IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **STEPHEN T. ROBLES,** United States Air Force *Appellant*	)	No. ACM 40280 30 June 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **9 September 2022**. The record of trial was docketed with this Court on 12 May 2022. From the date of docketing to the present date, 49 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

GRANTED
1 JULY 2022

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 June 2022.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

30 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) STEPHEN T. ROBLES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40280 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 June 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **STEPHEN T. ROBLES,** United States Air Force *Appellant*	)	No. ACM 40280 1 September 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 October 2022**. The record of trial was docketed with this Court on 12 May 2022. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 20 October 2021, and 14-15 February 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Buckley Space Force Base (SFB), of one charge and four specifications of willful dereliction of duty in violation of Article 92, Uniform ilitary Justice (UCMJ), one charge and one specification of wrongful broadcasting of sual images, in violation of Article 117a, UCMJ, and five specifications[2] of indecent conduct in violation of Article 134, UCMJ. R. at 286. A military judge sentenced Appellant to

GRANTED
8 SEP 2022

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 128, UCMJ, and one charge and two specifications in violation of Article 128b, UCMJ, were "dismissed without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld." ROT, Vol. 1, Entry of Judgment (EOJ), dated 28 March 2020.

[2] For Specification 3 of Charge III (indecent conduct), Appellant was found guilty by exceptions and substitutions. The words "in one of the" was substituted for the words "in the." ROT, Vol. 1, EOJ. Of the excepted words, Appellant was found not guilty. Of the substituted words, Appellant was found guilty. *Id.*

be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for a total of 325 days,[3] and to be discharged with a bad conduct discharge. R. at 398; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 22 March 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade, and automatic and adjudged forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits; the transcript is 399 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

[3] Appellant was sentenced to be confined for 35 days (for Specification 1 of Charge I), to be confined for 25 days (for Specification 2 of Charge I), and to be confined 35 days (for the Specification 3 of Charge I), to be confined for 30 days (Specification 4 of Charge I); to be confined for 50 days (the Specification of Charge II), to be confined for 35 days (Specification 1 of Charge III), to be confined for 35 days (Specification 2 of Charge III), to be confined for 25 days (Specification 3 of Charge III), to be confined for 20 days (Specification 4 of Charge III), and to 35 days (Specification 5 of Charge III), with all the sentences running consecutively. R. at 398.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 September 2022.

Respectfully submitted,

Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

7 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) STEPHEN T. ROBLES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40280 Panel No. 2

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

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

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

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 September 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **STEPHEN T. ROBLES,** United States Air Force *Appellant*	)	No. ACM 40280 30 September 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 November 2022**. The record of trial was docketed with this Court on 12 May 2022. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 20 October 2021, and 14-15 February 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Buckley Space Force Base (SFB), of one four specifications of willful dereliction of duty in violation of Article 92, Uniform itary Justice (UCMJ), one charge and one specification of wrongful broadcasting of intimate visual images, in violation of Article 117a, UCMJ, and five specifications[2] of indecent

GRANTED
4 Oct 2022

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 128, UCMJ, and one charge and two specifications in violation of Article 128b, UCMJ, were "dismissed without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld." ROT, Vol. 1, Entry of Judgment (EOJ), dated 28 March 2022.
[2] For Specification 3 of Charge III (indecent conduct), Appellant was found guilty by exceptions and substitutions. The words "in one of the" was substituted for the words "in the." ROT, Vol. 1, EOJ. Of the excepted words, Appellant was found not guilty. Of the substituted words, Appellant was found guilty. *Id.*

conduct in violation of Article 134, UCMJ. R. at 286. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for a total of 325 days,[3] and to be discharged with a bad conduct discharge. R. at 398; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 22 March 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade, and automatic and adjudged forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits; the transcript is 399 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and not yet begun her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

[3] Appellant was sentenced to be confined for 35 days (for Specification 1 of Charge I), to be confined for 25 days (for Specification 2 of Charge I), and to be confined 35 days (for the Specification 3 of Charge I), to be confined for 30 days (Specification 4 of Charge I); to be confined for 50 days (the Specification of Charge II), to be confined for 35 days (Specification 1 of Charge III), to be confined for 35 days (Specification 2 of Charge III), to be confined for 25 days (Specification 3 of Charge III), to be confined for 20 days (Specification 4 of Charge III), and to 35 days (Specification 5 of Charge III), with all the sentences running consecutively. R. at 398.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 September 2022.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

3 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) STEPHEN T. ROBLES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40280 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 October 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **STEPHEN T. ROBLES,** United States Air Force *Appellant*	)	No. ACM 40280 1 November 2022

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 December 2022**. The record of trial was docketed with this Court on 12 May 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 20 October 2021, and 14-15 February 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Buckley Space Force Base (SFB), of one charge ecifications of willful dereliction of duty in violation of Article 92, Uniform Code of stice (UCMJ), one charge and one specification of wrongful broadcasting of intimate visual images, in violation of Article 117a, UCMJ, and five specifications[2] of indecent conduct

GRANTED

2 NOVEMBER 2022

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 128, UCMJ, and one charge and two specifications in violation of Article 128b, UCMJ, were "dismissed without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld." ROT, Vol. 1, Entry of Judgment (EOJ), dated 28 March 2022.

[2] For Specification 3 of Charge III (indecent conduct), Appellant was found guilty by exceptions and substitutions. The words "in one of the" was substituted for the words "in the." ROT, Vol. 1, EOJ. Of the excepted words, Appellant was found not guilty. Of the substituted words, Appellant was found guilty. *Id*.

in violation of Article 134, UCMJ. R. at 286. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for a total of 325 days,[3] and to be discharged with a bad conduct discharge. R. at 398; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 22 March 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade, and automatic and adjudged forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits; the transcript is 399 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[4] and has yet to complete her review of Appellant's case. Counsel is currently assigned 20 cases; 9 cases are pending initial AOEs before this Court. This is military counsel's third priority case. The following cases[5] have priority over the present case:

---

[3] Appellant was sentenced to be confined for 35 days (for Specification 1 of Charge I), to be confined for 25 days (for Specification 2 of Charge I), and to be confined 35 days (for the Specification 3 of Charge I), to be confined for 30 days (Specification 4 of Charge I); to be confined for 50 days (the Specification of Charge II), to be confined for 35 days (Specification 1 of Charge III), to be confined for 35 days (Specification 2 of Charge III), to be confined for 25 days (Specification 3 of Charge III), to be confined for 20 days (Specification 4 of Charge III), and to 35 days (Specification 5 of Charge III), with all the sentences running consecutively. R. at 398.

[4] Since the filing of Appellant's last EOT, counsel co-authored a reply brief in *United States v. Anderson,* ACM 39969, USCA Dkt. No 22-0193/AF, which was submitted to the Court of Appeals for the Armed Forces (CAAF) on 30 September 2022, filed a lengthy brief in *United States v. Kitchen*, ACM 40155 on 17 October 2022, submitted a reply brief in *United States v. Ramirez*, ACM S32538 (f rev) on 18 October 2022, and was second chair for the *United States v. Anderson* oral argument at the CAAF on 25 October 2022.

[5] Counsel also has a supplement to petition for grant of review due to the Court of Appeals for the Armed Forces (CAAF) in *United States v. Torello*, ACM S32691 on 7 November 2022, and a supplement to petition for grant of review due to the CAAF in *United States v. Daniels III*, ACM 39407 (rem) on 16 November 2022.

1. *United States v. Jones*, ACM 40226 – The record of trial is 10 volumes; the trial transcript is 1070 pages. There are 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits. Counsel has begun her review of Appellant's ROT.

2. *United States v McTheny*, ACM S32725 – The record of trial is 2 volumes; the trial transcript is 108 pages. There are 3 prosecution exhibits, 5 defense exhibits, and 4 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

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

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

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 November 2022.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

2 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) STEPHEN T. ROBLES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40280 Panel No. 2

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

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

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

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 November 2022.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **STEPHEN T. ROBLES,** United States Air Force *Appellant*	)	No. ACM 40280 1 December 2022

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 January 2023**. The record of trial was docketed with this Court on 12 May 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 20 October 2021, and 14-15 February 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Buckley Space Force Base (SFB), of one charge and four specifications of willful dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), one charge and one specification of wrongful broadcasting of intimate visual images, in violation of Article 117a, UCMJ, and five specifications[2] of indecent conduct

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 128, UCMJ, and one charge and two specifications in violation of Article 128b, UCMJ, were "dismissed without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld." ROT, Vol. 1, Entry of Judgment (EOJ), dated 28 March 2022.

[2] For Specification 3 of Charge III (indecent conduct), Appellant was found guilty by exceptions and substitutions. The words "in one of the" was substituted for the words "in the." ROT, Vol. 1, EOJ. Of the excepted words, Appellant was found not guilty. Of the substituted words, Appellant was found guilty. *Id*.

in violation of Article 134, UCMJ. R. at 286. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for a total of 325 days,[3] and to be discharged with a bad conduct discharge. R. at 398; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 22 March 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade, and automatic and adjudged forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits; the transcript is 399 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[4] and has yet to complete her review of Appellant's case. Counsel is currently assigned 24 cases; 11 cases are pending initial AOEs before this Court. This is military counsel's fifth priority case, and third priority case before this Court. The following cases[5] have priority over the present case:

---

[3] Appellant was sentenced to be confined for 35 days (for Specification 1 of Charge I), to be confined for 25 days (for Specification 2 of Charge I), and to be confined 35 days (for the Specification 3 of Charge I), to be confined for 30 days (Specification 4 of Charge I); to be confined for 50 days (the Specification of Charge II), to be confined for 35 days (Specification 1 of Charge III), to be confined for 35 days (Specification 2 of Charge III), to be confined for 25 days (Specification 3 of Charge III), to be confined for 20 days (Specification 4 of Charge III), and to 35 days (Specification 5 of Charge III), with all the sentences running consecutively. R. at 398.

[4] Since the filing of Appellant's last EOT, counsel filed a supplement to petition for grant of review due to the Court of Appeals for the Armed Forces (CAAF) in *United States v. Torello*, ACM S32691 on 7 November 2022, a supplement to petition for grant of review in *United States v. Daniels III*, ACM 39407 (rem) on 16 November 2022, filed two motions relating to *Dubay* proceedings in *United States v. Knodel*, ACM 40018 on 16 November 2022, and filed a supplement to petition for grant of review in *United States v. Carlile*, ACM 40053, on 23 November 2022.

[5] Counsel also has a reply brief due in *United States v. Kitchen*, ACM 40155, on 13 December 2022.

1. *United States v. Witt*, ACM 36785 (reh), USCA Dkt No. 22-0090/AF – Counsel will be presenting oral argument before the CAAF on 6 December 2022.

2. *United States v. Knodel*, ACM 40018 – Counsel will be attending a motions hearing 12-13 December 2022 in Miramar, CA as part of Appellant's *DuBay* proceedings. Appellant's *DuBay* hearing has been scheduled for 10-12 January 2023. Three motions have been filed and counsel anticipates another two motions will be filed and litigated during the motions hearing.

3. *United States v. Jones*, ACM 40226 – The record of trial is 10 volumes; the trial transcript is 1070 pages. There are 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits. Counsel has reviewed approximately 650 pages of Appellant's transcript.

4. *United States v McTheny*, ACM S32725 – The record of trial is 2 volumes; the trial transcript is 108 pages. There are 3 prosecution exhibits, 5 defense exhibits, and 4 appellate exhibits. Counsel has completed her review of Appellant's ROT and is consulting with Appellant on issues to raise before this Court.

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

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

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 December 2022.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

2 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) STEPHEN T. ROBLES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40280 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 December 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40280**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Stephen T. ROBLES	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 1 December 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 6th day of December, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **7 January 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of his right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **STEPHEN T. ROBLES,** United States Air Force *Appellant*	)	No. ACM 40280 3 January 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 February 2023**. The record of trial was docketed with this Court on 12 May 2022. From the date of docketing to the present date, 236 days[1] have elapsed. On the date requested, 270 days will have elapsed.

On 20 October 2021, and 14-15 February 2022, pursuant to his pleas,[2] Appellant was convicted at a general court-martial convened at Buckley Space Force Base (SFB), of one charge and two specifications of willful dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), one charge and one specification of wrongful broadcasting of intimate visual images, in violation of Article 117a, UCMJ, and five specifications[3] of indecent conduct

GRANTED
6 JAN 2023

[1] This EOT is being filed on 3 January 2023 based upon the Court's closure for the family day and federal holiday.

[2] Pursuant to his plea agreement, one charge and one specification in violation of Article 128, UCMJ, and one charge and two specifications in violation of Article 128b, UCMJ, were "dismissed without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld." ROT, Vol. 1, Entry of Judgment (EOJ), dated 28 March 2022.

[3] For Specification 3 of Charge III (indecent conduct), Appellant was found guilty by exceptions and substitutions. The words "in one of the" was substituted for the words "in the." ROT, Vol. 1,

in violation of Article 134, UCMJ. R. at 286. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for a total of 325 days,[4] and to be discharged with a bad conduct discharge. R. at 398; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 22 March 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade, and automatic and adjudged forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits; the transcript is 399 pages. Appellant is not currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[5] and has yet to complete her review of Appellant's case. Counsel is currently assigned 23 cases; 12 cases are pending initial AOEs before this Court. This is military counsel's fourth priority case, and third priority case before this Court. The following cases have priority over the present case:

EOJ. Of the excepted words, Appellant was found not guilty. Of the substituted words, Appellant was found guilty. *Id*.

[4] Appellant was sentenced to be confined for 35 days (for Specification 1 of Charge I), to be confined for 25 days (for Specification 2 of Charge I), and to be confined 35 days (for the Specification 3 of Charge I), to be confined for 30 days (Specification 4 of Charge I); to be confined for 50 days (the Specification of Charge II), to be confined for 35 days (Specification 1 of Charge III), to be confined for 35 days (Specification 2 of Charge III), to be confined for 25 days (Specification 3 of Charge III), to be confined for 20 days (Specification 4 of Charge III), and to 35 days (Specification 5 of Charge III), with all the sentences running consecutively. R. at 398.

[5] Since the filing of Appellant's last EOT, counsel argued *United States v. Witt*, USCA Dkt. No. 22-0090/AF on 6 December 2022, filed a reply brief in *United States v. Kitchen*, ACM 40155 on 13 December 2022, and participated in a *DuBay* motions hearing held at MCAS Miramar in *United States v. Knodel*, ACM 40018 on 13 December 2022.

1. *United States v. Knodel*, ACM 40018 – Counsel and Appellant's civilian appellate defense attorney will be representing Appellant at his *DuBay* hearing, which is scheduled for 10-12 January 2023, with the potential for the hearing to continue through 13 January 2023. The hearing will be held at the naval base located near MCAS Miramar, San Diego. Undersigned counsel will be traveling on Saturday, 7 January 2023 and is scheduled to return on Saturday, 14 January 2023 (in the event that Appellant's *DuBay* hearing concludes on 13 January 2023). Twenty-four witnesses are currently anticipated to testify at the *DuBay* hearing.

2. *United States v. Jones*, ACM 40226 – The record of trial is 10 volumes; the trial transcript is 1070 pages. There are 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits. Counsel has completed her review of Appellant's transcript and will be finishing up her review of the rest of his ROT in order to consult with him regarding potential issues to raise in his brief in order to begin drafting his brief.

3. *United States v McTheny*, ACM S32725 – The record of trial is 2 volumes; the trial transcript is 108 pages. There are 3 prosecution exhibits, 5 defense exhibits, and 4 appellate exhibits. Counsel has completed her review of Appellant's ROT and is consulting with Appellant on issues to raise before this Court.

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

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

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 January 2023.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

5 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) STEPHEN T. ROBLES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40280 Panel No. 2

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

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

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

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 January 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **STEPHEN T. ROBLES,** United States Air Force *Appellant*	)	No. ACM 40280 30 January 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 March 2023**. The record of trial was docketed with this Court on 12 May 2022. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

On 20 October 2021, and 14-15 February 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Buckley Space Force Base (SFB), of one charge and [illegible] fications of willful dereliction of duty in violation of Article 92, Uniform Code of M[illegible]ce (UCMJ), one charge and one specification of wrongful broadcasting of intimate visual images, in violation of Article 117a, UCMJ, and five specifications[2] of indecent conduct

GRANTED
31 JAN 2023

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 128, UCMJ, and one charge and two specifications in violation of Article 128b, UCMJ, were "dismissed without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld." ROT, Vol. 1, Entry of Judgment (EOJ), dated 28 March 2022.

[2] For Specification 3 of Charge III (indecent conduct), Appellant was found guilty by exceptions and substitutions. The words "in one of the" was substituted for the words "in the." ROT, Vol. 1, EOJ. Of the excepted words, Appellant was found not guilty. Of the substituted words, Appellant was found guilty. *Id*.

in violation of Article 134, UCMJ. R. at 286. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for a total of 325 days,[3] and to be discharged with a bad conduct discharge. R. at 398; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 22 March 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade, and automatic and adjudged forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits; the transcript is 399 pages. Appellant is not currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[4] and has begun reviewing Appellant's ROT but has yet to complete her review of his case. Counsel is currently assigned 21 cases; 11 cases are pending initial AOEs before this Court. This is military counsel's second priority case. The following case has priority over the present case:

[3] Appellant was sentenced to be confined for 35 days (for Specification 1 of Charge I), to be confined for 25 days (for Specification 2 of Charge I), and to be confined 35 days (for the Specification 3 of Charge I), to be confined for 30 days (Specification 4 of Charge I); to be confined for 50 days (the Specification of Charge II), to be confined for 35 days (Specification 1 of Charge III), to be confined for 35 days (Specification 2 of Charge III), to be confined for 25 days (Specification 3 of Charge III), to be confined for 20 days (Specification 4 of Charge III), and to 35 days (Specification 5 of Charge III), with all the sentences running consecutively. R. at 398.

[4] Since the filing of Appellant's last EOT, counsel filed a supplement to petition for grant of review in *United States v. Ramirez*, ACM S32538 on 5 January 2023, and represented another client at his *DuBay* hearing (*United States v. Knodel*, ACM 40018), which was conducted from 10-14 January 2023 at Naval Base San Diego.

1. *United States v. Jones*, ACM 40226 – The record of trial is 10 volumes; the trial transcript is 1070 pages. There are 13 prosecution exhibits, 11 defense exhibits, and 68 appellate exhibits. Counsel is currently consulting with Appellant on issues to raise, researching issues, and drafting Appellant's brief which is due to this Court on 21 February 2023.

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

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

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 January 2023.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

30 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) STEPHEN T. ROBLES, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40280 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 January 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **STEPHEN T. ROBLES,** United States Air Force *Appellant*	)	No. ACM 40280 1 March 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 April 2023**. The record of trial was docketed with this Court on 12 May 2022. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 20 October 2021, and 14-15 February 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Buckley Space Force Base (SFB), of one charge and four specifications of willful dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), one charge and one specification of wrongful broadcasting of intimate visual images, in violation of Article 117a, UCMJ, and five specifications[2] of indecent conduct

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 128, UCMJ, and one charge and two specifications in violation of Article 128b, UCMJ, were "dismissed without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld." ROT, Vol. 1, Entry of Judgment (EOJ), dated 28 March 2022.

[2] For Specification 3 of Charge III (indecent conduct), Appellant was found guilty by exceptions and substitutions. The words "in one of the" was substituted for the words "in the." ROT, Vol. 1, EOJ. Of the excepted words, Appellant was found not guilty. Of the substituted words, Appellant was found guilty. *Id*.

in violation of Article 134, UCMJ. R. at 286. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for a total of 325 days,[3] and to be discharged with a bad conduct discharge. R. at 398; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 22 March 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade, and automatic and adjudged forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits; the transcript is 399 pages. Appellant is not currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[4] and has begun reviewing Appellant's ROT but has yet to complete her review of his case. Counsel is currently assigned 23 cases; 12 cases are pending initial AOEs before this Court. This is military counsel's first priority case and counsel has reviewed approximately 175 pages of Appellant's transcript.

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

---

[3] Appellant was sentenced to be confined for 35 days (for Specification 1 of Charge I), to be confined for 25 days (for Specification 2 of Charge I), and to be confined 35 days (for the Specification 3 of Charge I), to be confined for 30 days (Specification 4 of Charge I); to be confined for 50 days (the Specification of Charge II), to be confined for 35 days (Specification 1 of Charge III), to be confined for 35 days (Specification 2 of Charge III), to be confined for 25 days (Specification 3 of Charge III), to be confined for 20 days (Specification 4 of Charge III), and to 35 days (Specification 5 of Charge III), with all the sentences running consecutively. R. at 398.

[4] Since the filing of Appellant's last EOT, counsel filed a lengthy brief in *United States v. Jones*, ACM 40226, on 21 February 2023.

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

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 March 2023.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

2 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) STEPHEN T. ROBLES, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40280 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 March 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40280**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Stephen T. ROBLES	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 1 March 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 3d day March, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eigth) is **GRANTED**. Appellant shall file any assignments of error not later than **7 April 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, the court will continue to closely examine any further requests for an enlargement of time.

FOR THE COURT

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (E-5) **STEPHEN T. ROBLES,** United States Air Force *Appellant*	))))))))))	**APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL** Before Panel No. 2 Case No. ACM 40280 Filed on: 14 March 2023

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

Pursuant to Rules 3.1 and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to examine the sealed material in Appellant's record of trial: Prosecution Exhibit (Pros. Ex.) 1 at 4, 6, 8, 10, 13, 15, 17, 19, 21; Pros. Ex 2-12, Pros. Ex. 13 at 11-22, and Pros. Ex. 16 at 11. These exhibits, many of which contain sexually explicit photographs, were examined by trial counsel and defense counsel, and ordered sealed by the military judge.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these materials is reasonably necessary to appellate counsel's responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant. A review of the entire record is necessary because this Court is empowered by Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c), to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(c), UCMJ, 10 U.S.C. §866, counsel must therefore examine "the entire record."

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed material must be reviewed in order for counsel to provide "competent appellate representation." *Id*. Therefore, military defense counsel's examination of sealed materials is reasonably necessary to fulfill their responsibilities in this case, since counsel cannot perform their duty of representation under Article 70, UCMJ, 10 U.S.C. §870, without first reviewing the complete record of trial.

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

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 14 March 2023.

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

14 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) STEPHEN T. ROBLES, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40280 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Material. The United States does not object to Appellant's counsel reviewing the materials listed in Appellant's motion –which appear to have been available to all parties at trial – so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

The United States would not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this Court has first determined there is good cause for Appellant's counsel to do so under R.C.M. 1113.

WHEREFORE, the United States respectfully responds to Appellant's motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 14 March 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40280**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Stephen T. ROBLES	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 14 March 2023, Appellant's counsel submitted a Motion to Examine Sealed Materials, requesting to examine Prosecution Exhibits 1–13 and 16. Appellant's motion states the exhibits were reviewed by trial and defense counsel and sealed by the military judge. Appellant's counsel avers that "review of the referenced exhibits is necessary to conduct a complete review of the record of trial" and viewing the exhibits "is reasonably necessary to fulfill their responsibilities in this case."

The Government responded to the motion on 14 March 2023. It does not object to Appellant's counsel reviewing materials that were released to both parties at trial—as long as the Government "can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials."

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.). The court finds Appellant's counsel has made a colorable showing that review of the exhibits is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 16th day of March, 2023,

ORDERED:

Appellant's Motion to View Sealed Materials is **GRANTED**.

Appellate defense counsel and appellate government counsel may view the sealed portions of **Prosecution Exhibits 1–13 and 16**, subject to the following conditions:

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

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **STEPHEN T. ROBLES,** United States Air Force *Appellant*	)	No. ACM 40280 31 March 2023

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 May 2023**. The record of trial was docketed with this Court on 12 May 2022. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 20 October 2021, and 14-15 February 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Buckley Space Force Base (SFB), of one charge [illegible]pecifications of willful dereliction of duty in violation of Article 92, Uniform Code of [illegible]ustice (UCMJ), one charge and one specification of wrongful broadcasting of intimate [illegible] in violation of Article 117a, UCMJ, and five specifications[2] of indecent conduct

GRANTED
4 APR 2023

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 128, UCMJ, and one charge and two specifications in violation of Article 128b, UCMJ, were "dismissed without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld." ROT, Vol. 1, Entry of Judgment (EOJ), dated 28 March 2022.

[2] For Specification 3 of Charge III (indecent conduct), Appellant was found guilty by exceptions and substitutions. The words "in one of the" was substituted for the words "in the." ROT, Vol. 1, EOJ. Of the excepted words, Appellant was found not guilty. Of the substituted words, Appellant was found guilty. *Id*.

in violation of Article 134, UCMJ. R. at 286. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for a total of 325 days,[3] and to be discharged with a bad conduct discharge. R. at 398; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 22 March 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade, and automatic and adjudged forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of 18 prosecution exhibits, 6 defense exhibits, and 15 appellate exhibits; the transcript is 399 pages. Appellant is not currently confined, is aware of his appellate rights, and has consented to necessary requests for extensions of time, including this request.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[4] and has begun reviewing Appellant's ROT but has yet to complete her review of his case. Counsel is currently assigned 22 cases; 12 cases are pending initial AOEs before this Court. This is military counsel's first priority case. Counsel has reviewed Appellant's ROT, consulted with Appellant concerning issues to raise, has been conducting research on those issues, and is

[3] Appellant was sentenced to be confined for 35 days (for Specification 1 of Charge I), to be confined for 25 days (for Specification 2 of Charge I), and to be confined 35 days (for the Specification 3 of Charge I), to be confined for 30 days (Specification 4 of Charge I); to be confined for 50 days (the Specification of Charge II), to be confined for 35 days (Specification 1 of Charge III), to be confined for 35 days (Specification 2 of Charge III), to be confined for 25 days (Specification 3 of Charge III), to be confined for 20 days (Specification 4 of Charge III), and to 35 days (Specification 5 of Charge III), with all the sentences running consecutively. R. at 398.

[4] Since the filing of Appellant's last EOT, counsel filed a petition for reconsideration in *United States v. Daniels III*, ACM 39407 (rem) to the Court of Appeals for the Armed Forces on 10 March 2023, and filed a brief in *United States v. Flores*, ACM S32728, on 21 March 2023.

drafting Appellant's Assignments of Error. Absent extraordinary circumstances, undersigned counsel does not anticipate requesting any further enlargements of time.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to finish drafting and finalizing Appellant's Assignments of Error.

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

Respectfully submitted,

JENNA M. ARROYO, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 March 2023.

Respectfully submitted,

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3 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) STEPHEN T. ROBLES, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40280 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 April 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

STEPHEN T. ROBLES,
Staff Sergeant (E-5),
United States Air Force
Appellant.

No. ACM 40280

BRIEF ON BEHALF OF APPELLANT

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INDEX

TABLE OF AUTHORITIES

Cases

SUPREME COURT CASES

COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

SERVICE COURT OF CRIMINAL APPEALS CASES

Statutes, Rules, and Other Authorities

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Staff Sergeant (E-5) **STEPHEN T. ROBLES**, United States Air Force, *Appellant*	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2 No. ACM 40280 Filed on: 8 May 2023

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

Assignments of Error

I.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING VICTIM IMPACT STATEMENTS THAT WERE NOT OFFERED BY THE VICTIM, THE VICTIM'S DESIGNEE, OR THE VICTIM'S COUNSEL?

II.

WHETHER SSGT ROBLES'S PLEA OF GUILTY TO SPECIFICATION 4 OF CHARGE III IS IMPROVIDENT?

III.

WHETHER THE PORTION OF SSGT ROBLES'S PLEA AGREEMENT WHICH PROVIDES THAT DISMISSAL OF CERTAIN CHARGES AND SPECIFICATIONS WOULD ONLY RIPEN INTO DISMISSAL WITH PREJUDICE "UPON COMPLETION OF APPELLATE REVIEW WHERE THE FINDINGS AND SENTENCE HAVE BEEN UPHELD" IS VOID OR OTHERWISE UNENFORCEABLE?

IV.

WHETHER SSGT ROBLES'S SENTENCE—WHICH INCLUDES A BAD CONDUCT DISCHARGE—IS INAPPROPRIATELY SEVERE?[1]

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

Statement of the Case

On 20 October 2021, and 14-15 February 2022, SSgt Stephen T. Robles, Appellant, was tried by a military judge alone at a general court-martial convened at Buckley Space Force Base (SFB). Record (R.) at 1, 25, 273. Consistent with his pleas,[2] SSgt Robles was convicted of one charge and four specifications of negligent dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892, *Manual for Courts-Martial*, *United States* (2019 ed.) (2019 *MCM*)[3]; one charge and one specification of wrongful broadcasting of visual images of sexually explicit conduct, in violation of Article 117a, UCMJ, 10 U.S.C. § 917a, and five specifications[4] of indecent conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 286. A military judge sentenced SSgt Robles to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for a total of 325 days[5] and to be discharged with a bad conduct discharge. R. at 398; Record of Trial (ROT), Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 22 March 2022. The convening authority denied SSgt Robles's deferment requests relating to his

[2] Pursuant to his plea agreement, one charge and one specification in violation of Article 128, UCMJ, and one charge and two specifications in violation of Article 128b, UCMJ, were "dismissed without prejudice to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld." ROT, Vol. 1, Entry of Judgment (EOJ), dated 28 March 2022.
[3] All references to the punitive articles, Rules for Court-Martial (R.C.M.), and Military Rules of Evidence are the 2019 *MCM*, unless otherwise noted.
[4] For Specification 3 of Charge III (indecent conduct), Appellant was found guilty by exceptions and substitutions. The words "in one of the" was substituted for the words "in the." ROT, Vol. 1, EOJ. Of the excepted words, Appellant was found not guilty. *Id*. Of the substituted words, Appellant was found guilty. *Id*.
[5] Appellant was sentenced to be confined for 35 days (for Specification 1 of Charge I), to be confined for 25 days (for Specification 2 of Charge I), to be confined 35 days (for the Specification 3 of Charge I), to be confined for 30 days (Specification 4 of Charge I); to be confined for 50 days (the Specification of Charge II), to be confined for 35 days (Specification 1 of Charge III), to be confined for 35 days (Specification 2 of Charge III), to be confined for 25 days (Specification 3 of Charge III), to be confined for 20 days (Specification 4 of Charge III), and to be confined for 35 days (Specification 5 of Charge III), with the sentences running consecutively. R. at 398.

reduction in grade, and automatic and adjudged forfeitures. *Id*. The convening authority also denied SSgt Robles's request to have his automatic forfeitures waived. *Id*.

Statement of Facts

Background

SSgt Robles joined the Air Force on 8 May 2012. Prosecution Exhibit (Pros. Ex.) 1. He and M.R. were married on 28 March 2018. *Id*. At the time of his court-martial, he had been selected for promotion to Technical Sergeant (TSgt). Defense Exhibit (Def. Ex. F). In fact, due to an administrative error, his unit hosted his promotion party on 1 December 2021 and SSgt Robles began wearing his uniform displaying his TSgt rank. R. at 361; Def. Ex. F. When his unit was notified of the oversight, SSgt Robles was allowed to telework, rather than returning to work wearing the rank of SSgt. *Id*.

The Charged Offenses

SSgt Robles pleaded guilty to one charge and four specifications of negligent dereliction of duty in violation of Article 92, UCMJ. Pros. Ex. 1. During the providence inquiry, SSgt Robles admitted that he was addicted to alcohol and pornography, and he discovered that he could access and post pornographic images and videos using a social media application called Tumblr. R. at 74-75. He indicated it was possible to search for pornographic images on Tumblr, and upon liking an image, the image saved to his Tumblr account. R. at 76. After SSgt Robles liked several pornographic images, he began amassing his own private collection of images. *Id*. Eventually, he decided to create his own Tumblr page. *Id*. He created this Tumblr page with the username h0tafwifemelly. R. at 77; Pros. Ex. 1. He created the Tumblr page as "a way to carry out personal fantasies." R. at 75. He wrote the page from his wife's perspective believing that he would receive more pictures if people believed the page belonged to a female. R. at 77.

S.D., a civilian, was SSgt Robles's wife's older sister. R. at 99; Pros. Ex. 1. SSgt Robles was friends with S.D. on Facebook, and he pulled images of her from her Facebook page. R. at 76-77. He then posted these images next to sexually explicit images of a woman who looked like S.D. *Id.* He also included captions next to the two images implying that the sexually explicit images were of S.D., and suggesting S.D. was involved in a sexual relationship with SSgt Robles. R. at 78; Pros. Ex. 1. Likewise, SSgt Robles was friends with L.G., Ho.P.,[6] and K.R.—all civilians—on Facebook. R. at 98, 115, 133; Pros. Ex. 1. Just as with S.D., he pulled non-sexually explicit images of them from their Facebook pages and posted these non-sexually explicit images next to sexually explicit images of women who looked like them. R. at 98, 115, 133. He then added captions suggesting that L.G., Ho.P., and K.R. were the women in the sexually explicit images, and used the captions to imply that these women were involved in a sexual relationship with SSgt Robles, M.R., or both. Pros. Ex. 1.

SSgt Robles acknowledged he had a duty to treat others with respect at all times, which included his communications on social media. Pros. Ex. 1. While he was under the influence of alcohol when he committed the above acts, he confirmed he knew what he was doing. R. at 91. He also confirmed his addiction to pornography did not compel him to create the posts. R. at 90. Additionally, he agreed that his conduct was not covered by the First Amendment. R. at 88-90.

SSgt Robles also pleaded guilty to wrongful broadcasting of visual images of his then-wife, M.R. engaged in sexually explicit conduct in violation of Article 117a, UCMJ. R. at 148. The images he posted to his Tumblr page included pictures of M.R. topless, exposing her breasts, and

[6] Ho.P, is referred to as H.P. in the charge sheet. ROT, Vol. 2., Charge Sheet (Specification 3 of Charge I). In the Stipulation of Fact, she is referenced as Ho.P. *See* Pros. Ex. 1. Her victim unsworn statement refers to her as H.W. Court Exhibit (Ct. Ex.) C; *see also* R. at 297 (noting that H.W. was formerly Ho.P.). For consistency, she is referred to as Ho.P. throughout this brief.

performing oral sex on SSgt Robles. *Id*. He did not have consent to post any of these images to his Tumblr page. *Id*.

Lastly, SSgt Robles pleaded guilty to one charge and five specifications of indecent conduct in violation of Article 134, UCMJ. Pros. Ex. 1. These five specifications of indecent conduct involved current or former military members. *Id*. Specification 1 of Charge III required the Government prove both terminal elements—that the conduct was prejudicial to good order and discipline and service discrediting. R. at 175. Specifications 2-5 of Charge III required the Government prove SSgt Robles's actions were service discrediting. *Id*. SSgt Robles agreed that his actions amounted to indecent conduct when he pulled non-sexually explicit images from Facebook of J.S., A.T., t H.P., M.D., and - C.J. and posted these images next to sexually explicit images of women who looked like these women. R. at 177-78, 198, 215, 244, 229-30, 239. Additionally, he agreed that his actions were indecent when he posted captions under these images implying that 1st Lt J.S., A.T., H.P., t M.D., and C.J. were the women depicted in the sexually explicit images, and giving the impression that said women were engaged in a sexual relationship with SSgt Robles, M.R., or both. R. at 181-82, 201, 206-07, 223-24, 234-35, 244, 246; Pros. Ex. 1.

Argument

I.

THE MILITARY JUDGE ERRED IN ADMITTING VICTIM IMPACT STATEMENTS THAT WERE NOT OFFERED BY THE VICTIM, THE VICTIM'S DESIGNEE, OR THE VICTIM'S COUNSEL.

Standard of Review

Interpreting R.C.M. 1001A[7] is a question of law reviewed *de novo*. *United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022) (citing *United States v. Barker*, 77 M.J. 377, 382 (C.A.A.F. 2018)). This Court reviews a military judge's admission of victim impact statements for an abuse of discretion. *See United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019); *Barker*, 77 M.J. at 382–83. A military judge abuses his discretion when he makes a ruling based on an erroneous view of the law. *Barker*, 77 M.J. at 383 (citing *United States v. Lubich*, 72 M.J. 170, 173 (C.A.A.F. 2013)).

Additional Facts

During SSgt Robles's presentencing hearing, the Government offered Ct. Ex. C, a written victim unsworn statement of Ho.P. R. at 297-98, 306. In this two-page statement, Ho.P. detailed her friendship with SSgt Robles, discussed her career as a pharmacist and the enjoyment it brought her, and the shame she has felt as a result of SSgt Robles's actions. Ct. Ex. C. She stated she has had "major career setbacks" as a result of his actions, and she has "worked hard to demonstrate integrity as a professional in everything [she does.]" *Id*. She discussed her feelings of "shame, anger, and disgust [as a result of] knowing these pages are forever on the internet." *Id*. The Defense objected to the admission of this statement as Ho.P. was not present at SSgt Robles's presentencing hearing. *Id*. The Government stated, "we do have someone who can testify, or state they received this document from Ms. [Ho.P.] herself." *Id*. The Defense then clarified its position:

> [I]f it's the court's position that someone that is not a representative or, you know, a designee within the realm of 1001, could be the individual that authenticates the document, then we don't need them to come in.
>
> It's just, our standpoint is that 1001 doesn't distinguish with the right to be heard, whether it is a verbal statement to the court a written statement to the court.

[7] R.C.M. 1001(c) replaced R.C.M. 1001A and is the version applicable to SSgt Robles's case.

R. at 307. When the military judge inquired whether the Defense was objecting to authentication, the Defense responded:

> Yes, sir. I guess there would be -- to expand on it a bit is that, the individual that the government would call to authenticate the document would not be an individual that the rule permits to provide the unsworn statement.
>
> So it would be similar if we had that individual just get up and read the statement, that's essentially what that witness is doing.
>
> So it's authentication, but -- to figure out what the document is. But also, the next step is, is that permissible within the rules to have someone who is not the victim, the victim's representative, or has been designated by the military judge to provide that information?

R. at 307-08.

After the military judge suggested the unsworn statement seemed authentic (R. at 308), the Defense noted that even if the document was authenticated, the rules must be considered, stating:

> Do the rules allow someone to provide that unsworn information to the court, that is not the actual named victim?
>
> Because the rule specifically says it has to come from the victim, the representative, or a designee created by the military judge.

Id.

After the Government disagreed with the Defense's interpretation, the Defense countered the Government's argument by noting R.C.M. 1001(c)(5)(B) states:

> "Upon good cause, the military judge may permit crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement." Again, I feel like they're establishing that it can't be anyone that is associated, it has to be the representation under (5)(B).

R. at 310 (quoting R.C.M. 1001(c)(5)(B)).

After hearing from the Government and the Defense, the military judge referenced R.C.M. 1001(c)(5)(B)'s requirement that a victim unsworn statement be presented to the trial and defense

counsel. *Id*. As the statement was provided to both parties, the military judge found that "it would seem to undermine the rule to allow a written unsworn statement, if the victim has to actually come in and testify, or make some sort of verbal statement in order to give a written unsworn statement." *Id*.

The Defense raised the same objection to Ct. Ex. H, the written victim unsworn statement of H.P.[8] R. at 298-99, 320. In this one-page statement, H.P. discussed her friendship with SSgt Robles and explained that when she was contacted about the Tumblr page, she was in the middle of switching careers and bases in the Air National Guard. Ct. Ex. H. She had to disclose information about the page to her First Sergeants, all the while feeling "ashamed to have [her] face and name attached" and she was "extremely embarrassed" that one of her troops would come across "these photos that will compromise [her] integrity and all that [she's] worked for." *Id*. H.P. was also ashamed that her sister [Ho.P.] and other civilians had been targeted by SSgt Robles, as "this is the most shameful way someone could have represented [the military] in this instance." *Id*.

Likewise, the Defense maintained this same objection to Ct. Ex. J, the written victim unsworn statement of C.J. R. at 298-99, 322. In this one-page statement, C.J. discussed her relationship with SSgt Robles, noting she and SSgt Robles had been friends and she could not recall any negative interactions with him. Ct. Ex. J. She explained she had been "a victim of sexual harassment and sexual abuse which led to [her] being a victim in a prior court-martial in 2018." *Id*. She emphasized that "SSgt Robles knew extensively of the history [she] had faced, with [her] confiding in him personally after the fact." *Id.* Given his knowledge of her history, "for

[8] H.P. was referred to as H.P. in the charge sheet. ROT, Vol. 2, Charge Sheet (Specification 3 of Charge III).

him to also knowingly do things that are violating and inappropriate, is hypocritical, hurtful, and triggering to [her] PTSD." *Id*.

During his sentencing argument, the trial counsel referenced Ho.P.'s unsworn victim statement, emphasizing she had been a professional pharmacist for a decade, and underscoring that "she told you that she was devastated about [the] accused's actions. Devastated that any of the 300 team members she supervises will see what the accused did to her." R. at 370. Similarly, the trial counsel focused the military judge's attention on H.P.'s statement, stating, "you will read that she is ashamed that her face is associated with what the accused did, with what he dragged her into." R. at 371. Likewise, the trial counsel referenced C.J.'s unsworn victim statement, stressing that she "[c]onfided in the accused . . . [C.J.] told the accused about a previous investigation she was involved in in which she was a victim. And he put her on this website, and doing, so re-victimized her. He knew that about her, and he chose her to include on his website." *Id*.

SSgt Robles's plea agreement provided minimum and maximum sentences for each of his charges and specifications. Specifically, the military judge was required to adjudge a sentence for the specifications involving Ho.P., H.P., and C.J., as follows:

> c. To Specification 3 of Charge I:
> Maximum confinement: 35 days
> Minimum confinement: 12 days
>
> h. To Specification 3 of Charge III:
> Maximum confinement: 35 days
> Minimum confinement: 12 days
>
> j. To Specification 5 of Charge III:
> Maximum confinement: 35 days
> Minimum confinement: 12 days

App. Ex. X at 2-3. His plea agreement specified that all confinement terms would be served consecutively. *Id*. at 3.

Law and Analysis

Pursuant to R.C.M. 1001(c)(2)(A), a crime victim is "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules." "[A]ny crime victim *who is present at the presentencing proceeding* has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both." R.C.M. 1001(a)(3)(A) (emphasis added). "If the crime victim exercises the right to be reasonably heard, the crime victim shall be called by the court-martial." R.C.M. 1001(c)(1). Additionally, if the crime victim elects to provide an unsworn statement, "[t]he unsworn statement may be oral, written, or both." R.C.M. 1001(c)(5)(A). R.C.M. 1001(c)(5)(B) states that "[u]pon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement."

While a crime victim has the right to be reasonably heard, this right is not unfettered. At the outset, the person must qualify as a crime victim. R.C.M. 1001(c)(2)(A). A crime victim's statement must also conform to R.C.M. 1001(c)(2)(B) (providing that victim impact is "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.").

Here, Ho.P., H.P., and C.J. were not present at SSgt Robles's presentencing proceeding,[9] and SSgt Robles's defense counsel objected to the admission of Ct. Ex. C, H, and J. The defense counsel argued that there are limits on who may offer a victim impact statement, noting "the rule specifically says it has to come from the victim, the representative, or a designee[.]" R. at 308.

[9] R. at 306, 320, 322.

To that point, only upon a showing of good cause, may the victim's *own* counsel "'deliver all or part of the crime victim's unsworn statement.'" R. at 310 (quoting R.C.M. 1001(c)(5)(B)).

In overruling the objection, the military judge did not discuss R.C.M. 1001(a)(3)(A). R. at 310. Nor did he discuss the plain language of this rule, which specifically states that the right to be reasonably heard is tethered to the *presence* of a crime victim at an accused's presentencing proceeding (i.e., "any crime victim *who is present at the presentencing proceeding*"). R. at 310. That the victim be present is further supported by R.C.M. 1001(c)(1), which states that a victim who elects to provide an unsworn statement "shall be *called* by the court-martial." (emphasis added). Rather than analyzing whether the rules require the victim's presence, the military judge focused on R.C.M. 1001(c)(5)(B)'s requirement that the trial and defense counsel be provided a written proffer, noting that both trial and defense counsel had been provided a copy of the written unsworn statements. *Id*. In *Barker*, the Court of Appeals for the Armed Forces (CAAF) emphasized, "All of the procedures in R.C.M. 1001A contemplate the *actual participation* of the victim, and the statement being offered by the victim or through her counsel." 77 M.J. at 383 (emphasis added). Because the statements were not offered by the victim or her counsel, the CAAF found that the military judge abused his discretion in admitting the statements. *Id*. at 383-84.

The military judge also found that "it would seem to undermine the purpose of the rule to allow a written unsworn statement, if the victim has to actually come in and testify, or make some sort of verbal statement in order to give a written unsworn statement." R. at 310. In *Edwards*, the CAAF found that the military judge abused his discretion when he erroneously admitted a victim unsworn statement that was neither oral nor written, as required by the rules. 82 M.J. at 244. Just as in *Edwards*, here, the military judge abused his discretion when he focused on "the purpose of the rule" rather than on the plain text of R.C.M. 1001(a)(3)(A) and R.C.M. 1001(c)(1), which

require that a victim—who is *present* at the presentencing proceeding—be *called* by the court-martial to offer his or her unsworn statement.

If sentencing evidence was erroneously admitted, this Court considers "(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." *Barker*, 77 M.J. at 384. The Government has the burden of proving the admission of the erroneous evidence was harmless. *Edwards*, 82 M.J. at 246. Recently, the CAAF highlighted that this four-factor test for evaluating prejudice "is considerably more difficult to apply to sentencing." *Id.* at 247. The CAAF noted that deciding whether an accused is guilty versus not guilty is a binary decision, compared with a sentencing decision where "there is a broad spectrum of lawful punishments that a panel might adjudge." *Id*.

Here, with regards to the strength of the Government's case, the Government's findings case was strong, as SSgt Robles pleaded guilty to the aforementioned offenses. However, the Government's sentencing case was weak, as the Government submitted just two sentencing exhibits: SSgt Robles's Personal Data Sheet and his Enlisted Performance Reports. Pros. Ex. 18-19. Additionally, the Government did not call any sentencing witnesses. R. at 294. On the other hand, the Defense presented an impressive sentencing case, which included accolades SSgt Robles's received throughout his career (Def. Ex. B), and character letters from a licensed counselor and a chaplain commending the enormous strides he had made in addressing his addictions to alcohol and pornography. Def. Ex. D at 1-2, 9-10. Additionally, co-workers and family members wrote letters on his behalf about his caring nature, his willingness to volunteer, his mentorship, and his sorrow and remorse for his actions. Def. Ex. D at 3, 4, 7.

In examining the next two *Barker* factors, both the materiality and quality of the three victim unsworn statements was high. These statements provided the military judge with significant information regarding each woman's relationship with SSgt Robles and how his actions had impacted them personally and professionally. Ct. Ex. C, H, J. Moreover, the trial counsel specifically referenced Ho.P., H.P., and C.J.'s statements during his argument. R. at 370, 371.

The military judge sentenced SSgt Robles to the maximum confinement allowed under his plea deal for Specification 3 of Charge I (involving Ho.P.) and Specification 5 of Charge III (involving C.J.). R. at 398. He sentenced SSgt Robles to 25 days for Specification 3 of Charge III (involving H.P.). *Id*. Notably, the military judge found SSgt Robles guilty by exceptions and substitutions for H.P.'s specification (Specification 3 of Charge III). R. at 286. In discussing SSgt Robles's plea of guilty to this specification, the military judge determined that SSgt Robles had posted one sexually explicit image, not multiple sexually explicit images as charged. R. at 221. During this discussion, the military judge noted, "And I'm not making a finding right now, but it would seem if anything to lower the degree of culpability. Because instead of there being multiple images, it's just one of the images." *Id*.

While the military judge had the discretion to sentence SSgt Robles to as little as 17 days for each of these specifications, after reading the unsworn victim statements of Ho.P., and C.J., he sentenced SSgt Robles to the maximum term of confinement for these two specifications. While he did not sentence SSgt Robles to the maximum for the specification involving H.P., his comments during the plea inquiry are instructive. Because SSgt Robles posted one image, not multiple images, the military judge suggested this fact "would seem to lower the degree of culpability." R. at 221. While he could have sentenced SSgt Robles to 17 days for this specification, after reading H.P.'s victim unsworn statement, he sentenced him to 25 days.

Therefore, the military judge's error in admitting the three written unsworn statements did substantially prejudice Appellant's adjudged sentence and Appellant is entitled to relief.

WHEREFORE, SSgt Robles respectfully requests that this Honorable Court set aside and reassess his sentence for Specification 3 of Charge I, Specification 3 of Charge III, and Specification 5 of Charge III.

II.

SSGT ROBLES'S PLEA OF GUILTY TO SPECIFICATION 4 OF CHARGE III IS IMPROVIDENT.

Standard of Review

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion, which is found when a military judge accepts a plea without an adequal factual basis. *United States v. Inabinette*, 66 M.J. 320, 321 (C.A.A.F. 2008). However, "the military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo." *Id.*

Additional Facts

In discussing the definition of "sexually explicit" with SSgt Robles, the military judge stated the following:

> So with regard to "sexually explicit," the proposed definition of the statement, was that it includes sex acts such as actual or simulated genital to genital contact, oral to genital contact, anal to genital contact, or oral to anal contact. It also includes depictions of uncovered genitalia, pubic area, buttocks, or a female breast that lacks serious artistic, literary, scientific, or political value.
>
> And as I noted earlier, paragraph 16 in the stipulation describes sexually explicit -- well, it gives more things that would be included in the definition of "sexually explicit," *which include, basically, women that are nude, posing in lingerie, or engaged in sex acts*.
>
> And so I would also say that, essentially, it seems like what's -- I'm [getting] at here is things that are pornographic, provocative, obscene, just kind of a *general common-sense understanding* of what "sexually explicit" would be from a layperson's perspective, *rather than a highly technical, legal definition of it*.

R. at 72 (emphasis added).

Later, during the military judge's discussion of Specification 4 of Charge III, the military judge noted: "So in this one, there are no acts, but one of them she -- the person depicted appears to be nude." R. at 232. The military judge also discussed the other two images at issue, describing the female in the images as being "in lingerie, which according to -- and kind of provocatively posed looking back at the camera." *Id*.

With regards to the three images referenced by the military judge, in the first image, the female is posed naked in a chair with her back to the camera. Pros. Ex. 13 at 20. Due to her positioning, her breasts, genitals, and pubic area are not displayed. *Id*. She is smiling, and looking over her shoulder, with her buttocks displayed. *Id*. In the second and third images, what appears to be the same female is sitting on a bed with her legs underneath her. *Id.* Because her back is to the camera, her breasts, genitals, and pubic area are not visible. *Id*. She is wearing lingerie which displays her buttocks. *Id*.

Law

In Specification 4 of Charge III, SSgt Robles was charged with indecent conduct under Article 134, UCMJ. The specification alleged the following:

> In that STAFF SERGEANT STEPHEN T. ROBLES, United States Air Force, 460th Contracting Squadron, Buckley Air Force Base, Colorado, did within the continental United States, between on or about 1 March 2019 and on or about 31 October 2019, commit indecent conduct, to wit: electronically posting descriptions and sexually explicit images on Tumblr, a social networking platform, to create the appearance that [M.D.] was pictured in the sexually explicit images, and that said conduct was of a nature to bring discredit upon the armed forces.

ROT, Vol. 2, Charge Sheet.

To convict SSgt Robles of indecent conduct in violation of Article 134, UCMJ, facts satisfying the following elements needed to be adduced:

> (1) That between on or about 1 March 2019 and on or about 31 October 2019, within the continental United States, [SSgt Robles] wrongfully engaged in certain conduct, to wit: electronically posting descriptions and sexually explicit images on Tumblr, a social networking platform to create the appearance that [M.D.] was pictured in the sexually explicit images;
>
> (2) That the conduct was indecent; and
>
> (3) That under the circumstances, [SSgt Robles's] conduct was of a nature to bring discredit upon the armed forces.

R. at 228-29; 2019 *MCM*, pt. IV, ¶104.b.

"Sexually explicit conduct" is defined in Article 117a, UCMJ and Article 134, UCMJ. Article 117a, UCMJ differentiates between an "intimate visual image" and a "visual image of sexually explicit conduct." 2019 *MCM*, Appendix 2, Article 117a, UCMJ. "The term 'intimate visual image' means a visual image that depicts a private area of a person." *Id*. Additionally, "private area" is defined as "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." *Id*. In comparison, "sexually explicit conduct" means "actual or simulated genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex, bestiality, masturbation, or sadistic or masochistic abuse." *Id*. Article 134, UCMJ defines "sexually explicit conduct" in the same manner. 2019 *MCM*, pt. IV, ¶ 95.c.(10)(a)-(d). However, because child pornography involves minors, Article 134, UCMJ, includes an additional definition of "sexually explicit conduct:" (e) "lascivious exhibition of the genitals or pubic area of any person." 2019 *MCM*, pt. IV, ¶ 95.c.(10)(e).

Analysis

The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea. *United States v. Moon*, 73 M.J. 382, 386 (C.A.A.F. 2014). Here, the Government charged SSgt Robles with electronically posting descriptions and displaying *sexually explicit images* to create the appearance that then-SSgt M.D. was pictured in the *sexually explicit images*. ROT, Vol. 2, Charge Sheet (emphasis added). To find SSgt Robles guilty of this specification, the military judge needed to elicit facts from SSgt Robles demonstrating that SSgt Robles actually posted *sexually explicit images* of M.D. The military judge failed to elicit such facts, and, thus, he abused his discretion.

Notably, the images that SSgt Robles posted do not meet the definition of "sexually explicit conduct" found in the 2019 *MCM*—under Article 117a, UCMJ, or Article 134, UCMJ—as the non-minor female in the images is not engaged in *any* sexual acts. *See* Pros. Ex. 9 at 3, 4, 8; Pros. Ex. 13 at 20. The military judge acknowledged as much when he stated, "So in this one, there are *no acts*, but one of them she -- the person depicted appears to be nude." R. at 232 (emphasis added). The military judge then mentioned two additional images, describing the female in the images as being "in lingerie, which according to -- and kind of provocatively posed looking back at the camera." *Id*.

In discussing the Government's definition of "sexually explicit"[10] with SSgt Robles, the military judge posited that the definition was "just kind of a *general common-sense understanding* of what "sexually explicit" would be from a layperson's perspective, *rather than a highly technical, legal definition of it*." R. at 72 (emphasis added). Thus, rather than finding fault with the Government's overly expansive definition of "sexually explicit," found nowhere in the MCM,

[10] *See* Pros. Ex. 1 at paragraph 16.

the military judge blessed the Government's definition by suggesting this definition conveyed a "general common-sense understanding" of what constituted "sexually explicit" material. R. at 72. After providing SSgt Robles with his interpretation of the Government's overly expansive definition, the military judge asked SSgt Robles whether he agreed with the elements and definitions as discussed. R. at 73. SSgt Robles indicated his agreement. *Id*.

Significantly, this question came after the military judge discussed three separate elements and three different definitions with SSgt Robles. R. at 71-73. While parts of the Government's definition of "sexually explicit" encompass the definition of "sexually explicit conduct" found in Article 117a, UCMJ and Article 134, UCMJ, other parts of the definition do not. The military judge did not parse the definition of "sexually explicit" into its component parts when asking whether SSgt Robles agreed with the elements and definitions as discussed. R. at 73. It is telling that the military judge himself noted that the definition used by the Government did *not* comport with the *legal definition* of "sexually explicit." R. at 72. An accused, such as SSgt Robles, should not stand convicted of an offense when the Government is free to craft its own definition of what constitutes criminal conduct, rather than abiding by the statutorily enacted (Article 117a, UCMJ) or presidentially implemented (Article 134, UCMJ) definitions. There was no need to resort to a "common-sense understanding" when "sexually explicit conduct" has been defined and criminalized within the UCMJ. Additionally, while the military judge may have believed this definition was a "common-sense understanding," this does not mean that others—including those in the military or the larger community—would classify images of nude or lingerie-clad women as "sexually explicit." Notably, in the first image, the female is posed naked in a chair in such a manner that her breasts, genitals, and pubic area are *not* displayed. Pros. Ex. 13 at 20. She is smiling, and looking over her shoulder, with her buttocks displayed. *Id*. In the second and third

images, the same female is sitting on a bed with her legs underneath her. *Id.* She is wearing lingerie which displayed her buttocks. *Id*. As her back is the camera, you cannot see her breasts, genitals, or pubic area. *Id*.

At one time, the images at issue here may have been considered indecent or obscene. However, today, women and men can peruse lingerie catalogs, like Victoria's Secret, or go online to search for lingerie or thong bikinis they wish to purchase for their spouse or significant other. Models are artfully posed in these catalogs and online websites, wearing lingerie, underwear, and bikinis (including thong bikinis which expose their buttocks). Additionally, during the summertime, women may be seen at pools and beaches wearing the thong bikinis they purchased from the aforementioned catalogs or online websites. The amount of skin displayed in these catalogs, online websites, or by women wearing said bikinis is comparable to that displayed in the images in this specification. Those images would not be considered sexually explicit, and neither should the images at issue here.

The facts the military judge elicited from SSgt Robles are insufficient to sustain SSgt Robles's conviction for indecent conduct because the images at issue are not "sexually explicit" as defined and criminalized within the UCMJ under Article 117a, UCMJ, and Article 134, UCMJ. The military judge acknowledged this disconnect, but accepted SSgt Robles's plea of guilty, despite the fact that at the images at issue contained no sexual acts. Thus, his acceptance of SSgt Robles's plea of guilty was an abuse of discretion.

WHEREFORE, SSgt Robles respectfully requests that this Honorable Court set aside his conviction for Specification 4 of Charge III.

III.

THE PORTION OF SSGT ROBLES'S PLEA AGREEMENT WHICH PROVIDES THAT DISMISSAL OF CERTAIN CHARGES AND SPECIFICATIONS WOULD ONLY RIPEN INTO DISMISSAL WITH PREJUDICE "UPON COMPLETION OF APPELLATE REVIEW WHERE THE FINDINGS AND SENTENCE HAVE BEEN UPHELD" IS VOID OR OTHERWISE UNENFORCEABLE.

Standard of Review

Whether a condition of a plea agreement impermissibly deprives an accused of the complete and effective exercise of post-trial and appellate rights in violation of R.C.M. 705(c)(1)(B) is a question of law reviewed de novo. *See United States v. Tate*, 64 M.J. 269, 271 (C.A.A.F. 2007).

Additional Facts

SSgt Robles's plea agreement stated he "was not waiving the right to . . . complete and effective exercise of post-trial and appellate rights[.]" App. Ex. X at 2. Additionally, this agreement included a provision stating that the convening authority agreed to:

> a. Withdraw the following upon acceptance of my plea of guilty as described in paragraph 2.a above: (i) Additional Charge I and its Specification and (ii) Additional Charge II and its Specifications; and
>
> b. Dismiss the following without prejudice upon announcement of the sentence, to ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld: (i) Additional Charge I and its Specifications and (ii) Additional Charge II and its Specifications.

Id.

During his colloquy with SSgt Robles concerning the terms of the plea agreement, the military judge focused on the aforementioned provision:

> So then in paragraph 3 it talks about the things that you would be -- that you were requesting the convening authority do based on your offer. And so it has to do with withdrawing and dismissing the Additional Charge and -- well, Additional Charges I and II and their specifications. And so they would be withdrawn and dismissed

> without prejudice, basically once I accept the -- well, once I indicate that I would accept the guilty plea. But then, that would ripen into prejudice, and I'm not sure if your counsel have already talked to you about what "prejudice" means. It seem[s] since you talked about this, they have, but just to be clear.
>
> If something's dismissed with prejudice, that means that it cannot be brought again by the same sovereign. If it's dismissed without prejudice, then that means they, theoretically or potentially, that charge and specification could be raised against you again; could be brought against you again and you could be prosecuted for those.
>
> So how this works is that it would be, those charges and specifications would be dismissed after the plea was accepted without prejudice. But then that would ripen into prejudice, once appellate review determined that the findings and sentence were approved.
>
> So do you understand that?

R. at 257. SSgt Robles replied, "Yes, your honor." *Id*.

Law

Article 66(d), UCMJ, provides that in any case in which a Court of Criminal Appeals (CCA) has jurisdiction to consider an accused's timely appeal of his court-martial conviction, "[t]he Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "Thus, the Uniform Code provides for an automatic review which is unparalleled elsewhere." *United States v. Mills*, 12 M.J. 1, 4 (C.M.A. 1981). "A complete Article 66, UCMJ, review is a 'substantial right' of an accused, and a CCA may not rely on only selected portions of a record or allegations of error alone." *United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016) (internal citation omitted) (citations omitted). This scope of review is significantly different "from direct review in the civilian federal appellate courts." *Id*. at 222-23 (internal quotations omitted).

Thus, while an appellant may be prevented from raising an issue on appeal by operation of a "waive all waivable motions" provision in his plea agreement, he cannot "waive a CCA's statutory mandate unless . . . [he] waives the right to appellate review altogether—and that election cannot be made until after the trial and sentencing." *Id*. at 223. Thus, "[e]ither a case is subject to a *complete* appellate review under Article 66(c), UCMJ, or it is not because such review was waived — after trial and sentencing — under Article 61, UCMJ." *Chin*, 75 M.J. at 223 (emphasis added) (citation omitted). Therefore, "[i]f an appellant elects to proceed with Article 66, UCMJ, review, as in this case, then the CCA is commanded *by statute* to review the entire record and approve only that which 'should be approved.'" *Id*. Even if an appellant has no *constitutional* right to an appeal in the first instance, once that right is conferred upon him by *statute*, then this statutory right of appeal must still conform to the demands of due process and equal protection. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985).

Article 53a, UCMJ, 10 U.S.C. § 853a, permits the convening authority and the accused to enter into a plea agreement[11] any time before the announcement of the findings of a court-martial. It also grants the military judge the discretion to reject a plea agreement that "is prohibited by law or is contrary to, or is inconsistent with, a regulation prescribed by the President with respect to terms, conditions, or other aspects of plea agreements." Article 53a(b)(4)-(5), UCMJ. R.C.M. 705 provides further instruction on the permissible form and content of plea agreements. The rule permits an accused to "plead guilty to . . . one or more charges and specifications" and to "fulfill

[11] Much of the case law cited to in this brief examines the application of prior versions of R.C.M. 705 to pretrial agreements, as opposed to plea agreements under R.C.M. 705 (2019 *MCM*). The provisions of R.C.M. 705 (2019 *MCM*) are nearly identical to the corresponding provisions in the 2016 *MCM*. *Compare* R.C.M. 705(c)(1)(A)-(B) (2019 *MCM*) *with* R.C.M. 705(c)(1)(A)-(B) (2016 *MCM*).

such additional terms or conditions that may be included in the agreement and that are not prohibited under [R.C.M. 705]." R.C.M. 705(b)(1). The rule allows a convening authority to agree to "withdraw one or more charges or specifications from a court-martial." R.C.M. 705(b)(2)(C). But the rule also prohibits the enforcement of a "term or condition" in a plea agreement which:

> [D]eprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete presentencing proceedings; *the complete and effective exercise of post-trial and appellate rights*.

R.C.M. 705(c)(1)(B) (emphasis added). Neither the Defense nor the Government may propose a term or condition prohibited by law or public policy. R.C.M. 705(e)(1).

The CAAF and its predecessors have noted the potential dangers to the fair administration of justice posed by plea agreements, noting that while such agreements "are considered beneficial and acceptable components of military justice practice, if left unchecked, various provisions therein might well undermine the military justice system." *United States v. Allen*, 8 C.M.A. 504, 507 (C.M.A. 1957); *see also United States v. Davis*, 50 M.J. 426, 429 (C.A.A.F. 1999) (incorporating the *Allen* principle into R.C.M. 705). The following principle has thus emerged: "Pretrial agreement provisions are contrary to 'public policy' if they interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity of the disciplinary process." *United States v. Raynor*, 66 M.J. 693, 697 (A. F. Ct. Crim. App. 2008) (quoting *United States v. Cassity*, 36 M.J. 759, 763 (N. M. Ct. Crim. App. 1992)). "Appellate case law, its sources, and R.C.M. 705 are, themselves, statements of public policy." *Cassity*, 36 M.J. at 761.

R.C.M. 1115(c) provides that "[n]o person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw from appellate review." As both

the CMA and the Navy-Marine Corps Court of Military Review recognized, "[t]he rules of the marketplace . . . are not permitted to operate unregulated in the military justice system. Despite the mutual assent of the parties, the propriety of a particular pretrial agreement provision and its operation in the case must be assessed in view of the basic tenets of the military justice system." *Cassity*, 36 M.J. at 762 (citing *United States v. Dawson*, 10 M.J. 142, 144-45 (C.M.A. 1981)).

Over 40 years ago, the CMA was presented with a case in which a pretrial agreement provided, "should the accused's plea of guilty to unpremeditated murder or sodomy be changed by anyone to not guilty, the charge of premeditated murder and the referral of the case as capital may be reinstated by the Convening Authority." *United States v. Partin*, 7 M.J. 409, 411 (C.M.A. 1979). At trial, the military judge advised the appellant that "if for any reason, any appellate authority overturns the finding of guilty . . . you could later be tried on a charge of premeditated murder." *Id*. at 411. The military judge later asked the appellant whether he understood "that the right has been reserved to reinstate a premeditated murder charged if, at any appellate stage of the trial, they set aside the findings pursuant to the guilty pleas[.]" *Id*. Rather than mount a facial attack, the appellant argued that this provision's "interpretation by the military judge and the acquiescence of the appellant and both counsel at the trial constituted the incorporation of an illegal condition into the pretrial agreement." *Id*. While the Court declined to facially "address [this provision] at the present time" it also made a point of saying "we do not condone it in any way." *Id*. at 411 n.3.[12]

[12] *But see Partin*, 7 M.J. at 413 n.* (Cook, J., concurring in the result) (disagreeing with the principal opinion insofar as it suggested "that a convening authority cannot require final judicial acceptance of a plea of guilty as a condition to effectuation of a pretrial agreement with the accused").

The CMA ultimately determined that the military judge's "interpretation in no way reflects the express terms of the pretrial agreement and is erroneous as a matter of military procedure" because the express terms of the plea agreement only referred to entering pleas of guilty or not guilty; it did not state anything about an appellate court's later determination as to whether such pleas were provident. *Id*. at 412. Yet, the Court still recognized that if the military judge's interpretation of the pretrial agreement had been correct, there would be cause for concern that it impermissibly interfered with the exercise of military appellate rights:

> The appellant also contends that the presence of such a condition in a pretrial agreement imposes an impermissible burden on his statutory rights to automatic and discretionary review of his court-martial. *See* Articles 66 and 67, UCMJ, 10 U.S.C. §§ 866 and 867, respectively. *Indeed, if this misinterpretation by the military judge was an actual term of the pretrial agreement, this argument may have merit.*

Id. (emphasis added).

However, the presence of an impermissible term in a plea agreement is not necessarily fatal to the result of the court-martial. *See Tate,* 64 M.J. at 272. Where a term or condition of a plea agreement is impermissible and thus unenforceable, courts may determine whether the presence of the unenforceable term renders the entire plea agreement void. *See United States v. Holland*, 1 M.J. 58, 60 (C.M.A. 1975) (concluding the presence of an unenforceable term in a plea agreement required the voiding of the agreement and the authorization of a rehearing); *United States v. McLaughlin*, 50 M.J. 217, 218-19 (C.A.A.F. 1999) (concluding an impermissible term may be treated as null without vitiating the remainder of the agreement); *Tate*, 64 M.J. at 272 (concluding that impermissible terms may be stricken from a pretrial agreement without impairing the balance of the agreement and the accused's plea).

In *United States v. Goldsmith*, No. ACM 40148, 2023 CCA LEXIS 8, at *14 (A.F. Ct. Crim. App. 11 Jan. 2023) (unpub. op.), a panel of this Court stated, "we cannot conclude the

provision [conditioning dismissal with prejudice upon the appellant's findings and sentence being upheld] operated to deprive Appellant of his ability to completely and effectively exercise his appellate rights." In coming to this conclusion, this Court confirmed that the existence of this provision "might lead Appellant to question whether or not to raise certain issues on appeal," but noted that the appellant had agreed to the term. *Id*. at *13.

In *United States v. Greer*, No. ACM 39806 (f rev), 2022 CCA LEXIS 411, at *8-9 (A.F. Ct. Crim. App. 18 Jul. 2022) (unpub. op.), this Court *sua sponte* considered whether the appellant's plea of guilty was improvident when the specification alleged he struck the alleged victim with his "hands" as opposed to striking her with one "hand." This Court determined that "the military judge's colloquy with Appellant did raise a substantial basis to question the providency of Appellant's guilty plea," but ultimately determined that the discrepancy "[did] not imperil the providency of his guilty plea as a whole." *Id*. at *11. Thus, this Court remedied the error by modifying the word "hands" to "hand." *Id*.

In *United States v. McCameron,* No. ACM 40089, 2022 CCA LEXIS 663, at *2 (A.F. Ct. Crim. App. 17 Nov. 2022) (unpub. op.), the appellant challenged his guilty plea to damaging personal property, claiming the specification failed to allege an offense, and alternatively that the military judge abused his discretion in accepting the appellant's guilty plea to this specification. The appellant's argument hinged on the distinction between real property and personal property proscribed in Article 109, UCMJ. *Id*. at *11-12. Because this Court found that the military judge erred in several ways, including when he informed the appellant that he "was pleading guilty to damaging 'personal property' when the wall of his residence was real, not personal property," this Court was "not confident Appellant understood the nature of the offense of which he was charged and pleaded guilty." *Id*. at *13, *14. As a result, this Court set aside his finding of guilty and

reassessed his sentence, reducing his adjudged fine by $100.00. *Id*. at *36.

In *United States v. Sayers*, No. ACM 40142 (f rev), slip. op. at 2, 5 (A.F. Ct. Crim. App. 27 Mar. 2023) (unpub. op.), the appellant argued that the military judge committed plain error by failing to advise him that the statute of limitations had run for the charge of fraudulent enlistment which he was pleading guilty to. This Court agreed, finding that "the military judge committed plain error and this error resulted in material prejudice." *Id*. at 7. Thus, this Court set aside the findings of guilty and reduced appellant's sentence by three months (from 36 months to 33 months). *Id*. at 8, 16.

In *United States v. Driskill*, No. ACM 39889 (f rev), 2022 CCA LEXIS 496, at *2, *3-4, *55 (A.F. Ct. Crim. App. 23 Aug. 2022) (unpub. op.), *rev. granted on other grounds*, __ M.J. __, No. 23-0066/AF (C.A.A.F. 1 May 2023) (order granting review), the appellant, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), argued that his sentence to 40 years and 9 months of confinement—for rape of a child, sexual abuse of a child, and wrongful possession of obscene cartoons—was inappropriately severe. This Court concurred, indicating:

> [B]ased on our collective experiences as judge advocates and appellate judges, and taking into account the principles of sentencing and the matters in aggravation, as balanced by the matters in mitigation, we conclude that Appellant's sentence to confinement for 40 years and 9 months is inappropriately severe.

Id. at *56. This Court reassessed his sentence, finding that a term of thirty years confinement should be affirmed. *Id*. at *57.

In *United States v. Hernandez*, No. ACM 39606 (rem), 2023 CCA LEXIS 104, at *15 (A.F. Ct. Crim. App. 28 Feb. 2023) (unpub. op.), the appellant contended that the portion of his sentence which included a dishonorable discharge—for a single wrongful use of cocaine—was inappropriately severe. This Court agreed, stating:

> Based on our collective experiences as judge advocates and appellate judges, and

> taking into account R.C.M. 1003(b)(8), the nature of the offense, the principles of sentencing, and the matters contained in Appellant's record of trial, we conclude that Appellant's sentence to a dishonorable discharge for a single incident of drug abuse—under the facts presented here—is inappropriately severe.

Id. at *17. Instead, the Court reassessed his sentence, finding a bad conduct discharge should be affirmed. *Id*.

Analysis

A plea agreement term that conditions a material and favorable benefit on whether relief is granted on appeal is unenforceable. SSgt Robles's plea agreement contains such an unenforceable condition. While Additional Charge I and II and their Specifications were withdrawn and dismissed without prejudice (*see* ROT, Vol 2., Charge Sheet; ROT, Vol. 1, EOJ, dated 28 March 2022), his plea deal conditioned the dismissal with prejudice of these charges and specifications on this Court affirming his findings and sentence without modification. App. Ex. X at 2. Thus, if this Court or another appellate court alters the findings or sentence in any way, these charges and specifications could potentially be resurrected. This condition violates R.C.M. 705(c)(1)(B) and implicates R.C.M. 1115(c).

Article 66(d), UCMJ, affords SSgt Robles a "substantial right" he cannot waive—even if he *wanted to*—prior to being sentenced. *Chin*, 75 M.J. at 222-23. No one is permitted to "compel, coerce, or induce an accused by force, promises of clemency, *or otherwise* to waive or withdraw from" this substantial right. *See* R.C.M. 1115(c) (emphasis added). The *MCM* likewise provides that a term or condition in a plea agreement which deprives the accused of the right to "the complete *and effective* exercise of post-trial and appellate rights" shall not be enforced. R.C.M. 705(c)(1)(B) (emphasis added). Paragraph 2(e) of SSgt Robles's plea agreement aligns with that right when it affirmed SSgt Robles was not giving up his right to the "complete and effective exercise of [his] post-trial and appellate rights[.] App. Ex. X at 2. However, that term is in conflict

with the concerning "ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld" clause in the agreement. *Id*.

It is a logical fallacy to suggest SSgt Robles is entitled to the "complete *and effective* exercise" of his appellate rights when prejudice ripening is conditioned upon him losing on appeal. Moreover, this Court's unique statutory charge compels it to review SSgt Robles's case and to "affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ. This Court must perform its congressionally-mandated duties, *regardless* of whether SSgt Robles brings such errors to the Court's attention personally or through counsel. Absent withdrawing his case from appellate review, this Court will conduct its review under Article 66(d), UCMJ, and will grant relief when relief is warranted.

In several recent cases, this Court has found error when conducting its Article 66(d), UCMJ review. *See Greer*, 2022 CCA LEXIS 411, at *8-9, *11, *McCameron*, 2022 CCA LEXIS 663, at *13-14, *36; *Sayers*, unpub. op. at 7, 8, 16; *Driskill,* 2022 CCA LEXIS 496, at *57; *Hernandez*, 2023 CCA LEXIS 104, at *17. These cases highlight the importance of this Court's independent, "awesome, plenary, and *de novo* power" of review under Article 66(d), UCMJ. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). In examining these cases, and cases like them, it is apparent that, pursuant to this Court's congressionally-mandated duties, it grants relief when relief is warranted—regardless of whether an issue is attorney-raised, raised pursuant to *Grostefon*, or when this Court *sua sponte* identifies an issue.

The provision in SSgt Robles's plea agreement effectively eviscerates his right to the complete and effective exercise of his appellate rights. SSgt Robles is left with the untenable decision to either pursue an appeal and risk further prosecution or forego an appeal all together

thereby withdrawing from appellate review. SSgt Robles respectfully asks this Court to sever the problematic term. *See McLaughlin*, 50 M.J. at 218-19; *Tate*, 64 M.J. at 272. The alternative of voiding the entire plea agreement would potentially subject him to the additional charges and specifications he specifically sought to avoid. Instead, SSgt Robles implores this Court to excise the language "where the findings and sentence have been upheld" so Paragraph 3(b). instead reads:

> Dismiss the following without prejudice upon announcement of the sentence, to ripen into prejudice upon completion of appellate review ~~where the findings and sentence have been upheld~~: (i) Additional Charge I and its Specification and (ii) Additional Charge II and its Specifications.

The offending term is analogous to that severed by the CAAF in *Tate*: a term of a pretrial agreement which required the accused to waive both mandatory and discretionary consideration by the clemency and parole board for a period of twenty years and decline clemency or parole if offered during that period. The CAAF found this term deprived the appellant of the complete and effective exercise of his post-trial and appellate rights. 64 M.J. at 272. In *United States v. Clark*, the CAAF determined that striking a term from a pretrial agreement was an appropriate remedy insofar as the term could be interpreted to require the accused to stipulate to evidence of his polygraph examination. 53 M.J. 280, 283 (C.A.A.F. 2000).

An agreement between an accused and the convening authority that has any "tend[ency] to inhibit the exercise of appellate rights" should not be approved especially in light of Congress's concern that courts-martial convictions receive full appellate review. *Mills*, 12 M.J. at 4. As such, SSgt Robles asks that this Court to line through the language of his plea agreement as illustrated above so that prejudice will ripen upon completion of appellate review.

WHEREFORE, SSgt Robles respectfully requests this Honorable Court void the term in his plea agreement conditioning the ripening of prejudice to his findings and sentence being upheld on appeal.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division 8 May 2023.

Respectfully submitted,

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APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), SSgt Robles, through appellate defense counsel, personally requests that this Court consider the following matters:

III.

SSGT ROBLES'S SENTENCE—WHICH INCLUDES 325 DAYS OF CONFINEMENT AND A BAD CONDUCT DISCHARGE—IS INAPPROPRIATELY SEVERE.

Standard of Review

The standard of review for sentence appropriateness is *de novo*. *United States v. Lane*, 64 M.J.1, 2 (C.A.A.F. 2006); *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005).

Additional Facts

During his court-martial, SSgt Robles expressed sincere remorse for his actions. R. at 74. He stated, "I want to start off by saying how ashamed I am in that I'm here in front of you today. I'm here to accept responsibility and hopefully give the named victims some closure. I know I can't take back what I've done." *Id*. He went on to say, "I'm deeply and truly remorseful for the pain I've caused." *Id*.

SSgt Robles began his verbal unsworn saying, "First, I want to start off with an apology to everyone in this courtroom. But especially to my ex-wife [M.], and the other women I harmed, embarrassed, and shamed through my actions." R. at 362. He discussed his issues with alcohol, noting that he had struggled with alcohol over the years. He attributed his struggle with alcohol to his father's alcoholism, his own depression and self-consciousness due to his weight, the bullying he endured throughout adolescence into adulthood, and dealing with his mother's death. R. at 362-63. He acknowledged that he "must be punished, and [he] fully deserve[s] it." R. at 363-64.

In his written unsworn, SSgt Robles discussed his time working in an Emergency Room (ER), and his decision to join the Air Force after his mother's death. Def. Ex. E. His mother had been everything to him, and after her death, he decided he could not continue working in the hospital because "everyday reminded [him] of the day she passed away." *Id*. One of the pharmacy technician managers he worked with was a retired Chief Master Sergeant, and SSgt Robles asked him about his service. *Id*. However, when SSgt Robles went to the recruiter, he was told he would not be eligible because of his weight. *Id*. In three months, SSgt Robles got down to the required weight and he was able to enlist. *Id.*

SSgt Robles discussed his time in the Air Force and his struggles to maintain his weight after failing three consecutive PT tests. *Id*. He discussed his wife's struggles with alcohol, and his own struggles with alcohol and pornography. *Id.* He noted that having hit rock bottom and facing the inevitably of a court-martial, he had begun repairing himself through the help of therapy and alcohol treatment. R. at 364. At the time of his court-martial, SSgt Robles had been "sober for 433 days and still going." Def. Ex. E. He explained that he had "renewed [his] relationship with God and Jesus Christ[.]" *Id*.

Additionally, SSgt Robles's sentencing case consisted of accolades he received throughout his career (Def. Ex. B), and character letters from a licensed counselor and a chaplain commending the enormous strides he had made in addressing his addictions to alcohol and pornography. Def. Ex. D at 1-2, 9-10. His therapist, J.M., noted that SSgt Robles had attended 31 therapeutic sessions with her. *Id.* at 1. According to her, she had observed significant growth over his 20 months of therapy—"emotionally, psychologically, and spiritually[.]" *Id*. His chaplain, Lt Col S.S., stated he met with SSgt Robles at least 14 times and referred him to a local therapist (J.M) so he and the therapist could work collaboratively with SSgt Robles. Def. Ex. D at 9. Lt Col S.S. stated "I

believe that SSgt Robles is a changed man, and today I believe he is more whole mentally and emotionally than most." *Id.* at 10. Additionally, his brother and sister-in-law discussed his caring nature, and his sorrow and remorse for his actions. Def. Ex. D at 6, 7. His co-workers wrote letters on his behalf about his caring nature, his willingness to volunteer, and his mentorship. Def. Ex. D at 3, 4.

Law

Appellate courts have not only the power but also the independent duty to consider the appropriateness of adjudged sentences. *See United States v. Baker*, 28 M.J. 121, 123 (C.M.A. 1989). Under Article 66(d), UCMJ, this Court may only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (*2019 MCM*). "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused."[13] *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (internal quotations and citations omitted). This Court's broad power to ensure a just sentence is distinct from the convening authority's clemency power to grant mercy. *See United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Sentence appropriateness is assessed by considering the appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim App. 2006), *aff'd* 65 M.J. 35 (2007).

[13] Prior versions of Article 66(c), UCMJ, have included the same or substantially similar language about sentence appropriateness, such that case law interpreting these provisions should be honored, even for cases referred after 1 January 2019. *See* Executive Order 13,825.

Analysis

SSgt Robles had to overcome obstacles throughout his life. He struggled with his weight, he was bullied by his peers, and he had to cope with the loss of his mother, someone who meant the world to him. R. at 362-63; Def Ex. E. When he decided to join the Air Force, he was not eligible to enlist until he was able to lose additional weight. Def. Ex. E. However, SSgt Robles overcame these obstacles, ultimately joining and exceling in the Air Force. Def. Ex. B, E. Despite his accomplishments, he continued to struggle with alcoholism and an addiction to pornography, culminating in his pleading guilty to the charged offenses. R. at 363; Def. Ex. E.

SSgt Robles expressed sincere remorse throughout his court-martial. R. at 74, 362; Def Ex. E. His impressive sentencing case demonstrates that he has high rehabilitative potential. His sentencing case included accolades he received throughout his career (Def. Ex. B), and character letters from a licensed counselor and a chaplain commending the enormous strides he had made in addressing his addictions to alcohol and pornography. Def. Ex. D at 1-2, 9-10. Both his therapist and his chaplain believed he was a changed man. *Id.* Additionally, co-workers and family members wrote letters on his behalf about his caring nature, his willingness to volunteer, his mentorship, and his sorrow and remorse for his actions. Def. Ex. D at 3, 4, 7.

In considering the facts and circumstances of the offenses to which SSgt Robles pleaded guilty, the matters in mitigation and extenuation offered on the record, and evidence of SSgt Robles's rehabilitative potential—which included 325 days confinement and bad conduct discharge—is inappropriately severe.

WHEREFORE, SSgt Robles requests this Honorable Court exercise its authority under Article 66, UCMJ to modify his sentence.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **STEPHEN T. ROBLES**, United States Air Force *Appellant*	)	No. ACM 40280 19 May 2023

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

Pursuant to Rule 23.3(m)(5)-(6), the United States respectfully requests an enlargement of time to file its Answer to Appellant's assignments of error. Currently, the United States' answer is due on 8 June 2023. The United States requests an enlargement for a period of 14 days, which will end on 22 June 2023. This case was docketed with the Court on 12 May 2022. Since docketing, Appellant has been granted nine enlargements of time. Appellant filed his assignments of error with this Court on 8 May 2023, 360 days after docketing with this Court. This is the United States' first request for an enlargement of time. As of the date of this request, 371 days have elapsed. If this Court grants this request, 406 days will have elapsed.

There is good cause for the enlargement of time in this case. An enlargement of time is necessary to ensure that assigned counsel will have sufficient time to review the record of trial and draft and file the United States' answer. Appellant has raised four assignments of error in a 32-page brief. Undersigned counsel anticipates these issues will require significant time to research and draft answers to Appellant's assignments of error.

counsel is striving to complete all necessary work as soon as possible. But under el is currently only one of three available active duty appellate counsel

GRANTED
25 MAY 2023

available due to the re-assignment of one to stand up the new Office of Special Trial Counsel, the month long TDY schedule of another to be trained for his upcoming role as a Special Trial Counsel, and the TDY schedule of a third as an instructor for Special Trial Counsel Course.

Between now and when this brief is due, undersigned counsel is tasked with drafting responses to United States v. Lee, a brief with seven assignments of error which is due to this Court no later than 26 May 2023, and United States v. Gammage, a brief with one assignment of error which is due to this Court by 3 June 2023. Undersigned counsel is also required to attend the Transition Assistance Program on 22-23 May for her upcoming separation. This is undersigned counsel's third priority case after Lee and Gammage. Undersigned counsel has not begun review of this case yet. Undersigned counsel only just returned from maternity leave on 5 May 2023 and has been working on Lee.

Due to heavy workload and office absences, there is no other JAJG attorney who could file a brief sooner. Reserve personnel have already been tasked with drafting answers for other briefs with earlier upcoming deadlines, however, JAJG currently has at least 13 pending assignments of error briefs.

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

Maj, USAF
Appellate Government Counsel, Government Trial
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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 19 May 2023.

BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **STEPHEN T. ROBLES**, United States Air Force *Appellant.*	)	ACM 40280
	)	22 June 2023

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

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INDEX

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

AIR FORCE COURT OF CRIMINAL APPEALS

OTHER SERVICE COURTS

FEDERAL CIRCUIT COURTS OF APPEALS

STATUTES

OTHER AUTHORITIES

22 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
Staff Sergeant (E-5) **STEPHEN T. ROBLES**, USAF, *Appellant.*	)	Panel 2 No. ACM 40280

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING VICTIM IMPACT STATEMENTS THAT WERE NOT OFFERED BY THE VICTIM, THE VICTIM'S DESIGNEE, OR THE VICTIM'S COUNSEL?

II.

WHETHER [APPELLANT'S] PLEA OF GUILTY TO SPECIFICATION 4 OF CHARGE III IS IMPROVIDENT?

III.

WHETHER THE PORTION OF [APPELLANT'S] PLEA AGREEMENT WHICH PROVIDES THAT DISMISSAL OF CERTAIN CHARGES AND SPECIFICATIONS WOULD ONLY RIPEN INTO DISMISSAL WITH PREJUDICE "UPON COMPLETION OF APPELLATE REVIEW WHERE THE FINDINGS AND SENTENCE HAVE BEEN UPHELD" IS VOID OR OTHERWISE UNENFORCABLE?

IV.[1]

WHETHER [APPELLANT'S] SENTENCE – WHICH INCLUDES A BAD CONDUCT DISCHARGE – IS INAPPROPRIATELY SEVERE?

STATEMENT OF THE CASE

On 24 September 2021, the convening authority referred six charges and fourteen specifications against Appellant.[2] (*Charge Sheet*, 24 September 2021, ROT, Vol. 2.) Charge I alleged that, in violation of Article 92, Uniform Code of Military Justice (UCMJ), Appellant was derelict in the performance of his duties when he willfully failed to refrain from electronically posting descriptions and sexually explicit images on Tumblr, a social networking platform, to create the appearance that the victims were pictured in the sexually explicit images. (Id.) Charge I contained four specifications, one for each victim: SD, LG, HoP, and KR. (Id.) Charge II alleged that Appellant wrongfully broadcasted sexually explicit images of his wife, MR, without her consent and when she retained a reasonable expectation of privacy in violation of Article 117a, UCMJ. (Id.) Charge III alleged that Appellant committed indecent conduct when he electronically posted descriptions and sexually explicit images on Tumblr to create the appearance that the victims were pictured in the sexually explicit images. (Id.) Charge III, Specification 1 alleged that his behavior was to the prejudice of good order and discipline and of a nature to bring discredit upon the armed forces in violation of Article 134, UCMJ. (Id.) While Charge III, Specifications 2-5 alleged that his behavior was of a nature to bring discredit upon the armed forces in violation of Article 134, UCMJ. (Id.) Charge III contained five specifications, one specification for each victim: JS, AT, HP, MD, and CJ. (Id.) Additional

[1] Appellant raised this Issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[2] Charge III was dismissed the day it was referred. (*Charge Sheet*, 24 September 2021, ROT, Vol. 2.) Charge IV was renumbered as Charge III. (Id.)

Charge I alleged that Appellant unlawfully wrapped his hands around his wife's neck in violation of Article 128, UCMJ. (Id.) Additional Charge II had two specifications and alleged that Appellant tackled MR to the ground with his body and jabbed her in the neck with his finger. (Id.)

Appellant entered into a plea agreement and agreed to plead guilty to Charge I and its specifications, Charge II and its specification, and Charge III and its specifications. (App. Ex. X.) In exchange for his pleas, the convening authority agreed to withdraw and dismiss, initially without prejudice and then later with prejudice upon completion of appellate review if the findings and sentence are upheld, Additional Charge I and its specification and Additional Charge II and its specifications. (Id.) In accordance with his plea agreement, Appellant was sentenced to a bad conduct discharge, confinement for 325 days, total forfeitures of all pay and allowances, reduction to the grade of E-1, and a reprimand. (*Entry of Judgment*, 28 March 2022, ROT, Vol. 1.)

STATEMENT OF FACTS

Appellant created an account on Tumblr where he uploaded sexually explicit photographs of women. (Pros. Ex. 1.) The username for the Tumblr account was " " (Id.) " " was MR's nickname, and the username translates to " ." (Pros. Ex. 1, R. at 335.) On the account, Appellant pretended to be his wife so he could curate a fantasy world, through sexually explicit images and captions, where he was engaged in extramarital, sexual relationships with other women. (Pros. Ex. 1.) To further this fantasy, Appellant took images from the personal Facebook or Snapchat pages of women he knew and posted them next to pornographic images of women who resembled the victims. (Id.) He would then post captions to the photographs to create the impression that the victims were in a sexual

relationship with him. (Id.) For instance, SD was Appellant's sister-in-law. (Id.) He took an image of her from her Facebook page and posted it next to images of women performing sexually explicit acts. (Id.) He then created the caption, "hubby getting suck by slutty sister *heart eyes emoji*," to create the impression that his wife had posted pictures of her sister performing oral sex on Appellant. (Id.) Appellant created similar posts for all the victims and in many cases used the victim's real names on the public site. (Id.) None of the women, except his wife, had ever been in an intimate relationship with Appellant. (Id.)

On the same Tumblr account, Appellant posted actual photographs of his wife exposing her breasts and performing oral sex on him. (R. at 148, Pros. Ex. 1, Pros. Ex. 6.) The photographs were taken in "the confidence of [their] marriage" and MR did not consent or know that Appellant posted the images publicly on the internet. (R. at 148.)

Prior to trial, Appellant was contacted by two victims regarding the publicly posted images. (Pros. Ex. 1, Pros. Ex. 12, Pros. Ex. 16.) Appellant repeatedly denied that he was involved with the Tumblr account. (Pros. Ex. 16.) One of the victims, CJ, a prior co-worker of Appellant's, reached out to Appellant via Facebook to ask about the images. (Pros. Ex. 16.) Appellant said:

> I never would send a photo like that so it had to be someone who knew me and had a connection to [a mutual friend].
> . . .
> Appellant: [AT][3] blames us but I never had any pictures like that of her. And I would NEVER want pictures of MR out there like that.
> . . .
> CJ: [AT] thought it was you?

[3] AT was another victim. (*Charge Sheet*, 24 September 2021, ROT, Vol. 2.) AT learned of the Tumblr page when a high school friend she had not spoken to in years reached out to her and sent her the link to Appellant's Tumblr page which contained images of her. (Ct. Ex. G.) AT initially believed that MR was the creator of the account because it was written from her perspective. (Id.) When she confronted Appellant, he denied any responsibility for the account. (Id.)

> Appellant: She thought it was MR then started to say it was me.
> . . .
> CJ: Someone posted pictures of your wife and you accepted that?
> Appellant: No!!
> CJ: Why would someone do this?
> Appellant: I had talked to OSI and they said since the page was down there wasn't much they could do.
> . . .
> CJ: This is fucked up. I'm having a hard time believing this isn't you because all of these women are connected to you.
> Appellant: No way I'd do that!
> CJ: Who would?
> Appellant: I never knew what tumblr was before [AT] told me.
> CJ: Who could it be then? [a mutual friend]? [another mutual friend]?

(Pros. Ex. 16.)

Appellant then listed three people both he and CJ knew as possible creators of the page and said one of them was "scumbag" enough. (Id.) CJ then brought up that the Air Force Office of Special Investigations (OSI) would find the creator. (Id.) Appellant replied, "I hope they do. This has fucked me and [MR] up for months. What's fucked up is people are blaming me for this." (Id.) When CJ asked him if he created the images and posts, Appellant stated, "I'm dead serious. I have no clue how this tumblr shit happened. That's the honest truth . . . I swear to you. I . . . don't have any knowledge about tumblr beforehand or it even existed. That's the honest truth." (Id.) He also told CJ, "I feel your pain in all of this as [we] went through it already. Things in day to day remind us of this crazy bullshit and it ruins our day." (Id.) When CJ asked Appellant if he knew anything else because she could not handle any more surprises, he said, "I even paid for an IP address tracker to see if I could track the pictures. And it would direct me to New York or Germany." (Id.)

Once Appellant knew he was being investigated by OSI, he reached out to a prior co-worker, JB. (Id.) He asked, "Bro do you know anything about Tumblr and some pics of chicks

we know from Offutt on there?" (Id.) JB replied that he was not aware of the account. (Id.) Despite being the creator of the posts, Appellant said,

> Hmmmm ok. I guess there was some pics of chicks we know. Now [CJ] and [AT] are blaming me for it. Guess that's what OSI is investigating me for. Yea I had never heard of Tumblr until this. Which fuck I would never post pictures like that online for everyone to see. Besides it being fucked up I'm not stupid I know you can go to jail for that shit.

(Id.)

Appellant's trial began on 14 February 2022 and concluded on 15 February 2022. (*Entry of Judgment*, 28 March 2022, ROT, Vol. 1.)

I.

THE MILITARY JUDGE DID NOT ERR IN ADMITTING VICTIM IMPACT STATEMENTS.

Additional Facts

During the presentencing proceeding, trial counsel informed the military judge there were crime victims who wished to exercise their right to be heard. (R. at 297.) HoP, HP, and CJ, were not physically present at the proceeding, but chose, along with seven other victims, to exercise their right to be heard and submitted unsworn impact statements. (R. at 297-298.) HoP, HP, and CJ were not entitled to or represented by a victim's counsel. (R. at 64.)

During the proceeding, trial defense counsel initially objected to the substance of some of the unsworn statements, including HP's and CJ's. (R. at 299.) Trial counsel relayed trial defense counsel's objections to HP and CJ, and they chose to redact the objected to material and submit their statements to the court with the redactions. (R. at 320, 353-54.)

Trial defense counsel also objected to the admission of HoP's, HP's, and CJ's unsworn statements in their entirety. (R. at 306, 321, 322.) Trial defense counsel first objected to HoP's

unsworn statement due to lack of authentication because HoP was not present to "ask that [her statement] be considered with respect to" Appellant's case. (R. at 306.) After trial counsel explained there was a witness present who could testify that HoP was advised of her right to be heard and then provided the written unsworn statement in response to that advisement, trial defense counsel withdrew the objection for lack of authentication. (R. at 306, 309, 311.) Trial defense counsel then focused his objection on whether RCM 1001 required that it be "the victim, their representative, or a designee created by the military judge" who would provide the court with the victim's unsworn statement. (R. at 308.) Trial defense counsel reiterated the same objection to HP's and CJ's unsworn statements when he argued that the victim was not the individual who actually offered the statement. (R. at 318, 320, 322.)

The military judge overruled trial defense counsel's objections and admitted all three unsworn statements as court exhibits. (R. at 310-11, 321, 323, 354, Ct. Ex. C, Ct. Ex. H, Ct. Ex. J.) When he made his ruling, the military judge first explained that, procedurally, RCM 1001(c)(5)(B) required a crime victim who elected to present an unsworn statement to first provide a written proffer of the matters to both trial counsel and trial defense counsel. (R. at 310.) The military judge noted that occurred. (Id.) The military judge then explained how Appellant's case was distinguished from United States v. Barker, 77 M.J. 377 (C.A.A.F. 2018) and United States v. Hamilton, 78 M.J. 335 (C.A.A.F. 2019).[4] (R. at 352.) He identified that HoP, HP, and CJ were named victims who participated in the case against Appellant when they

[4] The military judge explained that both Barker and Hamilton "dealt with child porn cases where there were affidavits or other statements that had been collected from victims in the past, and then were put in during those courts without, necessarily, actual victim participation in those cases, or discussions addressing specifically harm arising from the actions in those cases. (R. at 352.)

provided "specific impact statements" for Appellant's case and detailed the "effects of [Appellant's] actions on them. (R. at 352.)

Standard of Review

A military judge's interpretation of R.C.M. 1001A[5] is a question of law reviewed de novo. Barker, 77 M.J. at 382. Additionally, courts review a military judge's decision to admit evidence or victim impact statements for an abuse of discretion. Id.; United States v. Edwards, 82 MJ 239, 243 (C.A.A.F. 2022). An abuse of discretion occurs when the military judge makes clearly erroneous findings of fact or when the military judge's legal conclusions are influenced by an erroneous view of the law. United States v. Hollis, 57 M.J. 74, 79 (C.A.A.F. 2002). The abuse of discretion standard is a "strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010).

Law and Analysis

Congress has granted crime victims the right to be "reasonably heard" during any sentencing hearing related to that offense for which they are a victim. Article 6b(a)(4)(B), UCMJ. A victim under Article 6b is defined as "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter. Article 6b(b), UCMJ. A crime victim has the right to make a sworn or unsworn statement. R.C.M. 1001(c)(4) and R.C.M. 1001(c)(5). The content of the unsworn statement may include victim impact or matters in mitigation. R.C.M. 1001(c)(3). "Victim impact" is defined as "any

[5] R.C.M. 1001A was redesignated as R.C.M. 1001(c) with the enactment of the Military Justice Act of 2016. Executive Order No. 13,825 § 3(a), 83 Fed. Reg. 9889 (8 March 2018).

financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(B).

During a presentencing hearing the military judge is required to announce to any crime victim who is present that they have the right to reasonably be heard, including the right to make a written statement, and to ensure, prior to the conclusion of the presentencing proceeding, that any such crime victim was afforded the opportunity to be reasonably heard. R.C.M. 1001(a)(3)(A). The President established R.C.M. 1001(c) as the procedure used for the right to be reasonably heard. A victim's unsworn statement may be oral, written, or both oral and written. R.C.M. 1001(c)(5)(C). The rule provides that if a crime victim elects to provide an unsworn statement, she "shall provide a written proffer of the matters that will be addressed in the statement to trial counsel and defense counsel. Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement." Id.

Appellant argues that the military judge abused his discretion when he admitted HoP's, HP's, and CJ's written unsworn statements over trial defense counsel's objections. (App. Br. at 11.) The thrust of his argument is that the right to be reasonably heard is "tethered to" the physical presence of the crime victim at the presentencing proceeding per R.C.M. 1001(a)(3)(A). (Id.) Appellant misunderstands the rule.

R.C.M. 1001(a)(3)(A) provides for the advice the military judge must provide and the inquiry the military judge must conduct during the presentencing proceeding. The rule explains that a military judge is required to announce, to any victim present at the presentencing hearing, that they have the right to be reasonably heard. R.C.M. 1001(a)(3)(A). The military judge will also ensure any such crime victim was afforded the opportunity to be reasonably heard. R.C.M.

1001(a)(3)(A). The rule is not a bar to prevent victims who are not physically present at a presentencing proceeding from providing an unsworn statement; instead, it is meant to ensure crime victims who are present are aware of their rights under Article 6b.

Appellant attempts to liken his case to Barker. There, our superior court held that the military judge abused his discretion when he admitted a victim impact statement from a crime victim who had no contact with the trial counsel, did not participate in the appellant's court-martial, was not aware of the appellant's court-martial, nor was the impact statement offered by the victim. Barker, 77 M.J. 383-84. As the military judge noted, Appellant's case is distinguishable from Barker. (R. at 352.) All three victims, HoP, HP, and CJ, were aware of the case against Appellant and were advised of their right to attend Appellant's court-martial in accordance with Article 6b, UCMJ. (R. at 6, 306.) Each victim then elected to exercise her right to be reasonably heard and participate in Appellant's court-martial by personally offering her written unsworn statement to the court through trial counsel. (R. at 297-98, 306, 353-54.) Once the military judge asked if there were any crime victims who wished to be heard, government trial counsel moved to admit the statements HoP, HP, and CJ provided. (R. at 297.)

Appellant suggests that because the victims were not physically present and did not personally offer their statements to the military judge, the military judge erred by admitting the statements. (App. Br. at 11.) However, nothing in the rules requires a victim to personally enter the well of the court and offer their statement to the military judge. Practically, a victim who wishes to be heard will personally, or through counsel, provide their written unsworn statement to trial counsel and request that trial counsel submit the statement to the court for admission as a

court exhibit. Since HoP, HP, and CJ were not eligible for representation by a victim's counsel[6], they offered their statements to the court by personally providing the statements to trial counsel. (R. at 297-98.)

This Court and our superior court have both recognized that the rules do not require a victim to be physically present to offer their unsworn statements. The Court of Appeals for the Armed Forces (CAAF) in Barker, and again in Hamilton, explained that "the introduction of statements under [R.C.M. 1001A(a)] is prohibited without, at a minimum, either the presence or *request* of the victim. Barker, 77 M.J. at 382 (emphasis added); *see also* Hamilton, 78 M.J. at 341. Further, this Court held in United States v. Clark-Bellamy, a child pornography case, that the plain language of R.C.M. 1001A(e) did not require a victim's "physical presence . . . to present or offer a victim impact statement to the court, and that telephonic or other reliable means is sufficient to meet the intent of R.C.M. 1001A(e)[7]." ACM 39709, 2020 CCA LEXIS 391 at *19 (A.F. Ct. Crim. App. 27 October 2020) (unpub. op.). There, this Court explained that it rejected

> the argument that Congress, in providing rights for victims, also meant to add to their emotional, psychological, and potentially financial burden by requiring their physical presence in every case, where re-victimization has no limitation geographically or temporally, and a victim's right to make a statement would be hidden behind an impractical barrier of constantly being at the beck and call of prosecutors, rendering inconsequential the statutes and rules that are specifically designed to give them a voice.

[6] Department of the Air Force Instruction 51-207, *Victim and Witness Rights and Procedures*, para 3.2.2.3, provides which victims are entitled to victim counsel services. HoP and CJ, as civilians, were not eligible. While HP was a member of the Arizona Air National Guard, the circumstances of the offense did not have a nexus to her military service and so she too was not eligible for victim services. (Pros. Ex. 1.)

[7] There was no material change to the rule when R.C.M. 1001A was redesignated as R.C.M. 1001(c) with the enactment of the Military Justice Act of 2016 that would affect this Court's analysis.

Id. at *17.

While the victims in this case did not offer their statements over the phone, the reliability of their written statements is not in question. While trial defense counsel initially seemed to object to HoP's statement for lack of authentication, that objection was withdrawn. (R. at 307, 311.) Thereafter, trial defense counsel did not object that the statements lacked authentication – only that R.C.M. 1001(c) requires the victim to be present to offer her statement. (R. at 306, 309, 311, 318, 320, 322.) Nor is Appellant is arguing on appeal that the written statements were unreliable.

Where the plain language of R.C.M. 1001(c) does not require a victim to be present to offer their unsworn written statement and both this Court and the CAAF have concurred, the military's judge decision to admit the three victim unsworn statements was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." White, 69 M.J. at 239. He did not abuse his discretion.

Yet, even if error is assumed in Appellant's case, his claim should still be denied because the admission did not prejudice Appellant's substantial rights. United States v. Lopez, 76 M.J. 151, 156 (C.A.A.F. 2017). If the admission of evidence at sentencing is an error, the test for prejudice "is whether the error substantially influenced the adjudged sentence." Hamilton, 78 M.J. at 343 (citing to United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009). This Court will consider the following four factors to determine whether an error substantially influenced a 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." Barker, 77 M.J. at 385.

First, the strength of the Government's case was extremely strong. During his Care[8] inquiry, Appellant admitted to being derelict in the performance of his duties, in violation of Art. 92, UCMJ, when he posted, on Tumblr, photographs of HoP next to pornographic images of women who resembled HoP to suggest HoP was the woman in the pornographic images. (R. at 115.) He also admitted to committing indecent conduct, in violation of Art. 134, UCMJ, when he created similar posts of H.P. and C.J. (R. at 215, 239.) The stipulation of fact and multiple prosecution exhibits contained numerous annotated photographs of the women. (Pros. Ex. 1, Pros. Ex. 4, Pros. Ex. 8, Pros. Ex. 10, Pros. Ex. 11.) Next to the photographs, Appellant created the following captions: "hubby sexy as fuck ex gf [HoP];" "hubbies BJ compilation – big titties hotwife side chick mouthslut fuck buddy [CJ] . . . [HoP];" "these sisters have similar taste for hubbies cock" "#sidechick, #slut, #mouthslut, #fuck buddy;" and "Hubbies old supervisor," and "side chick slut mouthslut 'F' buddy." (Pros. Ex. 1., R. at 241.) This conduct was devasting to the women he victimized.

When Appellant created these posts, he used the victim's real names. If someone who knew one of the victims came across Appellant's account, as happened with AT, they would be led to believe the victims were in a sexual relationship with Appellant and that the victims were pictured in the sexually explicit images. With two of the victims, HoP and HP, Appellant exploited their relationship as sisters when he used the caption "these sisters have similar taste for hubbies cock." (Pros. Ex. 1.) With CJ, Appellant knew she had been through the court-martial process previously and still chose to victimize her. (Pros. Ex. 16.) Additionally, even though this case is over the images and captions Appellant posted will forever remain on the internet. As demonstrated, even without the victim impact statements from these three women,

[8] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

Appellant's conduct, on its own, and the undeniable affect it had on the women establishes the strength of the Government's case.

In contrast, Appellant's sentencing case was relatively weak. Appellant submitted a 45-page sentencing package that consisted of coins and awards from his military service, photographs, an unsworn statement, and six-character letters. (Def. Ex. A.) However, most of the coins or awards he received were in 2017 or prior – only two were received in 2019 and after. (Def. Ex. B.) And while Appellant did submit character letters on his behalf, many of the individuals who praised him for his professionalism and adherence to the Air Force's core values knew him at the time he was victimizing ten women in a public forum, but were unaware of this private conduct. (Def. Ex. D.)

Additionally, even though the content of the victim's unsworn statements was material for sentencing purposes, it did not have the quality to affect Appellant's sentence. First, while Appellant places weight on the fact that trial counsel cited to the unsworn statements in his sentencing argument, that was only a brief portion of the argument. (App. Br. at 9.) Instead, and more persuasively, trial counsel focused his argument on the "seriousness of the offense[s]," which occurred in a public forum for the "entire Internet to see," and that the misconduct was committed against women who trusted him without regard for the impact the women would face. (R. 365-77.) Second, Appellant was sentenced by military judge alone and a judge, while human, "is generally less apt to be emotionally swayed by the facts of the crime" than a panel. (R. at 38.); Lynch v. Fla. Dep't of Corr., 776 F.3d 1209, 1230 n.17 (11th Cir. 2015).

Finally, while Appellant faced a maximum of twenty-eight years of confinement, he agreed to a confinement cap of one year, and he was sentenced just below that – 325 days. (*Entry of Judgment*, 28 March 2022, ROT, Vol. 1; R. at 248.)

In sum, the military judge did not commit a clear abuse of discretion by admitting HoP's, HP's, and CJ's victim impact statements. Finally, any presumed error did not prejudice Appellant. Therefore, this Court should deny Appellant's claim and affirm the findings and sentence in this case.

II.

APPELLANT'S PLEA OF GUILTY TO SPECIFICATION 4 OF CHARGE III WAS PROVIDENT.

Additional Facts

Charge III, Specification 4 alleged that:

> Appellant . . . did commit indecent conduct, to wit: electronically posting descriptions and *sexually explicit* images on Tumblr . . . to create the appearance that [CJ] was pictured in the *sexually explicit* images, and that said conduct was of a nature to bring discredit upon the armed forces.

(*Charge Sheet*, 24 September 2021, ROT, Vol. 2.) (emphasis added).

Appellant entered into a plea agreement and pled guilty to, among other charges and specifications, Charge III and its specifications. (App. Ex. X, R. at 54.) The military judge conducted a Care inquiry and explained the elements of the offense. (R. at 175-76, 228-37.) The elements of the offense required that Appellant:

> (1) [W]rongfully engaged in certain conduct, to wit: electronically posting descriptions and sexually explicit images on Tumblr, a social networking platform, to create the appearance that [MD] was pictured in the sexually explicit images;
>
> (2) That the conduct was indecent; and
>
> (3) That under the circumstances, [his] conduct was of a nature to bring discredit upon the armed forces.

(R. at 228-29.) Prior to conducting the plea the military judge had a discussion with the parties and clarified the definition that would be used for the term "sexually explicit" in Charge I and

Charge III. (R. at 48-50.) He identified that the term "sexually explicit conduct" was defined in the Manual for Courts Martial (MCM) under Article 117a, UCMJ, the wrongful broadcast or distribution of intimate visual images, and under Article 134, UCMJ, child pornography, and that the definition was different for both offenses. (R. at 48.) The military judge further explained that the term used in the charges was "sexually explicit" and not "sexually explicit conduct." (R. at 49.) He also noted that paragraph 16 of the stipulation of fact described the sexually explicit photographs as including images "of nude women, women posing in differing forms of lingerie, and women performing sexual acts." (R. at 49, Pros. Ex. 1.) The military judge remarked that the stipulation of fact did not use the term "sexually explicit conduct," nor did it use the definitions for the term as defined in Article 134, UCMJ, child pornography, or Article 117a, UCMJ. (Id.) Finally, he clarified that the parties intended to use the broader "general common-sense understanding," of the term "sexually explicit" as they agreed in the stipulation of fact. (R. at 49.) Trial defense counsel did not object, and neither party had any correction or anything to add regarding this issue. (Id.) The military judge stated he would use the common sense understanding of the term "sexually explicit" and not the definition for "sexually explicit conduct" from the MCM. (Id.) Again, trial defense counsel did not object. (Id.)

During the plea colloquy, the military judge defined the term "sexually explicit" to include "sex acts such as actual or simulated genital to genital contact, oral to genital contact, anal to genital contact, or oral to anal contact. It also include[d] depictions of uncovered genitalia, pubic area, buttocks, or a female breast that lacks serious artistic, literary, scientific or political value." (R. at 72.) He also stated the term included "women that are nude, posing in lingerie, or engaged in sex acts" as the parties stipulated to in paragraph 16 of the stipulation of fact. (Id.) In other words, the military judge explained, and as was previously discussed,

"sexually explicit" included "pornographic, provocative, obscene, [and] just kind of a general common-sense understanding of what" the term would be from "a layperson's perspective, rather than a highly technical, legal definition of it." (Id.) Appellant did not object to the military judge's description. (R. at 72-73.)

Appellant agreed, in the stipulation of fact, that the photographs were sexually explicit because they included images of women posed in lingerie and in the nude. (Pros. Ex. 1.) During the Care inquiry for Charge III, Specification 4, the military judge had Appellant view the photographs charged. (R. at 232-33.) He asked Appellant if he believed the photographs were sexually explicit given the definitions used previously for the Article 92, UCMJ, offenses and the other Article 134, UCMJ, offenses and Appellant agreed they were. (Id.)

Additionally, in the stipulation of fact, Appellant agreed that all elements of the offense were satisfied. (Pros. Ex. 1.) During the plea colloquy, Appellant detailed how he was friends with MD, then an active-duty military member, and pulled photographs of MD, some which displayed her in uniform, from her Facebook and Snapchat pages. (R. at 229-30, Pros. Ex. 1.) He then posted those photographs alongside photographs from his pornographic collection with captions to imply MD was the woman in the sexually explicit images. (Id.) There were eight images in total – five images of MD, two images of a woman "posing provocatively" in lingerie and a thong with her butt exposed looking over her shoulder, and one image of woman posing in the nude. (R. at 232, Pros. Ex. 1, Pros. Ex. 9, Pros. Ex. 13.) In the captions, Appellant referred to MD as "side chick slut fuck buddy," "side chick slut hotwife fuck buddy [MD]," and "hubbies new sex buddy." (R. at 234.)

The military judge had also defined the term "indecent." He explained it was a "form of immorality relating to sexual impurity, which is grossly vulgar, obscene, and repugnant to

common propriety, and tends to excite sexual desire or depraved morals with respect to sexual relations." (R. at 175, 229.) Appellant said his conduct was indecent because he publicly posted images of MD, an active-duty military member, next to pornographic images to imply to that MD was the woman in the pictures. (R. at 234.) He further explained that when the photographs were viewed in conjunction with the captions it gave the impression that MD was engaged in an extramarital relationship with another military member. (R. at 234-35.) Appellant stipulated that "the intended false appearance is a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." (Pros. Ex. 1.)

The military judge found Appellant's plea provident and accepted his plea of guilty for Charge III, Specification 4. (R. at 284.)

Standard of Review

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion and questions of law arising from the guilty plea are reviewed de novo. United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008); United States v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996) (citation omitted).

Law and Analysis

In reviewing the providence of a guilty plea, courts consider the appellant's "colloquy with the military judge, as well [as] any inferences that may reasonably be drawn from it." United States v. Carr, 65 M.J. 39, 41 (C.A.A.F. 2007). A military judge abuses his discretion when accepting a plea if he does not ensure the accused provides an adequate factual basis to support the plea during the providency inquiry. *See* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969); Inabinette, 66 M.J. at 322; *see also* R.C.M. 910(e). When reviewing the

adequacy of an appellant's plea, this Court affords the military judge "significant deference," Inabinette, 66 M.J. at 322 (citing United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002)), and must uphold a guilty plea unless there is a "substantial basis" in law and fact for questioning the plea. *See* United States v. Hiser, 82 M.J. 60, 64 (C.A.A.F. 2022) (citing United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)). In sum, the military judge must ensure the accused understands the facts (what he did) that support his guilty plea, the judge must be satisfied that the accused understands the law applicable to his facts (why he is guilty), and that he is actually guilty. *See* United States v. Medina, 66 M.J. 21, 26 (C.A.A.F. 2008); Jordan, 57 M.J. at 238.

Appellant argues that his guilty plea to Charge III, Specification 4 was improvident because the military judge failed to elicit facts to establish the existence that Appellant posted sexually explicit images.[9] (App. Br. at 17.) Appellant is wrong.

First, at face value, the images Appellant posted are clearly sexually explicit. The word "explicit" is defined as "open in the depiction of nudity or sexuality." Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary (accessed 14 June 2022). Appellant posted three images of women in various states of nudity, posed in provocative positions. In one image, a woman is sitting on chair completely naked with her butt exposed looking back at the camera and in the other two images a woman is facing away from the camera, dressed in lingerie with her butt exposed. (R. at 231-33, Pros. Ex. 1, Pros. Ex. 9, Pros. Ex. 13.) In statutory interpretation, the Supreme Court has explained that "no single argument has more weight" than the plain meaning of the word. Browder v. United States, 312 U.S. 335

[9] In his brief Appellant argues that the military judge needed to "elicit facts from [Appellant] that [Appellant] actually posted sexually explicit images of [MD]." (App. Br. at 17.) However, Charge III, Specification 4 did not allege that Appellant posted sexually explicit images of MD, only that he posted descriptions and sexually explicit images of other women to create the impression MD was pictured in the images. (*Charge Sheet*, 24 September 2021, ROT, Vol. 2.)

(1941). This Court should give similar weight to the plain meaning of the words "sexually explicit" in Charge III, Specification 4.

Despite stipulating and swearing under oath during his plea colloquy that the images were sexually explicit, Appellant has now reversed course and argues the images were not sexually explicit. (R. at 232-33, Pros. Ex. 1, App. Br. at 19.) In his brief, Appellant attempts to liken the images to artful pictures of models in a Victoria's Secret magazine or sales advertisements for swimwear. (App. Br. at 19.) Appellant's comparison fails, even if one assumes the images in sales advertisements are not sexually explicit. Appellant admitted the images came from his "collection of pornographic images" and the women were not "artfully" posed – they were posed in a provocative manner and posted, in part, so he could receive more sexually explicit images from other individuals. (R. at 229-30.) The images were sexually explicit, especially when the viewed with the captions – "side chick slut fuck buddy," "side chick slut hotwife fuck buddy [M]," and "hubbies new sex buddy" – Appellant attached to them. (R. at 234, Pros. Ex. 1, Pros. Ex. 9, Pros. Ex. 13.)

Second, despite having no objection in the stipulation of fact or at trial to the agreed upon definition of "sexually explicit," Appellant now attempts to conflate the definition of "sexually explicit" with "sexually explicit conduct." Appellant contends the images he posted did not, and were required to, meet the definition of "sexually explicit conduct" as defined in the MCM under Article 117a, UCMJ, and Article 134, UCMJ, child pornography. (App. Br. at 17.) To meet the definition of "sexually explicit conduct" under either of the above charges the images must show some sort of sexual act. (Id.) Appellant's assertions are incorrect.

The military judge did not abuse his discretion when accepted Appellant's guilty plea because Appellant was not charged under Article 117a, UCMJ, or charged with possessing or

distributing child pornography, under Article 134, UCMJ. Nor did the Government alleged that Appellant committed indecent conduct by posting images of women engaged in *sexually explicit conduct*. (*Charge Sheet*, 24 September 2021, ROT, Vol. 2.) The Government only alleged, and Appellant agreed, that he posted sexually explicit images. As a result, the military judge was correct, and the parties at trial agreed, to not apply the technical legal definition of "sexually explicit conduct" that is found in other articles in the UCMJ. On appeal, Appellant is trying to read in an element and definition that the charge does not require, and this Court should reject his argument.

During the Care inquiry, the military judge identified that Appellant was charged with posting sexually explicit images and confirmed Appellant understood, and agreed with, the definition he would use for that term. (R. at 49-50, 72-73, 232-33.) Then the military judge ensured Appellant provided an "adequate factual basis to support the plea" when Appellant: (1) identified, in the stipulation of fact, that the photographs were sexually explicit because they included images of women posed in lingerie and in the nude; and (2) viewed the photographs charged, during the plea colloquy, and admitted the photographs were sexually explicit given the definitions used previously for the Article 92, UCMJ, offenses, and the other Article 134 offenses. (Pros. Ex. 1, Pros. Ex. 9, and Pros. Ex. 13, R. at 232-33.) Care, 40 C.M.R. at 541; Inabinette, 66 M.J. at 322; *see also* R.C.M. 910(e). The military judge also viewed the admitted images himself and determined they were sexually explicit. (Pros. Ex. 1, Pros. Ex. 9, and Pros. Ex. 13.)

Further, when reviewing the adequacy of an appellant's plea this Court will afford the military judge significant deference and will only set aside a guilty plea if there is a "substantial basis" in law and fact for questioning the plea. Inabinette, 66 M.J. at 322. In this case,

Appellant has not cited to any law or case to suggest that the technical legal definition for "sexually explicit conduct" as defined under Article 117a, UCMJ, and Article 134, UCMJ, child pornography, applies to a charge for indecent conduct under Article 134, UCMJ.

Here, the military judge ensured Appellant understood what he did (committed indecent conduct when he electronically posted descriptions and sexually explicit images to create the appearance that MD was pictured in the sexually explicit images), why he was guilty (he posted, on Tumblr, sexually explicit photographs of women next to images of MD with captions that indicated MD was in all the photographs and was having an extramarital with him), and that he was actually guilty (he agreed that his actions met the definitions and elements of the crime). *See* Medina, 66 M.J. at 26; Jordan, 57 M.J. at 238. Therefore, the military judge did not abuse his discretion and this Court should uphold Appellant's plea.

III.

THE PORTION OF APPELANT'S PLEA AGREEMENT WHICH PROVIDED THAT DISMISSAL OF CERTAIN CHARGES AND SPECIFICATIONS WOULD ONLY RIPEN INTO DISMISSAL WITH PREJUDICE "UPON COMPLETION OF APPELLATE REVIEW WHERE THE FINDINGS AND SENTENCE HAVE BEEN UPHELD" WAS NOT VOID AND WAS ENFORCABLE.

Additional Facts

In exchange for Appellant's plea of guilty, the convening authority agreed to dismiss the additional charges and their specifications "without prejudice upon announcement of the sentence, to ripen into prejudice upon completion of appellate review where the findings and the sentence have been upheld." (App. Ex. X.) Appellant signed the Offer for Plea Agreement on 4 February 2022 and both his trial defense attorneys signed and certified that Appellant had been advised of the terms of the plea agreement and that his signature was voluntary. (Id.)

During Appellant's trial the military judge discussed the terms of the plea agreement with Appellant. (R. at 252-65.) Relevant to this Issue, the military judge explained paragraph 3, regarding when prejudice would ripen, and stated,

> If something's dismissed with prejudice, that means that it cannot be brought again by the same sovereign. If it's dismissed without prejudice, then that means that they, theoretically or potentially, that charge and specification could be raised against you again; could be brought against you again and you could be prosecuted for those. So how this works is that it would be, those charges and specifications would be dismissed after the plea was accepted without prejudice. But then that would ripen into prejudice, once appellate review determined that the findings and sentence were approved.

(R. at 256-57.) The military judge asked if Appellant understood, and he did. The military judge also asked if he had any questions and Appellant did not. (Id.) Following the review of the plea agreement, Appellant told the military judge: (1) he was satisfied with his trial defense counsel's advice concerning the plea agreement; (2) he fully understood the terms of the plea and how it affected his case; (3) he was entering the plea voluntarily; and (4) he did not have questions about his plea agreement. (R. at 278-80.)

At the end of Appellant's trial, trial counsel, in accordance with the plea agreement, requested that the additional charges be dismissed, initially without prejudice, and then to ripen into prejudice upon completion of appellate review, where the findings and sentence have been upheld. (R. at 285.) The military judge granted the motion for the charges and specifications to be withdrawn. (R. at 285-86.)

Standard of Review

The interpretation of a pretrial agreement is a question of law, which is reviewed de novo. United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F. 2006). Even where the appellate court is reviewing an issue de novo, however, it normally defers to any findings of fact by the military judge unless they are clearly erroneous. United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995).

Law and Analysis

Generally, in a plea agreement, an accused is free "to waive [his] constitutional rights in exchange for a benefit." United States v. Cron, 73 M.J. 718, 729 (A.F. Ct. Crim. App. 2014) (citation omitted). Case law favors the "ability of an [appellant] to waive his rights as part of a pretrial agreement, absent some affirmative indication the accused entered the agreement unknowingly and involuntarily." *See* United States v. Edwards, ACM S29885, 2001 LEXIS 302, *7 (A.F. Ct. Crim. App. 29 Nov 2001) (unpub. op.) (citing United States v. Mezzanatto, 513 U.S. 196, 130 L. Ed. 2d 697, 115 S. Ct. 797 (1995)). A plea agreement condition is invalid "if the accused did not freely and voluntarily agree to it." R.C.M. 705(c)(1)(A). Moreover, even when an accused freely agrees, a plea agreement condition "shall not be enforced if it deprives the accused of the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights." R.C.M. 705(c)(1)(B).

In a court-martial, either party can propose "any term or condition not prohibited by law or public policy." United States v. McFadyen, 51 M.J. 289, 290 (C.A.A.F. 1999) (quotation omitted); R.C.M. 705(e)(1). "What provisions violate appellate case law is determined by reference to precedent." United States v. Cassity, 36 M.J. 759, 761 (N.M.C.M.R. 1992). And

the terms in a plea agreement are contrary to public policy if they either "interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity and fairness of the disciplinary process." United States v. Raynor, 66 M.J. 693, 697 (A.F. Ct. Crim. App. 2008) (quoting Cassity, 36 M.J. at 762). "Appellate case law, its sources, and R.C.M. 705 are, themselves, statements of public policy." Cassity, 36 M.J. at 760–62.

The challenged plea agreement term – requiring the convening authority to dismiss the additional charges and specifications with prejudice "upon completion of appellate review where the findings and sentence have been upheld" – is permissible because it does not violate the law or public policy. As to the law, the challenged term does not violate R.C.M. 705 or R.C.M. 1115(b)(6)(c), and this Court found the term permissible in United States v. Goldsmith, ACM 4048, 2023 CCA LEXIS 8 (A.F. Ct. Crim. 11 January 2023) (unpub. op.). As to policy, the challenged term did not interfere with court-martial fact-finding, sentencing, or review functions, or undermine public confidence in the integrity and fairness of the disciplinary process. Indeed, it did not deprive Appellant of his appellate rights – he raised multiple assignments of error seeking various relief. But even if this Court goes against its reasoning in Goldsmith and finds the challenged term is impermissible, Appellant suffered no prejudice, and this Court can sever the problematic term rather than voiding the entire plea agreement.

1. The challenged term did not violate the law because it adheres to R.C.M. 705 and 1115, and this Court has found the term permissible in United States v. Goldsmith.

The challenged term does not violate R.C.M. 705(c)(1)(B) because it did not deprive Appellant of the complete and effective exercise of his post-trial and appellate rights. Appellant does not claim that the challenged term forced him to waive his appellate rights. Nor does a plain reading of the challenged term impair his right to bring an appeal. To the contrary, Appellant's plea agreement stated that "in accordance with R.C.M. 705(c)(1)(B) . . . I understand

that I am not waiving . . . the right to complete and effective exercise of post-trial and appellate rights." (App. Ex. X.) The parties understood that the challenged term did not impair Appellant's exercise of appellate rights. And Appellant demonstrated his understanding by fully exercising those rights: he requested and received appellate defense counsel and raised four assignments of error. He has maximized the appellate process and sought various forms of relief, and it is unclear what more he would have done without the challenged term.

To that point, although Appellant contends he was left with the "untenable decision" of either pursuing an appeal and risking further prosecution or forgoing appeal altogether by withdrawing from appellate review, he did exercise his appellate rights. (App. Br. at 29-30.) Recently, in United States v. Goldsmith, this Court was faced with an appellant challenging a plea agreement with identical terms. Goldsmith, unpub. op. at *1. After reviewing the case, this Court found that "whatever pressure [the appellant] may have felt by virtue of the plea agreement provision" it did not stop him from raising six issues and "asking for the very sort of relief which would relieve the convening authority of the obligation to dismiss . . . the specifications with prejudice." Goldsmith, unpub. at *14. Similarly here, however difficult Appellant claims his decision was, it did not stop him from completely and effectively exercising his appellate rights. Under these circumstances, the challenged provision did not violate R.C.M. 705(c)(1)(B).

Further, the challenged term restated the convening authority's ability to "withdraw from a plea agreement . . . if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review." R.C.M. 705(e)(4)(B). Through this provision, the convening authority already had the power to withdraw from the plea agreement dependent upon an appellate outcome. The challenged term expanded that power to include the

adjudged sentence, but it was always the case that the Government could "resurrect" dismissed charges if Appellant's pleas were held improvident. As this Court noted in Goldsmith, "if anything, such an agreement operates to an appellant's benefit, as it creates the opportunity for that appellant to see withdrawn specifications dismissed with prejudice." Goldsmith, unpub. at *12.

Additionally, the challenged term did not violate R.C.M. 1115(c). Appellant does not allege that anyone compelled, coerced, or induced him by force, promises of clemency, or otherwise to waive or withdraw appellate review. And the record shows he has not waived or withdrawn from appellate review. Instead, he availed himself of the appellate process. He cannot credibly claim a violation of R.C.M. 1115(c) when he failed to allege that anyone compelled, coerced, or induced him to waive or withdraw his appellate review. Thus, the challenged provision did not violate the plain language of either R.C.M. 705(c)(1)(B) or 1115(c).

Turning next to caselaw, as mentioned above, this Court in Goldsmith recently addressed this exact issue. In Goldsmith, the appellant entered into a plea agreement where the convening authority agreed to dismiss two specifications without prejudice upon announcement of the appellant's sentence and the dismissal would then "ripen into prejudice upon completion of appellate review where the findings and sentence have been upheld." Goldsmith, unpub. at *5. As in this case, the appellant argued the provision was void or otherwise unenforceable because it deprived him of complete and effective exercise of post-trial and appellate rights. Id. This Court found that not only can it not "conclude the provision operated to deprive Appellant of his ability to completely and effectively exercise his appellate rights" but it cannot even find that it impacted those rights at all. Id. at *14. Since the term in Appellant's case is identical to that in Goldsmith, this Court should also find the provision in Appellant's agreement enforceable.

Importantly, while Appellant cites to this Court's decision in Goldsmith, he makes no effort to distinguish his case, nor could he. (App. Br. at 25.) Neither does Appellant cite to any other authority which has held the challenged term is impermissible. Instead, he relies on dicta from United States v. Partin, where the Court of Military Appeals (CMA) considered a pretrial agreement provision that allowed a convening authority to reinstate capital proceedings if "the accused's plea of guilty to unpremeditated murder or sodomy be changed by anyone to not guilty." 7 M.J. 409, 411 (C.M.A. 1979). Specifically, Appellant relies on the CMA's remark that an objection to such a provision – because it imposes a burden on the appellant's statutory rights to automatic and discretionary review of his court-martial – "may have merit." Id. at 412; (App. Br. at 24.) But this Court, in Goldsmith, rejected that comparison. This Court explained "the comment in Partin about not condoning the pretrial agreement term seems to provide little in the way of a concrete foundation for Appellant's argument, especially in light of the fact the Partin court upheld the agreement." Goldsmith, unpub. at *8. Additionally, this Court noted that two years following the decision in Partin, the court distanced itself from that language in United States v. Mills, 12 M.J. 1, (C.M.A. 1981). This Court found that "[r]eading Partin and Mills together, what is prohibited is prosecutorial vindictiveness after a successful appeal or – arguably – an agreement provision which would subject an accused to a higher sentence based solely on an appellate court's decision to order a rehearing." Id. at 9-10. Appellant, in his brief, fails to address, why the Court should deviate from its stated analysis of Partin.

In sum, the plain language of R.C.M. 705(c)(1)(B) and R.C.M. 1115(c) do not prohibit the challenged term. Multiple appellate courts have upheld the challenged term under Article 66,

UCMJ review.[10] And Appellant cites to no authority holding that the challenged term is impermissible. Under these circumstances, the challenged term does not violate the law.

2. The challenged term did not violate public policy because it did not deprive Appellant of his appellate rights and it does not undermine public confidence in the disciplinary process.

The challenged term also survives public policy review because it did not interfere with the court-martial fact-finding, sentencing, and review processes, and its inclusion in Appellant's plea agreement would not undermine public confidence in the court-martial system.

a. The challenged term did not interfere with court-martial fact-finding, sentencing, or review functions.

The record discloses no evidence that the challenged term interfered with Appellant's trial, post-trial process, or appellate review. Indeed, the challenged term did not discourage trial defense counsel from objecting at trial. It did not dissuade Appellant from submitting matters. And it did not deter Appellant from submitting four assignments of error. Nor will the challenged term impair this Court's ability to review the record. In fact, Appellant does not claim that the challenged term interfered with any stage of the court-martial process.

[10] United States v. Victrelli, No. 201900075, 2019 CCA LEXIS 228, at *1-3 (N-M Ct. Crim. App. 13 May 2019) (unpub. op); United States v. Brasberger, No. 201900084, 2019 CCA LEXIS 356, at *1-3 (N-M Ct. Crim. App. 29 Aug. 2019) (unpub. op); United States v. Kirkland, No. 201900108, 2019 CCA LEXIS 379, at *1-2 (N-M Ct. Crim. App. 30 Sep. 2019) (unpub. op); United States v. Barclay, No. 201800271, 2019 CCA LEXIS 410, at *8 (N-M Ct. Crim. App. 29 Oct. 2019) (unpub. op); United States v. Kay, No. 201900161, 2019 CCA LEXIS 435, at *1-2 (N-M Ct. Crim. App. 31 Oct. 2019) (unpub. op); United States v. Parsons, No. 201900145, 2019 CCA LEXIS 427, at *1-2 (N-M Ct. Crim. App. 31 Oct. 2019) (unpub. op); United States v. Gevero, No. 201900148, 2019 CCA LEXIS 474, at *1-2 (N-M Ct. Crim. App. 27 Nov. 2019) (unpub. op); United States v. Anne, No. 201900072, 2019 CCA LEXIS 506, at *8-9 (N-M Ct. Crim. App. 18 Dec. 2019) (unpub. op); United States v. Langill, No. 201900206, 2020 CCA LEXIS 28, at *1-2 (N-M Ct. Crim. App. 29 Jan. 2020) (unpub. op); and United States v. Delnevo, No. 201900017, 2020 CCA LEXIS 46, at *9 (N-M Ct. Crim. App. 24 Feb. 2020) (unpub. op).

Moreover, the parties did not think that the challenged term would interfere with any court-martial review functions. The plea agreement stated that "[i]n accordance with R.C.M. 705(c)(1)(B)," Appellant was not waiving his right to "complete sentencing proceedings, and complete and effective exercise of post-trial and appellate rights." (App. Ex. X.) This shows that the parties had a meeting of the minds concerning the effect of the challenged term, agreeing that it would not inhibit Appellant's post-trial and appellate rights.

b. The challenged term did not undermine public confidence in the integrity and fairness of the disciplinary process.

When considering whether the challenged term undermines public confidence, this Court should consider whether Appellant voluntarily agreed to the term and whether the record shows any evidence of government coercion or overreaching. R.C.M. 705; Rivera, 46 M.J. at 55.

First, Appellant voluntarily agreed to the challenged term. During the plea agreement colloquy, Appellant confirmed that he understood his plea agreement, and no one forced him to enter it. (R. at 278-80.) The military judge discussed the challenged term with Appellant, and Appellant said he understood it and voiced no concerns. (R. at 256-57.) The plea agreement also stated that Appellant offered "to plead guilty because it [would] be in [his] best interest in accordance with the conditions stated herein." (App. Ex. X.) Importantly, Appellant is not now asserting on appeal that he did not understand the provision.

Indeed, the plea agreement served Appellant's best interest by conferring a substantial benefit: it gave him a favorable confinement cap and dismissed three serious offenses, for assault and domestic violence. (Id.) Appellant got that benefit because he accepted the challenged term; he was able to "'maximize' what he [had] to 'sell'" because he was "permitted to offer what the prosecutor [was] most interested in buying." Mezzanatto, 513 U.S. at 208. That is, the convening authority wanted to buy final judicial acceptance of Appellant's guilty

plea and sentence before dismissing grave charges with prejudice. Appellant was willing to sell that certainty without giving up any fundamental rights. On balance, this bargain favored Appellant. While a plea agreement may raise the specter of coercion and overreaching, there is also a danger of restricting plea agreements to the detriment of an accused. Rivera, 46 M.J. at 54.

Second, Appellant does not assert, and the record does not reflect, any evidence of Government coercion or overreaching. Appellant bargained for the benefits of the plea agreement and "absent some affirmative indication the accused entered the agreement unknowingly and involuntarily," and, unless R.C.M. 705(c)(1)(B) demands it, this Court should not deprive Appellant of the deal he made. *See* Edwards, unpub. at *7 (citing Mezzanatto, 513 U.S. at 130).

In sum, the challenged term did not violate the law or public policy, and therefore the challenged term is permissible. This Court should not strike it from Appellant's plea agreement.

3. If this Court goes against its analysis in Goldsmith and determines the challenged term is impermissible, Appellant suffered no prejudice.

Even if the challenged term were impermissible, Appellant suffered no prejudice. As discussed, there is no evidence that the challenged term interfered with Appellant's trial, post-trial process, or appellate review. Rather than voiding the entire plea agreement, this Court can treat the challenged term as "null without impairing the remainder of the agreement." United States v. Tate, 64 M.J. 269, 272–73 (C.A.A.F. 2007) (citation omitted). Specifically, this Court can strike the portion of the challenged term requiring that the sentence be upheld. The modified term would thus state that dismissal would ripen into prejudice upon completion of appellate review where the findings have been upheld. This modified term aligns with R.C.M. 705(e)(4)(B), restating the convening authority's power to withdraw from a plea agreement if

findings are set aside "because a plea of guilty entered pursuant to the agreement is held improvident on appellate review." The modified term would also remove any perceived disincentive for an appellant to challenge the sentence on appeal.

Conclusion

The challenged term does not violate the law or public policy, and Appellant makes no claim that it discouraged the exercise of his appellate rights. Under these circumstances, he deserves no relief.

IV.[11]

APPELLANT'S SENTENCE – WHICH INCLUDES A BAD CONDUCT DISCHARGE – WAS NOT INAPPROPRIATELY SEVERE.

Additional Facts

Appellant was sentenced by military judge alone to 325 days of confinement, a bad conduct discharge, reduction to the grade of E-1, total forfeitures, and a reprimand. (*Entry of Judgment*, dated 28 March 2022, ROT, Vol. 1.)

Standard of Review

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

Law and Analysis

Appellant's sentence is not inappropriately severe. Rather, it fits his actions and the findings of guilt in this case. The appropriateness of a sentence is assessed "by considering the

[11] Appellant raised this Issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

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

Appellant's sentence of 325 days of confinement, a bad conduct discharge, reduction to the grade of E-1, total forfeitures, and a reprimand is an appropriate punishment because Appellant posted pornographic images of women next to actual photographs of the victims to suggest the women in the pornographic images women were the victims. (*Entry of Judgment*, dated 28 March 2022, ROT, Vol. 1.) He also, through the captions added to the pictures, intended to create the impression that the victims engaged in sexual acts with him. (Pros. Ex. 1.) All of the victims were women Appellant knew, some very closely and some through their military service. One victim was his sister-in-law and another was an active duty Judge Advocate. (Pros. Ex. 1.) All ten of the victims were violated by Appellant's conduct and are forced to grapple with the aftermath of having these photographs and their names attached to the images posted on the Internet for everyone to see in perpetuity. (Ct. Ex. A-J.)

With one victim, his wife, Appellant went a step further. Not only did he pose as his wife when he created and uploaded the above photographs of the other victims, but he also posted actual photographs of his wife engaged in sexually explicit conduct on the Internet without her knowledge or consent. (*Entry of Judgment*, dated 28 March 2022, ROT, Vol. 1; R. at 149-150.) He admitted that the photographs were taken in the "confidence of [their] own marriage" and that his wife was "crushed" when she learned about his actions. (R. at 150.) In her unsworn

statement to the military judge, MR explained she learned there were sexually explicit of herself performing sexual acts online from another victim and that Appellant denied any involvement with the Tumblr account. (R. at 336.) She stated that his actions – posting the photographs and creating a fictional sexual narrative on a website under her name – caused her physical, emotional, and mental distress. (R. at 336-37.) MR told the military judge that because Appellant used her name to create the site and post the images, she lived in a "constant state of fear and distress" that she would be charged by law enforcement which, in turn, impacted her ability to focus while she pursued her nursing degree. (Id.)

Even though Appellant agreed to the sentencing terms of his plea agreement, Appellant now argues his sentence was inappropriately severe. (App. Br. App. at 33.) But as the Court of Military Appeals explained, "[a]bsent evidence to the contrary, an accused's own sentence proposal is a reasonable indication of its probable fairness to him." United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979). Yet, Appellant now impliedly argues that he should not be held to the terms he bargained for because of the matters "in mitigation and extenuation" presented. (App. Br. App. at 36.) He does not argue that the plea agreement limitations were unfair; indeed that Appellant agreed to the sentencing terms demonstrates its fairness. Instead, Appellant points to obstacles he overcame, like being overweight and losing his mother approximately nine years prior to the start of his misconduct. (Id.) He claims these were contributing factors to his struggle with alcoholism and addiction to pornography which ultimately led to the misconduct he was convicted of. (Id.) But, importantly, Appellant ignores the severity and aggravating factors of his own crime and how his conduct affected the victims of his misconduct. Ten women have to live everyday of their lives with their names attached to the pornographic images Appellant created and, in the case of his wife, with her own her body exposed. (Pros. Ex. 1.) At least one

victim was contacted by an old classmate because he saw the images on the Tumblr account. (Ct. Ex. G.) Even though Appellant expressed some remorse and sought therapy, he did not do so until he was under investigation and facing the consequences of his misconduct. (Def. Ex. D, E.)

His crime warranted 325 days of confinement, reduction in rank, total forfeitures, a bad conduct discharge, and a reprimand. Appellant violated unsuspecting military members, his family, and his friends when he posted the photographs and captioned the images on a public forum online. He did so even though he knew that posting the images would cause harm and shame to the victims. (R. at 109, 125, 135, 142, 163.) To support the fact that Appellant deserves the adjudged sentence, Appellant admitted that he "negatively impacted" the lives of the victims through his actions and that he caused his wife "harm and emotional distress." (R. at 150, Def. Ex. E.)

To further support the fact that Appellant deserves the adjudged sentence, Appellant was fully aware of the wrongfulness and consequences of his misconduct and still curated the Tumblr page without a hint of hesitation or remorse. When confronted by one of the victims he knew his conduct was reprehensible and a "scumbag" thing to do, so he denied it. (Pros. Ex. 16.) He falsely claimed that he would never do anything like that, it had "fucked" him and his wife up for months, and he lied about "feeling" the victim's pain. (Id.) He also knew that his conduct could send him to jail. (Id.) When Appellant's misconduct first came to light, instead of taking responsibility he chose to continue to lie and gaslight the victims. Despite Appellant knowing his actions were wrong, he was not dissuaded from continuing to create and post the sexually explicit photographs of his wife and insinuate pornographic photographs were of the other victims with captions like "hubby getting suck by my slutty sister." (Pros. Ex. 1.) As a result, a

more severe punishment was necessary to rehabilitate and deter Appellant from committing future offenses. For these reasons, Appellant's punishment "fit[s] the offender" and his convictions. United States v. Mack, 9 M.J. 300, 317 (C.M.A. 1980) (citation omitted).

The maximum confinement that could have been adjudged was 28 years of confinement. (R. at 107.) Appellant was ultimately sentenced to be confined for less than one percent of the maximum term of confinement allowed. The bad conduct discharge Appellant received is an appropriate punishment for an individual convicted of these crimes against ten victims. It is not as if the sentence was wildly disproportionate to Appellant's actions. Thus, Appellant is entitled to no relief, and this Court should affirm the appropriate sentence returned by the military judge.

Therefore, the United States respectfully requests this Honorable Court deny Appellant's request to modify his sentence.

CONCLUSION

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

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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 June 2023 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Staff Sergeant (E-5) **STEPHEN T. ROBLES**, United States Air Force, *Appellant*	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2 No. ACM 40280 Filed on: 29 June 2023

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

COMES NOW, Appellant, Staff Sergeant (SSgt) Stephen T. Robles, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and submits this reply to the Government's Answer, filed on 22 June 2023 (hereinafter Gov. Ans.). Appellant primarily rests on the arguments contained in his Brief on Behalf of Appellant, filed on 8 May 2023 (hereinafter App. Br.), but provides the following additional arguments in reply to the Government's Answer.

Argument

II.

SSGT ROBLES'S PLEA OF GUILTY TO SPECIFICATION 4 OF CHARGE III IS IMPROVIDENT.

In its Answer, the Government notes the military judge defined the term "sexually explicit" for SSgt Robles during his plea inquiry. Gov. Ans. at 16. It then claims "the images Appellant posted are clearly sexually explicit." *Id*. at 19. It bears emphasizing that the military judge's definition of "sexually explicit" included the following: "sex acts such as actual or simulated

genital to genital contact, oral to genital contact, anal to genital contact, or oral to anal contact."[1] R. at 72. This definition is the same definition listed for "sexually explicit conduct" found in Article 117a, UCMJ. *See Manual for Courts-Martial, United States* (2019) (2019 *MCM*), Appendix 2, Article 117a(b)(6). Notably, for Specifications 1-3 and Specification 5 of Charge III, SSgt Robles posted images of unknown women engaging in "sexually explicit conduct," (i.e., sexual acts) such that this definition adequately described his actions. Thus, for those specifications, the Government could have used the definition of "sexually explicit conduct" to charge Appellant with committing indecent conduct. However, the Government was in a different posture for the images SSgt Robles posted relating to M.R. Because those images did *not* involve sexual acts, the Government was unable to use this same definition. However, the Government could have availed itself of the definition of intimate visual images from Article 117a, UCMJ. *See* 2019 *MCM* Appendix 2, Article 117a(b)(3).[2] This definition is much broader. Instead, the Government—and the military judge—claimed that its more expansive definition of "sexually explicit" covered SSgt Robles's conduct. But it is the Government who controls the charge sheet,[3] and it should not be able to create definitions out of whole cloth to suit its needs.

As argued in his initial brief, the images in Specification 4 of Charge III are not "sexually explicit" as defined within the UCMJ. App. Br. at 17-19. While the Government asserts these images are provocative (Gov. Ans. at 19), a provocative image may still have artistic value. The terms are not mutually exclusive. In fact, artists often utilize the nude form in their art.

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[1] Additionally, the military judge noted that the proposed definition "gives more things that would be included in the definition of 'sexually explicit,' which include, basically, *women that are nude, posing in lingerie*, or engaged in sex acts." R. at 72 (emphasis added).

[2] A "intimate visual image" is defined as "a visual image that depicts the private area of a person." 2019 *MCM*, Appendix 2, Article 117a(b)(3). "Private area" is defined as "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple. *Id*.

[3] *United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021).

Michelangelo's David "is one of [his] most recognizable works, and has become one of the most recognizable statutes in the entire world of art."[4] Notably, this statue depicts David in his nude form and stands 13 feet 5 inches tall.[5]

The Government next posits SSgt Robles's comparison to pictures of models in a Victoria's Secret magazine or sales advertisements "fails, even if one assumes the images in sales advertisements are not sexually explicit." Gov. Ans. at 20. In making this statement, the Government is suggesting images—readily available on the Internet for consumers to peruse in determining whether they wish to purchase a swimsuit—would qualify as sexually explicit. Even a "general common-sense understanding" would not include an understanding that images of lingerie or swimsuits would be classified as "sexually explicit." As argued in his initial brief, SSgt Robles's plea of guilty to Specification 4 of Charge III is improvident.

WHEREFORE, SSgt Robles respectfully requests that this Honorable Court set aside his conviction for Specification 4 of Charge III.

III.

THE PORTION OF SSGT ROBLES'S PLEA AGREEMENT WHICH PROVIDES THAT DISMISSAL OF CERTAIN CHARGES AND SPECIFICATIONS WOULD ONLY RIPEN INTO DISMISSAL WITH PREJUDICE "UPON COMPLETION OF APPELLATE REVIEW WHERE THE FINDINGS AND SENTENCE HAVE BEEN UPHELD" IS VOID OR OTHERWISE UNENFORCEABLE.

The Government alleges that "[t]he challenged term does not violate R.C.M. 705(c)(1)(B) because it does not deprive Appellant of the complete and effective exercise of his post-trial and appellate rights. Appellant does not claim that the challenged term forced him to waive his

[4] *See* Analysis of the Art of Renaissance Italy, ItalianRenaissance.org, available at https://www.italianrenaissance.org/michelangelos-david/ (last accessed 29 July 2023).
[5] *Id*.

appellate rights." Gov. Ans. at 25. While it is true SSgt Robles did not claim he was forced to waive his appellate rights, it is unclear how SSgt Robles is afforded "the *complete and effective exercise* of his post-trial and appellate rights," if he is faced with a Sophie's choice of waiving his appellate rights or asserting viable assignments of error, which, if this Court finds deserving of relief, may cause his prior charges and specifications to be resurrected. Notably, an "appeal" is defined as "a challenge to a previous legal determination. An appeal is directed towards a legal power higher than the power making the challenged determination. . . . Appeals can be discretionary or of right. An appeal of right is one that the higher court must hear, if the losing party demands it, while a discretionary appeal is one that the higher court may, but does not have to, consider." Cornell Law School, Legal Information Institute, available at https://www.law.cornell.edu/wex/appeal (last accessed on 29 June 2023). If an appeal is "a challenge to a previous legal determination," it is unreasonable to suggest SSgt Robles is afforded his complete appellate rights before this Court—his appeal of right[6]—when he is unable to raise any issue which may affect his findings and sentence or run afoul of the plea agreement provision at issue. Nor does the Government grapple with the cases SSgt Robles cites to in which this Court—pursuant to Article 66(d), UCMJ—has granted substantive relief to servicemembers on appeal. *See* App. Br. at 26-29.

In discussing the plain language of R.C.M. 705(c)(1)(B) and R.C.M. 1115(c), the Government asserts that "[m]ultiple appellate courts have upheld the challenged term under Article 66, UCMJ review." Gov. Ans. at 28-29. To support this proposition, the Government provides a footnote, citing to 10 Navy-Marine Corps Court of Criminal Appeals' (NMCCA) decisions. Gov.

[6] *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985).

Ans. at 29 n.10. However, a review of these cases demonstrates that all but three cases were submitted to the NMCCA on the merits, without any specific assignment of error.[7] In looking at the three with assigned errors, two argued their sentences were inappropriately serve[8] and one alleged prosecutorial misconduct and ineffective assistance of counsel.[9] None of these appellants raised this issue challenging the plea provision as being against public policy. In conducting its Article 66(d), UCMJ, review in these cases, the NMCCA analyzed the appellants' assigned errors without any discussion of the potential effect of this plea provision on the appellants' cases.[10] Therefore, it is unclear whether the NMCCA "upheld the challenged term" as the Government claims. Gov. Ans. at 28. Notably, for each case, the NMCCA affirmed the appellants' findings and sentence, such that this plea provision would be of no consequence. *Barclay*, 2019 CCA LEXIS 410, at *9; *Anne*, 2019 CCA LEXIS 506, at *9; *Delnevo*, 2020 CCA LEXIS 46, at *9-10. In contrast, SSgt Robles has raised several meritorious assignments of error, and challenged the specific ramifications of this plea provision upon the exercise of his appellate rights.

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[7] *United States v. Victrelli*, No. 201900075, 2019 CCA LEXIS 228, at *1-3 (N-M Ct. Crim. App. 13 May 2019) (unpub. op); *United States v. Brasberger*, No. 201900084, 2019 CCA LEXIS 356, at *1-3 (N-M Ct. Crim. App. 29 Aug. 2019) (unpub. op); *United States v. Kirkland*, No. 201900108, 2019 CCA LEXIS 379, at *1-2 (N-M Ct. Crim. App. 30 Sep. 2019) (unpub. op); *United States v. Kay*, No. 201900161, 2019 CCA LEXIS 435, at *1-2 (N-M Ct. Crim. App. 31 Oct. 2019) (unpub. op); *United States v. Parsons*, No. 201900145, 2019 CCA LEXIS 427, at *1-2 (N-M Ct. Crim. App. 31 Oct. 2019) (unpub. op); *United States v. Gevero*, No. 201900148, 2019 CCA LEXIS 474, at *1-2 (N-M Ct. Crim. App. 27 Nov. 2019) (unpub. op); *United States v. Langill*, No. 201900206, 2020 CCA LEXIS 28, at *1-2 (N-M Ct. Crim. App. 29 Jan. 2020) (unpub. op).

[8] *United States v. Anne*, No. 201900072, 2019 CCA LEXIS 506, at *8-9 (N-M Ct. Crim. App. 18 Dec. 2019) (unpub. op); *United States v. Delnevo*, No. 201900017, 2020 CCA LEXIS 46, at *9 (N-M Ct. Crim. App. 24 Feb. 2020) (unpub. op).

[9] *United States v. Barclay*, No. 201800271, 2019 CCA LEXIS 410, at *8 (N-M Ct. Crim. App. 29 Oct. 2019) (unpub. op)

[10] In each case, the NMCCA mentioned the plea provision at issue solely to address an error in the court-martial order (CMO). *Barclay*, 2019 CCA LEXIS 410, at *8; *Anne*, 2019 CCA LEXIS 506, at *8-9; *Delnevo*, 2020 CCA LEXIS 46, at *9.

WHEREFORE, SSgt Robles respectfully requests this Honorable Court void the term in his plea agreement conditioning the ripening of prejudice to his findings and sentence being upheld on appeal.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 29 June 2023.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40280**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Stephen T. ROBLES	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 8th day of August, 2023,

ORDERED:

The Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
CADOTTE, ERIC J., Colonel, Senior Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal