection here." 64 M.J. at 282.

In light of our superior court's explicit approval in *Hardison* and prior cases of the continuous course of conduct doctrine under R.C.M. 1001(b)(4), we decline to find the doctrine conflicts with R.C.M. 1001(b)(4).

Appellant also argues that admitting uncharged misconduct under the continuous course of conduct doctrine is an "[a]textual [a]berration" that conflicts with the plain language of Article 56(c), UCMJ. Specifically, Appellant observes that Article 56(c), UCMJ, repeatedly commands an accused be sentenced for "the offense" and that admission of uncharged misconduct violates that command. Appellant acknowledges that "R.C.M. 1001(b)(4) tracks closely with the language of Article 56, [UCMJ]" but contends the language in R.C.M. 1001(b)(4) departs from Article 56, UCMJ, where it allows that aggravation evidence may be "directly relating to or resulting from the offense . . . ." The implication of Appellant's argument is that this language in R.C.M. 1001(b)(4) conflicts with the plain language of Article 56, UCMJ. We disagree. Article 56, UCMJ, does indeed direct that an accused be sentenced for their offenses, but the R.C.M. 1001(b)(4) command that aggravation evidence be directly related to or resulting from the offenses of which the accused is convicted is consistent with the language in Article 56, UCMJ, specifically that the accused be punished based on "the nature and circumstances of the offense and the history and characteristics of the accused" and the "seriousness of the offense."[6] Likewise, admitting uncharged misconduct that is directly related to the offense when the charged and uncharged misconduct are part of a continuing course of conduct is consistent with the Article 56, UCMJ, command that punishment be based on "the nature and circumstances of the offense."

Appellant further contends that even if the continuous course of conduct doctrine is not inconsistent with Article 56, UCMJ, or R.C.M. 1001(b)(4), and has not been overruled by the CAAF, the military judge improperly applied the doctrine to admit uncharged misconduct under the circumstances of this

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[6] We also note the inclusion in R.C.M. 1001(b)(4) of this type of aggravation evidence was in effect when Congress recently enacted the current version of Article 56, UCMJ, as part of the Military Justice Act of 2016. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5301, 130 Stat. 2000, 2919–21 (2016). The "new" Article 56 did not circumscribe aggravation evidence as an appropriate sentencing consideration. *See United States v. Tyler*, 81 M.J. 108, 113 (C.A.A.F. 2021) (citations omitted) ("We assume that Congress is aware of existing law when it passes legislation.").

case. Appellant contends it was error to admit the uncharged misconduct because (1) the uncharged misconduct was remote in time to the charged conduct; (2) the uncharged misconduct involved a different person; and (3) the uncharged misconduct exceeded the plain language of the charge. We are unpersuaded.

First, we find the uncharged misconduct detailed in Clip Two was not remote in time to the charged misconduct. It occurred within, or very near, the charged timeframe of "between on or about 1 August 2021 and on or about 5 October 2021." In Clip Two, Appellant asserted she sold the alprazolam to Mr. D in "August, late July." That transaction was somewhat removed from the late September alprazolam distribution that Appellant detailed during her guilty-plea inquiry, but no more remote than the instances of uncharged misconduct upheld in *Shupe* (where uncharged misconduct occurred weeks to months apart from the charged misconduct), and nowhere near as remote as the uncharged misconduct rejected in *Hardison* (where uncharged misconduct occurred three years earlier than charged misconduct).

Appellant also contends admission of the uncharged misconduct in this case was inappropriate because it involved a different recipient of the illicit drugs than the charged misconduct. Our superior court has, in some cases, observed that the "victims" of the charged and uncharged misconduct were the same. *See, e.g.*, *United States v. Nourse*, 55 M.J. 229, 232 (C.A.A.F. 2001); *Mullens*, 29 M.J. at 400. But the CAAF has not *required* that aggravation evidence of uncharged misconduct involve precisely the same persons as the charged misconduct to be admissible under R.C.M. 1001(b)(4). In fact, as the CMA expressly noted in *Shupe*, the aggravation evidence of additional misconduct involved sales of lysergic acid diethylamide (LSD) to "numerous buyers." 36 M.J. at 436. In *Ross*, the CMA upheld admission of aggravation evidence showing the appellant altered dozens of enlistment aptitude tests (*i.e.*, different persons' tests) even though he pleaded guilty to altering only four. 34 M.J. at 187. Here, the uncharged misconduct involved sale of two tablets of alprazolam, the same drug Appellant had just pleaded guilty to selling. The uncharged sale was not to the same buyer of the charged alprazolam distribution, but was to Mr. D, to whom Appellant had just admitted selling a different drug, and the sale occurred at the same location where the charged sale of cocaine to Mr. D took place. Under the circumstances of this case, the fact that the buyer of the uncharged distribution of alprazolam was different than the buyer in the charged distribution of alprazolam does not remove the uncharged distribution from the scope of a "directly related" offense.

Finally, Appellant asserts "any uncharged misconduct relating to selling additional [alprazolam] pills was not 'resulting from' or 'directly relating' to 'the offense' because it goes above and beyond the charge itself." Appellant's

contention that the uncharged misconduct "exceeded the plain language of the charge" amounts to a redundant assertion that the uncharged misconduct is, in fact, uncharged misconduct. The Government does not argue to the contrary and we find this assertion requires no further analysis.

The military judge's findings of fact are supported by the evidence and his application of the correct legal principles was not clearly unreasonable. Though the military judge did not cite specific cases by name when he ruled in favor of admitting Clip Two under R.C.M. 1001(b)(4), he described our superior court's precedent regarding a "continuous course of conduct" in *Ross*, 34 M.J. at 187, described *supra*, and *Shupe,* 36 M.J. at 436. In *Shupe*, the CMA noted the aggravation evidence established the conduct to which the appellant pleaded guilty was not isolated but part of "an extensive and continuing scheme" to sell illegal drugs. 36 M.J. at 436. The same can be said of the uncharged misconduct in this case. We conclude the military judge did not abuse his discretion in admitting Clip Two as uncharged misconduct under R.C.M. 1001(b)(4) or in determining the evidence satisfied Mil. R. Evid. 403.

B. Firearms Prohibition

The staff judge advocate's indorsement to the Statement of Trial Results indicates Appellant's conviction triggered a "[f]irearm [p]rohibition" under 18 U.S.C. § 922. Appellant asks this court to assess whether 18 U.S.C. § 922 is constitutional when the triggering offenses were non-violent. We decline to undertake such an assessment in this case. In reviewing appeals under Article 66(b)(3), UCMJ, 10 U.S.C. § 866(b)(3), this court "may act only with respect to the findings and sentence as entered into the record." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). This court held in *United States v. Lepore*, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), the 18 U.S.C. § 922 firearm prohibition was not a finding or part of the sentence; accordingly this court lacks authority under Article 66, UCMJ, to direct modification of that portion of the staff judge advocate's indorsement to the Statement of Trial Results. We do not read *United States v. Lemire,* 82 M.J. 263 n* (C.A.A.F. 2022) (unpub. op.), to provide a basis to consider Appellant's claim, as Appellant suggests, when in that case the CAAF merely directed the court-martial promulgating order "be corrected."

C. Sentence Severity

1. Law

We review issues of sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (footnote omitted).

This court "may affirm only . . . the sentence or such part or amount of the sentence, as [it] finds correct in law and fact and determines, on the basis of

the entire record, should be approved." Article 66(d)(1), UCMJ. Courts "assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (alteration in original) (citation omitted). Although this court has broad discretion in determining whether a particular sentence is appropriate, and Article 66, UCMJ, empowers us to "do justice," we have no authority to "grant mercy" by engaging in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted).

A plea agreement with the convening authority is "some indication of the fairness and appropriateness of [an appellant's] sentence." *United States v. Perez*, No. ACM S32637 (f rev), 2021 CCA LEXIS 501, at *7 (A.F. Ct. Crim. App. 28 Sep. 2021) (unpub. op.) (footnote omitted); *see also United States v. Fields*, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015) (an "accused's own sentence proposal is a reasonable indication of its probable fairness to him" (citations omitted)).

2. Analysis

Appellant's claim that her sentence is inappropriately severe rests primarily on her assertion of prior traumas in her life and the fact that she deployed to the Middle East. Appellant does not detail which aspect(s) of her sentence are inappropriately severe, but instead suggests that based on this "strong evidence in mitigation and extenuation," this court should "reduce her sentence." Under the specific facts of this case, Appellant's arguments for a reduced sentence are more a request for clemency than an appeal of sentence severity.

In her plea agreement, Appellant agreed that a bad-conduct discharge "must" be adjudged, that a minimum of 205 days and maximum of 490 days of confinement "must" be adjudged, and that a reprimand, rank reduction, and forfeiture of all pay allowances "may" be adjudged. Having enjoyed the benefits of her plea agreement, including a cap on confinement and the withdrawal and dismissal with prejudice of multiple specifications, Appellant now seeks to convince us the punishment she received, which is well within the range of punishment to which she agreed in her plea agreement, is "inappropriately severe." We are not convinced.

Appellant was convicted of committing numerous drug crimes on behalf of, and in active participation with, a criminal gang. Two of these drug distributions were to an active-duty Air Force member, and one occurred in public view while that Airman was in uniform. After carefully considering Appellant, the nature and seriousness of the offenses, the particularized extenuat-

ing and mitigating evidence, and all the other matters in the record of trial, we conclude Appellant's sentence is not inappropriately severe.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).

Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Bradley D. Lampkins,
Appellant

USCA Dkt. No. 24-0069/AF
Crim.App. No. 40135

O R D E R

On further consideration of the granted issues, 84 M.J. 310 (C.A.A.F. 2024), and in view of *United States v. Johnson*, __ M.J. __ (C.A.A.F. 2025), it is, by the Court, this 22nd day of July, 2025,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Nelson)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40135 (f rev)

UNITED STATES
Appellee

v.

Bradley D. LAMPKINS
Airman First Class (E-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Upon Further Review

Decided 2 November 2023

Military Judge: Thomas J. Alford; Andrew R. Norton (post-trial processing); Dayle P. Percle (remand).

Sentence: Sentence adjudged on 12 August 2020 by GCM convened at Minot Air Force Base, North Dakota. Sentence entered by military judge on 17 November 2020: Dishonorable discharge, confinement for 46 months, reduction to E-1, and a reprimand.

For Appellant: Lieutenant Colonel Todd J. Fanniff, USAF; Major Spencer R. Nelson, USAF.

For Appellee: Major Morgan R. Christie, USAF; Major John P. Patera, USAF; Major Brittany M. Speirs, USAF; Mary Ellen Payne, Esquire.

Before ANNEXSTAD, GRUEN, and KEARLEY, *Appellate Military Judges*.

Judge GRUEN delivered the opinion of the court, in which Senior Judge ANNEXSTAD and Judge KEARLEY joined.

GRUEN, Judge:

This case is before us for a second time. A military judge sitting as a general court-martial convicted Appellant, consistent with his pleas, of one specification of attempt to steal $9,999.00 (Charge I); two specifications of larceny (Charge II); and 43 specifications of making, drawing, or uttering check, draft, or order without sufficient funds (Charge III), in violation of Articles 80, 121, and 123a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880, 921, 923a.[1] The military judge sentenced Appellant to a dishonorable discharge, confinement for 46 months, reduction to the grade of E-1, and a reprimand.[2] Upon recommendation from the military judge, the convening authority suspended all confinement in excess of 24 months for a period of two years and one month from the date of findings, 12 August 2020, at which time the suspended confinement would be remitted without further action unless the suspension was sooner vacated.

Appellant initially raised four issues which we have reworded: (1) whether Appellant is entitled to relief due to a 353-day post-trial processing delay; (2) whether the record of trial was incomplete; (3) whether the military judge abused his discretion in denying Appellant's motion for appropriate relief for illegal pretrial punishment; and (4) whether trial counsel committed prosecutorial misconduct during sentencing argument.

We agreed with Appellant with respect to issue (2). On 25 October 2022, we remanded this case to the Chief Trial Judge, Air Force Trial Judiciary, to correct the record under Rule for Courts-Martial (R.C.M.) 1112(d) to resolve a substantial issue with the post-trial processing, insofar as the military judge's ruling on speedy trial was missing from the record of trial. *United States v. Lampkins*, No. ACM 40135, 2020 CCA LEXIS 500, at *2–3 (A.F. Ct. Crim. App. 25 Oct. 2022) (order).[3] Appellant's record was re-docketed with this court on 9 November 2022 and included the missing ruling. Thus, we find the military judge's correction of the record remedies the error identified in our earlier order.

Subsequent to re-docketing, Appellant submitted three additional issues, which we have reworded and re-numbered: (5) whether the Government's

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[1] Because Appellant was convicted of conduct spanning between on or about 28 October 2018 and on or about 7 August 2019, references in this opinion to the punitive articles of the UCMJ are to both the *Manual for Courts-Martial, United States* (2016 ed.) and the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*). As charges were referred to trial after 1 January 2019, references to the Rules for Courts-Martial and all other UCMJ references are to the 2019 *MCM*.

[2] Appellant was awarded 363 days of pretrial confinement credit against his sentence.

[3] We note an error in the LEXIS cite in that our order was issued on 25 October 2022, but the LEXIS cite incorrectly reflects 2020.

submission of an incomplete record of trial tolls the time period for presumptively unreasonable post-trial delay under *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); (6) whether Appellant is entitled to special relief because the Government engaged in both speedy trial violations and unreasonable post-trial delay; and (7) whether the military judge's analysis of the factors in *Barker v. Wingo*, 407 U.S. 514 (1972), addressing a speedy trial motion fully aligned with that of *United States v. Harrington*, 81 M.J. 184 (C.A.A.F. 2021), *recon. denied,* 81 M.J. 322 (C.A.A.F. 2021)—a case decided after the military judge's ruling at trial.[4]

As to issue (5), we decline Appellant's request to find that over 800 days had elapsed between announcement of the sentence and docketing his case with this court. Here, the record establishes that Appellant's case was docketed at 353 days. We consider the 353-day delay in our discussion of issue (1) below.

We have carefully considered issue (7) and find no discussion or relief is warranted. *See United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987)).

With regard to issue (1), for the reasons stated below, we find remedy is appropriate to address the excessive post-trial delay. In our decretal paragraph, we affirm the findings of guilty and only so much of the sentence that should be approved.

I. BACKGROUND

The charges in this case stem from a number of fraudulent money transactions made by Appellant. Appellant pleaded guilty to all three charges including a total of 46 specifications. In the fall of 2018, Appellant was 19 years old and received a monthly pay of $1,931.10. He arrived at his first duty station on 24 September 2018 and opened a bank account on 27 September 2018 with an initial deposit of $70.00. On 28 October 2018, Appellant wrote the first of many fraudulent checks, this one to the Army and Air Force Exchange Service in the amount of $1,301.75 for the purchase of a computer and card scanner. On 23 February 2019, Appellant stole a Ford F-350 from a Minot, North Dakota, resident, the truck having a value of $23,000.00. In June 2019 he stole $26,800.00 worth of items and services from a local vehicle-related company. Finally, in August 2019, Appellant wrote a check to his wife in the amount of $9,999.00 knowing he did not have the funds in his checking account to cover said check.

[4] Appellant personally raises issues (3), (4), and (7) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

II. DISCUSSION

A. Post-Trial Processing

1. Additional Background

On 10 August 2020, the military judge sentenced Appellant, and on 19 October 2020, the court reporter certified the record of trial "as accurate and complete" in accordance with R.C.M. 1112(b) and R.C.M. 1112(c)(1). Appellant's case was docketed with this court on 30 July 2021—353 days from the date he was sentenced.

On 9 July 2021, trial counsel provided an affidavit and case chronology explaining why it took the Government 353 days to docket Appellant's case with this court.[5] We have corrected the number of days from sentencing to docketing and added information from the record of trial detailing the post-trial processing timeline in this case as set forth below.

Date	Event	Days after Sentence Announcement
9 December 2020	The base legal office deposited the original and four copies of the record of trial with the Traffic Management Office (TMO) for mail delivery via FedEx. The base legal office then updated the Automated Military Justice Analysis and Management System (AMJAMS) reflecting such action, which caused the case to no longer appear in the open case reports.	120
9–11 December 2020	The TMO lost one copy of the record of trial intended for the Air Force Appellate Records Branch (JAJM), and erroneously mailed the original to Appellant's confinement facility. The TMO mailed Appellant's copy, the remaining copy intended for JAJM, and the remaining copy to the servicing legal office for the general court-martial convening authority at the Numbered Air Force (NAF).	120–122
11–18 February 2021	The NAF received the records of trial and identified missing documents and extensive errors.	184–191

[5] Appellant calculated a delay of 352 days—we have calculated a delay of 353 days.

6 April 2021	The NAF returned all the records of trial to the base legal office for correction.	238
9 April 2021	The noncommissioned officer in charge (NCOIC) maintained the NAF's copy of the record of trial. The other records of trial were in a sealed box placed inside a cubicle of the case paralegal who already had permanently changed duty stations.	241
21 June 2021	A newly assigned paralegal who began working in the above-mentioned cubicle discovered the box of records of trial in Appellant's case, and gave them to the NCOIC of the military justice section. The NCOIC indicated that processing those copies of the record of trial was no longer time sensitive because *Moreno* had tolled.	315
5–6 July 2021	The NCOIC inspected the records of trial and realized the original record was among them. The NCOIC began correcting the identified errors.	328–329
7 July 2021	The base legal office determined all missing documents had been obtained for inclusion in the record of trial.	330
8–9 July 2021	Another copy of the record of trial was created to replace the one lost in December 2020. The original and three copies were all corrected and provided to TMO for distribution.	331–332
30 July 2021	JAJM received the original record of trial.	353

2. Law

As a matter of law, this court reviews whether claims of excessive post-trial delay resulted in a due process[6] violation. *United States v. Anderson*, 82 M.J. 82, 86 (C.A.A.F. 2022). Even if we do not find a due process violation, we may nonetheless grant Appellant relief for excessive post-trial delay under our broad authority to determine sentence appropriateness pursuant Article 66(d), UCMJ, 10 U.S.C. § 866(d). *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

[6] *See* U.S. CONST. amend. V.

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *Moreno*, 63 M.J. at 135 (citations omitted). The United States Court of Appeals for the Armed Forces (CAAF) in *Moreno* held that a presumptive due process violation occurs under any of the following circumstances: (1) the convening authority takes action more than 120 days after completion of trial; (2) the record of trial is docketed by the service Court of Criminal Appeals (CCA) more than 30 days after the convening authority's action; or (3) a CCA completes appellate review and renders its decision more than 18 months after the case is docketed with the court. *Id.* at 150. As Appellant's case was processed under new procedural rules, we apply the 150-day aggregate standard threshold announced in *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). When docketing occurs more than 150 days after sentencing, the delay is presumptively unreasonable. "This 150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in *Moreno*." *Id.*

A case that does not meet the 150-day threshold triggers an analysis of the four non-exclusive factors set forth in *Barker* to assess whether Appellant's due process right to timely post-trial and appellate review has been violated: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135 (first citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); and then citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004) (per curiam)). Analyzing these factors requires determining which factors favor the Government or an appellant and then balancing these factors. *Moreno*, 63 M.J. at 136. No single factor is dispositive, and the absence of a given factor does not prevent this court from finding a due process violation. *Id.* When examining reasons for the delay this court determines "how much of the delay was under the Government's control" and "assess[es] any legitimate reasons for the delay." *United States v. Anderson*, 82 M.J. 82, 88 (C.A.A.F. 2022).

Moreno identified three types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of a convicted person's grounds for appeal and ability to present a defense at a rehearing. 63 M.J at 138–39 (citations omitted). "The anxiety and concern subfactor involves constitutionally cognizable anxiety that arises from excessive delay," and the CAAF requires "an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Anderson*, 82 M.J. at 87 (quoting *United States v. Toohey*, 63 M.J. 353, 361 (C.A.A.F. 2006)).

Furthermore, Article 66(d), UCMJ, authorizes this court to grant relief for excessive post-trial delay even in the absence of a due process violation. *See Tardif*, 57 M.J. at 225. In *Tardif*, the CAAF recognized "a Court of Criminal Appeals has

authority under Article 66[, UCMJ,] to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a)[, UCMJ]." *Id.* at 224 (citation omitted). The essential inquiry under *Tardif* is whether, given the post-trial delay, the sentence "remains appropriate[ ] in light of all circumstances." *Toohey*, 63 M.J. at 362 (citing *United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004) (per curiam)).

We provided a further analytical framework for that analysis in *United States v. Gay*, where we set forth a six-factor test to apply before granting "sentence appropriateness" relief under *Tardif* and *Toohey*, even in the absence of a due process violation:

> 1. How long did the delay exceed the standards set forth in *United States v. Moreno,* 63 M.J. 129 (C.A.A.F. 2006)?
>
> 2. What reasons, if any, has the [G]overnment set forth for the delay? Is there any evidence of bad faith or gross indifference to the overall post-trial processing of this case?
>
> 3. Keeping in mind that our goal under *Tardif* is not to analyze for prejudice, is there nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay?
>
> 4. Has the delay lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline?
>
> 5. Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation?
>
> 6. Given the passage of time, can this court provide meaningful relief in this particular situation?

74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd* 75 M.J. 264 (C.A.A.F. 2016).

3. Analysis

Appellant contends that he is entitled to relief due to a 353-day post-trial processing delay between the day he was sentenced and the day his record of trial was docketed with this court. Appellant claims that he has suffered particularized anxiety and concern and is therefore prejudiced because of this delay. He further argues that a due process violation has occurred because "the delay adversely affects the public perception of the fairness and integrity of the military justice system." We agree the delay from sentencing to docketing with this court was presumptively unreasonable. While we do not find that the delay prejudiced Appellant, we nevertheless find that relief is appropriate to address the delay.

The Government delay in docketing Appellant's case with this court was 353 days—more than double the 150-day threshold set in *Livak*. Therefore, there is a facially unreasonable delay in post-trial processing. We must now address whether a due process violation has occurred, which requires analysis of the *Barker* factors. The first factor of the *Barker* analysis—the length of the delay—weighs heavily in favor of Appellant. Here, the delay was over 200 days past the 150-day threshold set forth by this court in *Livak*.

The second factor—the reasons for the delay—also weighs in Appellant's favor. The record shows the Government failed on multiple levels during the post-trial processing of the record. Not only did the base legal office responsible for moving the case post-sentencing fail to send the correct copies of the record to the NAF, the NAF took nearly two additional months to identify errors and send the record back to the base legal office for correction. We note a troubling period during post-trial processing wherein for 77 days the record sat untouched, in a cubicle at the base legal office. We find no good reasons were provided to justify delay, and accordingly find that this factor weighs in favor of Appellant.

With respect to the third factor—Appellant's assertion of the right to timely review and appeal—Appellant asserted his right to timely appellate review for the first time in his brief to this court. He asserted this right a second time upon re-docketing. No one factor is dispositive in the *Barker* analysis and the primary responsibility for speedy processing rests with the Government. *Moreno*, 63 M.J. at 136–37. Thus, we find with respect to Appellant's assertion of the right to timely review and appeal, this factor neither weighs in favor nor against Appellant's interests.

The final *Barker* factor addresses prejudice. Appellant asserts he has suffered constitutionally cognizable anxiety from the delay affecting him "physically, mentally, socially, and hindered [his] ability to move on with [his] life." He claims his concern and anxiety is distinguishable from the normal anxiety of an appeal because a medical doctor has diagnosed him with depression and post-traumatic stress disorder. Appellant further claims that the stress and anxiety have increased since he was released from confinement because of the post-trial processing delay. He states the stress and anxiety prevent him from sleeping without medication and he has nightmares given he has not yet had closure with his appeal. Additionally, he claims the lack of finality of his appeal has prevented him from applying for a service characterization upgrade or medical benefits and caused him difficulty in applying for employment. We do not agree with Appellant that his concern and anxiety are distinguishable from the normal concern and anxiety of an appeal and thus, we do not find prejudice. *See Toohey*, 63 M.J. at 361; *see also Anderson,* 82 M.J. at 87 (holding no prejudice for post-trial delay delaying appellant's clemency and parole consideration because prospects of receiving clemency or parole are inherently speculative); *United States v. Bush*, 68 M.J.

96, 101 (C.A.A.F. 2009) (holding no prejudice because appellant's assertion that post-trial delay led to a lost job opportunity were speculative and uncorroborated). We find this factor weighs in favor of the Government.

Where there is no qualifying prejudice from the delay, there is no due process violation unless, "when balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362. Here, we find the delays were egregious, not justified, and would adversely affect the public's perception of the fairness and integrity of the military justice system. Again, we note that the overall delay in docketing this case with our court was 353 days, more than double the 150-day standard established in *Livak*. Additionally, we note that we have not been presented with any justification for the delay. Most troubling, though, is the fact that even after this case was over the 150-day standard Appellant's record was left untouched, in a cubicle at the base legal office. Therefore, we find the delay in this case amounted to a due process violation, and that Appellant is entitled to relief. We provide such relief in our decretal paragraph.

Finally, we note that even if we had not found a due process violation, after considering the factors outlined in *Gay,* we would find that Appellant is entitled to *Tardif* relief in the same amount for the excessive post-trial delay. Here, we again are persuaded by the fact that the delay exceeded the standards set forth in *Livak* by over 200 days*;* the general lack of attention by the Government to the overall post-trial processing of this case; the lack of sufficient reasons for the delay; the harm to confidence in the military justice process due to extensive delay; the confidence this court can provide meaningful relief in this particular situation; and the fact that to grant relief is consistent with the dual goals of justice and good order and discipline.

B. Illegal Pretrial Punishment

1. Additional Background

Appellant contends that the military judge abused his discretion when he denied Appellant's motion for appropriate relief for illegal pretrial confinement based on erroneous findings of fact and overlooking important facts. Appellant specifically argues that he is entitled to relief for two reasons: (1) because he was not permitted to go outdoors while in pretrial confinement; and (2) because his restriction to base was tantamount to confinement based on the fact that for 154 days Appellant could not sleep in his own home, put his children to bed, or spend quality time with his wife. We do not find the military judge abused his discretion and find no relief is warranted.

2. Law

"The question of whether [an a]ppellant is entitled to credit for an Article 13[, UCMJ,] violation is reviewed de novo." *United States v. Fischer*, 61 M.J. 415, 418

(C.A.A.F. 2005) (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)). "It is a mixed question of law and fact, and the military judge's findings of fact will not be overturned unless they are clearly erroneous." *Id.* "Appellant bears the burden of proof to establish a violation of Article 13[, UCMJ]." *Id.*

Article 13, UCMJ, provides, "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him." Article 13, UCMJ, prohibits two types of actions: (1) the intentional imposition of punishment on an accused prior to trial, i.e., illegal pretrial punishment; and (2) "pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial, i.e., illegal pretrial confinement." *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003) (citing *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000) (additional citation omitted)).

The determination of whether pretrial restriction is tantamount to confinement is based on the totality of the conditions imposed by the restriction. *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003) (citation omitted). The CAAF has set forth criteria to consider when determining if pretrial restriction is tantamount to confinement:

> The nature of the restraint (physical or moral), the area or scope of the restraint (confined to post, barracks, room, etc.), the types of duties, if any, performed during the restraint (routine military duties, fatigue duties, etc.), and the degree of privacy enjoyed within the area of restraint. Other important conditions which may significantly affect one or more of these factors are: whether the accused was required to sign in periodically with some supervising authority; whether a charge of quarters or other authority periodically checked to ensure the accused's presence; whether the accused was required to be under armed or unarmed escort; whether and to what degree [the] accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available for the accused's use; the location of the accused's sleeping accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing).

Id. (alteration in original) (quoting *United States v. Smith*, 20 M.J. 528, 531–32 (A.C.M.R. 1985), *cited with approval in United States v. Guerrero*, 28 M.J. 223, 225 (C.M.A. 1989)).

3. Analysis

Appellant's first claim is based on the military judge's finding that there was a valid, weather-related reason as to why he was denied access outside during

certain periods of his pretrial confinement. Specifically, Appellant claims "the [m]ilitary [j]udge erred in basing his ruling on erroneous facts and a reasoning that a policy of general applicability to all persons in confinement can justify what amounted to punishment." Appellant claims that the military judge made a clearly erroneous finding of fact that the temperatures at Minot Air Force Base, North Dakota, were "well below zero" at times during Appellant's stay in confinement. The military judge was presented with evidence that when the temperature dropped to 32 degrees Fahrenheit, inmates were not allowed outside. The fact that temperatures during the winter in Minot at times were "well below zero" is a finding of fact "through reasonable inferences that the military judge could reach from testimony and other evidence that was presented on the motion." *United States v. Harris*, Misc. Dkt. No. 2020-07, 2021 CCA LEXIS 176, at *12 (A.F. Ct. Crim. App. 16 Apr. 2021) (unpub. op.).

The military judge stated on the record, "I know it can get cold up here," and received evidence about Appellant's crimes purchasing a snowblower, spread, and ice melt. Using his common knowledge of the local area, combined with logical inferences from the testimony, the military judge could aptly conclude that the temperatures fell "well below zero" at times during Appellant's stay in confinement. This finding is "fairly supported by the record." *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985) (quoting *United States v. Lonberger*, 459 U.S. 422, 432 (1983)). Ultimately, the military judge concluded that there was no evidence that Appellant's confinement conditions "were done for the purposes of punishment, nor is there evidence that those conditions were more rigorous than necessary to ensure [Appellant's] presence at trial." Appellant failed to meet his burden to establish entitlement to credit on this point and we concur with the military judge's finding that there was no intent to punish Appellant when he was denied outside access due to inclement weather.

Appellant's second claim is that the military judge abused his discretion when he found Appellant's 154-day restriction to base was not tantamount to confinement. Appellant's argument is that during this time he could not sleep in his own home, put his children to bed, or spend quality time with his wife.

According to the criteria set forth by the CAAF to consider when determining if pretrial restriction is tantamount to confinement, the only fact Appellant raises that potentially is a consideration is the location of his sleeping accommodations. In this case, while Appellant was not sleeping in his own home during pretrial restriction, there is no indication that his sleeping accommodations alone were somehow tantamount to confinement. The military judge recognized in his ruling denying Appellant's motion that Appellant could not sleep in his own home during this time but noted that Appellant's wife and children were free to visit him. The military judge did not find the conditions Appellant complained of amounted to

pretrial confinement. We agree and find Appellant has not met his burden to establish a violation of Article 13, UCMJ, and is not entitled to relief on this point.

C. Prosecutorial Misconduct

1. Additional Background

Appellant claims that trial counsel invoked the community when calling him a "complete stain" during pre-sentencing proceedings and that this was improper argument under *United States v. Voorhees*, 79 M.J. 5 (C.A.A.F. 2019). As the CAAF reiterated in *Voorhees*, "Disparaging comments are also improper when they are directed to the defendant himself," and "[t]rial counsel's word choice served as 'more of a personal attack on the defendant than a commentary on the evidence.'" *Id*. at 12 (first quoting *United States v. Fletcher*, 62 M.J. 175, 182 (C.A.A.F. 2005); and then quoting *Fletcher*, 62 M.J. at 183). Appellant further claims that trial counsel's comment that he was a "complete stain" is analogous to calling him a "pig" as the trial counsel did in *Voorhees*, which the CAAF said amounted to clear error, *id*. at 7–8, and that this improper argument has negatively affected him. We find any error did not result in material prejudice to a substantial right of Appellant.

2. Law

The issue of "[i]mproper argument is a question of law that we review de novo." *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011) (citation omitted). However, if trial defense counsel does not object to a sentencing argument by trial counsel, we review the issue for plain error. *Id.* (citing *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007)). To establish plain error, an appellant "must prove the existence of error, that the error was plain or obvious, and that the error resulted in material prejudice to a substantial right." *Id.* at 106 (citing *Erickson*, 65 M.J. at 223). Because "all three prongs must be satisfied in order to find plain error, the failure to establish any one of the prongs is fatal to a plain error claim." *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

"The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). Three factors "guide our determination of the prejudicial effect of improper argument: '(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction[s].'" *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (alteration in original) (quoting *Fletcher*, 62 M.J. at 184). "In applying the *Fletcher* factors in the context of an allegedly improper sentencing argument, we consider whether trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the appellant was sentenced on the basis of the evidence

alone." *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013) (alteration, internal quotation marks, and citation omitted).

"Trial counsel is entitled to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Frey*, 73 M.J. at 248 (internal quotation marks and citation omitted). "During sentencing argument, the trial counsel is at liberty to strike hard, but not foul, blows." *Halpin*, 71 M.J. at 479 (internal quotation marks and citation omitted). "[T]he argument by a trial counsel must be viewed within the context of the entire court-martial." *Baer*, 53 M.J. at 238. "The focus of our inquiry should not be on words in isolation, but on the argument as viewed in context." *Id.* (internal quotation marks and citations omitted).

When analyzing allegations of improper sentencing argument in a judge-alone forum, we presume a "military judge is able to distinguish between proper and improper sentencing arguments." *Erickson*, 65 M.J. at 225.

3. Analysis

As there was no objection during trial counsel's sentencing argument, we analyze this issue under a plain error standard of review. We need not determine whether trial counsel's sentencing argument constituted plain and obvious improper argument in this case as we ultimately find that Appellant has failed to demonstrate any material prejudice.

In testing for material prejudice, the first *Fletcher* factor considers the severity of the misconduct. 62 M.J. at 184. On this matter, we note that the "lack of a defense objection is some measure of the minimal impact of a prosecutor's improper comment." *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (internal quotation marks and citation omitted). Here, we find that the comment was minor and relatively insignificant. The comment was not the cornerstone of trial counsel's argument and we note the comment was made one time and did not appear anywhere on counsel's 16 slides used during argument. Ultimately, we find the comment had minimal impact, if any, on Appellant's sentence.

Regarding the second *Fletcher* factor—curative measures taken—no curative instruction was necessary because of the judge-alone forum. We note that military judges are presumed to know and follow the law, absent clear evidence to the contrary. *See United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) (per curiam) (citation omitted); *see also Erickson*, 65 M.J. at 225 (noting the presumption that a military judge is able to distinguish between proper and improper sentencing arguments). Appellant has presented no evidence that the military judge in this case was unable to distinguish between proper and improper sentencing argument.

As to the third *Fletcher* factor—the weight of the evidence supporting the sentence—we find this factor weighs heavily in the Government's favor. The evidence

in this case was strong and uncontested, as it came from Appellant's own admissions to the military judge during his guilty plea inquiry. Appellant admitted to attempting to steal $9,999.00, larceny, and 43 specifications of making, drawing, or uttering checks without sufficient funds. The military judge sentenced Appellant to a dishonorable discharge, confinement for 46 months, reduction to the grade of E-1, and a reprimand. The 46 months' confinement is significantly less than Appellant's maximum exposure. As noted *supra*, we further reduce Appellant's sentence for unreasonable delay in this case.

In conclusion, we find that Appellant has failed to meet his burden to demonstrate that any error resulted in material prejudice to a substantial right. After considering trial counsel's comments as a whole, we are confident that Appellant was sentenced based on the evidence alone. *See Halpin*, 71 M.J. at 480.

D. Appellate Review

This review is specific to the processing time starting when Appellant's case was first docketed with this court, as we have already addressed sentencing to docketing with this court *supra*. Subsequent to re-docketing, Appellant requested this court find he is entitled to special relief when there is both a speedy trial violation and unreasonable post-trial delay during the appellate process to address the effect of those two errors in combination. Appellant concedes "this is a question of first impression" and cites no law to support special relief in such circumstances, nor does he define special relief under these circumstances. We decline to make a finding on the effect of the combined delays and address the delay in appellate processing below.

1. Additional Background

Appellant's record of trial was originally docketed with this court on 30 July 2021. Appellant requested and was granted eight enlargements of time to file his assignments of error, over the Government's opposition, extending the deadline to file his brief until 25 June 2022.

On 24 June 2022, Appellant filed his brief setting forth issues with this court. In his brief, issue (2) asks whether the record of trial is incomplete because it is missing the military judge's ruling on one of the two legal issues the defense counsel specifically preserved for appellate review. Specifically, the record was missing the military judge's ruling on the Defense Motion for Speedy Trial. While the Government argued Appellant's requested remedy for correction was unwarranted, they acknowledged the record did not include the subject ruling. On 25 October 2022, this court remanded the record for correction, directing that the record be returned to the court not later than 14 November 2022 for completion of appellate review. *Lampkins*, order at *500 (*see* n.3 *supra*).

The corrected record was re-docketed with this court on 9 November 2022. Thereafter, on 9 January 2023, Appellant filed an additional brief with three

additional issues. On 8 February 2023, the Government filed their answer to Appellant's brief. On 31 January 2023, Appellant filed a Motion for Leave to File Demand for Speedy Appellate Review arguing that 30 January 2023 was the 18-month deadline for this court to issue a decision, thus triggering *Moreno's* presumption of facially unreasonable delay. The Government did not oppose. On 9 February 2023 we granted Appellant's motion by treating such motion as a "demand for speedy appellate review." On 15 February 2023, Appellant filed a Motion for Leave to File a Supplemental Assignment of Error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), which we denied on 24 February 2023.

2. Law

We review de novo an appellant's entitlement to relief for post-trial delay. *Livak*, 80 M.J. at 633 (citing *Moreno*, 63 M.J. at 135).

"[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *Moreno*, 63 M.J. at 135 (citations omitted). In *Moreno*, the CAAF established a presumption of facially unreasonable delay "where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals." *Id.* at 142.

Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker,* 407 U.S. at 530: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice [to the appellant]." *Moreno*, 63 M.J. at 135 (citations omitted). The CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) "particularized" anxiety and concern "that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;" and (3) impairment of the appellant's grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted).

Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362.

3. Analysis

Over 18 months have elapsed since Appellant's record of trial was originally docketed with this court. Assuming for purposes of our analysis that the October 2022 remand and November 2022 re-docketing of the record did not "reset" the *Moreno* timeline, there is a facially unreasonable delay in the appellate proceedings. In light of this assumption, we have considered the *Barker* factors and find no violation of Appellant's due process rights. Although Appellant asserted in a declaration attached to the record that the delay in his appeal negatively affected

him physically, mentally, socially, and hindered his ability to move on with his life, we have found his arguments uncompelling. We have found no material prejudice to Appellant's substantial rights stemming from the appellate process. We find his confinement has not been "oppressive" for purposes of our *Moreno* analysis. Furthermore, we find appellate review processing has not been so egregious as to adversely affect the perception of the military justice system.

The timeline in appellate processing is largely attributable to Appellant's requests for enlargements of time and additional filings. After this court re-docketed his case, Appellant was afforded the opportunity to submit additional issues, which he did on 9 January 2023. Before the Government had an opportunity to respond to Appellant's brief, on 31 January 2023, Appellant filed a Motion for Leave to File Demand for Speedy Appellate Review. On 8 February 2023, the Government filed their response to Appellant's brief. On 15 February 2023, Appellant motioned to supplement his two earlier briefs requesting this court accept an additional issue pursuant to *Grostefon*. This court denied that motion. Accordingly, we find no violation of Appellant's due process rights.

Furthermore, recognizing our authority under Article 66(d), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate in this case even in the absence of a due process violation. *See Tardif*, 57 M.J. at 225. After considering the factors enumerated in *Gay*, 74 M.J. at 742, we conclude that with respect to appellate review, no such relief is warranted.

III. CONCLUSION

We affirm only so much of the sentence that includes 46 months' confinement, a bad-conduct discharge, reduction to the grade of E-1, and a reprimand. The findings as entered, and the sentence as modified, are correct in law and fact, and no other error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings as entered and the sentence, as modified, are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **BRADLEY D. LAMPKINS,** United States Air Force *Appellant*	)	**MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERROR UNDER *GROSTEFON*** Before Panel No. 1 No. ACM 40135 (f rev) 15 February 2023

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

Pursuant to Rules 18(b) and 23(d) of this Honorable Court's Rules of Practice and Procedure, Appellant, Airman First Class (A1C) Bradley D. Lampkins, personally moves for leave to file a Supplemental Assignment of Error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Pursuant to Rule 23(d), A1C Lampkins' motion for leave to file is combined with the underlying Supplemental Assignment of Error, which is attached as Appendix A. As good cause for this motion, A1C Lampkins relies on his ability to benefit from changes to the law during the pendency of his appeal and the recent legal developments at the Supreme Court and the United States Court of Appeals for the Fifth Circuit.

A1C Lampkins filed his initial Brief on 24 June 2022. The day before filing, the Supreme Court issued its decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, which held that the Second and Fourteenth Amendments protected an individual's right to carry a handgun for self-defense outside the home. 142 S. Ct. 2111, 2117 (2022). After this Court remanded A1C Lampkins' case for the Government re-docketed the case, A1C Lampkins filed his additional Brief on . The Government provided its Answer on 8 February 2023.

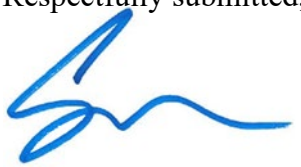
DENIED
24 FEB 2023

Notably, on 2 February 2023, the Fifth Circuit decided *United States v. Rahimi*, holding that 18 U.S.C.S. § 922(g)(8) was unconstitutional because the Government failed to demonstrate that § 922(g)(8)'s domestic violence restriction of the Second Amendment fit within the Nation's historical tradition of firearm regulation. 2023 U.S. App. LEXIS 2693, at *28 (5th Cir. Feb. 2, 2023). This decision is the good cause that A1C Lampkins is relying on to file this Supplemental Assignment of Error. Although *Bruen* was decided before his second brief was filed, the ramification of *Bruen* and how it could affect A1C Lampkins' rights was not fully known to him until the Fifth Circuit issued *Rahimi* on 2 February 2023.

A1C Lampkins has met the requirement of good cause given the fact that he is entitled to the benefit of changes in the law during the pendency of his direct appeal, coupled with the constitutional magnitude of the decisions discussed above. While Fifth Circuit precedent is not binding upon this Court, A1C Lampkins anticipates *Bruen* and *Rahimi* will spur additional changes in the law that may affect his rights. A1C Lampkins recognizes the delays in appellate review he has suffered to this point. If the Court grants this motion, he understands the additional delay may be held against him for speedy appellate review purposes.

WHEREFORE, A1C Lampkins respectfully requests this Honorable Court grant his motion and consider his Supplemental Assignment of Error.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 15 February 2023.

Respectfully submitted,

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APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), A1C Bradley Lampkins, Appellant, through Appellate Defense Counsel, personally requests that this Court consider the following matter:

IV.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN A1C LAMPKINS WAS CONVICTED OF NON-VIOLENT OFFENSES AND WHETHER THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021)?

Law and Analysis

The test for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government 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, 142 S. Ct. 2111, 2129-30 (2022) (citation omitted).

In applying this test, the Fifth Circuit recently held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.' Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated." *United States v. Rahimi*, No. 21-11001, 2023 U.S. App. LEXIS 2693, at *28 (5th Cir. Feb. 2, 2023) (citation omitted). Notably, Rahimi was "involved in five shootings" and pled guilty to "possessing a firearm while under a domestic violence restraining order." *Rahimi,* at *3.

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

The Fifth Circuit made two broad points. First, the Government's contention that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* limited their applicability to only "law-abiding, responsible citizens," is incorrect. *Rahimi* at *7. The Fifth Circuit's bottom line was:

> [T]he Government's argument fails because (1) it is inconsistent with *Heller*, *Bruen*, and the text of the Second Amendment, (2) it inexplicably treats Second Amendment rights differently than other individually held rights, and (3) it has no limiting principles.

Rahimi, at *8.

Second, and despite the violent nature of his offenses, the Fifth Circuit held that "The Government fails to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id*. at *27-28. If the Government failed to prove that our Nation's historical tradition of firearm regulation did not include violent offenders, then it certainly cannot prove that its firearm prohibition on A1C Lampkins' for non-violent offenses would be constitutional.

A further problem with the Statement of Trial results and Entry of Judgment is that the Government did not indicate which specific subsection of § 922 it relied on to find that A1C Lampkins fell under the firearm prohibition. Thus, A1C Lampkins is unable to argue which specific subsection of § 922 is unconstitutional in his case, although he knows it would not be the domestic violence or drugs section given the facts of his case. Regardless, given the non-violent nature of the facts of his case, and *Rahimi*'s holding, it appears that the Government would not be able to meet its burden of proving a historical analog that barred non-violent offenders from possessing firearms.

In *United States v. Lepore*, citing to the 2016 edition of the Rules for Courts-Martial, this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial

is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021). Despite the court martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760. However, this Court emphasized that, "To be clear, we do not hold that this court lacks authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority." *Id.*

Six months after this Court's decision in *Lepore*, the Court of Appeals for the Armed Forces (CAAF), decided *United States v. Lemire*. In that decision, CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." 82 M.J. 263, at n.* (C.A.A.F. 2022) (unpub. op.). The CAAF's direction that the Army Court of Criminal Appeals fix—or order the Government to fix—the promulgating order, is in contravention to this Court's holding in *Lepore*.

If logic follows, the CAAF's decision in *Lemire* reveals three things: First, the CAAF has the power to correct administrative errors in promulgating orders—even via unpublished decisions regardless of whether the initial requirement was a collateral consequence. Second, the CAAF believes that Courts of Criminal Appeals have the power to address collateral consequences under Article 66 as well since it "directed" the Army Court of Criminal Appeals to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCA's have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders even if the Court deems them to be a collateral consequence.

Additionally, *Lepore* is distinguishable from the case *sub judice*. In *Lepore*, this Court made clear that "All references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at n.1. This Court then emphasized "the mere fact that a firearms prohibition annotation, *not required by the Rules for Courts-Martial*, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." *Id.* at 763 (emphasis added). The new 2019 rules, however, contain language that both the Statement of Trial Results and the Entry of Judgment contain "Any additional information…required under regulations prescribed by the Secretary concerned." Rules for Courts-Martial (R.C.M.) 1101(a)(6); 1111(b)(3)(F). AFI 51-201, *Administration of Military Justice*, dated 8 April 2022, para 13.3 required the Statement of Trial results to include "whether the following criteria are met…firearm prohibitions." As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered. Even if this Court does not find this argument persuasive, it still should consider the issue under *Lepore* since this issue is not an administrative fixing of paperwork, but an issue of constitutional magnitude.

WHEREFORE, A1C Lampkins requests this Court find the Government's firearm prohibition is unconstitutional, overrule *Lepore* in light of *Lemire*, and order that the Government correct the Statement of Trial Results to reflect which subsection of § 922 it used to prohibit his firearm possession.

22 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Airman First Class (E-3) BRADLEY D. LAMPKINS, United States Air Force *Appellant.*	) **UNITED STATES' OPPOSITION TO**) **APPELLANT'S MOTION FOR LEAVE**) **TO FILE SUPPLEMENTAL**) **ASSIGNMENT OF ERROR**)) Before Panel No. 1)) No. ACM 40135 (f rev))) 22 February 2023

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

Pursuant to Rules 18(d), 18.4, and 23(c) of this Honorable Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for leave to file a supplemental assignment of error, dated 14 February 2023. Appellant fails to establish good cause to grant this motion, and it should be denied to reinforce this Court's rules on timeliness and to discourage further instances of piecemeal appellate litigation.

Rule 18(d) requires that "[a]ny brief for an accused shall be filed within 60 days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court." Consistent with Rule 18.4, this Court may permit supplemental filings "submitted by motion for leave to file in accordance with Rule 23(d)."[1] In United States v. Albarda, this Court required the appellant "to show good cause to warrant acceptance" of a motion for leave to file a supplemental assignment of error. 2021 CCA LEXIS 75, at *29 n.7 (A.F. Ct. Crim. App. 22 February 2021) (unpub. op.).

[1] Rule 23(d) states that "[a]ny pleading not authorized or required by these or Service Court rules shall be accompanied by a motion for leave to file such pleading."

Appellant seeks to supplement his initial assignments of errors by raising one additional assignment of error[2] arguing that the federal statute prohibiting his possession of a firearm is unconstitutional. (Motion for Leave to File, dated 15 February 2023.) Appellant moves this Court to consider the additional assignment of error 235 days after his initial filing and 22 days after submitting his additional brief when this Court re-docketed his case. For good cause, Appellant cites the Fifth Circuit's recent decision in United States v. Rahimi, 2023 U.S. App. LEXIS 2693, __ F.4th __ (5th Cir. 2 February 2023). (Id.) Appellant further argues that this opinion "will spur additional changes in the law that may affect his rights." (Id.)

Rahimi is not relevant to Appellant's assignment of error. In Rahimi, a Fifth Circuit panel struck down 18 USC § 922(g)(8) as unconstitutional under the Second Amendment. Id. at *1. The statute at issue in Rahimi, 18 USC § 922(g)(8), prohibits the possession of firearms by someone subject to a domestic violence restraining order. Id. 18 USC § 922(g)(8). Here, Appellant was never subject to a domestic violence restraining order. Therefore, § 922(g)(8) is inapplicable. Instead, Appellant's firearm restriction stems from the felon restriction in § 922(g)(1) which makes it unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year."

Courts that have addressed Rahimi since it was decided have consistently made clear the Fifth Circuit's holding is limited to the domestic violence restraining order part of the statute and does not extend to other portions of statute, like the felon restriction:

> Defendant filed Rahimi as supplemental authority in this case, arguing it supports her position. The Court disagrees. Rahimi struck down § 922(g)(8), which is quite dissimilar from § 922(g)(3). § 922(g)(8) prohibits firearm possession by individuals subject to domestic violence restraining orders based on their threat to a

[2] Appellant raises this supplemental assignment of error personally, pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

> specific individual, and not a defined class of persons based on their danger to society writ large (such as the felon restriction). As noted above, Rahimi actually endorses the latter type of restrictions as consistent with the historical record. As § 922(g)(3) resembles the latter type of restrictions, the findings in Rahimi support the constitutionality of the statute at issue in this case.

United States v. Posey, No. 2:22-CR-83 JD, 2023 U.S. Dist. LEXIS 22005, at *24 n.7 (N.D. Ind. 9 February 2023).

> [T]he Court in Rahimi, in the same paragraph, seemingly acknowledged that the 'law-abiding citizen' language used in Heller and then Bruen *did* mean to exclude 'groups that have historically been stripped of their Second Amendment rights' by 'longstanding prohibitions on the possession of firearms by felons and the mentally ill.

United States v. Price, No. 21 CR 164, 2023 U.S. Dist. LEXIS 23794, at *9 (N.D. Ill. 13 February, 2023).

In sum, Rahimi recognized that the right to keep and bear arms is subject to reasonable restriction, including the felon restriction. Id. This is consistent with Supreme Court precedent that has rejected Second Amendment challenges to "longstanding prohibitions on the possession of firearms by felons." District of Columbia v. Heller, 554 U.S. 570, 573 (2008). Therefore, Rahimi does not apply to Appellant's case and his justification for the late filing fails.

Moreover, Rahimi is not binding authority and was only decided by a panel of the Fifth Circuit, as opposed to *en banc*.[3] Therefore, this Court should not accept Appellant's untimely filing that relies exclusively on a singular case of limited persuasion that addresses an inapplicable portion of the firearm statute.

[3] "And the likelihood that the Fifth Circuit will rehear Rahimi *en banc* cannot be ignored." United States v. Gleaves, No. 3:22-cr-00014, 2023 U.S. Dist. LEXIS 20328, at *9 n.3 (M.D. Tenn. Feb. 6, 2023).

The Court should discourage this type of piecemeal litigation, which unduly delays appellate review. This is especially true in Appellant's case where he has already demanded speedy appellate review. The Army Court of Criminal Appeals, when determining "whether to provide relief for a new claim not raised during an earlier appeal from the same appellant" recently held that in second and successive appeals relief will only be provided if the appellant can show both good cause for failing to raise the claim in the prior appeal and actual prejudice resulting from the newly raised assignment of error. United States v. Steele, 82 M.J. 695 (A. Ct. Crim. App. 2022) *pet. granted*, No. 22-0254/AR, 2022 CAAF LEXIS 780 (C.A.A.F. 2 November 2022).

This Court applies that rationale for cases on remand but should apply the same analysis for supplemental assignments of error. United States v. Shavrnoch, 47 M.J. 564, 569 (A.F. Ct. Crim. App. 1997). While the rules do permit this Court to consider supplemental pleadings; allowing Appellant to submit a supplemental assignment of error, while simultaneously demanding speedy trial, creates an exception that swallows the rule and encourages untimely filings.

For this reason, the United States respectfully requests this Honorable Court deny Appellant's motion for leave to file his supplemental assignment of error.

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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 22 February 2023 via electronic filing.

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United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Douglas G. Lara,
Appellant

USCA Dkt. No. 25-0163/AF
Crim.App. No. 40247

ORDER DENYING PETITION

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 17th day of July, 2025,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Herbers)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40247 (reh)

UNITED STATES
Appellee

v.

Douglas G. LARA
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 17 March 2025

Military Judge: Pilar G. Wennrich.

Sentence: Sentence adjudged 30 April 2024 by GCM convened at Hurlburt Field, Florida. Sentence entered by military judge on 20 May 2024: Bad-conduct discharge, 6 months of confinement, and reduction to E-1.

For Appellant: Major Nicole J. Herbers, USAF; Captain Joyclin N. Webster, USAF.

For Appellee: Lieutenant Colonel Jenny A. Liabenow, USAF; Captain Morgan L. Brewington, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, RAMÍREZ, and GRUEN, *Appellate Military Judges*.

Judge RAMÍREZ delivered the opinion of the court, in which Chief Judge JOHNSON and Judge GRUEN joined.

RAMÍREZ, Judge:

This case is before us a second time. Originally, on 27 September 2021, a military judge found Appellant guilty, in accordance with his pleas and pursuant to a plea agreement, of one specification of attempted viewing of child pornography, on divers occasions, in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880, and one specification of willful dereliction of duty, on divers occasions, for failing to refrain from storing, processing, displaying, and transmitting pornography, sexually explicit material, or sexually oriented material while on duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892.[*] The military judge sentenced Appellant to a bad-conduct discharge and confinement for 12 months.

On 10 April 2023, we found that Appellant's pleas of guilty were not knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. *United States v. Lara*, No. ACM 40247, 2023 CCA LEXIS 160, at *19 (A.F. Ct. Crim. App. 10 Apr. 2023) (unpub. op.). We ultimately set aside the findings of guilty as to all charges and specifications and the sentence and authorized a rehearing. *Id.* We then reconsidered our decision, withdrew the prior opinion, and issued another opinion. *United States v. Lara*, No. ACM 40247, 2023 CCA LEXIS 267, at *3 (A.F. Ct. Crim. App. 28 Jun. 2023) (unpub. op.). For the same reason, we set aside the findings of guilty as to all charges and specifications and the sentence and authorized a rehearing. *Id.* at *3, 22.

A rehearing was held on 30 April 2024, at which a military judge found Appellant guilty, in accordance with his pleas and pursuant to a plea agreement, of one specification of attempted viewing of child pornography, on divers occasions, in violation of Article 80, UCMJ, and one specification of willful dereliction of duty, on divers occasions, for failing to refrain from storing, processing, displaying, and transmitting pornography, sexually explicit material, or sexually oriented material while on duty, in violation of Article 92, UCMJ. The military judge sentenced Appellant to a bad-conduct discharge, confinement for six months, and reduction to the grade of E-1. The convening authority took no action on the findings, but did grant relief as to the sentence in the form of suspending the reduction in grade and waiving the automatic forfeitures for the benefit of Appellant's dependents.

Appellant now raises two issues on appeal: (1) whether Appellant's plea to attempted viewing of child pornography was improvident, and (2) whether Appellant's post-trial processing was improperly completed when the staff

[*] All references in this opinion to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

judge advocate found 18 U.S.C. § 922 applied to his offenses. We have carefully considered this second issue and find that it does not require discussion or relief. *See United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)); *see also United States v. Vanzant*, 84 M.J. 671, 681 (A.F. Ct. Crim. App. 2024) (holding the 18 U.S.C. § 922 firearm prohibition notation included in the staff judge advocate's indorsement to the entry of judgment is beyond a Court of Criminal Appeals' statutory authority to review), *rev. granted*, __ M.J. __, No. 24-0182/AF, 2024 CAAF LEXIS 640 (C.A.A.F. 17 Oct. 2024).

As to the remaining appellate issue, we find no error materially prejudicial to Appellant's substantial rights, and we affirm the findings and sentence.

I. BACKGROUND

Appellant was charged with attempting to view child pornography. Specifically, the Government alleged that between on or about 18 March 2019 and on or about 18 December 2019, at or near Navarre, Florida, on divers occasions, Appellant attempted to view child pornography; to wit, entering known "child-exploitable terms" in Internet search engines to view images of a minor, or what appears to be a minor, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces. Appellant admitted doing this in his stipulation of fact and in the factual inquiry of his plea. The stipulation of fact also includes documentation of searches such as "teen nude selfie" during the charged timeframe.

According to Appellant, on several occasions between 18 March 2019 and 18 December 2019, he would enter search terms into Internet search browsers such as "biker girls, teen nude selfie, and tiny." He would type those terms into a search engine or in the web browser to make thumbnails. He would then attempt to make those thumbnails larger to view. Appellant would also attempt to visit related websites, but these particular websites were blocked by his web browser.

The military judge defined sexually explicit conduct as "actual or simulated sexual intercourse or sodomy, [ ] including genital/genital, oral/genital, anal/genital, oral/anal, whether between persons of the same or opposite sex. Bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person." Appellant explained that the terms he entered were what he understood to be "child exploited" terms.

Appellant used terms to search pornography that he knew "could return images that were illegal and potentially child pornographic, but [he] entered them anyway." He "fully acknowledge[d] that while typing in those search terms and attempting to visit a website that potentially contained child exploitive material was wrong." He admitted that he had "no legal justification or excuse for the searches." He further admitted that "[his] actions of entering the terms and attempting to visit the websites were substantial steps made toward the commission of viewing child pornography."

Appellant told the military judge that upon reviewing the evidence with his counsel, he understood that "the images that were returned or that [he] was able to view, despite [his] efforts, were not child pornography." Nonetheless, he explained that "[n]o one forced [him] to attempt to view child pornography and [he] could have avoided such attempts if [he] wanted to." He also stated that his actions brought discredit upon the armed forces in that if a member of the public were to know that a military member attempted to access child pornography, "they would likely be upset and think less of the military because of these actions." Appellant also stipulated and admitted to the military judge that, during the same timeframe, he was derelict in the performance of his duties by failing to refrain from storing, processing, displaying, and transmitting pornography, sexually explicit, or sexually oriented material on government computer systems while on duty.

II. DISCUSSION

Appellant argues that his guilty plea to attempted viewing of child pornography was not provident for three reasons. First, he claims that neither the stipulation of fact nor his plea colloquy with the military judge established a substantial step toward the completion of the offense. Second, he claims that there was no independent intervening event that prevented the completion of the offense. Third, Appellant argues that his conduct was constitutionally protected and there was no "heightened inquiry into this protected conduct prior to the acceptance of his guilty plea." As explained below, we disagree.

A. Additional Background

During his providency inquiry, in response to follow-up questions by the military judge, Appellant once again admitted that he attempted to view child pornography on electronic devices. He told the military judge that he did this by "typing terms into search engines that [he] knew could possibly return images of children between the ages of 16 and teens to 18, so 16 to 18." When asked if Appellant intended to also view sexualized images of children

under the age of 18 years when he typed the words into the search engine, Appellant responded,

> Your Honor, when I typed in those terms I – I knew that what would be produced or returned is – would be teens that would appear to be under the age of 18. So, yes, Your Honor, it was my intention to look for teens that appeared under the age of 18.

The military judge then asked Appellant if he believed and admitted that his actions "were more than merely preparatory steps" and "clearly substantial steps made directly toward the commission of attempting to view child pornography." Appellant responded, "Yes, Your Honor." Appellant was then asked if he believed and admitted that his attempt would have been successful "but for the fact that his [I]nternet browser blocked the return of the results that [he was] seeking." Appellant answered, "Yes, Your Honor." The military judge then followed up by asking if Appellant believed and admitted that his attempt would have been successful but for that fact. Appellant again answered, "Yes, Your Honor."

Appellant stated that when he searched for what he anticipated would be child pornography, the Internet browser blocked the return of those sites. The military judge asked Appellant to describe what happened when his Internet browser blocked those sites. Appellant responded,

> Sometimes the page entirely would be blocked. It would show that – that the website contained pornographic material and that was the end of that action. Sometime if I was using digital images, the pictures, the thumbnails they would be either blurred out or just blank, and that's how they would be blocked.

The military judge then continued by clarifying that Appellant attempted to view child pornography on divers occasions where he believed that the search terms he typed "would return child pornographic images." Appellant agreed that he did that on multiple occasions.

Appellant concluded that the attempt to commit the offense was a freely made decision made on his part.

B. Law

Article 45(a), UCMJ, requires military judges to reject a plea of guilty if it appears that an accused "has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect." 10 U.S.C. § 845(a). "During a guilty plea inquiry[,] the military judge is charged with determining whether there is an adequate basis in law and fact to support

the plea before accepting it." *United States v. Forbes*, 78 M.J. 279, 281 (C.A.A.F. 2019) (citation omitted). "A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion." *United States v. Passut*, 73 M.J. 27, 29 (C.A.A.F. 2014) (citation omitted). Appellate courts grant military judges "significant discretion in deciding whether to accept an accused's guilty pleas." *United States v. Phillips*, 74 M.J. 20, 21 (C.A.A.F. 2015) (citation omitted).

"A ruling based on an erroneous view of the law constitutes an abuse of discretion." *Passut*, 73 M.J. at 29 (citation omitted). "The test for an abuse of discretion is whether the record shows a substantial basis in law or fact for questioning the plea." *Id.* (citation omitted). "The appellant bears the burden of establishing that the military judge abused that discretion, *i.e.*, that the record shows a substantial basis in law or fact to question the plea." *Phillips*, 74 M.J. at 21–22. A plea is provident so long as the appellant was convinced of, and described, all of the facts necessary to establish he is guilty of the crime at issue. *United States v. Murphy*, 74 M.J. 302, 308 (C.A.A.F. 2015).

"[A] substantial step must be conduct strongly corroborative of the firmness of the [accused's] criminal intent." *United States v. Byrd*, 24 M.J. 286, 290 (C.M.A. 1987) (citations omitted). To be found guilty of attempt, "the act must amount to more than mere preparation." *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011) (internal quotation marks omitted). "Accordingly, the substantial step must unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances." *Id.* (alteration in original) (internal quotation marks and citations omitted).

"An accused may be guilty of an attempt even though the commission of the intended offense was impossible because of unexpected intervening circumstances or even though the consummation of the intended offense was prevented by a mistake on the part of the accused." *United States v. LaFontant*, 16 M.J. 236, 238 (C.M.A. 1983).

"When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of critical significance." *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011) (internal quotation marks and citation omitted). "With respect to the requisite inquiry into the providence of a guilty plea . . . the colloquy between the military judge and an accused must contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior." *Id.* (citations omitted).

C. Analysis

We conclude that the military judge properly determined that there was an adequate basis in law and fact to support the plea before accepting it. The record does not show a substantial basis to question the providency of the plea. Appellant was convinced of, and described all of, the facts necessary to establish he was guilty of attempting to view child pornography. Finally, Appellant failed to establish that the military judge abused her discretion.

1. Substantial Step

Appellant's first argument is that neither the stipulation of fact nor his plea colloquy with the military judge established a substantial step toward the completion of the offense.

The military judge explained to Appellant that his actions must amount to a substantial step and a direct movement toward the commission of the intended offense. She continued that a "substantial step" is one that "is strongly corroborated [sic] of [his] criminal intent and is indicative of [his] resolve to commit the offense."

Appellant specifically stated, "I understand and admit that my actions of entering the terms and attempting to visit the websites were substantial steps made toward the commission of viewing child pornography." The military judge came back to this and asked Appellant if he believed and admitted that his actions were "more than merely preparatory steps" and "clearly substantial steps made directly toward the commission of attempting to view child pornography." Appellant told the military judge that they were. Therefore, regardless of what images "biker girls" or "tiny" would produce, it is clear that the substantial step was Appellant using the Internet search terms such as "teen nude selfie" and trying to visit particular websites with the intent of finding child pornography. We do not find merit in Appellant's claim that "[n]one of these search terms contain any words or descriptions that would return child pornography as none are linked to sexually explicit conduct nor to teens under the age of eighteen." We find no merit because he explained that he searched these terms with the intent of finding child pornography, even if it did not work. The searching "teen nude selfie" with Appellant's intent, alone, meets the test under the circumstances of this case.

Finally, Appellant's associated argument that there were no search terms for child pornography in the charged timeframe is not supported by the evidence. One attachment to the stipulation of fact was the Computer Examination of Media memorandum from the Department of Homeland Security which discovered Appellant's computer searches. This document included searches such as "teen nude selfie" on more than one occasion on 10 April 2019, which is during the charged timeframe.

2. Independent Intervening Event

Appellant claims that there was no independent intervening event that prevented the completion of the offense. Here, the military judge addressed this very issue. Appellant explained that when he searched for what he anticipated would be child pornography, the Internet browser blocked the return of those sites. The military judge asked Appellant to describe what happened when this occurred. Appellant explained that "[s]ometimes" an entire page would be blocked, or when "using digital images, the pictures, the thumbnails they would be either blurred out or just blank, and that's how they would be blocked." Here, the independent intervening event was the Internet blocking services that would trigger when he searched for would-be child pornography. Appellant is guilty of attempting to view child pornography even though the commission of his intended offense was impossible because of the intervening circumstances of the Internet blocking services. *See LaFontant*, 16 M.J. at 238 (C.M.A. 1983).

Appellant admitted that he could have avoided the attempt to commit the offense and by attempting to commit the offense, he made this decision freely, without coercion or force by anyone else.

3. Constitutionally Protected Activity

Third, Appellant argues that his conduct was constitutionally protected and there was no "heightened inquiry into this protected conduct prior to the acceptance of his guilty plea." He does not, however, provide any legal support for why or how his conduct was protected. Instead, he makes conclusions such as, "[T]he Government charged [Appellant] with an attempt to view child pornography based on search terms which could return child erotica, which is not sufficiently lascivious to meet the legal definition of sexually explicit conduct." Appellant did not have a constitutional right to view child pornography. *See United States v. Williams*, 553 U.S. 285, 288 (2008) ("We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment."). Appellant told the military judge he was searching for pornography and *intended* "to look for teens that appeared under the age of 18." The mere fact that Appellant expected his searches to identify legal pornography of 18- or 19-year-olds as well as unlawful images of individuals under 18 years of age does not confer constitutional protection over those searches. Unlike *United States v. Moon*, cited by Appellant, this is not a case where the Government prosecuted "conduct that is constitutionally protected in civilian society" on the grounds that it was nevertheless prejudicial to good order and discipline or of a nature to bring discredit on the armed forces in violation of Article 134, UCMJ, 10 U.S.C. § 934. 73 M.J. 382, 388 (C.A.A.F.

2014) (quoting *United States v. Barberi*, 71 M.J. 127, 131 (C.A.A.F. 2012) (citations omitted)).

Next, Appellant claims that "based on [Appellant's] colloquy, it is clear he did not understand the line between prohibited and permissive behavior." The evidence shows otherwise. Appellant made clear that the terms he used were terms that he knew to search pornography that "could return images that were illegal and potentially child pornography, but [he] entered them anyway." He specifically told the military judge, "While it is not easy for me to admit, I fully acknowledge that me typing in those search terms and attempting to visit a website that potentially contained child exploitive material was wrong."

We are not convinced that Appellant searching for "teen nude selfie" or trying to visit other similar websites is constitutionally protected. Again, Appellant has not met his burden of establishing that the military judge abused her discretion in accepting his plea of guilty.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *See* Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40247

UNITED STATES
Appellee

v.

Douglas G. LARA
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 28 June 2023

Military Judge: Matthew N. McCall.

Sentence: Sentence adjudged 27 September 2021 by GCM convened at Hurlburt Field, Florida. Sentence entered by military judge on 28 October 2021: Bad-conduct discharge and 12 months of confinement.

For Appellant: Major Stuart J. Anderson, USAF; Major Nicole J. Herbers, USAF.

For Appellee: Lieutenant Colonel Thomas J. Alford, USAF; Major Deepa M. Patel, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, RAMÍREZ, and GRUEN, *Appellate Military Judges*.

Judge RAMÍREZ delivered the opinion of the court, in which Chief Judge JOHNSON and Judge GRUEN joined.

RAMÍREZ, Judge:

A military judge found Appellant guilty, in accordance with his pleas and pursuant to a plea agreement, of one specification of attempt to view child pornography in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880, and one specification of willful dereliction of duty for failing to refrain from storing, processing, displaying, and transmitting pornography, sexually explicit material, or sexually oriented material while on duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892.[1]

Appellant's plea agreement provided, among other things, that two originally charged specifications would be withdrawn and dismissed with prejudice and there would be a minimum and a maximum sentence that could be adjudged.[2] It also stated, among other things, that the sentence would not include a dishonorable discharge. The military judge sentenced Appellant to a bad-conduct discharge and 12 months of confinement for the attempt to view child pornography specification and 2 months for the willful dereliction of duty specification, with the terms of confinement to run concurrently. The convening authority took no action on the findings or the sentence.

Appellant raised four issues on appeal which we reworded as follows: (1) whether Appellant received ineffective assistance of counsel regarding sex offender registration requirements; (2) whether the military judge abused his discretion when he accepted Appellant's guilty plea despite the information he received concerning sex offender registration requirements; (3) whether Appellant's guilty plea to attempted viewing of child pornography was improvident; and (4) whether Appellant's guilty plea to willful dereliction of duty was improvident.

On 10 April 2023, we issued an unpublished opinion where we found that Appellant's pleas of guilty were not knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. We ultimately set aside the findings of guilty as to all charges and specifications as well as the sentence and authorized a rehearing. *United States v. Lara*, No. ACM 40247, 2023 CCA LEXIS 160, at *19 (A.F. Ct. Crim. App. 10 Apr. 2023) (unpub. op.).

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[1] All references in this opinion to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] The plea agreement stated that for the attempt to view child pornography offense, Appellant would be sentenced to a minimum of 12 months of confinement and a maximum of 18 months of confinement. It also stated that for the dereliction of duty offense, Appellant would be sentenced to a minimum of one month of confinement and a maximum of six months of confinement. Finally, it stated that any adjudged periods of confinement would run concurrently.

On 10 May 2023, the Government filed a motion for reconsideration. Appellant filed his opposition on 17 May 2023, and after considering the opposing filings, we granted the motion for reconsideration.

After reconsideration, we withdraw the prior opinion and issue this opinion to address what the Government refers to as this court's "misapprehension" concerning federal sex offender requirements. We again find that Appellant's pleas of guilty were not knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences, and we set aside the findings of guilty as to all charges and specifications as well as the sentence and authorize a rehearing.

I. BACKGROUND

Appellant stipulated that between March 2019 and December 2019, on multiple occasions, he attempted to view child pornography on his personally owned communication systems and equipment. Appellant further stipulated that, during the same timeframe, he was derelict in the performance of his duties in that he willfully failed to refrain from storing, processing, displaying, and transmitting pornography, sexually explicit material, or sexually oriented material on government computer systems while on duty. Specifically, Appellant told the military judge he was viewing adult pornography on his government computer, at work, in an attempt to prevent his wife from catching him viewing pornography on his home computer after she installed software on the home computer for that purpose. According to Appellant, he would look at pornography at work in an effort to "get away with it."

Appellant was represented by two military trial defense counsel who assisted Appellant in negotiating a plea agreement with the convening authority. The plea agreement was signed by all parties on 13 September 2021. On 24 September 2021, Appellant and his trial defense counsel signed a memorandum, which was prepared by both defense counsel.[3] The memorandum concerns sex offender registration. In relevant part, it provides:

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[3] During the pendency of his appeal, Appellant filed a declaration and attachments with this court to support his allegations of ineffective assistance. In response to an order from this court, trial defense counsel, Major CB and Captain ET, provided responsive declarations as well as attachments, including the memorandum evidencing the advice. We considered Appellant's declaration, the declarations of trial defense counsel, and the attachments to resolve the claim of ineffective assistance of counsel. *See United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020) (noting with approval that Courts of Criminal Appeals have considered declarations "when necessary for resolving claims of ineffective assistance of trial defense counsel").

> You have been charged with attempting to view child pornography, a violation of Article 80 of the UCMJ. [Department of Defense Instruction (DODI)] 1325.7[4] requires Department of Defense officials to notify state and local law enforcement agencies, if you are found guilty of the charged offense. Additionally, if you are found guilty of a lesser included offense that is listed in DODI 1325.7, notification will also be required. If you are convicted of any offense listed in DODI 1325.7 you may be required to register as a sex offender in your state of residence.

The memorandum further contains an indorsement from Appellant which provides:

> I, [Appellant], have read DODI 1325.7, Appendix 4 to Enclosure 2: Listing Offenses Requiring Sex Offender Processing. [Major CB] and [Captain ET] have informed me orally and in writing that I may be required to register as a sex offender if I am found guilty of any offense listed in DODI 1325.7, Appendix 4 to Enclosure 2. I fully understand if I plead guilty to, or I am found guilty of, any offense listed in DODI 1325.7, Department of Defense officials will notify state and local authorities of my conviction and I may be required to register as a sex offender. I fully understand that if I am required to register as a sex offender, I must comply with all sex offender registration laws and I may be subject to criminal prosecution if I fail to comply with all sex offender registration laws.

Three days later, on 27 September 2021, at Appellant's court-martial and prior to accepting Appellant's guilty pleas, the following exchange occurred on the record:

> MJ [Military Judge]: So as to sex offender reporting and registration requirements, the court's reading of DoD Instruction[ ] 1325.07, [A]ppendix 4 of [E]nclosure 2, this offense does not require sex offender reporting and registration. Government, what is the [G]overnment's position?
>
> TC [Trial Counsel]: Your Honor, that is the [G]overnment's understanding as well.
>
> MJ: And understanding that this is the federal rule, [D]efense, I believe that you have already discussed this with your client?

---

[4] Department of Defense Instruction (DoDI) 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole* (11 Mar. 2013, incorporating Change 4, 19 Aug. 2020). DoDI 1325.07 is also sometimes listed as DoDI 1325.7.

> DC [Area Defense Counsel]: Yes, Your Honor, out of an abundance of caution with regard to the state rules, we did discuss the possibility of sex offender registration.
>
> MJ: Okay. But just to make sure that it is clear, although that's -- it's impossible to say what some state authority might decide, you agree with the court's and the [G]overnment's interpretation that this offense that [Appellant] is pleading guilty to does not require sex offenses [sic] registration and reporting?
>
> DC: That is correct, Your Honor.
>
> MJ: So [Appellant], at this time -- well hold on while your counsel are talking.
>
> CDC [Circuit Defense Counsel]: Could we have just a moment, Your Honor?
>
> MJ: Sure, let's go ahead and we will slow things down. We are moving quite [along] this morning, so let's go ahead and take a recess and then we will come back on the record when you're ready to go forward. Court is in recess.

After a recess, the following exchange ensued:

> MJ: Please be seated. Court is called [to] order. Parties are again present. All right, I believe where we left off, [Appellant] take a moment now and consult again with your defense counsel and tell me whether you still want to plead guilty. So take your time and talk with them.
>
> [The accused conferred with his counsels.][5]
>
> MJ: Do you still want to plead guilty?
>
> ACC [Appellant]: Yes, Your Honor.

Part of trial defense counsel's declaration to this court provides more insight as to what occurred during the colloquy. Major CB's declaration states:

> When the [m]ilitary [j]udge asked Defense specifically if advisement was required . . . a strategic decision was made that alerting the [c]ourt to a loophole, *would not* be in [Appellant]'s best interest, but would in fact be the opposite. If there was a loophole, an error in DODI 1325.7, or an error in the [m]ilitary [j]udge's reading of the requirements for such advisements, Defense was not going, to the detriment of our client, bring that to

[5] This bracketed comment is contained in the certified transcript of Appellant's court-martial.

> the [c]ourt's attention. This strategy did not change the advice to [Appellant], nor did it change the substance of the advice and the consequences of which [Appellant] was advised that he could face as a product of his plea of guilty.

Shortly after the colloquy above, trial counsel asked to address the issue again.

> CTC [Circuit Trial Counsel]: Your Honor, I apologize for interrupting. So just one point of clarification, earlier you had asked [Appellant] about reporting requirements of the DoDI?
>
> MJ: Yes.
>
> CTC: And just to make sure it is clear on the record that the [G]overnment's understanding that that instruction merely indicates what sort of offenses the federal government will actively report to the state. Not necessarily what a particular state's individual reporting requirements may be. And it is our understanding that the [D]efense has advised [Appellant] that even under the terms of the plea agreement, it is potentially possible that he may have to register given whatever law of the state that he may end up residing in.
>
> MJ: Sure. So did we -- so did you give that advice in writing, [D]efense?
>
> CDC: Your Honor, we did give that advice in writing. [Appellant] has been advised that a state may have different requirements than the federal and that this is based off of DoD reporting and federal reporting, [ ] *we have advised as you have*.
>
> MJ: Okay. Do you want to make that an Appellate Exhibit, if you have that advice or?
>
> CDC: Your Honor, our advice is tied to another legal document that's attorney[-]client privileged. Unless -- I don't think . . .
>
> MJ: We don't make it -- I mean, you have put it on the record that you gave that advice.
>
> CDC: Certainly.
>
> MJ: And you understand that, [Appellant], that every state is different? When we talk about sex offender reporting and registration requirements, we are discussing on the federal level what the military would put on the confinement order and would report. *And it doesn't meet the federal requirements when it comes to the military*, but we can't necessarily say what effect it might have in every state.

ACC: Yes, Your Honor.

(Omission in original) (emphasis added).

After Appellant's court-martial, the staff judge advocate prepared the first indorsement to the "[S]tatement of [T]rial [R]esults," which states that sex offender notification is not required in accordance with DoDI 1325.07.

When Appellant was released from confinement, he received a document entitled, "United States Probation System Offender Notice and Acknowledgment of Duty to Register as a Sex Offender." This document explains Appellant's duty to register as a sex offender, under one of three tiers, pursuant to the Sex Offender Registration and Notification Act of 2006 (SORNA) codified at 34 U.S.C. § 20901, *et seq*. The document further explains that a specific state's requirements may be different than that provided pursuant to 34 U.S.C. § 20901, *et seq*.

However, Appellant claims in his declaration that "[p]rior to [his] offer to enter into a plea agreement, [he] was advised by [his] trial defense counsel that [he] would not have to federally register for Attempt to view Child Pornography." Appellant continues that he told "trial defense counsel about [his] concerns about sex offender registration requirements prior to the offer to plead guilty." Appellant then states that "[a]t the time that [he] entered into that agreement and when [he] was at [his] court-martial, it was [his] understanding that [he] did not have to federally register."

Regarding the military judge, Appellant claims in his declaration that the "military judge at [his] trial advised [him] on the record that this offense did not require federal registration."

Appellant explains that he "understood that [his] federal conviction and potential sex offender registration requirements imposed by various [s]tates would impact where [he and his family] could live and what jobs [he] could do." Appellant claims prejudice, arguing he "did not know [he] would have to federally register, which now makes any location or job search more difficult." Additionally, Appellant claims that his "concern for [his] minor children and being able to provide for them is documented in both [his] oral and written unsworn statement, which [he] conferred on with [his] trial defense counsel."

Appellant concludes his declaration stating: "I would not have [pleaded] guilty nor entered into a plea agreement if I knew I would have to federally register for attempt to view child pornography."

II. DISCUSSION

A. Law

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Riley*, 72 M.J. 115, 119 (C.A.A.F. 2013) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)). "An abuse of discretion occurs when there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Id.* (internal quotation marks omitted).

A guilty "plea is more than an admission of past conduct; it is [an accused]'s consent that judgment of conviction may be entered without a trial -- a waiver of his right to trial before a jury and judge." *Riley*, 72 M.J. at 120 (internal quotation marks and citation omitted). Such waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* (internal quotation marks and citation omitted). Sex offender registration requirements are some of those relevant circumstances and likely consequences. *See id.* at 121 ("[W]e hold that in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea.").

Trial "defense counsel must inform the accused of [sex offender registration] consequences, but it is the military judge who bears the ultimate burden of ensuring that the accused's guilty plea is knowing and voluntary." *Id.* at 122.

There are three different, but interrelated, aspects of sex offense registration pertinent to this case: (1) the federal statute (34 U.S.C. § 20901, *et seq.*) (SORNA) which requires mandatory sex offender registration for those who are convicted of offenses within the statute's scope; (2) DoDI 1325.07 which identifies offenses that trigger mandatory sex offender reporting; and (3) state laws concerning registration for qualified sex offenses. *See United States v. Miller*, 63 M.J. 452, 459 (C.A.A.F. 2006); *United States v. Torrance*, 72 M.J. 607, 611–12 (A.F. Ct. Crim. App. 2013).

"[T]rial defense counsel should inform an accused prior to trial as to any charged offense listed on the DoD Instr[uction] 1325.7 [ ]: Listing Of Offenses Requiring Sex Offender Processing." *Miller*, 63 M.J. at 459 (citation omitted). Additionally, trial "defense counsel must be aware of the federal statute that requires mandatory reporting and registration for those who are convicted of offenses within the statute's scope, as well as DoDI 1325.7, which identifies offenses that trigger mandatory sex offender reporting." *Torrance*, 72 M.J. at 611–12 (internal quotation marks, brackets, and citation omitted.) "Trial defense counsel should also state on the record of the court-martial that counsel has complied with this advice requirement." *Miller*, 63 M.J. at 459. "While failure to so advise an accused is not per se ineffective assistance of counsel, it will

be one circumstance [an appellate c]ourt will carefully consider in evaluating allegations of ineffective assistance of counsel." *Id*. However, "[g]iven the plethora of sexual offender registration laws enacted in each state, it is not necessary for trial defense counsel to become knowledgeable about the sex offender registration statutes of every state." *Id.*

The federal statute (SORNA) directs the creation of the National Sex Offender Registry. 34 U.S.C. § 20921(a). The federal statute also specifically states that a sex offender must register in each jurisdiction where he resides, where he is an employee, and where he is a student. 34 U.S.C. § 20913(a). This requirement applies to military members regardless of whether their court-martial resulted in confinement or not. 34 U.S.C. § 20931(1)(A)–(B). An official must provide the sex offender with a form that provides him with the duties and responsibilities necessary to register pursuant to SORNA. 34 U.S.C. § 20919(a)(1)–(3). If serving confinement, the sex offender must register before completing his sentence. 34 U.S.C. § 20913(b)(1). The statute defines "sex offender" as "an individual who was convicted of a sex offense," and provides several meanings of a "sex offense," to include "a military offense specified by the Secretary of Defense," 34 U.S.C. § 20911(1), (5)(A)(iv), and "a criminal offense that is a specified offense against a minor," 34 U.S.C. § 20911(5)(A)(ii). In turn, the term "specified offense against a minor" includes possession of child pornography or "[a]ny conduct that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(7)(G), (I). Our superior court has recognized that "[c]hild pornography is a continuing crime" against the depicted child. *United States v. Barker*, 77 M.J. 377, 381 (C.A.A.F. 2018) (citing *Paroline v. United States*, 572 U.S. 434, 440 (2014)) (additional citation omitted). Moreover, an "attempt" to commit a sex offense as defined by the statute is itself a sex offense for purposes of SORNA. 34 U.S.C. § 20911(5)(A)(v).

A military judge has a duty to ensure that trial defense counsel has complied with their obligation to advise an accused concerning sex offender registration requirements. *Riley*, 72 M.J. at 122. The Military Judges' Benchbook "simply instruct[s] the military judge to ensure that defense counsel [has] complied" with our superior court's requirements for advice regarding sex offender registration requirements. *Id*. This is "clearly consistent with a military judge's responsibilities while conducting a plea inquiry." *Id*. "Given the lifelong consequences of sex offender registration, which is a particularly severe penalty," a military judge's failure to ensure an appellant understood the sex offender registration requirements of his guilty plea may result in a substantial basis to question the providence of an appellant's plea. *Id*. (internal quotation marks and footnote omitted).

In order to determine whether an appellant's plea was knowing and voluntary, or whether trial defense counsel were ineffective on such a matter, we look to the record of trial. *Id*. at 120; *see also United States v. Jessie*, 79 M.J.

437, 442 (C.A.A.F. 2020) (noting Courts of Criminal Appeals may consider declarations "when necessary for resolving claims of ineffective assistance of trial defense counsel"). However, "[d]etermining whether a plea is voluntary is by no means an exact science." *United States v. Perron*, 58 M.J. 78, 85 (C.A.A.F. 2003).

"The remedy for finding a plea improvident is to set aside the finding based on the improvident plea and authorize a rehearing." *Riley*, 72 M.J. at 122 (citations omitted).

B. Analysis

As we explained above, there are three different, but interrelated, aspects of sex offense registration pertinent to this case: the federal statute, 34 U.S.C. § 20901, *et seq*. (SORNA); DoDI 1325.07; and state laws concerning registration. *See Torrance*, 72 M.J. at 611–12. Appellant takes issue with the statutory federal registration requirements. There is nothing in (1) trial defense counsel's "Offenses Requiring Sex Offender Processing Advisement," (2) Appellant's indorsement, or (3) the trial transcript indicating that Appellant was ever notified that he may have to register as a sex offender under 34 U.S.C. § 20901, *et seq.*, the federal statutory registration requirements.

Further, during the court-martial, the military judge conducted his own legal analysis of the sex offender registration requirement "on the federal level" only, by way of "what the military would put on the confinement order and would report," because as he explained to Appellant and his trial defense counsel, "every state is different." The military judge told Appellant that Appellant's offense "doesn't meet the federal requirements when it came to the military," and therefore, the Department of Defense was not required to report Appellant's offenses. The military judge referred to the DoDI as the "federal rule," but never discussed the federal statutory registration framework under 34 U.S.C. § 20901, *et seq*.

Trial counsel also agreed with the military judge's interpretation and apparently the staff judge advocate did as well, given his annotations in the indorsement to the Statement of Trial Results. Indeed, by all indications, these individuals were under the impression that Appellant would not be required to register as a sex offender pursuant to the Department of Defense instruction, but were all silent as to 34 U.S.C. § 20901, *et seq*. However, it turned out Appellant did have a federal requirement to register, and this oversight did not come to light until Appellant's release from confinement.

On appeal, Appellant's trial defense counsel suggest they might have understood the military judge's interpretation was incorrect, but made the "stra-

tegic" decision not to highlight a possible "error in the [m]ilitary [j]udge's reading of the requirements for such advisements" by bringing the matter to the court's attention.

In our original opinion, we explained that the Government had not challenged Appellant's assertions that he was required to register pursuant to the federal statute. In its motion for reconsideration, the Government acknowledged that its "original Answer focused on Appellant's inability to prove he had ever actually registered as a 'federal sex offender,' [but the] Motion for Reconsideration should cement the Government's firm challenge."

During Appellant's guilty plea colloquy, trial defense counsel avoided the military judge's question with regards to the DoD Instruction and were completely silent as to 34 U.S.C. § 20901, *et seq.*:

> MJ: And understanding that this is the federal rule, [D]efense, I believe that you have already discussed this with your client?
>
> DC: Yes, Your Honor, out of an abundance of caution with regard to the state rules, we did discuss the possibility of sex offender registration.

Then trial defense counsel put on the record that they agreed with the military judge's reading of the law:

> MJ: Okay. But just to make sure that it is clear, although that's -- it's impossible to say what some state authority might decide, you agree with *the court's and the [G]overnment's interpretation that this offense that [Appellant] is pleading guilty to does not require sex offenses* [sic] *registration and reporting?*
>
> DC: *That is correct, Your Honor.*

(Emphasis added).

Shortly afterwards, trial defense counsel put on the record, "[W]e have advised as you have," telling the military judge that they advised Appellant that his plea did not require sex offender registration and reporting pursuant to the DoDI, but were again silent as to 34 U.S.C. § 20901, *et seq*.

In determining whether Appellant's plea was knowing and voluntary, we have looked to the record of trial and the documents submitted by Appellant and trial defense counsel. We find that Appellant's plea may have been voluntary but was not a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. *See Riley*, 72 M.J. at 121. Specifically, because Appellant was not properly informed about sex offender registration pursuant to the federal statute, 34 U.S.C. § 20901, *et seq.*, we find that his plea of guilty was not a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.

While the Government takes issue with the distinction that the federal statute, 34 U.S.C. § 20921, creates a national sex offender registry derived from the various sex offender registries of lower jurisdictions, rather than creating an independent, federal registry, this distinction is not the relevant point. Whether Appellant had to register for a uniquely federal registry or had to register with a state or territory pursuant to a federal statute, the bottom line is that Appellant was never informed by trial defense counsel of the registration requirements pursuant to 34 U.S.C. § 20901, *et seq*. *See Torrance*, 72 M.J. at 611–12. ("[Trial] defense counsel must be aware of the federal statute that requires mandatory reporting and registration for those who are convicted of offenses within the statute's scope."). According to the federal statute, a conviction for an attempt to view child pornography falls within the meaning of "sex offense" and would foreseeably have required an individual to register as a sex offender.

Additionally, the military judge had a duty to ensure that trial defense counsel complied with their obligation to advise Appellant concerning sex offender registration requirements. The military judge addressed the DoDI and stated that the requirement for "every state is different," but did not address 34 U.S.C. § 20901, *et seq.,* with Appellant. In addition, the military judge did not ask trial defense counsel whether they advised Appellant with regards to the requirements of 34 U.S.C. § 20901, *et seq*. Because of the lifelong consequences of sex offender registration, the military judge's failure to ensure trial defense counsel advised Appellant about the federal statutory sex offender registration requirements of his guilty plea raises the question as to whether a substantial basis exists to question the providence of Appellant's plea of guilty.

Appellant makes clear in his declaration that he "would not have [pleaded] guilty nor entered into a plea agreement if [he] knew [he] would have to federally register for attempt to view child pornography." Again, we do not see this as an issue of an independent federal registry, but the requirements of the federal statute, which are distinct from the DoDI and any state requirement. Nonetheless, we read Appellant's declaration to mean he would not have entered into a plea agreement as to either offense knowing the consequences of a plea of guilty as to the one offense. We find Appellant's assertion plausible in light of the long-term impact of sex offender registration, and accordingly we find a substantial basis to question the providency of his guilty pleas. *See Riley*, 72 M.J. at 122 (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

Therefore, we set aside the findings and the sentence and authorize a rehearing.

III. CONCLUSION

The findings of guilty as to all Charges and Specifications are **SET ASIDE**. The sentence is **SET ASIDE**. A rehearing is authorized. The record of trial is returned to The Judge Advocate General. Article 66(f), UCMJ, 10 U.S.C. § 866(f). Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40247

UNITED STATES
Appellee

v.

Douglas G. LARA
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 10 April 2023

Military Judge: Matthew N. McCall.

Sentence: Sentence adjudged 27 September 2021 by GCM convened at Hurlburt Field, Florida. Sentence entered by military judge on 28 October 2021: Bad-conduct discharge and 12 months of confinement.

For Appellant: Major Stuart J. Anderson, USAF; Major Nicole J. Herbers, USAF.

For Appellee: Lieutenant Colonel Thomas J. Alford, USAF; Major Deepa M. Patel, USAF; Major John P. Patera, USAF; Mary Ellen Payne, Esquire.

Before KEY, RAMÍREZ, and GRUEN, *Appellate Military Judges*.

Judge RAMÍREZ delivered the opinion of the court, in which Senior Judge KEY and Judge GRUEN joined.

RAMÍREZ, Judge:

A military judge found Appellant guilty, in accordance with his pleas and pursuant to a plea agreement, of one specification of attempt to view child pornography in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880, and one specification of willful dereliction of duty for failing to refrain from storing, processing, displaying, and transmitting pornography, sexually explicit material, or sexually oriented material while on duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892.[1]

Appellant's plea agreement provided, among other things, that two originally charged specifications would be withdrawn and dismissed with prejudice and there would be a minimum and a maximum sentence that could be adjudged.[2] It also stated, among other things, that the sentence would not include a dishonorable discharge. The military judge sentenced Appellant to a bad-conduct discharge and 12 months of confinement for the attempt to view child pornography specification and 2 months for the willful dereliction of duty specification, each of the two specifications to run concurrently. The convening authority took no action on the findings or the sentence.

Appellant raises four issues on appeal which we reword as follows: (1) whether Appellant received ineffective assistance of counsel regarding sex offender registration requirements; (2) whether the military judge abused his discretion when he accepted Appellant's guilty plea despite the information he received concerning sex offender registration requirements; (3) whether Appellant's guilty plea to attempted viewing of child pornography was improvident; and (4) whether Appellant's guilty plea to willful dereliction of duty was improvident. Having considered Appellant's assignments of error, we find that Appellant's pleas of guilty was not a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. We set aside the findings of guilty as to all Charges and Specifications as well as the sentence and authorize a rehearing. As a result, we do not reach a conclusion on any other raised issue.

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[1] All references in this opinion to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] The plea agreement stated that for the attempt to view child pornography offense, Appellant would be sentenced to a minimum of 12 months of confinement and a maximum of 18 months of confinement. It also stated that for the dereliction of duty offense, Appellant would be sentenced to a minimum of one month of confinement and a maximum of six months of confinement. Finally, it stated that any adjudged periods of confinement would run concurrently.

I. BACKGROUND

Appellant stipulated that between March 2019 and December 2019, on multiple occasions, he attempted to view child pornography on his personally owned communication systems and equipment. Appellant further stipulated that, during the same timeframe, he was derelict in the performance of his duties in that he willfully failed to refrain from storing, processing, displaying, and transmitting pornography, sexually explicit material, or sexually oriented material on government computer systems while on duty. Specifically, Appellant told the military judge he was viewing adult pornography on his government computer, at work, in an attempt to prevent his wife from catching him viewing pornography on his home computer after she installed software on the home computer for that purpose. According to Appellant, he would look at pornography at work in an effort to "get away with it."

Appellant was represented by two military trial defense counsel who assisted Appellant in negotiating a plea agreement with the convening authority. The plea agreement was signed by all parties on 13 September 2021. On 24 September 2021, Appellant and his trial defense counsel signed a memorandum, which was prepared by both defense counsel.[3] The memorandum concerns sex offender registration. In relevant part, it provides:

> You have been charged with attempting to view child pornography, a violation of Article 80 of the UCMJ. [Department of Defense Instruction (DODI)] 1325.7[4] requires Department of Defense officials to notify state and local law enforcement agencies, if you are found guilty of the charged offense. Additionally, if you are found guilty of a lesser included offense that is listed in DODI 1325.7, notification will also be required. If you are convicted of any offense listed in DODI 1325.7 you may be required to register as a sex offender in your state of residence.

---

[3] During the pendency of his appeal, Appellant filed a declaration and attachments with this court to support his allegations of ineffective assistance. In response to an order from this court, trial defense counsel, Major CB and Captain ET, provided responsive declarations as well as attachments, including the memorandum evidencing the advice. We considered Appellant's declaration, the declarations of trial defense counsel, and the attachments to resolve the claim of ineffective assistance of counsel. *See United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020) (noting Courts of Criminal Appeals have considered declarations "when necessary for resolving claims of ineffective assistance of trial defense counsel").

[4] Department of Defense Instruction (DoDI) 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole* (11 Mar. 2013, incorporating Change 4, 19 Aug. 2020). DoDI 1325.07 is also sometimes listed as DoDI 1325.7.

The memorandum further contains an indorsement from Appellant which provides:

> I, [Appellant], have read DODI 1325.7, Appendix 4 to Enclosure 2: Listing Offenses Requiring Sex Offender Processing. [Major CB] and [Captain ET] have informed me orally and in writing that I may be required to register as a sex offender if I am found guilty of any offense listed in DODI 1325.7, Appendix 4 to Enclosure 2. I fully understand if I plead guilty to, or I am found guilty of, any offense listed in DODI 1325.7, Department of Defense officials will notify state and local authorities of my conviction and I may be required to register as a sex offender. I fully understand that if I am required to register as a sex offender, I must comply with all sex offender registration laws and I may be subject to criminal prosecution if I fail to comply with all sex offender registration laws.

Three days later, on 27 September 2021, at Appellant's court-martial and prior to accepting Appellant's guilty pleas, the following exchange occurred on the record:

> MJ [Military Judge]: So as to sex offender reporting and registration requirements, the court's reading of DoD Instruction[ ] 1325.07, [A]ppendix 4 of [E]nclosure 2, this offense does not require sex offender reporting and registration. Government, what is the [G]overnment's position?
>
> TC [Trial Counsel]: Your Honor, that is the [G]overnment's understanding as well.
>
> MJ: And understanding that this is the federal rule, [D]efense, I believe that you have already discussed this with your client?
>
> DC [Area Defense Counsel]: Yes, Your Honor, out of an abundance of caution with regard to the state rules, we did discuss the possibility of sex offender registration.
>
> MJ: Okay. But just to make sure that it is clear, although that's -- it's impossible to say what some state authority might decide, you agree with the court's and the [G]overnment's interpretation that this offense that [Appellant] is pleading guilty to does not require sex offenses registration and reporting?
>
> DC: That is correct, Your Honor.
>
> MJ: So [Appellant], at this time -- well hold on while your counsel are talking.

> CDC [Circuit Defense Counsel]: Could we have just a moment, Your Honor?
>
> MJ: Sure, let's go ahead and we will slow things down. We are moving quite [along] this morning, so let's go ahead and take a recess and then we will come back on the record when you're ready to go forward. Court is in recess.

After a recess, the following exchange ensued:

> MJ: Please be seated. Court is called order. Parties are again present. All right, I believe where we left off, [Appellant] take a moment now and consult again with your defense counsel and tell me whether you still want to plead guilty. So take your time and talk with them.
>
> [The accused conferred with his counsels.][5]
>
> MJ: Do you still want to plead guilty?
>
> ACC [Appellant]: Yes, Your Honor.

Part of trial defense counsel's declaration to this court provides more insight as to what occurred during the colloquy. Major CB's declaration states:

> When the [m]ilitary [j]udge asked Defense specifically if advisement was required . . . a strategic decision was made that alerting the [c]ourt to a loophole, *would not* be in [Appellant]'s best interest, but would in fact be the opposite. If there was a loophole, an error in DODI 1325.7, or an error in the [m]ilitary [j]udge's reading of the requirements for such advisements, Defense was not going, to the detriment of our client, bring that to the [c]ourt's attention. This strategy did not change the advice to [Appellant], nor did it change the substance of the advice and the consequences of which [Appellant] was advised that he could face as a product of his plea of guilty.

Shortly after the colloquy above, trial counsel asked to address the issue again.

> CTC [Circuit Trial Counsel]: Your Honor, I apologize for interrupting. So just one point of clarification, earlier you had asked [Appellant] about reporting requirements of the DoDI?
>
> MJ: Yes.

---

[5] This bracketed comment is contained in the certified transcript of Appellant's court-martial.

> CTC: And just to make sure it is clear on the record that the [G]overnment's understanding that that instruction merely indicates what sort of offenses the federal government will actively report to the state. Not necessarily what a particular state's individual reporting requirements may be. And it is our understanding that the [D]efense has advised [Appellant] that even under the terms of the plea agreement, it is potentially possible that he may have to register given whatever law of the state that he may end up residing in.
>
> MJ: Sure. So did we -- so did you give that advice in writing, [D]efense?
>
> CDC: Your Honor, we did give that advice in writing. [Appellant] has been advised that a state may have different requirements than the federal and that this is based off of DoD reporting and federal reporting, [ ] *we have advised as you have*.
>
> MJ: Okay. Do you want to make that an Appellate Exhibit, if you have that advice or?
>
> CDC: Your Honor, our advice is tied to another legal document that's attorney[-]client privileged. Unless -- I don't think . . .
>
> MJ: We don't make it -- I mean, you have put it on the record that you gave that advice.
>
> CDC: Certainly.
>
> MJ: And you understand that, [Appellant], that every state is different? When we talk about sex offender reporting and registration requirements, we are discussing on the federal level what the military would put on the confinement order and would report. *And it doesn't meet the federal requirements when it comes to the military*, but we can't necessarily say what effect it might have in every state.
>
> ACC: Yes, Your Honor.

(Omission in original) (emphasis added).

After Appellant's court-martial, the staff judge advocate prepared the first indorsement to the "[S]tatement of [T]rial [R]esults," which states that sex offender notification is not required in accordance with DoDI 1325.07.

When Appellant was released from confinement, he received a document entitled, "United States Probation System Offender Notice and Acknowledgment of Duty to Register as a Sex Offender." This document indicated Appellant had to register as a sex offender under the federal requirements, pursuant

to the Sex Offender Registration and Notification Act of 2006 (SORNA) codified at 34 U.S.C. § 20901, and he had to register as a sex offender in any state in which he resided.

However, Appellant claims in his declaration that "[p]rior to [his] offer to enter into a plea agreement, [he] was advised by [his] trial defense counsel that [he] would not have to federally register for Attempt to view Child Pornography." Appellant continues that he told "trial defense counsel about [his] concerns about sex offender registration requirements prior to the offer to plead guilty." Appellant then states that "[a]t the time that [he] entered into that agreement and when [he] was at [his] court-martial, it was [his] understanding that [he] did not have to federally register."

Regarding the military judge, Appellant claims in his declaration that the "military judge at [his] trial advised [him] on the record that this offense did not require federal registration."

Appellant explains that he "understood that [his] federal conviction and potential sex offender registration requirements imposed by various [s]tates would impact where [he and his family] could live and what jobs [he] could do." Appellant claims prejudice, arguing he "did not know [he] would have to federally register, which now makes any location or job search more difficult." Additionally, Appellant claims that his "concern for [his] minor children and being able to provide for them is documented in both [his] oral and written unsworn statement, which [he] conferred on with [his] trial defense counsel."

Appellant concludes his declaration stating: "I would not have [pleaded] guilty nor entered into a plea agreement if I knew I would have to federally register for attempt to view child pornography."

II. DISCUSSION

A. Law

A guilty "plea is more than an admission of past conduct; it is [an accused]'s consent that judgment of conviction may be entered without a trial -- a waiver of his right to trial before a jury and judge." *United States v. Riley*, 72 M.J. 115, 120 (C.A.A.F. 2013) (internal quotation marks and citation omitted). Such waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* (internal quotation marks and citation omitted). Sex offender registration requirements are some of those relevant circumstances and likely consequences. *See id.* at 121 ("[W]e hold that in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea.").

Trial "defense counsel must inform the accused of [sex offender registration] consequences, but it is the military judge who bears the ultimate burden of ensuring that the accused's guilty plea is knowing and voluntary." *Id*. at 122.

There are three different, but interrelated, aspects of sex offense registration pertinent to this case: (1) the federal statute (34 U.S.C. § 20901, *et seq*.) which requires mandatory sex offender registration for those who are convicted of offenses within the statute's scope; (2) DoDI 1325.7 which identifies offenses that trigger mandatory sex offender reporting; and (3) state laws concerning registration for qualified sex offenses. *See United States v. Miller*, 63 M.J. 452, 459 (C.A.A.F. 2006); *United States v. Torrance*, 72 M.J. 607, 611–12 (A.F. Ct. Crim. App. 2013).

"[T]rial defense counsel should inform an accused prior to trial as to any charged offense listed on the DoD Instr[uction] 1325.7 [ ]: Listing Of Offenses Requiring Sex Offender Processing." *Miller*, 63 M.J. at 459 (citation omitted). Additionally, trial "defense counsel must be aware of the federal statute that requires mandatory reporting and registration for those who are convicted of offenses within the statute's scope, as well as DoDI 1325.7, which identifies offenses that trigger mandatory sex offender reporting." *Torrance*, 72 M.J. at 611–12 (internal quotation marks, brackets, and citation omitted.) "Trial defense counsel should also state on the record of the court-martial that counsel has complied with this advice requirement." *Miller*, 63 M.J. at 459. "While failure to so advise an accused is not per se ineffective assistance of counsel, it will be one circumstance [an appellate c]ourt will carefully consider in evaluating allegations of ineffective assistance of counsel." *Id*. However, "[g]iven the plethora of sexual offender registration laws enacted in each state, it is not necessary for trial defense counsel to become knowledgeable about the sex offender registration statutes of every state." *Id.*

A military judge has a duty to ensure that trial defense counsel has complied with their obligation to advise an accused concerning sex offender registration requirements. *Riley*, 72 M.J. at 122. The Military Judges' Benchbook "simply instruct[s] the military judge to ensure that defense counsel [has] complied" with our superior court's requirements for advice regarding sex offender registration requirements. *Id*. This is "clearly consistent with a military judge's responsibilities while conducting a plea inquiry." *Id*. "Given the lifelong consequences of sex offender registration, which is a particularly severe penalty," a military judge's failure to ensure an appellant understood the sex offender registration requirements of his guilty plea results in a substantial basis to question the providence of an appellant's plea. *Id*. (internal quotation marks and footnote omitted).

In order to determine whether an appellant's plea was knowing and voluntary, or whether trial defense counsel were ineffective on such a matter, we

look to the record of trial. *Riley*, 72 M.J. at 120; *see also United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020) (noting Courts of Criminal Appeals may consider declarations "when necessary for resolving claims of ineffective assistance of trial defense counsel"). However, "[d]etermining whether a plea is voluntary is by no means an exact science." *United States v. Perron*, 58 M.J. 78, 85 (C.A.A.F. 2003). "The remedy for finding a plea improvident is to set aside the finding based on the improvident plea and authorize a rehearing." *Riley*, 72 M.J. at 122 (citations omitted).

"[W]here there is a mutual misunderstanding regarding a material term of a pretrial agreement, resulting in an accused not receiving the benefit of his bargain, the accused's pleas are improvident" and the law requires remedial action "in the form of specific performance, withdrawal of the plea, or alternative relief." *Perron*, 58 M.J. at 82 (citations omitted).

B. Analysis

As we explained above, there are three relevant aspects of sex offense registration raised in this case: (1) the federal statute, 34 U.S.C. § 20901, *et seq*., that requires mandatory registration for those who are convicted of offenses within the statute's scope; (2) DoDI 1325.07, which the Department of Defense identifies offenses that trigger mandatory sex offender reporting; and (3) state laws concerning registration for qualified sex offenses. *See Torrance*, 72 M.J. at 611–12. Appellant takes issue with the first—federal registration.

Reviewing trial defense counsel's declarations and attachments, it appears that trial defense counsel conflated the federal statutory registration framework and the Department of Defense's sex offender reporting to states. More importantly, there is nothing in (1) trial defense counsel's "Offenses Requiring Sex Offender Processing Advisement," (2) Appellant's indorsement, or (3) the trial transcript indicating that Appellant was ever notified that he would have to register as a sex offender under the federal statutory registration requirements. In fact, the opposite appears to be the case.

During the court-martial, the military judge conducted his own legal analysis of federal registration requirements and told Appellant on the record that he would not have to federally register. It further appears that trial defense counsel believed the military judge's analysis may have been wrong and purposefully chose to keep quiet on the record.

The military judge told Appellant on the record that in his "reading of DoD Instructions [sic] 1325.07, [A]ppendix 4 of [E]nclosure 2, this offense does not require sex offender reporting and registration." Trial counsel agreed with this interpretation and apparently the staff judge advocate did as well, given his annotations in the Statement of Trial Results. Indeed, by all indications, these

individuals were under the impression Appellant would not be required to register as a sex offender under the federal system—pursuant to federal law and the Department of Defense instruction. This interpretation, however, turned out to be wrong, and this error did not come to light until Appellant's release from confinement.[6] Now, on appeal, Appellant's trial defense counsel suggest they might have understood the military judge's interpretation was incorrect, but made the specific decision not to highlight a possible "error in the [m]ilitary [j]udge's reading of the requirements for such advisements" by bringing the matter to the court's attention.

During Appellant's guilty plea colloquy, trial defense counsel first dodged the question with regards to the federal statute and the DoD Instruction:

> MJ: And understanding that this is the federal rule, [D]efense, I believe that you have already discussed this with your client?
>
> DC: Yes, Your Honor, out of an abundance of caution with regard to the state rules, we did discuss the possibility of sex offender registration.

Then trial defense counsel put on the record that they agreed with the military judge's reading of the law:

> MJ: Okay. But just to make sure that it is clear, although that's -- it's impossible to say what some state authority might decide, you agree with *the court's and the [G]overnment's interpretation that this offense that [Appellant] is pleading guilty to does not require sex offenses registration and reporting?*
>
> *DC: That is correct, Your Honor.*

(Emphasis added).

Shortly afterwards, trial defense counsel put on the record, "[W]e have advised as you have," telling the military judge that they advised Appellant that his plea did not require federal sex offender registration and reporting.

In order to determine whether Appellant's plea was knowing and voluntary, we have looked to the record of trial and the documents submitted by Appellant and trial defense counsel. We find that Appellant's plea may have been voluntary but was not a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. *See Riley*, 72 M.J. at 121. Specifically, because Appellant was not properly informed—and was then misinformed—about federal sex offender registration, we find

[6] The Government does not challenge Appellant's assertions that he was appropriately required to register with federal authorities.

that his plea of guilty was not a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.

This, however, does not end our analysis. Appellant makes clear in his declaration that he "would not have [pleaded] guilty nor entered into a plea agreement if [he] knew [he] would have to federally register for attempt to view child pornography." We read that to mean he would not have entered into a plea agreement as to either offense knowing the consequences of a plea of guilty as to the one offense. Neither the Government nor trial defense counsel rebuts his claim with any evidence for us to consider.

Accordingly, we are left to determine which one of the three remedial actions listed in *Perron* should be taken. *See* 58 M.J. at 82. We have considered specific performance, withdrawal of the plea, and alternative relief. Here, neither specific performance—deregistering from a federal sex offender list—nor alternative relief is available. *Perron* instructs that if neither specific performance nor alternative relief is available, "the result is to nullify the original pretrial agreement, returning the parties to the status quo ante." *Id.* at 86.

Therefore, we find the only appropriate remedial remedy is to nullify the original plea agreement and return the parties to the status quo ante. We set aside the findings and the sentence and authorize a rehearing.

III. CONCLUSION

The findings of guilty as to all Charges and Specifications are **SET ASIDE**. The sentence is **SET ASIDE**. A rehearing is authorized. The record of trial is returned to The Judge Advocate General. Article 66(f), UCMJ, 10 U.S.C. § 866(f). Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 24-0049/AF
Crim.App. No. 40332

v.

O R D E R

S'hun R.
Maymi,
Appellant

On further consideration of the granted issues, 84 M.J. 308 (C.A.A.F. 2024), and in view of *United States v. Johnson*, __ M.J. __ (C.A.A.F. 2025), it is, by the Court, this 22nd day of July, 2025,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Nelson)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40332

UNITED STATES
Appellee

v.

S'hun R. MAYMI
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 5 October 2023

Military Judge: Lance R. Smith.

Sentence: Sentence adjudged 21 April 2022 by GCM convened at Royal Air Force Lakenheath, United Kingdom. Sentence entered by military judge on 9 May 2022: Dishonorable discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: Major Spencer R. Nelson, USAF; Major Eshawn R. Rawlley, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Captain Olivia B. Hoff, USAF; Captain Tyler L. Washburn, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, CADOTTE, and MASON, *Appellate Military Judges*.

Judge MASON delivered the opinion of the court, in which Chief Judge JOHNSON and Senior Judge CADOTTE joined.

MASON, Judge:

A military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of one charge with one specification of sexual assault and one charge with one specification of unlawful entry, in violation of Articles 120 and 129, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 929.[1,2] The military judge sentenced Appellant to a dishonorable discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority took no action on the findings; he deferred the reduction in grade until the date of his action and waived all automatic forfeitures for a period of six months for the benefit of Appellant's wife and child.

Appellant's counsel submitted this case for review on its merits. Appellant personally raises five issues: (1) whether the findings are legally and factually sufficient; (2) whether the Third Air Force Staff Judge Advocate committed unlawful command influence; (3) whether trial defense counsel are allowed to argue sex offender registration as a mitigating factor for consideration in sentencing; (4) whether the sentence adjudged by the court-martial was unduly severe; and (5) whether the "Firearm Prohibition Triggered Under 18 U.S.C. § 922" note on the staff judge advocate's indorsement to the entry of judgment is constitutional and whether this court can decide that question.[3] We have carefully considered issue (5). As recognized in *United States v. Lepore*, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), this court lacks authority to direct modification of the 18 U.S.C. § 922 prohibition noted on the staff judge advocate's indorsement.

We find no error materially prejudicial to Appellant's substantial rights and affirm the findings and sentence.

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[1] Unless otherwise noted, all references in this opinion to the UCMJ, Military Rules of Evidence, and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Appellant was charged with burglary. He was acquitted of burglary but convicted of the lesser-included offense of unlawful entry.

[3] Appellant raises all these issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The language of the issues raised have been paraphrased and the issues reordered.

I. BACKGROUND

In November 2020, AT was stationed at Royal Air Force (RAF) Mildenhall. AT had friends at RAF Mildenhall and at RAF Lakenheath. One of AT's friends from RAF Lakenheath was AR. On 26 November 2020, AR hosted a "Friendsgiving" dinner in her dorm room. Several Airmen attended the dinner, including Appellant.

AT arrived for the dinner later in the evening. Upon her arrival, she saw people sitting around, eating, drinking, listening to music, and socializing. After dinner, the group played different games, including drinking games. At some point, one of the attendees invited Appellant to join the group at the party. AT had never met Appellant before this evening.

Later in the evening, the dinner wound down and people began to leave. AR had told AT before the party that if AT was going to be drinking alcohol, she could stay in AR's dormitory room for the night so she did not have to drive back to RAF Mildenhall. AT did drink that night so she decided to stay in AR's room. AR left and went to another friend's room for the night. AR told AT that AT could tell everyone to leave..

After AR and others left, AT was left in AR's room with three male Airmen, including Appellant. They continued to play games, drink, and talk. Appellant made a couple of sexually charged comments and AT became uncomfortable. When the two other male Airmen decided to leave in the early hours of the morning, AT made sure that Appellant left as well.

AT laid down to go to sleep but was interrupted by Appellant knocking on the dorm room window. She went to the front door where Appellant stated that he left his cell phone in the room, so she let him in to look around. When Appellant asked if she had seen his phone, she stated she was unsure, she was tired, and she would let him know if she found it. Appellant then left the room. AT laid back down and soon fell asleep. The next thing AT remembered was waking up with someone touching her. Specifically, AT felt pain in her vagina and realized that someone's fingers were penetrating her in a back-and-forth motion. AT got out of the bed and moved to the other side of the room where she saw that the other person in the room was Appellant. AT very firmly yelled at Appellant to get out. Appellant responded, "my bad," he needed a place to sleep, and asked to sleep there. AT said "No" and Appellant eventually left. AT noticed that when she shut the door, the window next to the door was cracked open a little. She presumed the cracked window was how Appellant got into the room, so she closed it.

A few minutes later as she was in bed trying to fall back asleep, AT saw the door handle moving and heard something at the window. This happened a few times before she yelled out that she was going to call the police. Appel-

lant can be seen on the surveillance camera outside the dormitory room and then running away from the room. AT sent a message to one of her friends telling them what had happened and was eventually able to fall asleep.

The next morning, AR and a few others returned to the room. They all cleaned up the room and AT talked to them about what Appellant did. Later, AT went back to RAF Mildenhall and eventually reported the incident to law enforcement.

In April 2021, AT had a meeting over "Zoom"[4] with the Third Air Force staff judge advocate (SJA).[5] AT discussed with the SJA the case moving forward. The SJA talked about the possible toll that these cases going forward can take on people and asked AT if that was okay. The SJA told AT that he would "have her back" regardless of whether AT decided to go forward with the trial or not. He further stated that they would make sure that nothing like this would happen again at their base. AT took some time to think after the meeting and later decided that she would participate in a court-martial.

During the presentencing proceedings, trial defense counsel presented argument where he stated, "You also have to consider that he will be – that he's been convicted of a sexual offense and a sex offender the rest of his life." Trial counsel objected asserting that this was improper argument. Trial defense counsel asserted that *United States v. Tyler*, 81 M.J. 108 (C.A.A.F. 2021), permitted the argument. The military judge heard the positions of the parties and sustained the objection. He ruled that he would not allow argument on the collateral consequence of sex offender registration but would consider the unsworn statement reference.

II. DISCUSSION

A. Legal and Factual Sufficiency

Appellant challenges the legal and factual sufficiency of his sexual assault conviction.

1. Law

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

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[4] "Zoom" is an online application commonly used for conducting remote meetings.

[5] It is clear from a review of the charge sheet, convening order, and post-trial documents that the Third Air Force staff judge advocate (SJA) was the convening authority's SJA.

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted). The test for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1973)).

"The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,' [this] court is 'convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399). This court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. *See United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted); *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted), *rev. denied*, 82 M.J. 312 (C.A.A.F. 2022).

Appellant was convicted of sexual assault in violation of Article 120, UCMJ, which required the Government to prove the following two elements beyond a reasonable doubt: (1) that Appellant committed a sexual act upon AT, to wit: penetrating her vulva with his finger, with an intent to gratify his sexual desire; and (2) that Appellant did so without AT's consent. *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 60.b.(2)(d).

Appellant was also convicted of unlawful entry in violation of Article 129, UCMJ, which required the Government to prove the following two elements beyond a reasonable doubt: (1) that Appellant entered the applicable dormitory room assigned to AR; and (2) that the entry was unlawful. *See MCM*, pt. IV, ¶ 79.b.(2)(a)–(b).

2. Analysis

a. Sexual Assault

Appellant asserts that his conviction for sexual assault is both legally and factually insufficient. He argues that AT was the only witness to the alleged misconduct and that her version of what happened "grew over time," thus casting doubt on the conviction.

A careful review of AT's testimony as well as all the evidence presented in the findings portion of the trial demonstrates that the military judge as the trier of fact rationally found the essential elements of this crime beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. AT's testimony is corroborated by numerous accounts of other witnesses present in AR's room that night. Further, the surveillance footage of the dorms showing the actions of the attendees of the "Friendsgiving dinner" just outside the room, including Appellant's, provides compelling corroborative evidence to AT's description of the evening. After weighing the evidence and making allowances for not having personally observed the witnesses, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt. *See Reed*, 54 M.J. at 41.

b. Unlawful Entry

Appellant asserts that his conviction for unlawful entry is both legally and factually insufficient. Appellant again argues here that AT was the only witness to the alleged misconduct and that her version of what happened "grew over time," thus casting doubt on the conviction.

Here, these arguments can only undercut whether Appellant's entry into the dorm room was unlawful; there is no question that Appellant entered the room. Surveillance video shows Appellant standing outside of the dorm room for several minutes. He smoked something and paced along the walkway. He walked towards the surveillance camera staring up at it for several seconds and he tried to reach it but was unable to do so. He then walked back towards the dorm room door. Appellant is seen reaching his right arm inside the window beside the door. A few seconds later—he removed his arm, looked into the room through the window, slowly proceeded to open the door, and slowly stepped inside the room. This footage significantly corroborates AT's description of the evening's events and removes any doubt that Appellant's entry into the room at that time was unlawful. Viewing the evidence in the light most favorable to the Government, the military judge rationally found the essen-

tial elements of unlawful entry beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt. *See Reed*, 54 M.J. at 41.

B. Unlawful Influence

Appellant argues that the interaction between AT and the Third Air Force SJA was "unusual" and therefore "raises the specter of unlawful command influence."

1. Law

Article 37, UCMJ, states in relevant part:

> No person subject to this chapter [10 U.S.C. §§ 801 et seq.] may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts taken pursuant to this chapter [10 U.S.C. §§ 801 et seq.] as prescribed by the President.

National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 532(a)(2), 133 Stat. 1198, 1359–60 (2019) (amending Article 37, UCMJ, 10 U.S.C. § 837).

We review allegations of unlawful command influence de novo. *United States v. Horne*, 82 M.J. 283, 286 (C.A.A.F. 2022). The Defense has the initial burden of raising the issue of unlawful command influence by presenting "some evidence" of unlawful command influence, meaning the Defense "must show facts which, if true, constitute unlawful command influence." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citation omitted). This "burden of showing potential unlawful command influence is low, but is more than mere allegation or speculation." *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013) (citation omitted). If raised on appeal, an appellant must show: (1) facts which, if true, constitute unlawful command influence; (2) the proceedings were unfair; and (3) the unlawful command influence was the cause of that unfairness. *Id.*; *Biagase*, 50 M.J. at 150. If that burden is met, the burden then shifts to the Government to show beyond a reasonable doubt: (1) the predicate facts do not exist; or (2) the facts do not constitute unlawful command influence; or (3) the unlawful command influence did not affect the findings and sentence. *Biagase*, 50 M.J. at 151.

2. Analysis

Appellant fails to meet his initial burden of showing "some evidence" of unlawful influence. Appellant claims the discussion between the Third Air Force SJA and AT was "unusual," but does not articulate how that rises to unlawful influence.

Whether these conversations are unusual was not litigated at trial; Appellant did not file a motion or present additional evidence, and points only to AT's brief testimony on this issue. Recognizing that the initial burden is low, these facts still do not justify a conclusion that unlawful command influence occurred. Appellant has not demonstrated "some evidence" of unlawful command influence and is not entitled to relief.

C. Sex Offender Registration as an Arguable Mitigating Factor

Appellant argues that trial defense counsel should have been able to argue that because Appellant would have to register as a sex offender, that is a mitigating factor for the sentencing authority's consideration.

1. Law

We review a military judge's ruling on an objection to sentencing argument for an abuse of discretion. *United States v. Briggs*, 69 M.J. 648, 650 (A.F. Ct. Crim. App. 2010).

Sentencing arguments by counsel must be based upon evidence adduced at trial and any fair inferences as may be drawn therefrom. *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993). "Further, sentencing arguments 'cannot include a matter not supported by the facts'" or reasonable inferences drawn therefrom. *Briggs*, 69 M.J. at 650 (quoting *United States v. Beneke*, 22 C.M.R. 919, 922 (A.F.B.R. 1956)).

"A collateral consequence is '[a] penalty for committing a crime, in addition to the penalties included in the criminal sentence.'" *United States v. Cueto***,** 82 M.J. 323, 327 (C.A.A.F. 2022) (citing *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006) (quoting *Collateral Consequence*, BLACK'S LAW DICTIONARY (8th ed. 2004)). "The general rule concerning collateral consequences is that courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration." *United States v. Talkington*, 73 M.J. 212, 215 (C.A.A.F. 2014) (alteration in original) (citation omitted).

Sex offender registration is a collateral consequence of the conviction alone, not the sentence. *Cueto*, 82 M.J. at 327 (citing *Talkington,* 73 M.J. at 213).

2. Analysis

Trial defense counsel argued, "You also have to consider that he will be – that he's been convicted of a sexual offense and a sex offender the rest of his life." Trial counsel objected and the military judge sustained the objection after hearing the position of the parties. It is well settled that collateral consequences are not appropriate matter for argument in sentencing. Our superior court made clear in *Talkington* that sex offender registration is a collateral consequence. *Id*. Hence, argument on sex offender registration is improper.

Appellant argues, as his trial defense counsel did at trial, that *Tyler* changed the analysis with regards to this issue. 81 M.J. at 108. In *Tyler*, the United States Court of Appeals for the Armed Forces held that "[i]n the absence of explicit statutory limitation, or other clear evidence of Congress's or the President's intent to limit comment on unsworn victim statements in presentencing argument, we hold either party may comment on properly admitted unsworn victim statements." *Id*. at 113 (footnote omitted). The court recognized that procedurally, the victim's right to make a statement was akin to an accused's right of allocution and presumed that Congress and the President intended unsworn victim statements to be treated similarly to an accused's unsworn statement. *Id*. at 112. Notably though, the court did not hold that counsel may comment on collateral consequences contained in the unsworn victim statements. Therefore, while *Tyler* provided guidance with regards to unsworn victim statements, it did nothing to change the law regarding the prohibition on counsel arguing collateral consequences.

As trial defense counsel's argument was improper when he referenced a collateral consequence, sex offender registration, the military judge did not err, let alone abuse his discretion, by sustaining the objection to such reference.

D. Sentence Appropriateness

Appellant argues that his sentence, which included a dishonorable discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to the grade of E-1, is unduly severe.

1. Law

We review sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (footnote omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved based on the entire record. Article 66(d), UCMJ, 10 U.S.C. § 866(d). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record. *United States v. Fields*, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015). While we have significant discretion in de-

termining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *Id.*

2. Analysis

Appellant personally asserts that his sentence is unduly severe considering his alcoholism and the positive comments in his character letters. During presentencing, Appellant introduced an unsworn statement, seven character letters, a summation of awards and decorations received, and an assortment of photographs, mostly of him with his family.

Appellant's crimes were particularly aggravating. On a military installation in a foreign country, he unlawfully entered the dorm room of another Airman in the early hours of the morning and proceeded to sexually penetrate her while she slept. For his crimes, he faced a mandatory dishonorable discharge and maximum confinement in excess of 30 years.

After carefully considering Appellant, the nature and seriousness of the offenses, the particularized extenuating and mitigating evidence, and all the other matters in the record of trial, we conclude Appellant's sentence is not inappropriately severe.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).[6] Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

[6] We note that in his clemency request, Appellant requested that the convening authority waive automatic forfeitures. The convening authority purported to grant waiver of the automatic forfeitures commencing 14 days after the sentence was adjudged for six months, or until release from confinement or the expiration of Appellant's term of service, whichever was sooner. However, he did not grant any clemency with regards to the adjudged total forfeitures. Appellant does not raise any issues with regards to these actions or assert any prejudice. The record does not demonstrate any prejudice and we find none.

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Justin P. Mitton,
Appellant

USCA Dkt. No. 25-0223/AF
Crim.App. No. 40616

ORDER DENYING PETITION

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 21st day of August, 2025,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Abrams)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40616

UNITED STATES
Appellee

v.

Justin P. MITTON
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 16 June 2025

Military Judge: Vicki L. Marcus.

Sentence: Sentence adjudged on 22 February 2024 by GCM convened at Eielson Air Force Base, Alaska. Sentence entered by military judge on 2 April 2024: Bad-conduct discharge, confinement for 16 months, reduction to E-1, and a reprimand.

For Appellant: Lieutenant Colonel Allen S. Abrams, USAF; Captain Samantha M. Castanien, USAF.

For Appellee: Lieutenant Colonel Jenny A. Liabenow, USAF; Captain Heather R. Bezold, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, GRUEN, and ORTIZ, *Appellate Military Judges*.

Judge ORTIZ delivered the opinion of the court, in which Chief Judge JOHNSON and Judge GRUEN joined.

ORTIZ, Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of four specifica-

tions of abusive sexual contact, each without consent, to gratify his sexual desire, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.[1] Appellant was sentenced to a bad-conduct discharge, confinement for 16 months, reduction to the paygrade of E-1, forfeiture of all pay and allowances, and a reprimand. The convening authority took no action on the findings but disapproved the adjudged forfeiture of total pay and allowances, suspended the adjudged reduction of rank for a period of six months to be remitted after six months and waived automatic forfeitures for the benefit of Appellant's daughter for a period of six months. The convening authority provided the language for the reprimand.

Appellant raises three issues on appeal, which we reworded: (1) whether an error in the reprimand recorded on the entry of judgment (EoJ) warrants remand for correction; (2) whether the application of 18 U.S.C. § 922 to Appellant's case unconstitutionally deprived him of his right to possess firearms; and (3) whether the "systemic" application of 18 U.S.C. § 922 to bar Appellant from possessing firearms merits sentence relief. We have carefully considered issues (2) and (3) and find that they do not require discussion or relief. *See United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)); *see also United States v. Vanzant*, 84 M.J. 671, 681 (A.F. Ct. Crim. App. 2024) (holding 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), *rev. granted*, 85 M.J. 198 (C.A.A.F. 2024).[2] As to the remaining issue, we direct modification of the EoJ in our decretal paragraph.

I. BACKGROUND

After reviewing Appellant's clemency matters and consulting with his staff judge advocate, the convening authority signed the convening authority

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[1] Unless otherwise noted, all references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] On 27 November 2024, this court granted Appellant's motion to attach his declaration concerning his "post-trial processing and possession of firearms" but deferred whether consideration of the declaration was barred by *United States v. Jessie,* 79 M.J. 437 (C.A.A.F. 2020), and related case law until the court's Article 66, UCMJ, 10 U.S.C, § 866, review of the entire case was complete. In light of the court's ruling on issues (2) and (3), the court need not determine whether consideration of the declaration was barred.

decision on action memorandum (Decision on Action). In the Decision on Action, the convening authority set out the language for Appellant's reprimand, which stated:

> You are hereby reprimanded! In blatant disregard of the law and all standards of decency and morality, you touched your daughter in a sexual manner on multiple occasions over the course of several years, bringing tremendous discredit upon yourself and the United States Air Force. As a noncommissioned officer, our nation's young men and women looked *to* you for guidance and mentorship. You have proven yourself entirely unfit for such a position, as even your own child was not safe from your abuse. Rest assured, you will not be allowed to remain in any position to lead or mentor our Airmen. I can only hope that you will reflect seriously on the grave nature of your misconduct and never repeat your illegal, despicable behavior. Know that you will be under the closest scrutiny, and any further misconduct on your part may result in more severe action against you.

(Emphasis added).

The EoJ erroneously changed a single word from the convening authority's authorized reprimand: "As a noncommissioned officer, our nation's young men and women looked *at* you for guidance and mentorship." (Emphasis added). Appellant did not file a post-trial motion for correction of the EoJ. *See* Rule for Courts-Martial (R.C.M.) 1003(b)(1).

II. DISCUSSION

Both parties acknowledge that the EoJ does not accurately reflect the convening authority's reprimand language authorized in the Decision on Action. However, both parties also acknowledge that the change to the authorized reprimand in the EoJ is "small" and that the erroneous language does not change the overall meaning conveyed by the convening authority's authorized reprimand language. Rather than remand the case, this court will modify the EoJ in our decretal paragraph pursuant to our authority under R.C.M. 1111(c)(2). *See United States v. Hinds*, No. ACM S32756, 2024 CCA LEXIS 315, at *5 (A.F. Ct. Crim. App. 31 Jul. 2024) (unpub. op.) (holding Courts of Criminal Appeals can exercise R.C.M. 1111(c)(2)'s power to correct reprimand language in the EoJ to align with the approved reprimand language in the Decision on Action).

III. CONCLUSION

Consistent with our authority granted under R.C.M. 1111(c)(2), we correct the EoJ for the following sentence in the reprimand to read as follows: "As a noncommissioned officer, our nation's young men and women looked to you for guidance and mentorship." The findings are correct in law. Article 66(d), UCMJ, 10 U.S.C. § 866(d) (*Manual for Courts-Martial, United States* (2024 ed.)). In addition, the sentence is correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Austin J.
Van Velson,
Appellant

USCA Dkt. No. 24-0225/AF
Crim.App. No. 40401

O R D E R

On further consideration of the granted issue, 85 M.J. 250 (C.A.A.F. 2024), and in view of *United States v. Johnson*, __ M.J. __ (C.A.A.F. 2025), it is, by the Court, this 22nd day of July, 2025,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Bruha)
Appellate Government Counsel (Bezold)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40401

UNITED STATES
Appellee

v.

Austin J. VAN VELSON
Second Lieutenant (O-1), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 12 July 2024

Military Judge: Thomas A. Smith.

Sentence: Sentence adjudged 3 October 2022 by GCM convened at Laughlin Air Force Base, Texas. Sentence entered by military judge on 14 December 2022: Dismissal and confinement for 24 months.

For Appellant: Major Alexandra K. Fleszar, USAF; Major Spencer R. Nelson, USAF.

For Appellee: Lieutenant Colonel J. Pete Ferrell, USAF; Major Olivia B. Hoff, USAF; Captain Kate E. Lee, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, MASON, and KEARLEY, *Appellate Military Judges*.

Judge MASON delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge KEARLEY joined.

MASON, Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas, of one specification of possession of child pornography and one specification of communication of indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[1] Appellant was sentenced to a dismissal and confinement for 24 months. Appellant requested relief from the convening authority as to "any portion [of his] sentence" as he deemed appropriate. The convening authority considered Appellant's request as a request for deferment and waiver of automatic forfeitures and denied the request, ultimately taking no action on the findings or sentence. Subsequently, the military judge ordered correction of the convening authority's decision on action, specifically, that the convening authority consider Appellant's request for relief also as a request for deferment of Appellant's sentence to confinement. The convening authority considered the request as directed and again took no action on the findings or sentence.

Appellant challenges the providency of his guilty plea to the indecent language specification, arguing that (1) the military judge failed to conduct a heightened plea inquiry regarding Appellant's First Amendment[2] rights; (2) the military judge failed to ensure that in this case, there was a direct and palpable connection between Appellant's speech and the military mission or military environment; and (3) the plea inquiry did not establish the terminal element of the specification.

Additionally, Appellant alleges error in that the Government cannot prove that 18 U.S.C. § 922 is constitutional because it cannot demonstrate that here, where Appellant was not convicted of a violent offense, the statute is consistent with the nation's historical tradition of firearm regulation. We have carefully considered this issue. As we recognized in *United States v. Vanzant*, __ M.J. __, No. ACM 22004, 2024 CCA LEXIS 215, at *22–25 (A.F. Ct. Crim. App. 28 May 2024), and *United States v. Lepore*, 81 M.J. 759 (A.F. Ct. Crim. App. 2021) (en banc), this court lacks authority to provide the requested relief regarding the 18 U.S.C. § 922 prohibition notation on the staff judge advocate's indorsement to the entry of judgment or Statement of Trial Results.

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[1] Unless otherwise noted, all references in this opinion to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] U.S. CONST. amend. I.

As to the providency of his plea, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

I. BACKGROUND

Appellant entered active duty in February 2021. Shortly after, he arrived at Laughlin Air Force Base, Texas (Laughlin), for training. Within days of his arrival, Appellant began downloading child pornography on his phone and laptop computer. The images depicted actual minors aged 10 years or younger engaged in various sexual acts with adults.

Approximately four months after his arrival at Laughlin, Appellant engaged in a chat on an Internet chat website. Appellant pretended to be a single female with minor children. He began chatting with another person on the site who portrayed themself as an adult male with minor children. Unbeknownst to Appellant, the person with whom he was chatting was a civilian law enforcement detective. Following their conversation on the website, Appellant exchanged text messages directly with the detective. Appellant described their conversations as "concerning participating in sexual activities with minor children." Specifically, Appellant and the detective discussed adults having sex with minor children.

At some point after these chat and text conversations with the detective, Appellant's digital media was seized and analyzed. Evidence of Appellant's knowing possession of child pornography was recovered. At trial, the Government presented seven images of child pornography that were specifically charged in this case.

Appellant pleaded guilty to the possession of child pornography and the communication of indecent language specifications. Before accepting Appellant's pleas of guilty, the military judge did not conduct a "heightened inquiry" that discussed the communications in the context of free speech protections.[3] While discussing the communication of indecent language specification, Appellant agreed that the contents of the conversations with the detective were "grossly offensive" and would "shock the moral sense of the community because [they were] vulgar, filthy, and disgusting." Appellant also agreed that they violated community standards "[b]ecause sex with children is both illegal and immoral." He stated, "What I was talking about would reasonably tend to corrupt morals and incite offensive sexual thoughts."

[3] However, as discussed *infra*, the military judge's inquiry was nonetheless complete because Appellant's speech was not protected.

The indecent language specification alleged that the communication of indecent language was conduct of a nature to bring discredit upon the armed forces. On this point, Appellant stated,

> My conduct was of a nature to bring discredit upon the armed forces because [the detective], who was a civilian, found out that I was an Air Force officer; that I engaged in an offensive sexual discussion of this nature. That harmed the reputation of the Air Force and lower[ed] it in public esteem because officers are supposed to set the example in behavior and conduct. And this civilian was seeing that I, as an Air Force officer, did not behave in that expected manner; but, instead I behaved in a way that was very offensive. That looked terrible for the Air Force and the military. I had no legal justification or excuse for engaging in this offensive sexual discussion.

The military judge inquired further into this area. In response, Appellant repeated that he believed that the communications were conduct of a nature to bring discredit upon the armed forces because the detective was a civilian, and given Appellant's conduct, that might lower the detective's opinion of the Air Force.

Upon completion of his questions, the military judge asked the parties if they believed further inquiry was necessary. Trial counsel stated, "No, Your Honor." Trial defense counsel stated, "No, Sir."

II. DISCUSSION

A. Law

A military judge's decision to accept a guilty plea is reviewed for abuse of discretion, and questions of law arising from the guilty plea are reviewed de novo. *United States v. Kim*, 83 M.J. 235, 238 (C.A.A.F. 2023) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

"We give the military judge broad discretion in the decision to accept a guilty plea because the facts are undeveloped in such cases." *Id*. To provide relief, the pertinent question is whether "the record as a whole show[s] a substantial basis in law and fact for questioning the guilty plea." *Id*. (citing *Inabinette*, 66 M.J. at 322 (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.A.A.F. 1991))).

"When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of critical significance." *Id*. (quoting *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011)).

Under those circumstances, a military judge must conduct a "heightened" inquiry, explaining the distinction between constitutionally protected behavior and criminal conduct and ensuring the accused understands the differences. *See United States v. Moon*, 73 M.J. 382, 388 (C.A.A.F. 2014) ("Without a proper explanation and understanding of the constitutional implications of the charge, [a]ppellant's admissions in his stipulation and during the colloquy . . . do not satisfy *Hartman*.").

The First Amendment to the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The United States Supreme Court has recognized that while servicemembers are not excluded from First Amendment protection,

> the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible with the military that which would be constitutionally impermissible outside of it.

Parker v. Levy, 417 U.S. 733, 758 (1974).

"It is well-settled law that obscenity is not speech protected by the First Amendment, regardless of the military or civilian status of the 'speaker.'" *United States v. Meakin*, 78 M.J. 396, 401 (C.A.A.F. 2019) (citing *United States v. Williams*, 553 U.S. 285, 288 (2008)).

Our superior court "has long held that 'indecent' is synonymous with obscene." *Id.* (citing *United States v. Moore*, 38 M.J. 490, 492 (C.A.A.F. 1994)).

"[R]epugnant sexual fantasies involving children" that appeal "to the prurient interest" and are transmitted from a home computer to an anonymous third party online are not protected speech. *Id.* at 401–02 (citation omitted).

If the Government attempts to use the second clause of Article 134, UCMJ, to punish "speech that would be impervious to criminal sanction in the civilian world," the Government must prove a "direct and palpable connection between the speech and the military mission or military environment." *United States v. Grijalva*, No. 21-0215, __ M.J. __, 2024 CAAF LEXIS 358, *7 (C.A.A.F. 26 Jun. 2024) (alteration omitted) (quoting *United States v. Wilcox*, 66 M.J. 442, 447–48 (C.A.A.F. 2008)).

B. Analysis

The military judge in this case did not conduct a heightened inquiry addressing the distinction between constitutionally protected speech and the alleged criminal conduct. Appellant alleges that this was error in light of *Kim*. We disagree.

Immediately following his explanation of the elements and definitions relevant to the communication of indecent language specification, the military judge asked Appellant why he believed he was guilty of this offense. Appellant's description of his conduct—"grossly offensive," "vulgar, filthy, and disgusting" speech involving adults having sex with minor children—made abundantly clear that his speech was not protected speech. Rather, the speech involved indecency, which is synonymous with obscenity. Analogous to *Meakin*, the speech was communicated outside the home, through the Internet, and to an anonymous third party. 78 M.J. at 401–02. This was no "constitutional gray area." *Kim*, 83 M.J. at 239. As the misconduct did not involve protected speech, a "heightened" inquiry was not required in this case.

Appellant next alleges that in light of *Wilcox*, the guilty plea was improvident because a "direct and palpable connection between [Appellant's] speech and the military mission or military environment" was not established. 66 M.J. at 448. However, the requirement for this matter to be resolved is not triggered in every case where an accused utters words, be it orally, written, or typed online. Instead, the issue arises only when the Government attempts to use the second clause of Article 134, UCMJ, to punish speech that would be "impervious to criminal sanction in the civilian world." *Id.* at 447. "In some cases, the question of whether the First Amendment would or would not protect speech in a civilian context is not complicated." *Grijalva*, 2024 CAAF LEXIS 358, at *12. As indecent language, synonymous with obscenity, is not protected speech for either civilians or servicemembers, this matter was not at issue. Thus, the military judge was not required to ensure a direct and palpable connection between Appellant's speech and the military mission or military environment was established prior to acceptance of Appellant's guilty plea.

Finally, Appellant alleges that his guilty plea to the communication of indecent language specification is unconstitutional, legally insufficient, or improvident with regards to the terminal element alleged. We disagree. First, it is well-settled that Clause 2 of Article 134, UCMJ, is constitutional. *Parker*, 417 U.S. at 758. Next, "[b]ecause [Appellant] pleaded guilty, the issue must be analyzed in terms of providence of his plea, not sufficiency of the evidence." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). Lastly, Appellant's plea is provident with regards to the terminal element. In his sworn statements to the military judge, Appellant conveyed that he was an Air Force officer engaging in, by his own admission, indecent conduct, and that conduct was uncovered by a civilian. Appellant stated, "And this civilian was seeing that I, as an Air Force officer, did not behave in that expected manner; but, instead I behaved in a way that was very offensive. That looked terrible for the Air Force and the military." The military judge did not abuse

his discretion in finding Appellant's explanation adequate to meet this element of the offense.

Reviewing the inquiry as a whole, there is not a substantial basis to question Appellant's guilty pleas. The military judge did not abuse his discretion in accepting the pleas.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d).

Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Brandon A. Wood,
Appellant

USCA Dkt. No. 25-0005/AF
Crim.App. No. 40429

O R D E R

On further consideration of the granted issues, 85 M.J. 254 (C.A.A.F. 2024), and in view of *United States v. Johnson*, __ M.J. __ (C.A.A.F. 2025), it is, by the Court, this 22nd day of July, 2025,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Castanien)
Appellate Government Counsel (Kaufman)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40429

UNITED STATES
Appellee

v.

Brandon A. WOOD
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 13 August 2024

Military Judge: Christopher D. James (arraignment); Dayle P. Percle.

Sentence: Sentence adjudged 18 October 2022 by GCM convened at Barksdale Air Force Base, Louisiana. Sentence entered by military judge on 13 December 2022: Dishonorable discharge, confinement for 12 months, reduction to E-1, and a reprimand.

For Appellant: Major Spencer R. Nelson, USAF.

For Appellee: Colonel Steven R. Kaufman, USAF; Lieutenant Colonel Thomas J. Alford, USAF; Lieutenant Colonel J. Pete Ferrell, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before: JOHNSON, GRUEN, and KEARLEY, *Appellate Military Judges*.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

PER CURIAM:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one specification of wrongful possession of child pornography in violation of Article 134, Uniform of Code Military Justice (UCMJ), 10 U.S.C. § 934.[1] The military judge sentenced Appellant to a dishonorable discharge, confinement for 12 months, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings and did not modify the adjudged sentence. The convening authority denied Appellant's request for deferment of the reduction to the grade of E-1, but waived automatic forfeitures for six months for the benefit of Appellant's dependent child.

Appellant raises one issue on appeal: whether as applied to Appellant, reference to 18 U.S.C. § 922 in the Statement of Trial Results and entry of judgment is unconstitutional where the Government cannot demonstrate that barring his possession of firearms is "consistent with the nation's historical tradition of firearm regulation"[2] when he was not convicted of a violent offense.[3] After carefully considering this issue and for the reasons explained in *United States v. Vanzant*, __ M.J. __, No. ACM 22004, 2024 CCA LEXIS 215, at *24 (A.F. Ct. Crim. App. 28 May 2024) and *United States v. Lepore,* 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), we find Appellant is not entitled to relief.

In this case, Appellant did not raise the issue of the convening authority's failure to provide a reason in writing for the denial of the request for deferment. We, however, address this issue sua sponte. The convening authority's Decision on Action Memorandum indicates Appellant requested waiver of forfeitures for six months and deferment of reduction in grade for six months. The convening authority granted the request for waiver of automatic forfeitures, but expressly denied the deferment request. However, the convening authority did not provide a reason in writing for the denial of the request for deferment of reduction in grade. The record discloses no indication the Defense objected or moved for correction of the convening authority's failure to address the reasons why he denied the request to defer reduction in grade.

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[1] All references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] Citing *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

[3] Appellant personally raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

We review a convening authority's denial of a deferment request for an abuse of discretion. *United States v. Sloan*, 35 M.J. 4, 6 (C.M.A. 1992), *overruled on other grounds by United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018); Rule for Courts-Martial (R.C.M.) 1103(d)(2). "When a convening authority acts on an [appellant]'s request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the [appellant]) and must include the reasons upon which the action is based." *Id.* at 7 (footnote omitted); *see also* R.C.M. 1103(d)(2) ("The action of the authority acting on the deferment request shall be in writing" and "provided to the accused.").

"A motion to correct an error in the action of the convening authority shall be filed within five days after the party receives the convening authority's action." R.C.M. 1104(b)(2)(B).

Because Appellant did not object or move to correct an error in the convening authority's decision on action, we review the convening authority's decision therein to deny the deferment for plain error. *See United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citations omitted) (noting appellate courts review forfeited issues for plain error). Under the longstanding precedent of *Sloan*, the convening authority's failure to state the reasons he denied the request to defer reduction in rank was an error. *See* 35 M.J. at 7. For purposes of our analysis, we assume without holding the error was clear or obvious. However, under the circumstances of this case, we find no material prejudice to Appellant. Appellant bore "the burden of showing that the interests of [himself] and the community in deferral outweigh[ed] the community's interests in imposition of the punishment on its effective date." R.C.M. 1103(d)(2). Appellant not only forfeited the issue at the time, but he has not alleged on appeal prejudicial error by the convening authority. Furthermore, the convening authority granted Appellant's request to waive automatic forfeitures for the benefit of his dependent child pursuant to Article 58b, UCMJ, 10 U.S.C. § 858b. Given Appellant requested deferral of his reduction in rank "because his paycheck is going to his family," we are confident the convening authority entertained the rationale for the requested waiver *and* deferral. There is no indication the convening authority entertained an improper rationale for denying deferment of reduction in rank and we find Appellant's material rights were not substantially prejudiced by the convening authority's failure to state the reasons for the denial.

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Benjamin C. York,
Appellant

USCA Dkt. No. 25-0200/AF
Crim.App. No. 40604

ORDER DENYING PETITION

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is by the Court, this 11th day of August, 2025,

ORDERED:

That the petition is hereby denied.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Johnson)
Appellate Government Counsel (Liabenow)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40604

UNITED STATES
Appellee

v.

Benjamin C. YORK
Captain (O-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary[1]

Decided 30 April 2025

Military Judge: Pilar Wennrich (arraignment); Charles G. Warren.

Sentence: Sentence adjudged 14 April 2023 by GCM convened at Hurlburt Field, Florida. Sentence entered by military judge on 31 May 2023: Confinement for 15 days, forfeiture of $4,000.00 pay per month for 6 months, and a reprimand.

For Appellant: Major Frederick J. Johnson, USAF; Philip D. Cave, Esquire.

For Appellee: Colonel Zachary T. Eytalis, USAF; Lieutenant Colonel J. Peter Ferrell, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Major Regina M.B. Henenlotter, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, MASON, and KEARLEY, *Appellate Military Judges*.

Judge KEARLEY delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge MASON joined.

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[1] Appellant appeals his conviction under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A), *Manual for Courts-Martial, United States* (2024 ed.).

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

KEARLEY, Judge:

A general court-martial composed of officer members found Appellant guilty, contrary to his pleas, of one charge and one specification of abusive sexual contact and one charge and one specification of assault upon a commissioned officer in violation of Articles 120 and 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 928.[2] Both offenses involved a single victim, WS, a fellow Air Force officer who temporarily worked with Appellant. The military judge sentenced Appellant to confinement for 15 days, forfeiture of $4,000.00 pay per month for six months, and a reprimand. The convening authority provided the language to the adjudged reprimand and took no other action on the findings or sentence.

Appellant raised the following issues on appeal: (1) whether Appellant received ineffective assistance from his trial defense counsel; (2) whether the military judge erred by instructing the members that evidence of uncharged acts of physical contact could be used for certain purposes under Mil. R. Evid. 404(b); (3) whether the evidence was legally and factually sufficient to support his conviction of abusive sexual contact; (4) whether the court-martial panel was properly constituted; (5) whether the military judge erred by instructing the members that assault consummated by a battery was a lesser-included offense of abusive sexual contact; (6) whether 18 U.S.C. § 922 is constitutional as applied to Appellant; and (7) whether the military judge abused his discretion in denying Appellant's post-trial motion for a finding of not guilty as to the specification of abusive sexual contact.[3] We also consider another issue not raised by Appellant: (8) whether Appellant was subjected to unreasonable post-trial delay in appellate review.

We have carefully considered issues (5), (6), and (7) and we find they do not require discussion or relief. *See United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A.

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[2] Unless otherwise indicated, references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

1987)). As to the remaining issues, we find no error that materially prejudiced Appellant's rights, and we affirm the findings and sentence.

I. BACKGROUND[4]

Appellant and WS both served as instructors in the Air Force Reserve Officer Training Corps (ROTC). Appellant first met WS when she inspected Appellant's ROTC detachment in her role as a detachment assessor. Appellant and WS served in different career fields; WS served in law enforcement.

Appellant and WS met again at Maxwell Air Force Base (AFB), Alabama, in June 2019, where they were both on temporary duty (TDY) for ROTC summer field training for ROTC cadets. This was Appellant's second summer at ROTC field training and he was serving as a squadron training officer, with oversight of three flights. This was WS's first summer at field training and she was a flight training officer in a different squadron. At the time, Appellant was a captain and WS was senior to Appellant.

As part of the team of training officers, Appellant and WS were required to use a group messaging application. They were part of a group text that included all training officers and cadre. At some point, Appellant began to message WS directly. Initially, they exchanged work-related text messages, but, after some time had passed, Appellant began to text WS about social opportunities. He invited her to have a drink with him at least six times. WS would either not reply or provide a reason she could not join Appellant. At one point, when Appellant asked her if she wanted a beer, WS jokingly texted she would need "a beer or three LOL" after taking her upcoming physical fitness test.

On 4 July 2019, Appellant and WS joined a group of instructors for dinner at a local pizza restaurant. After dinner, Appellant and others in the group headed to a baseball game. WS decided not to go to the baseball game and instead returned to her room. One of the instructors heading to the game asked WS if she would take her leftover dinner back to the base for her. Appellant overheard this conversation and asked WS to do the same with his leftovers. WS agreed and returned to her room with the leftover pizza which she placed in her refrigerator.

The next day, the instructors were enjoying some time off due to the Independence Day holiday weekend. Appellant was with a group of instructors holding a barbeque and drinking outside of billeting. WS asked Appellant if

[4] The following background is drawn primarily from WS's trial testimony, supplemented by other evidence in the record.

the barbeque was still going on, implying that she would head down and bring his pizza. Appellant indicated it was winding down and asked WS for her room number. WS gave Appellant her room number, and he texted back, "I'll be by in a sec."

When Appellant arrived at her room, WS answered the door and went back into the room to retrieve his pizza from her refrigerator. Appellant entered the room and began talking to WS. WS handed Appellant his pizza and then she sat down on an ottoman next to a chair. Appellant put his pizza down, removed his shoes and sat down next to her on part of the chair and part of the ottoman, with his leg touching her leg. Appellant then swung one of his legs around her back to straddle her from behind and began massaging her shoulders. He then leaned in and kissed the back of WS's neck. WS stood up and told him, "You need to get your shoes, get your pizza and go." Appellant responded, "But do I, but do I?" He remained sitting down. WS said, "You're about to get yourself in trouble. You just need to get your pizza and go." WS testified that Appellant sat there for a little bit, and then he got up and started to pull WS towards him, grabbing at her clothes, "grabbing all over," and "tickling [her] sides." WS tried to push him away, but he just kept "tickling [her] sides and just grabbing all over."

As WS was trying to push him away from her, Appellant grabbed her buttocks with his hands and tried to pull her towards him. WS testified, "I was pushing him off of me and he grabbed—grabbed with his hands, just grabbed my butt while trying to pull me towards him." WS tried not to escalate the situation more or let their interaction become "super loud" because she had a neighbor across the hall who often had his door open and WS "did not want to mess things up" for Appellant professionally.

At some point Appellant went into WS's bathroom and turned on the shower. WS had no idea why he turned on the shower. While Appellant was in the bathroom WS texted another colleague and asked if he was in the dorms. He said he was across the base. She then texted "can't get dude out of my room." After leaving the bathroom, Appellant again approached WS and started pulling at her clothes and backed her into a corner. Appellant then tripped over the leg of the loveseat and pulled WS on top of him and continued to grab at her body to include her torso. At some point, Appellant stopped grabbing WS and he began singing a Celine Dion song, "My Heart Will Go On," from the *Titanic* movie. During this time, WS was able to send a group text to the same colleague and another colleague who lived in her dorm.

The second colleague went to WS's door in response to the text. She knocked on the door and, when WS opened it, she made an excuse that she and WS needed to go get money at the ATM before cadets would arrive the next day. Appellant said, "I guess I'm not invited," and left.

WS subsequently made two statements to OSI: one, the day after the event, and the other, nearly two years later. These statements are discussed in more detail *infra.*

A. Ineffective Assistance of Counsel

In his brief, Appellant asserts his trial defense counsel, Ms. JS and now-Major (Maj) JF, were ineffective in investigating and seeking discovery to lay a sufficient foundation to establish evidence that would shift the burden to the Prosecution to disprove unlawful command influence (UCI). Appellant did not submit a declaration. In response to Appellant's allegations of ineffective assistance, the Government moved this court to compel declarations from trial defense counsel. This court granted the motion and ordered Ms. JS and Maj JF to provide affidavits or declarations responding to Appellant's claims. The affidavits submitted by the counsel address trial defense counsel's strategy for handling the UCI motion.

1. Additional Background

a. Pre-preferral

The day after the incident, WS made a statement to the Air Force Office of Special Investigations (OSI) where she described what happened with Appellant when he came into her room. In this statement, she said he did not grab her "parts," but "he might have just barely grazed [her] butt" with his hand.

OSI coordinated with the Chief of Military Justice at Maxwell AFB, who opined that the allegations did not satisfy the elements of an Article 120, UCMJ, offense, but likely showed a violation of Article 128, UCMJ. As a result, Appellant received administrative punishment for the incident.

The record indicates that, after receiving administrative punishment, in April 2020, Appellant filed a congressional complaint with Senator Jeanne Shaheen alleging that the OSI was biased in their conduct of the investigation and used insufficient investigative methods to conduct the investigation. The same month, the Director of Staff at Headquarters (HQ) OSI responded to the congressional inquiry, stating OSI "conducted a thorough review into the investigation" in this case and the review showed that "the investigation was conducted in an unbiased manner and in accordance with Air Force and OSI policy."

Meanwhile, WS wanted to follow up on her statement to the OSI, specifically to provide more details. WS stated at trial that she requested "multiple times . . . back in 2019" to "give additional details, and [she] was not afforded that opportunity." She stated she made several phone calls, left messages, sent emails, and even stopped by the legal office when she was at Maxwell

AFB in the fall of 2019 and planned to provide additional details about where and how Appellant touched her. She spoke with an attorney at the Holm Center at Maxwell AFB who told her she would have the opportunity to provide more information and that someone would reach back out to her. According to WS, no one ever did.

In November 2020, WS made a Freedom of Information Act (FOIA) request for the report of investigation that she made to the OSI. When she read it, she did not feel it accurately summarized what she had said during the interview. She learned that her allegations against Appellant had been handled administratively and that her complaint had been investigated as an Article 128, UCMJ, offense for assault upon a commissioned officer, not as a sexual assault.

WS was not pleased with the command reaction to her original allegations.[5] WS wrote her United States Senator, The Honorable Tammy Duckworth, indicating that she did not feel her complaint was properly investigated. WS implied the investigation should have been handled not as just an assault, but as a sexual assault.

In response to WS's letter, Senator Duckworth wrote a letter to the Chief of Staff of the United States Air Force (CSAF) regarding her concerns about Captain York's behavior and the investigation, which included the following:

> Given these allegations, I'm questioning whether the Legal Office at the Holm's [sic] Center AFOSI Leadership at Maxwell Air Force Base are taking on measures to ensure the crimes that could fall under Article 120 are being appropriately investigated and tracked. . . .
>
> To ensure that there isn't a larger failure of the systems in place to investigate and prosecute crimes under Article 120 of the UCMJ, and care for survivors who report sexual assault, I request that your staff review any complaints related to the handling of reports of sexual assault lodged against the Holm's [sic] Center Legal Office, AFOSI, other legal centers and unit commanders on Maxwell Air Force Base, and verify that appropriate measures are being taken to track sexual assault cases and keep victims appropriately informed throughout the investigatory process.

[5] WS said she did not know the actual disposition until two days prior to the trial.

> I would appreciate you looking into this matter at your earliest convenience. Please advise [RC] in my Belleville office of your findings.

At some point after that letter was sent to the CSAF, OSI reopened its investigation. WS was re-interviewed and provided a more detailed statement to OSI in 2021, nearly two years after the incident. In this interview, WS told the investigators Appellant "definitely touched [her] breasts while pulling on [her] clothes," and "he absolutely touched [her] butt" and "touched all over . . . mostly through grabbing." Ultimately, court-martial charges for the offenses were preferred against Appellant.

b. Post-preferral

Trial defense counsel filed four discovery requests related to UCI, including requests for "any and all statements, memoranda for records, emails and papers to or from HQ AFROTC and AFROTC Northeast Region relating to Appellant, WS, or allegations substantive in this case." The Government provided timely responses to all four discovery requests for any such communications. During the several months leading to trial, the Government had informed trial defense counsel that the Defense possessed all responsive records in possession of the Government. The record of trial does not contain any documentation of communication from the CSAF relating to Senator Duckworth's letter to any Air Force entity such as the Office of the Inspector General of the United States Department of the Air Force, the OSI Detachment at Maxwell AFB, and the Holm Center for Officer Accessions & Citizen Development at Maxwell AFB.

Trial defense counsel filed a motion to dismiss for UCI. Appellant's trial defense counsel specifically referenced not having any communication between the CSAF and OSI. The defense position was that Senator Duckworth is capable of exerting UCI and that the CSAF exerted UCI in requesting a reopening of the investigation.[6] Trial defense counsel specifically stated there was a "reasonable inference" that the CSAF directed reopening the investigation and that was enough to shift the burden to the Government to show that UCI did not take place. Trial defense counsel argued, "[I]t is a 'but for' argument. It's a but for the reopening, there never would have been the preferral or this determination."

[6] The record did not contain any documentation of a request from the CSAF to OSI to reopen the investigation.

After hearing argument by both parties regarding the UCI, the military judge initially indicated he was "going to make a finding that the [D]efense has made some showing of UCI to shift the burden to the [G]overnment."

> So, I do find the [G]overnment is going to have to demonstrate beyond a reasonable doubt either that the facts as alleged do not constitute UCI or that they don't place an intolerable strain on the [G]overnment in order to satisfy its burden under the apparent UCI [standard]. I think I would analogize the situation in *Gerlich*[7] to this in terms of reasonable inference that the [CSAF] directed the reopening of the investigation. OSI was not going to do it themselves. They had already relooked at this after being asked by [Appellant] to look at it. And they said, Nothing to see here.

The military judge went on to explain his position and trial counsel provided additional argument. The military judge let the parties know he would use the lunch recess to deliberate.

After recessing, the military judge came back with a final decision stating, "[A]fter carefully reviewing the parties['] pleadings on the subject . . . , the court is going to respectfully deny the Defense's Motion to Dismiss for Unlawful Command Influence."

The military judge later provided a 23-page written ruling on the Defense Motion to Dismiss for UCI. The military judge concluded that there was no evidence that Senator Duckworth is a person subject to the Uniform Code of Military Justice given her current status as a civilian United States Senator.[8] He further found:

> [T]his request from Senator Duckworth was not a prejudgment of guilt; neither was it a recommendation for a particular case deposition; nor was [it] a recommendation of a particular punishment for [Appellant] in the event of a conviction; nor was it an expressed or implied threat to take adverse career action against [the CSAF] in the event he declined to "review any complaints related to the handling of reports of sexual assault" as set forth in Sen[ator] Duckworth's letter.

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[7] *United States v. Gerlich*, 45 M.J. 309 (C.A.A.F. 1996).

[8] The military judge took judicial notice of her status as an Army National Guard retiree.

The military judge went on to state:

> [OSI Headquarters] did re-initiate investigation in this case on or about 19 July 2021 after the Congressional Inquiry by Senator Duckworth. There is no evidence that [the] CSAF personally ordered it, but a fair inference from the facts is that the investigation was initiated from superior authority outside OSI channels.
>
> Assuming arguendo that [the] CSAF took direct or indirect action to direct or request AFOSI to re-initiate an investigation in the summer of 2021, [the] CSAF made no case disposition recommendations in any request from re-investigation.

The military judge determined that Appellant presented "no evidence that any officer preferring or referring charges did so under the specter of expectation from [the] CSAF or any other authority outside [the General Court-Martial Convening Authority's] chain of command." The military judge also pointed out that "[r]equests by the CSAF to initiate an investigation or to re-initiate an investigation are not in violation of existing DoD or AF regulations."

Appellant claims his trial defense counsel were ineffective by not doing more to investigate and seek discovery related to UCI. In response to this court's order, Appellant's civilian defense counsel, Ms. JS, and military defense counsel, Maj JF, submitted declarations about their discovery efforts. This court attached these declarations to the record of trial. The record now contains at least some of the defense discovery requests and the Government's responses.

Ms. JS indicated that because the Government responded to all four discovery requests with either new evidence or an explanation that no other evidence existed, trial defense counsel had no reason to file a motion to compel discovery.

Appellant's trial defense counsel claim they engaged in extensive efforts to obtain documentation related to the communications between Senator Duckworth and the CSAF, as well as all internal OSI correspondence. However, they were told everything had been turned over. Maj JF specifically stated,

> [T]he [d]efense team submitted a supplemental discovery request seeking any further documentation or evidence related to [WS's] congressional inquiry, IG complaint, and [Appellant's] prior OSI investigation as Cadet York. I can also personally state that I had numerous good faith conversations with both [P]rosecutors on this case, requesting all relevant discovery,

> correspondence, and materials regarding the named victim's initial congressional inquiry and I never doubted the Government's truthfulness when they indicated that everything had been turned over. The Senior Trial Counsel and Assistant Trial Counsel repeatedly assured the [d]efense team that no further correspondence existed beyond what the Government had already disclosed.

In her declaration, Ms. JS described her defense motion to dismiss for UCI and how she argued that they did not have any communication from the CSAF and OSI that led to reopening the investigation. She went on to explain her reasoning for not pursuing an interview of the CSAF and further investigating and seeking of discovery related to Appellant's claim of UCI. First, she felt the Government had engaged in substantial effort to exhaust potential avenues to uncover responsive materials. Second, Ms. JS believed securing additional evidence and asking for reconsideration of the UCI motion would be a "losing battle" and she did not foresee a different result because the communication from Senator Duckworth was not directive of any particular outcome and the military judge had already determined that she was incapable of committing UCI because she was not in the military or subject to the UCMJ. Third, she reminded Appellant that he had filed his own inquiry and both he and WS had not felt the 2019 investigation was properly conducted.

Ms. JS explained that Appellant keyed in on her remarks during the motion hearing that they did not have any communication from the CSAF in their discovery efforts. Ms. JS told Appellant that she did not believe she would be granted an opportunity to interview the CSAF, but even if she did, she did not think those efforts would lead to the CSAF admitting to directing any member of the chain of command to prefer charges (actual UCI) or any similar inclination that could produce any better inference of UCI (apparent UCI). Ms. JS explained how efforts to interview the CSAF would "likely delay the trial" and she saw the toll the reinvestigation already had on Appellant. Based on her professional interactions with Appellant over the years, she knew prolonging this issue was having a negative effect on Appellant's well-being.

Ms. JS detailed her discussions with Appellant where she described to him that, in light of the "very low potential for any meaningful relief to come from additional efforts to investigate or litigate the UCI issue," she felt their "time was better served to prepare for trial." She stated that Appellant concurred with her strategy to look forward to trial preparation. Maj JF also described how Appellant "agreed with all trial defense strategies that we made to provide him with the best opportunity for success in findings."

2. Law

a. Ineffective Assistance of Counsel

The Sixth Amendment[9] guarantees an accused the right to effective assistance of counsel. *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, we apply the standard set out in *Strick-land v. Washington*, 466 U.S. 668, 687 (1984), and begin with the presumption of competence as stated in *United States v. Cronic*, 466 U.S. 648, 658 (1984). *See Gilley*, 56 M.J. at 124 (citation omitted). Claims of ineffective trial defense counsel are reviewed de novo. *United States v. Palacios Cueto*, 82 M.J. 323, 327 (C.A.A.F. 2022) (citation omitted).

We utilize the following three-part test to determine whether the presumption of competence has been overcome:

> 1. Are the appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did trial defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If trial defense counsel were deficient, is there "a reasonable probability that, absent the errors," there would have been a different result?

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alteration and omission in original) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

The burden is on the appellant to demonstrate both deficient performance and prejudice. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted). To overcome the presumption of competence, appellant must show there were "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

"[C]ourts 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Datavs*, 71 M.J. at 424 (quoting *Strickland*, 466 U.S. at 689) (additional citation omitted). We will not second-guess reasonable strategic or tactical decisions by trial defense counsel. *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (cita-

[9] U.S. CONST. amend. VI.

tion omitted). When evaluating for prejudice, a "reasonable probability" of a different result is "a probability sufficient to undermine [our] confidence in the outcome" of the trial. *Datavs*, 71 M.J. at 424 (quoting *Strickland*, 466 U.S. at 694) (additional citation omitted).

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

United States v. Scott, 81 M.J. 79, 85 (C.A.A.F. 2021) (alteration in original) (quoting *Strickland*, 466 U.S. at 697) (additional citation omitted).

b. Unlawful Command Influence

We review allegations of UCI de novo. *United States v. Proctor*, 81 M.J. 250, 255 (C.A.A.F. 2021) (citations omitted). A claim of unlawful influence from a non-command source is evaluated by the same standard used to evaluate "those acting with the mantle of command authority." *United States v. Barry*, 78 M.J. 70, 76–77 (C.A.A.F. 2018).

Article 37(a)(3), UCMJ, 10 U.S.C. § 837(a)(3),[10] states:

> No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts taken pursuant to this chapter as prescribed by the President.

Additionally, Article 37(c), UCMJ, 10 U.S.C. § 837(c), states, "No finding or sentence of a court-martial may be held incorrect on the ground of a violation

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[10] All references in this opinion to Article 37, UCMJ, are from the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA), Pub. L. No. 116-92, § 532, 133 Stat. 1198, 1359–61 (20 Dec. 2019). FY20 NDAA made changes to Article 37, UCMJ, which took effect on 20 December 2019 and apply to violations of Article 37, UCMJ, committed on or after that date. In this case, as the alleged violations of UCI under Article 37, UCMJ, first occurred in calendar year 2021 when Senator Duckworth sent her letter to the CSAF. Thus, the new version of Article 37, UCMJ, is applicable to this case.

of this section unless the violation materially prejudices the substantial rights of the accused."

The test for actual unlawful command influence requires an appellant to demonstrate (1) "facts, which if true, constitute unlawful command influence;" (2) "the court-martial proceedings were unfair to the [appellant];" and (3) "the unlawful command influence was the cause of that unfairness." *United States v. Boyce*, 76 M.J. 242, 248 (C.A.A.F. 2017) (citation omitted). To determine if apparent unlawful command influence was present, an appellant must bring forward "some evidence" to suggest that: (a) the facts, if true, "constitute unlawful command influence," and (b) "this unlawful command influence placed an 'intolerable strain' on the public's perception of the military justice system because 'an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.'" *Id.* at 249 (citation omitted). "If [an appellant] presents some evidence of unlawful command influence, the burden shifts to the [G]overnment to prove beyond a reasonable doubt that either (a) the predicate facts proffered by the appellant do not exist, or (b) the facts as presented do not constitute unlawful command influence." *Proctor*, 81 M.J. at 256 (quotation marks and citation omitted). "The threshold for raising the issue at trial is low, but more than mere allegation or speculation." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citation omitted).

3. Analysis

As a preliminary matter, Appellant requested a *DuBay*[11] hearing. We have considered this request and do not find a *DuBay* hearing is required. *Cf. United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997) (announcing principles to consider before ordering a fact-finding hearing when the appellant submits an affidavit in support of an IAC claim on appeal); *see also* Article 66(f)(3), 10 U.S.C. § 866(f)(3) (providing authority for Courts of Criminal Appeals (CCA) to "order a hearing as may be necessary to address a substantial issue"). Appellant submitted no declaration, there is no conflict between the two trial defense counsel declarations, and there is no factual matter that needs to be resolved to make our determination, including whether a pertinent communication from the CSAF exists.

We have carefully considered Appellant's allegations of ineffective assistance of counsel, and we conclude he has not demonstrated he is entitled to relief. We follow the United States Supreme Court's guidance, as recognized

[11] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) (per curiam).

by our immediate superior court, the United States Court of Appeals for the Armed Forces (CAAF), "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Scott*, 81 M.J. at 85 (quoting *Strickland*, 466 U.S. at 697) (additional citation omitted). That is, we decide this case based on the third part of the test in *Gooch*: "[I]s there 'a reasonable probability that, absent the errors,' there would have been a different result?" 69 M.J. at 362 (citation omitted); s*ee also Datavs*, 71 M.J. at 424 (citation omitted) (stating that in claims of IAC, the burden is on the appellant to demonstrate prejudice). We answer this question in the negative.

Even if trial defense counsel was deficient in that they failed to make a more specific written discovery request and interview additional witnesses, Appellant has failed to show that there is a reasonable probability that, absent the error, there would have been a different result. The only evidence of impact of Senator Duckworth's memo we have is that it likely led to a second investigation. We note that even if the CSAF had directed a reopening of the investigation, that, in and of itself, is not necessarily UCI. Reopening an investigation is not directing a convening authority to take a specific action against an accused. *See Boyce*, 76 M.J. at 248 (citation omitted).

Appellant may claim that "but for" the second investigation, he would not have been convicted; however, the investigation alone is not prejudicial to Appellant. Simply reopening an investigation would not cause an observer to believe the court-martial proceeding was unfair to Appellant, especially when the Appellant himself complained about the bias and insufficient investigative methods in the first investigation. As such, a new investigation would not prejudice Appellant by undermining confidence in the outcome. *See also Datavs*, 71 M.J. at 424 (quoting *Strickland*, 466 U.S. at 694) (additional citation omitted) (when evaluating for prejudice, a "reasonable probability" of a different result is "a probability sufficient to undermine [our] confidence in the outcome" of the trial). A new investigation in this circumstance, where both parties criticized the original one, could actually strengthen confidence in the outcome, vice undermining it.

Therefore, even if the CSAF's office had somehow encouraged directly or indirectly that the investigation be reopened, and counsel was deficient in not uncovering this, such information likely would not have been UCI, nor would it have led to a different result under the circumstances. *See Gooch*, 69 M.J. at 362. Thus, even presuming that we found trial defense counsel's performance fell below the standard expected of fallible lawyers, Appellant has not met his burden to demonstrate prejudice and is, therefore, not entitled to relief.

B. Military Judge's Instruction – Uncharged Misconduct Under Mil. R. Evid. 404(b)[12]

Appellant claims that the military judge erred by instructing the members that certain evidence, specifically Appellant's acts of kissing WS's neck and rubbing her shoulders, could be considered under Mil. R. Evid. 404(b) for the purpose of demonstrating (1) lack of mistake of fact on the part of the accused and (2) Appellant's desire for WS and intent to gratify his sexual desire in touching her with or without her consent.

1. Additional Background

Prior to trial, Appellant's trial defense counsel submitted a "Defense Motion for Appropriate Relief Admit [Mil. R. Evid.] 412 Evidence," requesting to admit evidence that Appellant sat behind WS and massaged her shoulders and that WS did not resist. Appellant also wanted to admit evidence that he leaned forward to kiss WS on her neck while he massaged her shoulders. The Government did not object to this evidence and considered it *res gestae* of the offense. WS, through her counsel, objected to the consensual nature of the massage. In a closed hearing the military judge tried to clarify how the Government would use the evidence. The Government again reiterated it was "*res gestae*, facts and circumstances."

The military judge determined that the court would provide a limiting instruction to the members as to how they can use the evidence. Before the opening statements, the military judge held a hearing with the counsel. He informed them he intended to give a limiting instruction for the Mil. R. Evid. 412 evidence that would include an instruction relating to Mil. R. Evid. 404(b), specifically, the uncharged conduct of Appellant rubbing WS's shoulders and kissing her neck. The military judge read the proposed instruction:

> Members, you've heard testimony concerning that the accused may have rubbed the shoulders of [WS], and also kissed her neck. Neither of those instances are charged misconduct in this case, and so I advise you that that testimony was admitted for a limited purpose. Namely, the parties intend to offer counter arguments as to the implications of these actions. The [D]efense intends to argue that[,] if true, it may create a reasonable mistake of fact in the mind of the accused that [WS] may have been consenting to the charged misconduct. The

[12] Appellant does not claim the military judge erred by allowing uncharged misconduct into evidence under Mil. R. Evid. 404(b).

> [G]overnment intends to argue in contrast that those actions simply demonstrate the accused's sexual desire of [WS], and his intent to gratify his sexual desire in touching her with or without her consent. You may consider the evidence solely for its tendency, if any, to inform those bases I've just identified. You may not consider it for any other purpose. Specifically, you may not infer from the evidence that [WS] is a bad person with bad character or has the propensity to engage in sexual acts generally. Rather, you may consider it only for the limited purpose identified above. By the same token, you may not infer from this evidence that the accused is a bad person with bad character with general criminal propensity. Rather, you may consider it for the limited purpose identified above.
>
> In deciding the weight, if any, to give to this evidence, you may consider the totality of the circumstances surrounding this incident. Ultimately, the weight, if any, you give to these actions is solely within your discretion.

The military judge asked if there were any objections to that limiting instruction, and trial counsel said, "[N]o, sir" and trial defense counsel said, "[N]one, sir."

However, later in the trial after the Defense rested, while discussing instructions for the members, trial defense counsel objected to the military judge's proposed Mil. R. Evid. 404(b) instruction, which told the members they could consider evidence of massaging and kissing as evidence of intent to gratify sexual desire. Trial defense counsel pointed out there was no notice by the Government of their intent to use Mil. R. Evid. 404(b) evidence.[13] The Government's position was that the testimony was *res gestae*, and not Mil. R. Evid. 404(b) evidence, stating, "It's not uncharged misconduct. It is specific evidence for an element of the crime." The military judge "out of an abundance of caution" disagreed that the testimony was *res gestae*. The military judge specifically asked trial defense counsel during the closed hearing if they had "any objections" to the Government using evidence of Appellant's massaging of WS's shoulders and kissing of her neck "to suggest the accused intended to gratify his own sexual desire." Civilian defense counsel replied,

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[13] Anticipating the Defense would claim a lack of notice, the military judge stated he would question them as to how they could be unprepared to address this issue. He pointed out that this information was provided to them months earlier in discovery and discussed on the first day of trial.

"[N]one, sir." The military judge noted that he conducted a Mil. R. Evid. 404(b) analysis and concluded he would provide a Mil. R. Evid. 404(b) instruction.

The instruction read:[14]

> You heard testimony that the [a]ccused may have sat behind and rubbed the shoulders of [WS] and also kissed her neck, or attempted to kiss her neck, in the moments shortly preceding the charged misconduct. That is the buttocks grabbing and the torso grabbing. Neither of those instances, that is the kiss – alleged kiss on the neck or shoulders rubbing are themselves the charged misconduct in this case, and so I advise you that that testimony was admitted for a limited purpose, namely the parties intend to offer counter arguments as to the implications of these actions.
>
> The defense intends to argue that it if true, this may have created a "reasonable mistake of fact" in the mind of the [a]ccused that [WS] may have been consenting to the charged misconduct. The [G]overnment intends to argue in contrast that those actions tend to demonstrate the [a]ccused's sexual desire of [WS] and his intent to gratify his sexual desire in touching her with or without her consent. You may consider the evidence solely for its tendency, if any, to inform those two bases which I just mentioned. You *cannot* consider it for any other purpose.
>
> Specifically, you may *not* infer from this evidence that [WS] is a bad person with bad character or has any propensity to engage in sexual acts generally. Rather, you may consider it only for the limited purpose of whether her responses to the [a]ccused's actions in her room on the night of 5 July 2019 created any "reasonable mistake of fact as to consent" in the mind of the [a]ccused.
>
> By the same token, you may *not* infer from this evidence that the [a]ccused is a bad person with bad character or has any general criminal propensity in sexual acts generally. Rather, you may consider it only for the limited purpose of its tendency

[14] The instruction was titled, "Limited Use Evidence, Uncharged Physical Contact between the Accused and [WS]."

> if any, to demonstrate that Accused's motive and intent to gratify his sexual desire pertinent to Charge I.
>
> In deciding the weight, if any, to give to this evidence, you may consider the totality of the circumstances of these events. Ultimately, the weight, if any, you give to this evidence is solely in your own discretion.

(Emphasis added).

Appellant claims that the military judge's "sua sponte resolution was an abuse of discretion" and that the Defense detrimentally relied on the Government's lack of Mil. R. Evid. 404(b) notice and therefore, when the acts came in under Mil. R. Evid. 404(b) it was too late for the Defense to plan their case presentation, litigate the admissibility of evidence, and prepare a more thorough response to the instruction.

2. Law

A preserved claim of instructional error is a question of law reviewed de novo. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014). A military judge's decision to provide an instruction is reviewed for abuse of discretion. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002): *United States v. Anderson*, 51 M.J. 145, 153 (C.A.A.F. 1999).

The military judge "has substantial discretionary power in deciding on the instructions to give." *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999) (quoting *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)). Where an instruction is not requested by a party, the military judge may have a *sua sponte* duty to give it if the issue is reasonably raised by some evidence. *Id.* (citations omitted). Required instructions include "explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given." R.C.M. 920(e)(7). The subject of instruction in appropriate cases includes the limited purpose for which evidence was admitted and the effect of character evidence. *Id.,* Discussion.

Mil. R. Evid. 404(b)(1) prohibits the use of evidence of a crime, wrong, or other act by a person as evidence of the person's character to show this person acted in conformity with that character on a particular occasion. However, pursuant to Mil. R. Evid. 404(b)(2), such evidence may be admissible for another purpose, including, motive, plan, intent, or the absence of mistake. At the request of the accused, the prosecution must "provide reasonable notice of the general nature of any such evidence that the prosecution intends to offer at trial;" and "do so before trial; or during trial if the military judge, for good cause, excuses lack of pre-trial notice." Mil. R. Evid. 404(b)(2)(A), (B).

3. Analysis

The military judge did not abuse his discretion in providing a *sua sponte* instruction on how the evidence involving shoulder rubbing and kisses to WS's neck could be used. Military judges have "substantial discretionary power" in deciding which instructions to give. *Smith*, 50 M.J. at 455.

Evidence of Appellant's and WS's physical contact before the charged misconduct was raised during trial when WS testified about what happened once Appellant showed up at her room. Both before trial and during trial, trial defense counsel did not object to this evidence. To ensure that the members did not use this evidence for character or propensity purposes, the military judge used his *sua sponte* authority to give an instruction because the evidence was raised and he knew both sides intended to argue the evidence for different reasons. The instruction equally addressed both Appellant and WS and told the members not to use the information to determine that Appellant or WS were bad persons with bad character. He equally instructed them not to infer that WS had the propensity to engage in sexual acts generally and not to infer that Appellant had any criminal propensity in sexual acts generally. The military judge articulated how both sides intended to use the evidence to support their view of the case. As such, the military judge did not abuse his discretion by applying his substantial discretionary power to instruct the members how they can consider the evidence of physical contact.

Next, we turn to Appellant's argument that the Government failed to provide notice of the Mil. R. Evid. 404(b) evidence when "its argument that the information was res gestae was insufficient." The evidence at issue was contained in WS's OSI interviews and used in cross-examination of WS during her testimony. Trial defense counsel indicated they intended to argue the same evidence in support of their mistake of fact defense as to consent. The military judge granted them the ability to "argue it for the inferences desired." Significantly, trial defense counsel indicated to the military judge that they had no objections to the Government using evidence of Appellant's massaging of WS's shoulders and kissing of her neck to prove intent to gratify Appellant's sexual desire. Therefore, even if the Government violated the notice requirement contained in Mil. R. Evid. 404(b), Appellant was not prejudiced. Trial defense counsel did not argue they needed more time to prepare and in fact planned to, and did, use that evidence to support their theory of the case.

Given the discretionary power given to military judges with regards to instructions, combined with the particular care this military judge showed in crafting the instruction and ensuring that both parties could argue the evidence in the manner they intended, the military judge did not abuse his discretion in providing the instruction.

C. Legal and Factual Sufficiency

In his appeal, Appellant challenges the legal and factual sufficiency of abusive sexual contact in violation of Article 120, UCMJ. Appellant asserts the Government failed to prove the specific intent element of the charged offense—that Appellant touched WS's buttocks with intent to gratify his sexual desire.

1. Additional Background

WS testified at trial that after Appellant sat down next to her, he stood up and swung his leg all the way around the back of her body, sitting behind her on the ottoman, straddling her with one leg on either side of her. Appellant then gave her a massage and kissed the back of her neck. WS stood up and told Appellant to leave, and then Appellant began to grab her all over and pull her toward him, tickling her sides, while she tried to push him away. WS testified that Appellant then "grabbed [her] butt while trying to pull [her] towards him."

On cross-examination, WS acknowledged that her initial statement to OSI indicated Appellant "tried" to kiss her neck, although she did not know why the word "try" was in there. She also admitted that she and Appellant had previously discussed topics that included problems with showers in the billeting and finding a place to get massages. Additionally, WS told OSI she did not want to report the incident but felt she should because Appellant was around female ROTC cadets.

During the cross-examination, civilian trial defense counsel, Ms. JS, asked about the inconsistencies between the two statements WS made to OSI, the first in 2019, the day after the incident, and the second in 2021. WS agreed that in 2019, she talked about the touching of her buttocks as "grazing," while in 2021, she used the word "grabbing." She also agreed that in 2019, she did not say Appellant touched her breasts, but in 2021, she said he did. She admitted during cross-examination that in 2021 she was not sure if his touching of her breasts was done on purpose.

WS explained that in 2019, when she made her initial report, she was "embarrassed" and said her thought at the time was, "I'm like, I'm [a law enforcement professional]. I'm [senior to him]. Like this should not be happening." She also said,

> [Appellant] and I in that room were talking about all the things that he was—his career aspirations, opportunities that he was just about to have, and he was doing very well. And that weighed very heavily on me. It still weighs heavily on me. I didn't—my goal was not to ruin his life. And that's what I kept thinking about, he's making a decision, a bad decision while he

> was intoxicated, do I need to—how far do I need to press this issue. That's what I was thinking about.

On cross-examination, WS maintained her assertion that in the summer of 2019, when she first spoke to OSI, she was deeply conflicted over the consequences that her decision to report might bring about for Appellant:

> [Civilian Defense Counsel (CDC)]: You're telling us that in July of 2019, when you gave your statement, that you willfully gave them false information?
>
> [WS]: I left out details.
>
> [CDC]: But it wasn't just leaving it out, [WS], they asked you specifically about where you were touched, right?
>
> [WS]: I'm sure they did. And I did not, and still to this day my intent is not to ruin [Appellant]'s life. It is—I'm—that's not my goal here.

WS testified that after her first statement to OSI, she requested an opportunity in that same year to provide additional information to OSI about the touching but was not given an opportunity to do so. WS stated at trial that she asked "multiple times . . . back in 2019" to "give additional details, and [she] was not afforded that opportunity." She stated that she made several phone calls, left messages, sent emails, and even stopped by the legal office when she was TDY in the fall of 2019 and she spoke with an "attorney at that time" and was told she would have the opportunity to provide more information and that the legal office would reach back out to her, but she claimed they never did.

2. Law

a. Legal and Factual Sufficiency

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). "Our assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (citation omitted). "[T]he term 'reasonable doubt' does not mean that the evidence must be free from any conflict . . . ." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). "[I]n resolving questions of legal sufficiency, we are

bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Thus, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *King*, 78 M.J. at 221 (alteration in original) (citation omitted). "This deferential standard impinges upon the factfinder's discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *United States v. Mendoza*, __ M.J.__, No. 23-0210, 2024 CAAF LEXIS 590, at *9 (C.A.A.F. 7 Oct. 2024) (internal quotation marks and citation omitted). "The [G]overnment is free to meet its burden of proof with circumstantial evidence." *King*, 78 M.J. at 221 (citations omitted).

"The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *Rodela*, 82 M.J. at 525 (second alteration in original) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018).

b. Abusive Sexual Contact

To convict Appellant of abusive sexual contact without consent, the Government was required to prove the following two elements beyond a reasonable doubt: (1) that Appellant committed sexual contact upon WS, and (2) that Appellant did so without WS's consent. *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 60.b.(4)(d).

"Sexual contact" includes "touching or causing another person to touch, either directly or through the clothing, the . . . buttocks of any person, with an intent to . . . gratify the sexual desire of any person." *MCM*, pt. IV, ¶ 60.a.(g)(2).

"'[C]onsent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent." *MCM*, pt. IV, ¶ 60.a.(g)(7)(A). "All the surrounding circumstances are to be considered in determining whether a person gave consent." *MCM*, pt. IV, ¶ 60.a.(g)(7)(C).

"[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not

be guilty of the offense." Rule for Courts-Martial (R.C.M.) 916(j)(1). If the mistake goes to an element requiring general intent, it "must have existed in the mind of the accused and must have been reasonable under all the circumstances." *Id.* "Therefore, an honest and reasonable mistake that the victim consented to the charged sexual contact is an affirmative defense to abusive sexual contact as it is to other sexual offenses." *Rodela*, 82 M.J. at 526 (citations omitted). "Once raised, the Government bears the burden to prove beyond a reasonable doubt that the defense does not exist." *Id.* (citing R.C.M. 916(b)(1)) (additional citation omitted).

3. Analysis

Appellant asks this court to find his conviction for abusive sexual contact in violation of Article 120, UCMJ, to be legally and factually insufficient because of WS's inconsistent statements and the Government's lack of proof of his intent. After carefully reviewing the record, we find the Government introduced sufficient evidence for a rational trier of fact to find Appellant guilty of abusive sexual contact beyond a reasonable doubt, and we ourselves are so convinced.

a. Credibility of WS

Appellant claims that the inconsistencies between WS's statements to OSI shortly after the incident and her testimony at trial "should lead a reasonable factfinder to doubt the veracity of [WS]'s testimony that [Appellant] 'grabbed' her buttocks, and it is harder to infer intent to gratify sexual desire from other, potentially less deliberate forms of touching." However, after reviewing the unique facts of this case, we conclude that Appellant "touched" WS's buttocks as charged.

WS was able to explain the inconsistencies at trial. First, she explained that in 2019, during her first statement to OSI, she was "minimizing" Appellant's conduct, as Appellant's career aspirations "weighed heavily" on her. During the trial, she explained multiple times that she did not want to ruin Appellant's life or career. This line of reasoning is consistent with her decision in the moment of the incident to not get "super loud," as he attempted to grab and tickle her, in an effort to prevent alerting her neighbor to Appellant's behavior so he would not get in trouble. Second, WS was embarrassed to report the full extent of Appellant's actions. She was older than Appellant, senior to Appellant, and she was a law enforcement professional reporting her own assault to a law enforcement agency.

Additionally, and compelling to this court, is WS's testimony that after leaving field training, she returned to Maxwell AFB later that same year and sought out the legal office to add more information to her initial report. This took place prior to her request to see a copy of her report of investigation.

Thus, we find the argument that WS was motivated by a desire to get a different outcome to the investigation unpersuasive. It seems she wanted to supplement her initial report while the investigation was ongoing and since she was told she would have that opportunity, she waited . . . and waited . . . before deciding to file a FOIA request to find out what happened.[15]

In summary, although during trial WS testified to different facts than she initially laid out in her 2019 report to the OSI, a rational factfinder could find that WS's explanation for why she understated Appellant's behavior in her initial report to be reasonable. Moreover, the discrepancies alone do not cause us to find Appellant's conviction of abusive sexual contact to be factually insufficient.

b. Requisite Specific Intent

Appellant claims the Government attempted to meet its burden of establishing the required specific intent by arguing that Appellant's earlier attempt to kiss WS's neck showed intent to gratify his sexual desire. Appellant points out that kissing WS's neck is not the act the Government charged and goes on to argue that the kiss was not simultaneous with Appellant reportedly touching her buttocks. Thus, according to Appellant, the overall intent throughout a situation cannot be imputed to every discrete action within that situation.

Given the facts and circumstances of this case, we are not persuaded by Appellant's argument. A reasonable person could find the acts of kissing WS's neck and massaging her shoulders while straddling her from behind—in combination with the other evidence adduced at trial such as the massage, the grabbing, and the tickling and touching of her sides—sufficiently support a finding that Appellant subsequently touched WS's buttocks with the intent to gratify his sexual desire. In short, circumstantial evidence supports the element that Appellant had the requisite intent for abusive sexual contact in violation of Article 120, UCMJ, beyond a reasonable doubt.

Accordingly, we find Appellant's conviction for abusive sexual contact legally sufficient. Furthermore, having weighed the evidence in the record of trial, and having made allowances that we did not personally observe the witnesses, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt.

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[15] We note that the COVID-19 pandemic was ongoing during the time the investigation was ongoing.

D. Court Member Selection

1. Additional Background

Before convening Appellant's court-martial, the convening authority was provided with the names of 24 potential court-martial members. Of those 24, one clearly and two possibly had names that suggested they were female. The convening authority detailed 16 of the 24 personnel to serve as members on Appellant's court-martial. Included among the 16 members were all three members whose names suggested they may be female. The other 13 members had traditionally male names. In selecting the members to serve on the panel, the convening authority's memorandum states, "[B]y reason of their age, education, training, experience, length of service, and judicial temperament under Article 25, UCMJ, [10 U.S.C. § 825,] I detail the following individuals to serve as members in [Appellant's court-martial]."

Prior to the court-martial, a new convening authority relieved three members. One of the three members relieved was a member with a name that could have been a female name and the other two excusals had traditionally male names. The convening authority detailed three new replacement members to the panel. All three replacement members had traditionally male names.

Following voir dire at trial, trial counsel and trial defense counsel mutually agreed to challenge six potential members for cause, including the two remaining panel members with female names.[16] Both members were subsequently excused, and the panel was comprised entirely of members with traditionally male names.

The Defense did not object to the convening authority's court member selection process prior to his appeal before this court.

2. Law

Court-martial composition issues not raised at trial are forfeited and reviewed on appeal for plain error. *United States v. King*, 83 M.J. 115, 120–21 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 190 (2023). Under the plain error standard of review, the "[a]ppellant bears the burden of establishing: (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right." *Robinson*, 77 M.J. at 299 (citation omitted). In undertaking a plain error analysis, we "consider whether the error is obvi-

[16] From our review of voir dire and challenges, both members appear to have been female.

ous at the time of appeal, not whether it was obvious at the time of the court-martial." *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008).

"When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Article 25(e)(2), UCMJ, 10 U.S.C. § 825(e)(2).

In *United States v. Crawford*, the United States Court of Military Appeals held the intentional selection of African American servicemembers to serve on courts-martial in order to ensure fair representation of the community was consistent with constitutional guarantees of equal protection. 35 C.M.R. 3, 13 (C.M.A. 1964); *see also United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988) ("[A] commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community—such as blacks, Hispanics, or women—be excluded from service on court-martial panels.").

In *Batson v. Kentucky*, the United States Supreme Court held a criminal defendant "ha[s] the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria," and in particular "the Equal Protection Clause[17] forbids the prosecutor to challenge potential jurors solely on account of their race" through the exercise of peremptory challenges. 476 U.S. 79, 85–86, 89 (1986).

In *United States v. Jeter*, the CAAF overruled *Crawford* in light of *Batson*, holding "[i]t is impermissible to exclude or intentionally include prospective members based on their race." 84 M.J. 68, 73 (C.A.A.F. 2023). The CAAF explained, "whenever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted," which the Government may then attempt to rebut. *Id.* at 70. In *Jeter*, "trial defense counsel challenged the makeup of the panel, citing a 'systematic exclusion of members based on race and gender.' The military judge noted that '[i]t appears that [the panel] is all white men' . . . ." *Id.* at 71 (alterations in original). On appeal, the CAAF found the appellant had made a "prima facie showing that gives rise to a presumption that race was allowed to enter the selection process." *Id.* at 74. In support of this conclusion, the CAAF cited "racial identifiers" that were included in court member questionnaires provided to the con-

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[17] U.S. CONST. amend. XIV.

vening authority, as well as "other evidence before the [CCA]," and "the command's understandable belief that the *Crawford* case . . . was still good law." *Id*. Among this other evidence before the CCA was information that "two African American members on the original convening order were subsequently removed pursuant to the first amendment to the convening order; and three other courts-martial with African American accuseds were convened by this convening authority before all-white panel members." *Id*. In addition, the CCA obtained declarations from the convening authority and staff judge advocate, but "for all intents and purposes those affidavits simply reflected that they could not recall how the venire panel was chosen." *Id*. Under these circumstances, the CAAF found an "unrebutted inference that [a]ppellant's constitutional right to equal protection under the law was violated when the acting convening authority presumptively used a race-conscious selection process for panel members." *Id*.

3. Analysis

Because Appellant did not object to the convening authority's selection of court members at trial, we review for plain error. *See King*, 83 M.J. at 120–21. For the reasons stated below, we conclude Appellant has failed to demonstrate plain error.

Appellant claims that he has "made a prima facie showing that gives rise to a presumption that impermissible criteria was allowed to enter the court member selection process." Appellant claims that the documentation regarding the selection of court members fails to rebut this presumption because "none of it indicates the convening authorities did not consider the racial and gender identifiers available to them in the court member data sheets."

In support of this position, Appellant notes that in his case, as in *Jeter*, racial and gender identifiers for prospective court members were provided to the convening authorities. He also notes that, at the time of his trial, *Jeter* had not yet been decided, meaning that when selecting the panel of prospective members for Appellant's court-martial, the convening authority, in reliance on *United States v. Crawford*, 35 C.M.R. 3, 13 (C.M.A. 1964), "could use race to select a panel when it was 'in favor of, not against, an accused,'" which, in practice, as noted in *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994), meant that racial and gender identifiers could be included on the list of prospective members.

Relying on *Jeter*, Appellant contends his court-martial panel was improperly constituted because the convening authorities inappropriately considered gender in selecting members. According to Appellant, the "fact that the convening authority selected 100 percent of the potential panel members with traditionally female names, making them a larger proportion of the panel

than . . . of the pool from which they were selected, suggests consideration of gender." Appellant does not identify additional facts to suggest the convening authority selected court members in his case based on race.

The Government relies on this court's opinion in *United States v. Patterson* to argue that the "routine provision" of members with traditionally female names to a convening authority "does not in itself constitute a prima facie showing the convening authority in fact improperly relied on such criteria in selecting members under the plain error standard of review." 2024 CCA LEXIS 399, at *20–21 (A.F. Ct. Crim. App. 27 Sep. 2024) (unpub. op.), *rev. granted on different grounds*, No. 25-0073/AF, __ M.J. __, 2025 CAAF LEXIS 16, *1 (C.A.A.F. 6 Jan. 2025)

Furthermore, the Government contends Appellant has not demonstrated error in the panel composed by the convening authority just because it included women. The Government's argument rests on the assertion that "[b]y simple math when there is a small minority of women offered as potential court-members, it is *more* likely that all of them will be selected while not *all* members of the majority with traditionally male names will be selected."

As an initial matter, although *Jeter* specifically addressed racial discrimination, we assume for purposes of our analysis the same rationale applies to the selection or exclusion of members based on gender. This question was addressed in *J.E.B. v. Ala. ex rel. T.B.*, where the Supreme Court held that "gender—like race—is an unconstitutional proxy for juror competence and impartiality." 511 U.S. 127, 128 (1994)*; see also Patterson*, unpub. op. at *20–21 (holding that "*J.E.B.* essentially put gender on the same constitutional footing as race").

We are not persuaded Appellant has met his burden to demonstrate "clear" or "obvious" error in the selection process. We agree with the Government that providing the convening authority some professional and personal information about potential court members, including race and gender, does not in itself constitute a prima facie showing that the convening authority improperly relied on race and gender in selecting members under the plain error standard of review. As our superior court stated in *Jeter*, "racial identifiers are neutral, [although] capable of being used for proper as well as improper reasons." 84 M.J. at 74 (citing *Loving*, 41 M.J. at 285).

The circumstances in *Jeter* are distinguishable in several significant ways. First, and importantly, the appellant in *Jeter* did not forfeit the issue but challenged the selection process at trial, alleging "systematic exclusion of members based on race and gender." 84 M.J. at 71. Moreover, the record in *Jeter* indicated the panel was composed entirely of "white men." *Id.* Two African American members on the original convening order were subsequently

removed from the panel by the convening authority. *Id.* at 74. In the present case, when the convening authority relieved members in advance of trial, he relieved one of the members with a name suggesting they were female along with two other members whose names suggested they were male. The three replacement members all had traditionally male names. The two remaining female names were removed as a result of challenges by both parties. Second, in *Jeter* "three other courts-martial with African American accuseds were convened by [the same] convening authority before all-white panel members." *Id.* The CAAF concluded these circumstances in *Jeter*, coupled with the provision of racially identifying information to the convening authority, were sufficient for a prima facie showing under ordinary standards of review. In the instant case, we do not have equivalent circumstances.

Furthermore, we decline to expand and apply the holding in *Jeter* in such a way that could undermine the applicable federal statute. Essentially, Appellant is arguing that a convening authority cannot even know the name of any potential court member prior to making selections of the court members as such names could potentially reveal their genders. Practically, such a limitation upon convening authorities could prevent their ability to properly apply the criteria mandated for consideration by Article 25, UCMJ. For example, it would be quite a challenge for a convening authority to determine whether a potential court member, "in his opinion, [is] best qualified for the duty by reason of . . . judicial temperament" if they cannot know who they are evaluating. Article 25(e)(2), UCMJ.

Appellant has the burden to demonstrate "clear" or "obvious" error. He has not met this burden. Based on the facts of this case, we conclude Appellant is not entitled to relief on this issue.

E. Timeliness of Appellate Review

Although not raised by Appellant, we consider whether Appellant is entitled to relief for a facially unreasonable appellate delay. *See United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). We find no relief is warranted.

Appellant's record of trial was originally docketed with this court on 4 October 2023. However, it was docketed without a record of trial. As an Article 66(b)(1)(A), UCMJ, direct appeal, Appellant and this court waited for the Government to produce a verbatim transcript, which was provided to this court on 23 April 2024. Appellant requested, and was granted, four enlargements of time before he filed his brief with this court on 19 November 2024. The Government filed its answer brief on 30 January 2025, after receiving an enlargement of time to obtain declarations from trial defense counsel. On 6 February 2025, Appellant filed a reply to the Government's answer.

"[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *Moreno*, 63 M.J. at 135 (citations omitted). In *Moreno*, the CAAF established a presumption of facially unreasonable delay "where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the [CCA]." *Id.* at 142. Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice [to the appellant]." *Moreno*, 63 M.J. at 135 (citations omitted). The CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) "particularized" anxiety and concern "that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;" and (3) impairment of the appellant's grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted). Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). We review de novo an appellant's entitlement to relief for post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing *Moreno*, 63 M.J. at 135).

Over 18 months have elapsed since Appellant's record of trial was originally docketed with this court. Accordingly, under *Moreno* there is a facially unreasonable delay in the appellate proceedings. Although Appellant has not raised appellate delay in his assignments of error, we have evaluated the *Barker* factors. Appellant has not specifically alleged cognizable prejudice, and we find none. In particular, we have found no material prejudice to Appellant's substantial rights and affirm his sentence; therefore, we find his confinement has not been "oppressive" for purposes of our *Moreno* analysis. Furthermore, we find the delays involved in Appellant's case have not been so egregious as to adversely affect the perception of the military justice system.

The initial delay arose from the requirement to produce a verbatim transcript for a case eligible for an Article 66(b)(1)(A), UCMJ, direct appeal. The subsequent delays arose from Appellant's motions for enlargements of time. The delays before the Government's answer are attributable to the extent and complexity of Appellant's five assignments of error, including his claims of ineffective assistance of counsel. From the time the record was docketed, appellate review has proceeded without unreasonable delay. We note this court has issued its opinion less than four weeks over the 18-month *Moreno* standard. We note the transcript and record of trial are lengthy. Additionally,

we note Appellant has not made a demand for speedy appellate review. Accordingly, we find no violation of Appellant's due process rights.

We also conclude there is no basis for relief under Article 66(d)(2), UCMJ, in the absence of a due process violation. Considering all the facts and circumstances of Appellant's case, we decline to exercise our Article 66(d), UCMJ, 10 U.S.C. § 866(d), authority to grant relief for the delay in completing appellate review.

II. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court