IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	16 March 2023

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 **24 May 2023**. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 51 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,

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 16 March 2023.

Respectfully submitted,

REGGIE J. DINGMAN, TSgt, USAF
Appellate Defense Paralegal
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

17 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40403 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 17 March 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 (SECOND)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	17 May 2023

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 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 **23 June 2023**. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 27 October 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Hill Air Force Base (AFB), of one charge and eight specifications of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ). R. at 138. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months,[2] and to be discharged with a bad conduct discharge.

---

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 90, for willfully disobeying a superior commissioned officer was "withdrawn and dismissed with prejudice in accordance with the plea agreement." ROT, Vol. 1, Entry of Judgment (EOJ), dated 3 January 2023.

[2] Appellant was sentenced to be confined for 12 months (for Specification 1 of Charge II), to be confined for 12 months (for Specification 2 of Charge II), and to be confined 12 months (for Specification 3 of Charge II), to be confined for 3 months (Specification 4 of Charge II); to be confined for 5 months (Specification 5 of Charge II), to be confined for 10 months (Specification 6 of Charge II), to be confined for 6 months (Specification 7 of Charge II), and to be confined for

R. at 368; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 16 December 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. *Id.* The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id.*

The record of trial consists of 3 prosecution exhibits, 26 defense exhibits, and 8 appellate exhibits; the transcript is 369 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.

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

---

4 months (Specification 8 of Charge II), with all the sentences running consecutively. ROT, Vol 1., EOJ.

CERTIFICATE OF FILING AND SERVICE

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

18 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40403 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 18 May 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 (SECOND) OUT OF TIME**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	22 May 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)(7) 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) out of time. Appellant requests an enlargement for a period of 30 days, which will end on **23 June 2023**. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 118 days have elapsed. On the date requested, 150 days will have elapsed. Good cause exists to grant this EOT, because while counsel correctly identified the due date for Appellants' second EOT as 23 June 2023 in her first timely-filed EOT, she mistakenly indicated she was requesting 60 days vice 30 days to file his EOT. This EOT corrects counsel's mistakes.

On 27 October 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Hill Air Force Base (AFB), of one charge and eight specifications of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ). R. at 138. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 90, for willfully disobeying a superior commissioned officer was "withdrawn and dismissed with prejudice in accordance with the plea agreement." ROT, Vol. 1, Entry of Judgment (EOJ), dated 3 January 2023.

E-1, to be confined for a total of 12 months,[2] and to be discharged with a bad conduct discharge. R. at 368; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 16 December 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of 3 prosecution exhibits, 26 defense exhibits, and 8 appellate exhibits; the transcript is 369 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.

---

[2] Appellant was sentenced to be confined for 12 months (for Specification 1 of Charge II), to be confined for 12 months (for Specification 2 of Charge II), and to be confined 12 months (for Specification 3 of Charge II), to be confined for 3 months (Specification 4 of Charge II); to be confined for 5 months (Specification 5 of Charge II), to be confined for 10 months (Specification 6 of Charge II), to be confined for 6 months (Specification 7 of Charge II), and to be confined for 4 months (Specification 8 of Charge II), with all the sentences running consecutively. ROT, Vol 1., EOJ.

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 22 May 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

22 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40403 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 22 May 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 (THIRD)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	15 June 2023

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 **23 July 2023**. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 27 October 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Hill Air Force Base (AFB), of one charge and eight specifications of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ). R. at 138. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months,[2] and to be discharged with a bad conduct discharge.

---

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 90, for willfully disobeying a superior commissioned officer was "withdrawn and dismissed with prejudice in accordance with the plea agreement." ROT, Vol. 1, Entry of Judgment (EOJ), dated 3 January 2023.

[2] Appellant was sentenced to be confined for 12 months (for Specification 1 of Charge II), to be confined for 12 months (for Specification 2 of Charge II), and to be confined 12 months (for Specification 3 of Charge II), to be confined for 3 months (Specification 4 of Charge II); to be confined for 5 months (Specification 5 of Charge II), to be confined for 10 months (Specification 6 of Charge II), to be confined for 6 months (Specification 7 of Charge II), and to be confined for

R. at 368; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 16 December 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of 3 prosecution exhibits, 26 defense exhibits, and 8 appellate exhibits; the transcript is 369 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.

---

4 months (Specification 8 of Charge II), with all the sentences running consecutively. ROT, Vol 1., EOJ.

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 15 June 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

20 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40403 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 20 June 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 (FOURTH)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	13 July 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 **22 August 2023**. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 27 October 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Hill Air Force Base (AFB), of one charge and eight specifications of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ). R. at 138. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months,[2] and to be discharged with a bad conduct discharge.

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 90, for willfully disobeying a superior commissioned officer was "withdrawn and dismissed with prejudice in accordance with the plea agreement." ROT, Vol. 1, Entry of Judgment (EOJ), dated 3 January 2023.

[2] Appellant was sentenced to be confined for 12 months (for Specification 1 of Charge II), to be confined for 12 months (for Specification 2 of Charge II), and to be confined 12 months (for Specification 3 of Charge II), to be confined for 3 months (Specification 4 of Charge II); to be confined for 5 months (Specification 5 of Charge II), to be confined for 10 months (Specification

R. at 368; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 16 December 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of 3 prosecution exhibits, 26 defense exhibits, and 8 appellate exhibits; the transcript is 369 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters[3] and not yet begun her review of Appellant's case. Counsel is assigned 23 cases; 9 cases are pending initial AOEs before this Court. This is military counsel's fourth priority case. The following cases have priority over the present case:

1. *United States v. Pittman*, ACM 40298 - The record of trial is 6 volumes; the trial transcript is 341 pages. There are 14 prosecution exhibits, 13 defense exhibits, and 30 appellate exhibits. Counsel has begun her review of Appellant's ROT.

2. *United States v. Taylor Jr.*, ACM 40371 - The record of trial is 6 volumes; the trial transcript is 396 pages. There are 6 prosecution exhibits, 12 defense exhibits, and 36 appellate exhibits. Counsel has not yet begun her review of Appellant's ROT.

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6 of Charge II), to be confined for 6 months (Specification 7 of Charge II), and to be confined for 4 months (Specification 8 of Charge II), with all the sentences running consecutively. ROT, Vol 1., EOJ.

[3] Since the filing of Appellant's last EOT, counsel filed a lengthy brief in *United States v. Blackburn*, ACM 40303, on 28 June 2023, a reply brief in *United States v. Robles*, ACM 40280, on 29 June 2023, completed her review of the 1473-page *DuBay* transcript in *United States v. Knodel*, ACM 40018, on 7 July 2023, and co-wrote a Supreme Court petition in *United States v. King*, ACM 39583 for submission by 23 July 2023. Since the last EOT, counsel was also off for the Juneteenth holiday and for the 4th of July holiday.

3. *United States v. Gonzalez*, ACM 40375 - The record of trial is 2 volumes; the trial transcript is 107 pages. There are 4 prosecution exhibits, 5 defense exhibits, and 5 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,

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 13 July 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 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40403 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 14 July 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 40403**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Robert D. SCHNEIDER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

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

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	15 August 2023

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

Pursuant to Rule 23.3(m)(2) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **21 September 2023**. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 27 October 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Hill Air Force Base (AFB), of one charge and eight specifications of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ). R. at 138. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months,[2] and to be discharged with a bad conduct discharge.

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 90, for willfully disobeying a superior commissioned officer was "withdrawn and dismissed with prejudice in accordance with the plea agreement." ROT, Vol. 1, Entry of Judgment (EOJ), dated 3 January 2023.

[2] Appellant was sentenced to be confined for 12 months (for Specification 1 of Charge II), to be confined for 12 months (for Specification 2 of Charge II), and to be confined 12 months (for Specification 3 of Charge II), to be confined for 3 months (Specification 4 of Charge II); to be confined for 5 months (Specification 5 of Charge II), to be confined for 10 months (Specification

R. at 368; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 16 December 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Appellant is currently confined.

Counsel is currently assigned 11 cases; 8 cases are pending initial AOEs before this Court. Of those cases, the present case has the second highest priority. The undersigned counsel's three other highest priority cases include the following:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, one court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has not yet begun reviewing the record of trial. This case is the undersigned counsel's highest priority.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun reviewing the record of trial.
3) *United States v. Thomas*, ACM S32748 - The record of trial is three volumes consisting of 12 prosecution exhibits, three defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 119 pages. Undersigned counsel has begun reviewing the record of trial.

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6 of Charge II), to be confined for 6 months (Specification 7 of Charge II), and to be confined for 4 months (Specification 8 of Charge II), with all the sentences running consecutively. ROT, Vol 1., EOJ.

Through no fault of Appellant, the undersigned counsel was newly detailed to represent Appellant on 28 July 2023 after the release of Appellant's previous attorney. Counsel's initial review of the ROT has only been completed as of the date of this filing. Additionally, the undersigned counsel has been working on other assigned matters. Accordingly, an enlargement of time is necessary to allow the undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
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 15 August 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

17 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40403 Panel No. 3

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

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

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

PETE FERRELL, Lt Col, USAF
Director of Operations
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 17 August 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40403**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Robert D. SCHNEIDER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 15 August 2023, 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 18th day of August, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **21 September 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 Appellant's 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

FLEMING E. KEEFE, Capt, 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. 3
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	31 August 2023

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

Pursuant to Rule 23.3(m)(2) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **21 October 2023**. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 219 days have elapsed. On the date requested, 270 days will have elapsed.

On 27 October 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Hill Air Force Base (AFB), of one charge and eight specifications of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ). R. at 138. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months,[2] and to be discharged with a bad conduct discharge.

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 90, for willfully disobeying a superior commissioned officer was "withdrawn and dismissed with prejudice in accordance with the plea agreement." ROT, Vol. 1, Entry of Judgment (EOJ), dated 3 January 2023.

[2] Appellant was sentenced to be confined for 12 months (for Specification 1 of Charge II), to be confined for 12 months (for Specification 2 of Charge II), and to be confined 12 months (for Specification 3 of Charge II), to be confined for 3 months (Specification 4 of Charge II); to be confined for 5 months (Specification 5 of Charge II), to be confined for 10 months (Specification

R. at 368; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 16 December 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Appellant is currently confined.

Counsel is currently assigned 11 cases; 8 cases are pending initial AOEs before this Court. Of those cases, the present case has the second highest priority. The undersigned counsel's three other highest priority cases include the following:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, one court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has begun, but not yet completed an initial review of the record of trial. This case is the undersigned counsel's highest priority.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial..
3) *United States v. Thomas*, ACM S32748 - The record of trial is three volumes consisting of 12 prosecution exhibits, three defense exhibits, six appellate exhibits, and two court

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6 of Charge II), to be confined for 6 months (Specification 7 of Charge II), and to be confined for 4 months (Specification 8 of Charge II), with all the sentences running consecutively. ROT, Vol 1., EOJ.

exhibits; the transcript is 119 pages. Undersigned counsel has completed an initial review of the record of trial.

Through no fault of Appellant, the undersigned counsel was newly detailed to represent Appellant on 28 July 2023 after the release of Appellant's previous attorney. Counsel's initial review of the ROT has only been recently completed. Additionally, the undersigned counsel has been working on other assigned matters. These other matters include a previous detailing as trial defense counsel in the matter of *United States v. TSgt Samoy Young*, a special court-martial docketed to take place at Osan Air Base, Republic of Korea beginning on for approximately five days. Undersigned counsel will be traveling to the Republic of Korea on and does not anticipate returning until Accordingly, an enlargement of time is necessary to allow the undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
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 31 August 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

6 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40403 Panel No. 3

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

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

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

PETE FERRELL, Lt Col, USAF
Director of Operations
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 6 September 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
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. 3
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	13 October 2023

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

Pursuant to Rule 23.3(m)(2) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **20 November 2023**. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 262 days have elapsed. On the date requested, 300 days will have elapsed.

On 27 October 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Hill Air Force Base (AFB), of one charge and eight specifications of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ). R. at 138. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months,[2] and to be discharged with a bad conduct discharge.

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 90, for willfully disobeying a superior commissioned officer was "withdrawn and dismissed with prejudice in accordance with the plea agreement." ROT, Vol. 1, Entry of Judgment (EOJ), dated 3 January 2023.

[2] Appellant was sentenced to be confined for 12 months (for Specification 1 of Charge II), to be confined for 12 months (for Specification 2 of Charge II), and to be confined 12 months (for Specification 3 of Charge II), to be confined for 3 months (Specification 4 of Charge II); to be confined for 5 months (Specification 5 of Charge II), to be confined for 10 months (Specification

R. at 368; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 16 December 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Appellant is not currently confined. Undersigned counsel has completed the initial review of the ROT. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Of those cases, the present case has the second highest priority. The undersigned counsel's three other highest priority cases include the following:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, one court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has begun, but not yet completed an initial review of the record of trial. This case is the undersigned counsel's highest priority.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.

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6 of Charge II), to be confined for 6 months (Specification 7 of Charge II), and to be confined for 4 months (Specification 8 of Charge II), with all the sentences running consecutively. ROT, Vol 1., EOJ.

3) *United States v. Thomas*, ACM S32748 - The record of trial is three volumes consisting of 12 prosecution exhibits, three defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 119 pages. Undersigned counsel has completed an initial review of the record of trial.

Through no fault of Appellant, the undersigned counsel has been unable has been unable to complete further review of and prepare a brief for Appellant's case. In additiona to the matters specified above, counsel has been at work on a response to a petition for extraordinary relief before this Court in the matter of *In re RW v. United States*, due 30 October 2023. Accordingly, an enlargement of time is necessary to allow the undersigned counsel to further review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
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 13 October 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

16 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40403 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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.

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 16 October 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) OUT OF TIME**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	14 November 2023

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

Pursuant to Rule 23.3(m)(2) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignments of Error (AOE). Appellant filed for an enlargement of time on 13 November 2023. However, that motion contained an error in the date requested because it stated 20 November 2023 as the date requested. Appellant respectfully withdraws the motion filed on 13 November 2023, and respectfully requests for this Court to consider this motion instead, wherein Appellant requests an enlargement for a period of 30 days, which will end on **20 December 2023**. Good cause exists because undersigned counsel filed the original motion for enlargement of time within the required timeframe. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 27 October 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Hill Air Force Base (AFB), of one charge and eight specifications of making

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 90, for willfully disobeying a superior commissioned officer was "withdrawn and dismissed with prejudice in accordance with the plea agreement." ROT, Vol. 1, Entry of Judgment (EOJ), dated 3 January 2023.

a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ). R. at 138. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months,[2] and to be discharged with a bad conduct discharge. R. at 368; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 16 December 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Appellant is not currently confined. Undersigned counsel has completed the initial review of the ROT. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Of those cases, the present case has the second highest priority. The undersigned counsel's three other highest priority cases include the following:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, one court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has completed review of the ROT

[2] Appellant was sentenced to be confined for 12 months (for Specification 1 of Charge II), to be confined for 12 months (for Specification 2 of Charge II), and to be confined 12 months (for Specification 3 of Charge II), to be confined for 3 months (Specification 4 of Charge II); to be confined for 5 months (Specification 5 of Charge II), to be confined for 10 months (Specification 6 of Charge II), to be confined for 6 months (Specification 7 of Charge II), and to be confined for 4 months (Specification 8 of Charge II), with all the sentences running consecutively. ROT, Vol 1., EOJ.

and has begun drafting an assignment of error. This case is the undersigned counsel's highest priority.

2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.

3) *United States v. Thomas*, ACM S32748 - The record of trial is three volumes consisting of 12 prosecution exhibits, three defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 119 pages. Undersigned counsel has completed an initial review of the record of trial.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential error.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 13 November 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

15 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME OUT OF TIME ACM 40403 Panel No. 3

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

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

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

PETE FERRELL, Lt Col, USAF
Director of Operations
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 15 November 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40403**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Robert D. SCHNEIDER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 14 November 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) Out of Time 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 16th day of November, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) Out of Time is **GRANTED**. Appellant shall file any assignments of error not later than **20 December 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

FLEMING E. KEEFE, Capt, USAF
Deputy 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. 3
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	13 December 2023

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

Pursuant to Rule 23.3(m)(2) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his ninth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **19 January 2024**. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 27 October 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Hill Air Force Base (AFB), of one charge and eight specifications of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ). R. at 138. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months,[2] and to be discharged with a bad conduct discharge.

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 90, for willfully disobeying a superior commissioned officer was "withdrawn and dismissed with prejudice in accordance with the plea agreement." ROT, Vol. 1, Entry of Judgment (EOJ), dated 3 January 2023.

[2] Appellant was sentenced to be confined for 12 months (for Specification 1 of Charge II), to be confined for 12 months (for Specification 2 of Charge II), and to be confined 12 months (for Specification 3 of Charge II), to be confined for 3 months (Specification 4 of Charge II); to be confined for 5 months (Specification 5 of Charge II), to be confined for 10 months (Specification

R. at 368; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 16 December 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Appellant is not currently confined. Undersigned counsel has completed the initial review of the ROT. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Of those cases, the present case has the second highest priority. The undersigned counsel's three other highest priority cases include the following:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, one court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has completed review of the ROT and has begun drafting an assignment of error. This case is the undersigned counsel's highest priority.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.

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6 of Charge II), to be confined for 6 months (Specification 7 of Charge II), and to be confined for 4 months (Specification 8 of Charge II), with all the sentences running consecutively. ROT, Vol 1., EOJ.

3) *United States v. Thomas*, ACM S32748 - The record of trial is three volumes consisting of 12 prosecution exhibits, three defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 119 pages. Undersigned counsel has completed review of the record of trial.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. These other matters include preparations for oral argument before this Court in the matter of *In Re RW* which is scheduled to take place on 14 December 2023. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential error.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 13 December 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

15 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME OUT OF TIME ACM 40403 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant 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 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.

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

PETE FERRELL, Lt Col, USAF
Director of Operations
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 15 December 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
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 (TENTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	11 January 2024

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

Pursuant to Rule 23.3(m)(2) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his tenth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **18 February 2024**. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 352 days have elapsed. On the date requested, 390 days will have elapsed.

On 27 October 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Hill Air Force Base (AFB), of one charge and eight specifications of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ). R. at 138. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months,[2] and to be discharged with a bad conduct discharge.

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 90, for willfully disobeying a superior commissioned officer was "withdrawn and dismissed with prejudice in accordance with the plea agreement." ROT, Vol. 1, Entry of Judgment (EOJ), dated 3 January 2023.

[2] Appellant was sentenced to be confined for 12 months (for Specification 1 of Charge II), to be confined for 12 months (for Specification 2 of Charge II), and to be confined 12 months (for Specification 3 of Charge II), to be confined for 3 months (Specification 4 of Charge II); to be confined for 5 months (Specification 5 of Charge II), to be confined for 10 months (Specification

R. at 368; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 16 December 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Appellant is not currently confined. Undersigned counsel has completed the initial review of the ROT. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Of those cases, the present case has the second highest priority. The undersigned counsel's three other highest priority cases include the following:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, one court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has completed review of the ROT and has begun drafting an assignment of error. This case is the undersigned counsel's highest priority.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.

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6 of Charge II), to be confined for 6 months (Specification 7 of Charge II), and to be confined for 4 months (Specification 8 of Charge II), with all the sentences running consecutively. ROT, Vol 1., EOJ.

3) *United States v. Bates*, ACM S32752 – The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Undersigned counsel has completed an initial review of the record of trial.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to begin drafting an assignment of error. Undersigned counsel's primary focus is on completion of the assignment of error for *United States v. Scott*. Counsel hopes to complete that one soon in order to shift focus towards completion of an assignment of error in this case. Additionally, undersigned counsel has two petitions for review before the Court of Appeals for the Armed Forces which must be submitted with special attention towards the sensitive deadlines set by statute. These two cases are *United States v. Holt*, ACM 40390 and *United States v. Zier*, ACM 21014. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
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 11 January 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

17 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40403 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 over one 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 390 days in length. Appellant's over a 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 5 months combined for the United States and this Court to perform their separate statutory responsibilities.

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 17 January 2024.

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 (ELEVENTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	11 February 2024

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

Pursuant to Rule 23.3(m)(2) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eleventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **19 March 2024**. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 383 days have elapsed. On the date requested, 420 days will have elapsed.

On 27 October 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Hill Air Force Base (AFB), of one charge and eight specifications of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ). R. at 138. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months,[2] and to be discharged with a bad conduct discharge.

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 90, for willfully disobeying a superior commissioned officer was "withdrawn and dismissed with prejudice in accordance with the plea agreement." ROT, Vol. 1, Entry of Judgment (EOJ), dated 3 January 2023.

[2] Appellant was sentenced to be confined for 12 months (for Specification 1 of Charge II), to be confined for 12 months (for Specification 2 of Charge II), and to be confined 12 months (for Specification 3 of Charge II), to be confined for 3 months (Specification 4 of Charge II); to be confined for 5 months (Specification 5 of Charge II), to be confined for 10 months (Specification

R. at 368; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 16 December 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Appellant is not currently confined. Undersigned counsel has completed the initial review of the ROT. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Of those cases, the present case has the second highest priority. The undersigned counsel's three other highest priority cases include the following:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, one court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has completed review of the ROT and has begun drafting an assignment of error. This case is the undersigned counsel's highest priority.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.

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6 of Charge II), to be confined for 6 months (Specification 7 of Charge II), and to be confined for 4 months (Specification 8 of Charge II), with all the sentences running consecutively. ROT, Vol 1., EOJ.

3) *United States v. Bates*, ACM S32752 – The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Undersigned counsel has completed an initial review of the record of trial.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete drafting an assignment of error. Undersigned counsel continues to work towards completion on an assignment of errors for *United States v. Scott* which is due to be filed on 2 March 2024. Upon completion, undersigned counsel will immediately focus his effort on completing an assignment of errors for the instant case, while avoiding any further enlargements of time. Additionally, undersigned counsel must complete a supplement for a petition for review before the Court of Appeals for the Armed Forces in the matter of *United States v. Holt*, ACM 40390, by 28 February 2024. Finally, this court has specified two issues in *United States v. Thomas*, ACM S32748, with a briefing deadline of 7 March 2024. Given these competing priorities, undersigned counsel must carefully manage time over the next few weeks in order to ensure that proper attention is given to each of these cases. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
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 11 February 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

12 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	))))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH) ACM 40403 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 over one 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 420 days in length. Appellant's over a 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 4 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

J. PETE FERRELL, Lt Col, USAF
Director of Operations
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 12 February 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40403**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Robert D. SCHNEIDER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 11 February 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eleventh) 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 13th day of February, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eleventh) is **GRANTED**. Appellant shall file any assignments of error not later than **19 March 2024**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate a status conference.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (TWELFTH)**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	11 March 2024

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

Pursuant to Rule 23.3(m)(2) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his twelfth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 21 days, which will end on **9 April 2024**. The record of trial was docketed with this Court on 24 January 2023. From the date of docketing to the present date, 412 days have elapsed. On the date requested, 441 days will have elapsed.

On 27 October 2022, pursuant to his pleas,[1] Appellant was convicted at a general court-martial convened at Hill Air Force Base (AFB), of one charge and eight specifications of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ). R. at 138. A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months,[2] and to be discharged with a bad conduct discharge.

[1] Pursuant to his plea agreement, one charge and one specification in violation of Article 90, for willfully disobeying a superior commissioned officer was "withdrawn and dismissed with prejudice in accordance with the plea agreement." ROT, Vol. 1, Entry of Judgment (EOJ), dated 3 January 2023.

[2] Appellant was sentenced to be confined for 12 months (for Specification 1 of Charge II), to be confined for 12 months (for Specification 2 of Charge II), and to be confined 12 months (for Specification 3 of Charge II), to be confined for 3 months (Specification 4 of Charge II); to be confined for 5 months (Specification 5 of Charge II), to be confined for 10 months (Specification

R. at 368; ROT, Vol. 1, EOJ. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Decision on Action, dated 16 December 2022. The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. *Id*. The convening authority also denied Appellant's request to have his automatic forfeiture waived. *Id*.

The record of trial consists of three prosecution exhibits, 26 defense exhibits, and eight appellate exhibits; the transcript is 369 pages. Appellant is not currently confined. Undersigned counsel has completed the initial review of the ROT. Appellant has been advised of his right to a timely appeal, as well as the request for an enlargement of time. Appellant has agreed to the request for an enlargement of time.

Counsel is currently assigned 14 cases; 11 cases are pending initial AOEs before this Court. Of those cases, the present case has just assumed the highest priority. The undersigned counsel's three next highest priority cases include the following:

1) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.
2) *United States v. Bates*, ACM S32752 – The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Undersigned counsel has completed an initial review of the record of trial.

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6 of Charge II), to be confined for 6 months (Specification 7 of Charge II), and to be confined for 4 months (Specification 8 of Charge II), with all the sentences running consecutively. ROT, Vol 1., EOJ.

3) *United States v. Hilton*, ACM 40500 - The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. Appellant is currently in confinement. Undersigned counsel has not yet completed an initial review of the ROT.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete drafting an assignment of error (AOE). During this EOT cycle, undersigned counsel was hard at work on an AOE for *United States v. Scott*, ACM 40411. The completed brief was 54 pages in length and addressed eight errors. Counsel submitted the finished product to this Court on 11 March 2024. Additionally, undersigned counsel also filed a supplement for petition of review in *United States v. Holt*, ACM 40390, to the Court of Appeals of the Armed Forces on 28 February 2024. Having completed both of these tasks, counsel is now dedicating his primary efforts toward completing an assignment of error in this case. Counsel has begun drafting the assignment of error and does not anticipate requesting any further enlargements of time. However, the additional time will be necessary to fully address the issues raised in the record and to route the AOE for internal review before submission to this Court. Accordingly, an enlargement of time is necessary to allow undersigned counsel to complete drafting an AOE.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 11 March 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

12 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Technical Sergeant (E-6) ROBERT D. SCHNEIDER, USAF, *Appellant.*	)	ACM 40403 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 over one 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 441 days in length. Appellant's more than 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 two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 3 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

J. PETE FERRELL, Lt Col, USAF
Director of Operations
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 12 March 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

ROBERT D. SCHNEIDER,
Technical Sergeant (E-6),
United States Air Force
Appellant.

No. ACM 40403

BRIEF ON BEHALF OF APPELLANT

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Technical Sergeant (E-6), **ROBERT D. SCHNEIDER,** United States Air Force, *Appellant.*	)	No. ACM 40403
	)	9 April 2024

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

Assignments of Error

I.

WHETHER THE MILITARY JUDGE ERRED BY CONSIDERING IMPERMISSIBLE MATTERS INCLUDED IN THE VICTIM IMPACT STATEMENTS IN ARRIVING AT THE SENTENCE IMPOSED.

II.

WHETHER THE SENTENCE IMPOSED AGAINST TSGT SCHNEIDER WAS INAPPROPRIATELY SEVERE GIVEN HIS MILITARY BACKGROUND AND PERSONAL CIRCUMSTANCES DURING THE OFFENSES.

III.

WHETHER ILLEGIBLE PORTIONS OF THE RECORD OF TRIAL REQUIRE SENTENCING RELIEF OR REMAND FOR CORRECTION.

IV.

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

Statement of the Case

On 27 October 2022, at Hill Air Force Base (AFB), a military judge sitting as a general court-martial convicted Technical Sergeant (TSgt) Robert D. Schneider, pursuant to his pleas, of one charge and eight specifications of making a false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 107. (R. at 138.) A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months, and to be discharged with a bad-conduct discharge. (R. at 368; ROT, Vol. 1, EOJ.) The convening authority took no action on the findings or sentence. (ROT, Vol. 1, Decision on Action, dated 16 December 2022.) The convening authority denied Appellant's deferment request relating to his reduction in grade and automatic forfeitures. (*Id.*) The convening authority also denied Appellant's request to have his automatic forfeiture waived. (*Id.*)

Statement of Facts

TSgt Schneider began his Air Force career after high school and eventually became a member of the recruiter career field. (Def. Ex. Z at 3.) While training to become a recruiter, TSgt Schneider earned an award for being the top distinguished graduate in academic achievement. (*Id.*; Def. Ex I.) TSgt Schneider excelled in his job, earning numerous accolades. This included the

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022).

First Sergeants Special Achievement Award, four Silver Badge awards, and recognition as the top recruiter in his respective unit on six occasions. (Def. Ex. A.) TSgt Schneider received top ratings on his enlisted performance reports throughout the overwhelming majority of his career. (Pros. Ex. 3.) During his first two assignment, TSgt Schneider and his wife had three children. (Def. Ex. Z at 3.)

Then, from 2019 through 2021, TSgt Schneider's life entered a crisis of mental health struggles and alcohol abuse. (R. at 56; 333.) This crisis was spurred by the deterioration of his marriage. (R. at 301.) Using alcohol as a coping mechanism, TSgt Schneider's health rapidly declined. He "began to experience liver pain and blood in [his] feces, [his] thoughts became extremely negative, knowing that [his] alcohol consumption was killing [him]." (R. at 334.)

Amid this personal crisis, TSgt Schneider's career as an Air Force recruiter faltered. Most days, he entered survival mode where he "struggled to fully grasp the nature and consequences of [his] actions." (R. at 56.) He would "fake [his] way through every interaction that [he] was having" to "focus on the next opportunity" to consume alcohol. (*Id.*) And he provided false information to applicants about their acceptance into Officer Training School, which formed the basis of his convictions. Looking back on this period, TSgt Schneider struggled to understand why he did the things he did, except that he legitimately believed he "was going to die from" his alcohol use. (R. at 334.)

On 10 February 2021, TSgt Schneider was questioned by his Officer Accensions Flight Chief, Master Sergeant (MSgt) C.P., about the status of one of TSgt Schneider's officer candidates that was receiving false information from him. (Pros. Ex 1 at 30.) During the conversation, TSgt Schneider began to have a panic attack and display tense body language. (*Id*.) MSgt C.P. advised TSgt Schneider to go home for the day. (*Id.*) The following day, TSgt Scheider re-engaged with

MSgt C.P. MSgt C.P wanted to know why the applicant received false information. (*Id.* at 21.) TSgt Schneider broke down into tears and explained that he did not understand his actions and that his marriage was falling apart. (*Id.*) Following this, TSgt Schneider went to mental health. (*Id.*) He was later diagnosed with severe alcohol use disorder and adjustment disorder with mixed anxiety and depressed mood.[2] (*Id.* at 37.)

On 19 February 2021, TSgt Schneider called his father in a cry for help, explaining that his life was out of control. (R. at 304; Def. Ex. C at 1.) His father assisted in getting TSgt Schneider admitted into the Douglas County Detox Center before going to an extensive inpatient program at the Keystone Treatment Center in South Dakota. (R. at 335.) While in treatment, TSgt Schneider's wife filed for divorce. (R. at 301.) Despite this additional hardship, after successfully completing the inpatient program, TSgt Scheider began attending Alcoholics Anonymous and working with a sponsor to maintain to his sobriety. (R. at 309-10.) As of the court-martial, TSgt Schneider had been sober for 615 days and put considerable effort into remaining healthy. (R. at 56, 316.)

As part of his recovery, TSgt Schneider made a list of his wrongdoings for the purpose of making amends. (R. at 321.) This included coming to terms with his actions as a military recruiter while crippled by his alcoholism. (*Id.*) Even in these early stages of his recovery, TSgt Schneider acknowledged how his actions hurt people, including the named victims. (*Id.* at 321.) He admitted that he had misled several applicants by falsely informing them that they had been accepted into Officer Training School. (*Id.*) Part of TSgt Schneider's amends included reimbursing victims for

[2] Prior to his court-martial, TSgt Schneider underwent a mental health evaluation pursuant to R.C.M. 706. (Pros. Ex. 1, Attachment 8.) Although confirming TSgt Schneider's mental health diagnoses, the report indicated that TSgt Schneider was able to appreciate the wrongfulness of his actions and that he was capable of understanding that nature of the proceedings against him. (*Id.*) TSgt Schneider does not challenge the providence of his plea based on a lack of mental responsibility.

their financial losses. (R. at 46, 48, 147.) On 26 April 2021, TSgt Schneider willingly cooperated with Security Forces investigators by waiving his right to remain silent under Article 31, UCMJ. When interviewed, he was "forthright and forthcoming and confessed to misleading and lying to applicants." (Pros. Ex. 1 at 12.) TSgt Schneider took responsibility for his actions, which he described as "disgusting." (*Id.*) TSgt Schneider chose to plead guilty to offer his sincerest apologies and to help "amend for the damage that [he] caused." (Def. Ex. Z at 5.)

During the sentencing hearing, six of the named victims provided unsworn victim impact statements. (R. at 242-43.) Before receiving them, the military asked the parties if they had any objections to the statements. (R. at 245.) After consideration of the raised objections, the military judge inquired whether there were any additional objections which the parties replied in the negative. Trial defense counsel objected as speculative to victim E.H.'s assertions that TSgt Schneider caused him to suffer "100 thousand dollars" worth of financial harm, and that he ruined his romantic relationship. (R. at 246, 247.) The military judge denied the first objection by holding that E.H. could offer an estimation. (R. at 247.) The military judge denied the second objection on the basis that E.H. was merely expressing his opinion. (R. at 249.) E.H. also asserted without objection that TSgt Schneider "should be held accountable for this to the fullest extent of the [UCMJ]." (Court Ex. A at 2; R. at 275-76.)

Victim I.B.'s unsworn insinuated that TSgt Schneider was responsible for I.B.'s apparent identity theft. (Court Ex. B at 3.) Over defense objection, the military judge permitted this to remain in consideration as permissible speculation that reflected I.B.'s feelings of betrayal. (R. at 153.) Additionally, I.B. made reference to two allegations not subject to the plea. The first of these was I.B.'s assertion that TSgt Schneider posed as a lieutenant colonel during a phone interview with him. (Court Ex. B at 1.) I.B. also described a situation in which TSgt Schneider

supposedly responded to his question by telling him to relax and get a free veterans day meal while TSgt Schneider and others in the room laughed, as if to mock him. (*Id.*) I.B. also made a general claim that he had suffered "$100,000" in financial harm. Although trial defense counsel made no objection to these assertions, the military judge imposed no limitation on their consideration.

Victim S.D.'s impact statement explained that "[a]llowing TSgt Schneider to continue to serve in any capacity or to receive any benefits provided from the Air Force is an insult to those who genuinely serve or have served our country." (CE E at 3.) Likewise, Victim M.J.'s impact statement suggested that TSgt Schneider was unworthy of his paygrade and that "a lesser punishment would not be appropriate." (Court Ex. G.) The military took both of these without objection or any stated limitation on the record to their use.

The plea agreement limited the maximum confinement that could be imposed to 365 days, but contained no other restrictions on the sentence. (App. Ex. VI at 2.) During their sentencing argument, trial counsel frequently referenced victim impact. (R. at 345-46.) The Government argued for the maximum confinement permitted under the plea agreement, tying it separately to each victim and the experiences that they related in their statements. (R. at 346-51.) After taking the victim impact statements and hearing the Government's argument, the military judge imposed the maximum sentence for confinement permitted, in addition to a reprimand, bad conduct discharge, and a reduction to the paygrade of E-1. (R. at 368.)

I.

THE MILITARY JUDGE ERRED BY CONSIDERING IMPERMISSIBLE MATTERS INCLUDED IN THE VICTIM IMPACT STATEMENTS TO ARRIVE AT THE SENTENCE IMPOSED.

Standard of Review

A military judge's interpretation of R.C.M. 1001 is a question of law that is reviewed de novo. *United States v. Edward*, 82 M.J. 239, 243 (C.A.A.F. 2022). Where there is an objection, the standard of review for whether the contents of a victim impact statement are compliant with the Rules for Courts-Martial is the abuse of discretion standard. *Id.* (quoting *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021). "A military judge abuses his discretion when his legal findings are erroneous, or when he makes a clearly erroneous finding of fact." *Id.* at 243 (citations omitted).

Even where an issue has been waived, this Court retains the authority to address errors raised for the first time on appeal. *United States v. Andersen*, 82 M.J. 543, 547 (A.F. Ct. Crim. App. 2022). This is in accordance with Article 66(c), UCMJ, which mandates that this 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." Art. 66, UCMJ. A matter not raised at trial is reviewed for plain error. *United States v. Schmidt*, 82 M.J. 68, 73 (C.A.A.F. 2022). Plain error is shown where: (1) there was error, (2) the error was clear and obvious, and (3) the error results in material prejudice to the appellant's substantial rights. *Id.*

Law & Analysis

R.C.M. 1001(c) provides that a crime victim has a right to be reasonably heard during presentencing. However, this right is substantively limited to presenting matters related to "any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." (R.C.M. 1001(c)(2)(B).) Moreover, a victim impact statement may not include "a recommendation for a specific sentence." (R.C.M. 1001(c)(4).)

Importantly, a victim impact statement "is not a mechanism whereby the government may slip in evidence in aggravation that would . . . be prohibited by the Military Rules of Evidence, or

information that does not relate to the impact from the offense of which the accused is convicted." *United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019). "[T]he military judge has an obligation to ensure the content of a victim's unsworn statement comports with the parameters of victim impact or mitigation," as defined in the Rules for Courts-Martial. *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021); (R.C.M. 1001, *Discussion* ("Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3).").)

Additionally, matters in aggravation during presentencing must be directly related "to the offenses of which the accused has been found guilty" and may not consist of "'general evidence of . . . uncharged misconduct.'" *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (quoting *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001)). This represents a "higher standard than mere relevance." *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (internal quotation marks omitted). For a direct link to be shown, the matters in aggravation must be "closely related in time, type, and/or often outcome, to the convicted crime." *Hardison*, 64 M.J. at 282. Even where this is shown, admission is barred where the probative value is substantially outweighed by the danger of unfair prejudice. *Id.* at 281.

A. E.H.'s Statement Contained Improper References to Matters Not Directly Related to the Offenses that TSgt Schneider Plead Guilty to and a Sentencing Recommendation.

The military judge abused his discretion by considering E.H.'s entire unsworn victim impact statement. Specifically, the military judge erred by allowing impermissible portions of the victim impact statement to influence the sentence imposed, over TSgt Schneider's objection. This included E.H.'s speculative claim of financial harm, his assertion that TSgt Schneider ruined his romantic relationship, and his recommendation for the maximum sentence to be imposed.

E.H. estimated that he suffered "100 thousand dollars" worth of financial loss due to TSgt Schneider. (R. at 246.) The victim impact statement provided no explanation for how E.H. arrived at that figure. Trial defense counsel objected to this as being too speculative to have a probative relationship to TSgt Schneider's convicted offense. (R. at 246.) The military judge overruled this objection on the basis that E.H.'s estimation of financial harm was a permissible matter. (R. at 247.) This was error. E.H.'s victim impact statement acknowledged the attenuated nature of his claim by stating that "calculations [could not] be exactly monetized." (Court Ex. A at 2; R. at 274.) This caused E.H.'s assertion to directly fall contrary to R.C.M. 1001(c)(2)(B)'s requirement that matters of victim impact directly relate to the offense. Without specific details for how TSgt Schneider's actions caused such an alarming financial impact, the military judge could only speculate about how the criminal conduct could have directly caused it. Given this, the military judge erred by taking E.H.'s claim into consideration.

Similarly, E.H.'s assertion that his romantic relationship at the time deteriorated because of TSgt Schneider's actions was too speculative to establish a direct connection for purposes of victim impact. Rather, E.H. purported that the relationship ended due to "continual changes with information and schedules" and "due to her interpretation of my character throughout this process and the inability to marry into an erratic life." (R. at 247; 248-49.) The military judge permitted this to remain in the victim impact statement over defense objection on the basis that E.H. could include it as his mere opinion. (*Id.*) This violated R.C.M. 1001(c)(2)(B)'s prohibition against inclusion of attenuated matters with no direct connection the offense.

Finally, E.H.'s recommendation that TSgt Schneider "should be held accountable for this to the fullest extent of the [UCMJ]" was grossly impermissible. (CE A at 2; R. at 275-76.) Although trial defense counsel articulated no objection to this statement, its admission was a clear

and obvious error in light of R.C.M. 1001(c)(3)'s prohibition against a victim recommending a specific sentence. *United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989) ("The question of the appropriateness of punishment is one which must be decided by the court-martial; it cannot be usurped by a witness.")

B. I.B.'s Statement Contained Improper References to Uncharged Conduct.

The military judge abused his discretion by allowing I.B. to insinuate through his victim impact statement that TSgt Schneider was responsible for I.B.'s identity theft. (R. at 250-51, 253; Court Ex. B at 3.) Specifically, I.B. stated that "[w]ithin a week of us finding out about TSgt. [sic] Schneider's scheme, we were notified that our identities were stolen." (Court Ex. B at 3.) In response to an objection, the military judge reasoned that because I.B. merely speculated whether TSgt Schneider was responsible, this remained admissible for showing that I.B. felt betrayed or lied to. (R. at 153.) In doing so, the military failed to correctly apply the limitations of R.C.M. 1001(c)(2)(B) which only allow for victim impact "directly relating to or arising from the offense." TSgt Schneider was not charged with identity theft, meaning that I.B.'s allegation was completely divorced from the rule. Moreover, without substantiation that the identity theft did, in fact, directly relate to the offense that TSgt Schneider was found guilty of, the allegation had no relevance to presentencing. Accordingly, the military judge erred by overruling the defense objection.

Additionally, although without objection, it was clear error for the military judge to receive and consider two other unrelated and uncharged allegations in I.B.'s unsworn. The first of these was I.B.'s assertion that TSgt Schneider had posed as a lieutenant colonel during a phone interview with him. (Court Ex. B at 1.) Furthermore, I.B. described a situation where TSgt Schneider allegedly responded to a question by telling him to relax and get a free veterans day meal, while TSgt Schneider and others in the room laughed. (*Id.*) I.B. saw this as TSgt Schneider mocking

him. (*Id.*) Furthermore, I.B. made a general claim, without substantiation, that he had suffered "$100,000" in financial harm.

I.B.'s references to matters that TSgt Schneider was not convicted of were impermissible, and the military judge committed plain error by considering those statements. General assertions of uncharged misconduct are inappropriate for consideration during sentencing. *Hardison* 64 M.J. at 281. This is reflected in R.C.M. 1001(c)(3) which limits victim impact to matters "directly relating to or arising from *the offense of which the accused has been found guilty*." (emphasis added). The uncharged conduct detailed in I.B's unsworn violated this limitation, and should have been barred from consideration by the military judge. Similarly, I.B. general assertion of financial harm was without the foundation necessary to show a direct connection. Accordingly, these aspects of the unsworn statement were impermissible, and should not have been considered by the military judge.

C. S.D. and M.J.'s Victim Impact Statements Improperly Made Specific Recommendations for the Sentence.

The victim impact statements offered by S.D. and M.J. made improper recommendations for a specific sentence which the military judge erred by taking into consideration. Without objection, the military judge permitted S.D. to assert that "[a]llowing TSgt Schneider to continue to serve in any capacity or to receive any benefits provided from the Air Force is an insult to those who genuinely serve or have served our country." (CE E at 3.) This amounted to a specific recommendation for TSgt Schneider to receive a punitive discharge which was prohibited by R.C.M. 1001(c)(3). *See also Ohrt*, 28 M.J. at 305 (holding that the use of euphemisms to suggest a punitive discharge by witnesses is impermissible). Accordingly, the military judge erred by allowing this to remain under consideration.

Similarly, the military judge abused his discretion and failed to act as the appropriate gatekeeper by taking the unsworn of M.J. into consideration in its entirety. In particular, M.J. made a specific sentencing recommendation related to TSgt Schneider's paygrade, implying that the punishment should include a reduction in rank and that "a lesser punishment would not be appropriate." (Court Ex. G.) Although trial defense counsel indicated that they were not raising an objection to the statement about a lesser punishment being inappropriate, the portion relating to TSgt Schneider's rank represents a specific recommendation for sentencing that should have been barred from consideration under R.C.M. 1001(c)(3).

D. Admission of the Victim Impact Statements was Prejudicial.

The erroneous inclusion of the impermissible matters raised in the victim impact statements was prejudicial to TSgt Schneider. Where the contents of a victim impact statement produce error, the test for prejudice is "whether the error substantially influenced the adjudged sentence." *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018). The Government "bears the burden of demonstrating that the admission of erroneous evidence was harmless." *United States v. Cunningham*, 83 M.J. 367, 372 (C.A.A.F. 2023) (quoting *United States v. Edwards*, 82 M.J. 239, 246 (C.A.A.F. 2022)). Although military judges are presumed to know the permissible purposes for which matters on sentencing can be taken into consideration, the military judge's failure to limit the contents of the victim impact statements carries the appearance that the impermissible matters influenced the sentence imposed. *Cf. United States v. Hill*, 62 M.J. 271, 276 (C.A.A.F. 2006). Moreover, even if these errors individually were insufficient to warrant relief, their cumulative effect calls for the sentence to be reassessed. *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999) Prejudice in sentencing is determined based on "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in

question; and (4) the quality of the evidence in question." *Edwards*, 82 M.J. at 247 (citing *Barker*, 77 M.J. at 384).[3]

Applying the first factor, the strength of the Government's case, the Government presented virtually no matters in aggravation aside from the victim impact statements. Rather, the entirety of the Government's case relied upon victim impact, which they used to advocate for the harshest sentence permissible. (R. at 341, 345-46.) This is reflected in their presentencing argument, which focused on the matters related to the named victims. Without this, the Government's sentencing case was weak. Contrasting this with the second factor, the defense case contained substantial mitigation evidence, emphasizing TSgt Schneider's otherwise exemplary Air Force career, his considerable mental health struggles at the time of the offenses, and his full and continual acceptance of responsibility for his actions beginning at the earliest opportunity. *Infra*, AE II.

Given this, the materiality of the matters impermissibly raised in the victim impact statements was low. E.H.'s assertions of financial and personal harm lacked a foundational basis to show a direct connection to TSgt Schneider's actions. Rather, these referred to an expanded range of life circumstances that E.H. had experienced and placed all the blame on TSgt Schneider. Likewise, I.B.'s references to uncharged conduct was outside the bounds of the offenses that TSgt Schneider plead guilty to. Collectively, these matters only served to paint TSgt Schneider in a negative light apart from what had already been received into evidence or used during the guilty plea inquiry. The military judge's consideration of all of this is especially alarming given the

[3] The validity of the *Barker* factors for determining prejudicial error in the context of sentencing has been questioned by the Court of Appeals for the Armed Forces. *United States v. Cunningham*, 83 M.J. 367, n.4 (C.A.A.F. 2023). TSgt Schneider challenges the use of the *Barker* factors to determine whether he was prejudiced by the errors outlined in this brief and urges this court to adopt a more appropriate standard that accounts for the total effect of the errors.

frequent sentencing recommendations made by the victims. This lack of materiality was contrary to any valid purpose that the matters raised could have been used in the military judge's determination of a sentence. Despite this, the quality of the statements, and their tendency to have some sway over the sentence, was high given victims' proximity to the offenses. Collectively, each of these erroneously considered matters calls into question the sentence that the military judge imposed.

WHEREFORE, TSgt Schneider respectfully requests that this Court reassess his sentence to include disapproving the bad conduct discharge.

II.

THE SENTENCE IMPOSED AGAINST TSGT SCHNEIDER WAS INAPPROPRIATELY SEVERE GIVEN HIS MILITARY BACKGROUND AND PERSONAL CIRCUMSTANCES DURING THE OFFENSES.

Standard of Review

Sentence appropriateness is reviewed *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law & Analysis

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) (2016). "Article 66(c)'s sentence appropriateness provision is 'a sweeping Congressional mandate to ensure a fair and just punishment for every accused.'"[4] *United States v. Baier*, 60 M.J. 382, 384

[4] 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, 83 Fed. Reg. 9889, 9890 (8 Mar. 2018).

(C.A.A.F. 2005) (quoting *United States v. Bauerbach*, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001) (quoting *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955))). 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).

In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (alteration in original) (citation omitted).

The sentence adjudged against TSgt Schneider was inappropriately severe given the facts and circumstances of the case, to include TSgt Schneider's uncharacteristic behavior and severe mental health issues that he faced at the time of the offenses.

A. The Sentence Imposed was Incompatible with TSgt Schneider's Service Record.

TSgt Schneider's service record defies the severity of the sentence and demonstrates that the charged conduct was uncharacteristic of his typical behavior. Prior to this episode, TSgt Schneider was an exemplary Airman that continually performed at the very highest level among recruiters. His enlisted performance reports are virtually flawless, save for the ones occurring after the charged conduct came to light. (PE 3.) TSgt Schneider's awards and accolades are voluminous, showing that he was truly among the best in his field. Even after being relieved of these duties and re-assigned to the Offutt Field House, TSgt Schneider proved to be a "hard working, positive and a reliable asset." (DE B.) This demonstrates that TSgt Schneider's misconduct was the result of extenuating circumstances, namely his mental health crisis and alcohol abuse disorder. TSgt Schneider's actions during his crisis are completely inconsistent with how he conducted himself before and after. This should have warranted a lesser sentence than the

one imposed.

B. The Total Matters Contained in the Record Chiefly Concerned TSgt Schneider's Severe Illness.

Despite TSgt Schneider's admirable service record, one of the central narratives during pre-sentencing was the dire circumstances that he faced at the time of the misconduct. These circumstances were strongly mitigating and were the sole explanation for why he did the things he did. Specifically, TSgt Schneider was in the grips of a severe alcohol abuse disorder ultimately requiring in-patient treatment and a long stint in rehabilitation. This medical issue was so severe that TSgt Schneider expected to die from it. Consequently, TSgt Schneider found himself going into "survival mode," biding his time until he could drink again. He confessed that he did not understand why he made the false statements. After all, such conduct was a substantial deviation from this typical behavior and completely inconsistent with the character he demonstrated while in a sober state of mind. This shows that TSgt Schneider was driven by the chaos in his life, rather than a desire to purposely harm anyone or to benefit himself at the detriment of others. This case is thus distinct from one in which the accused was trying to enrich themselves by defrauding others. These circumstances strongly mitigated against the severity of the punishment imposed.

C. The Nature and Seriousness of the Offenses is Undermined by the Lack of Malicious Intent.

The offenses committed are inherently tied to TSgt Schneider's severe mental health problems. While the named victim's spoke of the various impacts that his actions had on their lives, TSgt Schneider did not appear to be acting maliciously. Nor did he have anything to gain from it. Rather, TSgt Schneider committed these offenses at a time when he was tremendously vulnerable and in great need of medical attention. The absence of any intention by TSgt Schneider to harm anyone mitigates against the sentence adjudged.

D. TSgt Schneider as a Particular Appellant is a Good Candidate for Reduced Sentence.

TSgt Schneider's sentence is inconsistent with the moral character he demonstrated following his mental health treatment. TSgt Schneider owned up to his misconduct early and took remedial measures as soon as he completed the treatment. These measures included his recognition that he needed to make amends, financial compensation to the victims, voluntary cooperations with security forces, and decision to plead guilty. At every step, TSgt Schneider showed tremendous contrition for his actions. This expression of character defies the severe sentence that was imposed against him. Rather, it shows him to be a prime candidate for a lower sentence than the one decided by the military judge.

WHEREFORE, TSgt Schneider respectfully requests that this Court reassess his sentence to include disapproving the bad conduct discharge.

III.

ILLEGIBLE PORTIONS OF THE RECORD OF TRIAL REQUIRE SENTENCING RELIEF OR REMAND FOR CORRECTION.

Additional Facts

During presentencing, the military judge admitted Prosecution Exhibit 3, which includes TSgt Schneider's enlisted performance reports (EPR). (R. at 142.) Pages 5 and 6 of the exhibit appear to be a referral EPR, but the pages are illegible. (PE 3 at 5-6.) Additionally, page 8 appears to be the memorandum accompanying the referral EPR, but it is blurry and does not legibly show whether TSgt Schneider elected to respond to the report. (*Id.* at 8.)

Standard of Review

Whether a record of trial is incomplete or not substantially verbatim is reviewed *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law and Analysis

The record of trial is "the very heart of the criminal proceedings and the single essential element to meaningful appellate review." *United States v. Credit*, 4 M.J. 118, 119 (C.M.A. 1977). A complete record is required for every court-martial in which the adjudged sentence includes "a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months." Article 54(c)(2), 10 U.S.C. § 854(c)(2). A complete record includes "[e]xhibits . . . and any appellate exhibits." R.C.M. 1112(b)(6).

The threshold question is whether the "omitted material was substantial, either qualitatively or quantitatively." *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (internal quotation marks omitted). "Omissions are quantitatively substantial unless the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness." *Id.* (internal punctuation and citations omitted).

A substantial omission in a record of trial raises a presumption of prejudice to an appellant, which the Government must rebut. *Id.* "Moreover, since in military criminal law administration the Government bears responsibility for preparing the record of trial, it is fitting that every inference be drawn against the Government with respect to the existence of prejudice because of an omission." *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981) (internal citation omitted).

The illegible referral EPR included in the ROT represents a substantial omission warranting relief. The enlisted performance reports introduced by trial counsel were relevant to sentencing under R.C.M. 1001(b)(2). This provision explains that "trial counsel may obtain and introduce personnel records of the accused" consisting of records reflecting "the past military efficiency, conduct, performance, and history of the accused." R.C.M. 1001(b)(2). Given the

derogatory nature of the referral EPR, this document was introduced against TSgt Schneider in support of the Government's case for a harsher sentence. Hence, the referral EPR and accompanying memorandum raise a substantial matter against TSgt Schneider, which called for a defense. But the illegible documents contained in the ROT prevent TSgt Schneider from determining their impact on his court-martial and from raising potential errors on appeal.

WHEREFORE, TSgt Schneider requests that this Court reassess his sentence to include disapproving the bad conduct discharge or remanding this case to correct the omission in the record.

IV.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN TSGT SCHNEIDER WAS CONVICTED OF A NON-VIOLENT OFFENSE AND THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021).

Additional Facts

After his conviction, the Government determined that TSgt Schneider's conviction met the firearm prohibition under 18 U.S.C. § 922 as reflected on the Entry of Judgement and Statement of Trial Results. (ROT, Vol. 1, Entry of Judgment, 3 January 2023.) The Government did not specify why, or under which section, his case met the requirements of 18 U.S.C. § 922. *Id.*

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation *de novo*. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021).

Law and Analysis

1. 18 U.S.C. § 922(g) is unconstitutional as applied to TSgt Schneider.

The test for applying the Second Amendment is:

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

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022) (citation omitted).

In applying this test, the Fifth Circuit recently held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.' Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated." *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023) (citation omitted). Notably, Rahimi was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at 448-49.

The Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 461 (citation omitted). Therefore, the Government bears the burden of justifying its regulation.

Second, the Fifth Circuit recognized that *D.C. v. Heller*, 554 U.S. 570 (2008), and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at 451. The Fifth Circuit explained that "*Heller*'s reference to 'law-abiding, responsible' citizens meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* at 452. Here the issue is whether the Founders would have "presumptively" tolerated a citizen like TSgt Schneider being stripped of his right to keep and bear arms after being convicted for a non-violent offense. *Id.*

Third, the Fifth Circuit held that "[t]he Government fails to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id*. at 460. If the Government failed to prove that our Nation's historical tradition of firearm regulation did not include a violent offender who pleaded guilty to possessing a firearm while under an agreed upon domestic violence restraining order, then it likely cannot prove that its firearm prohibition on TSgt Schneider for non-violent offenses would be constitutional.

A further problem with the Statement of Trial Results and Entry of Judgment is that the Government did not indicate which specific subsection of § 922 it relied on to find that TSgt Schneider fell under the firearm prohibition. Thus, TSgt Schneider is unable to argue which specific subsection of § 922 is unconstitutional in his case, although he knows it would not be the domestic violence or drugs section given the facts of his case. Regardless, given the non-violent nature of the facts of his case, and the *Rahimi* Court's holding, it appears that the Government would not be able to meet its burden of proving a historical analog that barred non-violent offenders from possessing firearms. *See also Range v. AG United States*, 69 F.4th 96, 106 (3d Cir. 2023) (holding application of 18 U.S.C. § 922(g)(1) to defendant convicted of providing false information on food stamp application unconstitutional.)

2. The Court may order correction of the Entry of Judgment and Statement of Trial Results.

In *United States v. Lepore*, citing to the 2016 edition of the Rules for Courts-Martial, this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021). Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction

relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760. However, this Court emphasized, "To be clear, we do not hold that this court lacks authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority." *Id.*

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

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

Additionally, *Lepore* is distinguishable from this case. In *Lepore*, this Court made clear that "[a]ll references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at n.1. This Court then emphasized "the mere fact that a firearms prohibition annotation, *not required by the Rules for*

Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." *Id.* at 763 (emphasis added). The newer 2019 rules, however, contain language that both the Statement of Trial Results and the Entry of Judgment contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6); 1111(b)(3)(F). DAFI 51-201, *Administration of Military Justice*, dated 8 April 2022, para 13.3 required the Statement of Trial results to include "whether the following criteria are met . . . firearm prohibitions." As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered. Even if this Court does not find this argument persuasive, it still should consider the issue under *Lepore* since this issue is not an administrative fixing of paperwork, but an issue of constitutional magnitude.

WHEREFORE, TSgt Schneider requests this Court find the Government's firearm prohibition is unconstitutional, overrule *Lepore* in light of *Lemire*, and order that the Government correct the Statement of Trial Results and Entry of Judgement to remove the firearm prohibition.

Respectfully submitted,

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Certificate of Filing and Service

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on April 9, 2024.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**ANSWER TO ASSIGNMENTS**
Appellee,	)	**OF ERROR**
	)	
v.	)	Before Panel No. 3
	)	
Technical Sergeant (E-6)	)	No. ACM 40403
ROBERT D. SCHNEIDER	)	
United States Air Force	)	9 May 2024
Appellant.	)	

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

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INDEX OF BRIEF

TABLE OF AUTHORITIES iv

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 2

ARGUMENT 10

I.

THE MILITARY JUDGE DID NOT ERR BY ACCEPTING VICTIM IMPACT STATEMENTS THAT ADDRESSED VICTIM IMPACT DIRECTLY RELATING TO OR ARISING FROM THE OFFENSE OF WHICH THE ACCUSED WAS FOUND GUILTY.

Additional Facts 10

Standard of Review 13

Law 14

Analysis 15

A. EH's statements were not erroneous because they fell within the scope of proper financial, social, and psychological victim impact. 15

B. IB's statements were not erroneous because they fell within the scope of proper financial and psychological victim impact. 18

C. Appellant waived any objection to SN's victim impact statement at trial. Even if this Court pierces waiver, SN's victim impact statement did not provide a specific sentencing recommendation. 20

D. Appellant waived any objection to MJ's victim impact statement at trial. Even if this Court pierces waiver, there was not a substantial influence on the sentence. 21

II.

APPELLANT'S SENTENCE WAS NOT INAPPROPRIATELY SEVERE.

Additional Facts.....22

Standard of Review.....23

Law and Analysis.....23

A. Appellant's service record and matters in mitigation do not outweigh the injury Appellant caused to eight people and the Air Force's reputation over two years......25

B. Reducing a sentence for good behavior is a matter in clemency which is outside the purview of this Court......27

III.

APPELLANT WAIVED ANY OBJECTION TO PROSECUTION EXHIBIT 3 AND, IN ANY EVENT, THE RECORD OF TRIAL IS COMPLETE AND ANY ARGUABLE OMISSION WAS INSUBSTANTIAL AND HARMLESS.

Additional Facts.....28

Standard of Review.....28

Law and Analysis.....29

IV.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF THIS COURT DID POSSESS JURISDICTION TO REVIEW THIS ISSUE, THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT CORRECTLY ANNOTATED THAT APPELLANT'S CONVICTION REQUIRED THAT HE BE CRIMINALLY INDEXED PER THE FIREARM PROHIBITION UNDER 18 U.S.C. § 922.

Law and Analysis 31

A. This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922, because that requirement is not part of the findings or sentence. 32

B. The Statement of Trial Results and Entry of Judgment were prepared correctly in accordance with the applicable Air Force Instruction. 35

C. The Firearm Possession Prohibitions in the Gun Control Act of 1968 are Constitutional. 36

CONCLUSION 39

CERTIFICATE OF FILING AND SERVICE 40

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

District of Columbia v. Heller, 554 U.S. 570 (2008) ..... *passim*

McDonald v. City of Chicago, 561 U.S. 742 (2010) 36, 37

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

United States v. Gonzales, 520 U.S. 1 (1997) 14, 16

COURT OF APPEALS FOR THE ARMED FORCES

United States v. Ahern, 76 M.J. 194 (C.A.A.F. 2017) 29

United States v. Arness, 74 M.J. 441 (C.A.A.F. 2015) 34

United States v. Ballard, 20 M.J. 282 (C.M.R. 1985) 23

United States v. Barker, 77 M.J. 377 (C.A.A.F. 2018) ..... *passim*

United States v. Campos, 67 M.J. 330 (C.A.A.F. 2009) 14, 17, 20, 21

United States v. Chin, 75 M.J. 220 (C.A.A.F. 2016) 14, 20

United States v. Davenport, 73 M.J. 373 (C.A.A.F. 2014) 28, 29, 30

United States v. Davis, 79 M.J. 329 (C.A.A.F. 2020) 13

United States v. Edwards, 35 M.J. 351 (C.M.A. 1992) 27

United States v. Edwards, 82 M.J. 239 (C.A.A.F 2022) 15

United States v. Erickson, 65 M.J. 221 (C.A.A.F. 2007) 13

United States v. Gladue, 67 M.J. 311 (C.A.A.F. 2009) 13, 17

United States v. Harrow, 65 M.J. 190 (C.A.A.F. 2007) 15

United States v. Healy, 26 M.J. 394 (C.M.A. 1988) 23

United States v. Henry, 53 M.J. 108 (C.A.A.F. 2000) 29, 30

United States v. Lashley, 14 M.J. 7 (C.M.A. 1982) 29

United States v. Lemire, 82 M.J. 263 (C.A.A.F. 2022) ..... *passim*

United States v. Nerad, 69 M.J. 138 (C.A.A.F. 2010) 23, 27

AIR FORCE COURT OF CRIMINAL APPEALS

United States v. Anderson, 67 M.J. 703 (A.F. Ct. Crim. App. 2009) 23

United States v. Dawson, 65 M.J. 848 (A.F. Ct. Crim. App. 2007) 33

United States v. Denney, No. ACM 40360, 2024 CCA LEXIS 101 (A.F. Ct. Crim. App. 8 March 2024) 31

United States v. Fields, 74 M.J. 619 (A.F. Ct. Crim. App. 2015) 30

United States v. Lepore, 81 M.J. 759 (A.F. Ct. Crim. App. 2021) ..... *passim*

SERVICE COURTS OF CRIMINAL APPEALS

United States v. Baratta, 77 M.J. 691 (N-M. Corps Ct. Crim. App. 2018) 35

United States v. Conner, 2024 CCA LEXIS 42 (A. Ct. Crim. App. 24 January 2024) 21, 22

United States v. Pennington, No. 20190605, 2021 CCA LEXIS 101 (A. Ct. Crim. App. 2 March 2021) 34

United States v. Sauk, 74 M.J. 594 (A.F. Ct. Crim. App. 2015) .....

United States v. Tellor, No. ACM 39770 (f rev), 2021 CCA LEXIS 444 (A.F. Ct. Crim. App. 1 September 2021) 13, 18

FEDERAL CIRCUIT COURTS

Folajtar v. Attorney General of the United States, 980 F.3d 897 (3rd Cir. 2020) 38

United States v. Everist, 368 F.3d 517 (5th Cir. 2004) 38

United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023) ..... *passim*

OTHER AUTHORITIES

10 U.S.C. § 866(d) ..... *passim*

18 U.S.C. § 922..... *passim*

Manual for Courts-Martial, A12-3 (2019 ed.) 22

MCM, pt. IV, ¶41.d(1) (2019 ed.) 32

MCM, pt. IV, ¶41.b(1)(d) (2019 ed.) 26

R.C.M. 1001(c) ..... *passim*

R.C.M. 1001(d)(1)(A) 25, 26

R.C.M. 1002(a) 24

R.C.M. 1003(b)(8)(C) 24

R.C.M. 1111(c)(2) 34

Second Amendment, U.S. Const. Amend. II ..... *passim*

Any, Merriam Webster's Dictionary (2024 online ed.) 14

Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, dated 14 April 2022 ..... *passim*

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 3
Technical Sergeant (E-6) **ROBERT D. SCHNEIDER** United States Air Force *Appellant.*	)	No. ACM 40403
	)	9 May 2024

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED BY CONSIDERING IMPERMISSIBLE MATTERS INCLUDED IN THE VICTIM IMPACT STATEMENTS IN ARRIVING AT THE SENTENCE IMPOSED.

II.

WHETHER THE SENTENCE IMPOSED AGAINST TSGT SCHNEIDER WAS INAPPROPRIATELY SEVERE GIVEN HIS MILITARY BACKGROUND AND PERSONAL CIRCUMSTANCES DURING THE OFFENSES.

III.

WHETHER ILLEGIBLE PORTIONS OF THE RECORD OF TRIAL REQUIRE SENTENCING RELIEF OR REMAND FOR CORRECTION.

IV.

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

STATEMENT OF CASE

A court-martial composed of a military judge sitting alone, convicted Appellant of one charge and eight specifications of making false official statements in violation of Article 107, UCMJ. (R. at 24, 138). Pursuant to a plea agreement, Appellant pleaded guilty to all eight specifications of Charge II, and Charge I and its specification were withdrawn and dismissed with prejudice. (R. at 27; App. Ex. VI). The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 12 months, and to be discharged with a bad-conduct discharge. (R. at 368; *Entry of Judgment*, dated 3 January 2023, ROT, Vol. 1). The convening authority took no action on the findings or sentence. (*Convening Authority Decision on Action*, dated 16 December 2022, ROT, Vol. 1). The convening authority denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, and his request for waiver of automatic forfeitures. (Id.)

STATEMENT OF FACTS

Appellant lied to eight United States Air Force Officer Training School (OTS) applicants. (Pros. Ex. 1). He told four of them that an officer selection board chose them to attend OTS, when they were not selected. (Id.) He told three of them that they were alternates to attend OTS,

when they were not alternates. (Id.) And he told one of them that he had an appointment at the Military Entrance Processing Station (MEPS), when there was no such appointment. (Id.)

Charge II, Specification 1: False Official Statements to EH

Appellant worked as an Air Force health professions recruiter with the 348th Recruiting Squadron. (R. at 39-40). EH was a physical therapist, and he expressed interest in joining the Air Force as a physical therapist. (R. at 45, 143). In April 2018, Appellant contacted EH to help EH apply to become an Air Force officer, but the "actual application process" Appellant walked EH through, "was not legitimate." (R. at 39-40, 44, 144). In October 2020, Appellant told EH "that he was accepted into OTS and had a starting date." (R. at 43, 150). But Appellant never submitted EH's application. Thus, the statement that EH was accepted to attend OTS was false. (R. at 46). Appellant knew EH was not accepted and the statement was false. (R. at 47). Appellant made all his statements to EH while acting in his official capacity as an Air Force recruiter. (R. at 43). EH testified that he trusted Appellant, "Again, he holds a substantial ranking as an NCO and that he conducted himself in a manner that I had no other reason than to believe was legitimate." (R. at 149).

During his guilty plea inquiry, Appellant claimed:

> At the time when I made false statements to him, the other people involved in this case, I was going through a mental health crisis. I was in the middle of the COVID-19 pandemic and I was drinking extensively every day. The conditions that were conflicting me led me to operate in a survival mode where I struggled to fully grasp the nature and consequences of my actions.

(R. at 40; *See also* R. at 55, 65, 74, 81, 91, 105). But Appellant's alcoholism did not prevent him "from appreciating, you know, what was occurring with Dr. [EH]." (R. at 52). "While my alcoholism definitely affected how I acted, I still fully understood my actions and what I was

doing." (R. at 52). EH also testified that Appellant was coherent and did not slur his words when they spoke on the phone. (R. at 145).

EH testified about his feelings when learning he was not selected for OTS:

> But it really just devalued what I had gone through, what I had prepared myself for, what I had prepared my friends and family for by sharing the news. . . . It – it weighed on me because I knew of the shame that it would take to inform everybody that this, in fact, was not true.

(R. at 151). EH then testified, "[I]f I had a loved one expressing interest in the military service, I would give them a great deal of reservation due to this process." (R. at 155).

Appellant's actions impacted EH during the years they were in contact, and EH explained as much in his victim impact statement. (R. at 272-276; Court Ex. A). Appellant required EH "to produce or complete documents in an urgent manner" or else his application would be delayed. (R. at 272; Court Exhibit A). Appellant also required EH to attend appointments that were typically cancelled causing EH to miss work forcing his coworkers to cover his duties. (R. at 272; Court Ex. A). EH explained the financial impact of Appellant's actions. He incurred travel expenses, bought uniforms, and lost wages because of quitting his job in anticipation of attending OTS. (R. at 273-274; Court Ex. A). Specifically, EH's job provided a $62,500 loan reimbursement program, but because EH relied on Appellant's statements, he quit his job forfeiting the loan reimbursement benefit. (R. at 273; Court Ex. A). EH also testified about this loan repayment program during the government's sentencing case-in-chief. (R. at 163). EH estimated in his victim impact statement that the financial loss he incurred because of expenses, lost wages, and lost benefits was more than $100,000. (R. at 274; Court Ex. A). EH's romantic and professional relationships were also strained by the uncertainty Appellant inflicted on EH. (R. at 274). What is more, EH's view of the Air Force was forever tainted. (R. at 275).

Charge II, Specification 2: False Official Statements to IB

IB expressed interest in joining the Air Force in a medical field, and Appellant worked with IB as his health professionals recruiter. (R. at 55, 58). In December 2019, Appellant contacted IB to help IB apply to become an Air Force officer. (Pros. Ex. 1 at 5). In October 2020, Appellant told IB that he was selected for OTS, but IB was not selected for OTS. (R. at 55, 57).

IB testified without objection, "My identity was stolen and we don't know who that was or why that was." (R. at 206). On cross-examination, trial defense counsel asked IB if anyone told him Appellant stole his identity. (R. at 209). IB said, "They could not—the IRS could not tell us one way or the other if he did or did not." (Id.) Upon clarification from trial defense counsel, IB, said no one told him Appellant stole his identity. (R. at 210).

IB stated in his victim impact statement, "My wife and I have both turned down better paying jobs and opportunities for advancement, due to the belief that we would be moving any time for the opportunity to join the Air Force." (R. at 278.). Both IB and his wife suffered lost wages when they quit their jobs to attend OTS training and move to St. Louis. (R. at 281-282).

Appellant told IB that he would be stationed at Scott Air Force Base, and he could sell his house and look for a house in St. Louis, Missouri, which IB then did. (Pros. Ex. 1 at 5; Court Ex. B). In late fall 2020, Appellant then told IB not to pack his belongings because the Air Force would send movers to pack for him. (Id.). In January 2021, Appellant called IB and told him the movers cancelled, and IB would need to move his belongings himself. (Id.). IB's sold his house already, and he and his wife were forced to move everything into a storage unit. (Id.). IB put earnest money of $1,400 down on a

house in St. Louis and was travelling to Montgomery, Alabama for training, when he was notified of Appellant's lies. (Pros. Ex. 1 at 5; Court Ex. B; R. at 209). Because IB was not actually moving to St. Louis, he lost the earnest money, and he and his wife were without meaningful work or a home with their infant for three months. (R. at 282; Court Ex. B).

IB still joined the Air Force, but his experience has been tainted because of Appellant's actions. IB explained, "I have had to navigate my Air Force career in a way that tries to remain honest without disclosing this dark time to my leadership and work relationships." (R. at 284). IB also stated that his family is skeptical of his service, "There is a palpable change in the way they view the military since this event. Their pride for me being in uniform has diminished and this makes me sad." (R. at 284).

Charge II, Specification 3: False Official Statements to JD

JD expressed interest in joining the Air Force in a medical field, and Appellant worked with JD as his health professionals recruiter. (R. at 66-67). In early 2020, Appellant contacted JD to help him apply to become an Air Force officer. (Pros. Ex. 1 at 6). In February 2021, Appellant told JD that he was selected for OTS, but JD was not selected for OTS. (Pros. Ex. 1 at 6; R. at 65). Appellant had not submitted JD's paperwork or application. (Pros. Ex. 1 at 6). Only after JD drove to Omaha, Nebraska on his way to OTS at Appellant's behest, did JD learn of Appellant's false statements to him. (Pros. Ex. 1 at 7).

In his victim impact statement, JD stated, Appellant asked him to send sensitive material, such as social security cards and birth certificates for all JD's family members. (Court Ex. C). JD sent the materials to Appellant because he thought they were required for the officer selection process. (Id.). JD did not know who had access to the sensitive materials, and he was in constant fear that his identity could be stolen. (Id.). Eventually, JD

became a member of the Air Force – as a rather than a as Appellant promised – as a Medical Service Corps Officer, but his view of the Air Force has been "severely impacted" by Appellant's actions. (Id.).

Charge II, Specification 4: False Official Statements to JH

JH expressed interest in joining the Air Force in a medical field, and Appellant worked with JH as his health professionals recruiter. (Pros. Ex. 1 at 7-8; R. at 73). In December 2019, Appellant contacted JH to help JH apply to become an Air Force officer, and JH sent Appellant medical records to acquire a waiver for a knee injury. (Id.). In December 2021, Appellant told JH that he was selected for OTS, but JH was not selected for OTS. (Pros. Ex. 1 at 8; R. at 76). Appellant had not submitted JH's paperwork or application, and when JH called the recruiting office Appellant's leadership explained the statements Appellant made to JH were false. (Pros. Ex. 1 at 6). JH did not provide a written or oral victim impact statement.

Charge II, Specification 5: False Official Statements to AC

AC expressed interest in the Health Professions Scholarship Program, and Appellant worked with AC to fill out forms. (Pros. Ex. 1 at 8). In late 2018 or early 2019, Appellant contacted AC to help AC apply to become an Air Force officer. (Pros. Ex. 1 at 9). In December 2021, Appellant told AC that she was selected as an alternate for OTS, but AC was not selected for OTS. (Pros. Ex. 1 at 9; R. at 80). Appellant never submitted AC's paperwork or application. (Pros. Ex. 1 at 8).

In her victim impact statement AC explained she relied on Appellant's statements that she had a high likelihood of commissioning into the Air Force. (Court Ex. D at 2). Because Appellant never turned in her application, AC missed out on applying to the actual Health

Professions Scholarship Program. (Id.). AC also turned down residencies, fellowships, and civilian employment in anticipation of commissioning into the Air Force. (Id.).

Charge II, Specification 6: False Official Statements to SN

SN[1] worked with a different recruiter and was referred to Appellant in March 2018. (Pros. Ex. 1 at 9). In April or May 2020, Appellant told SN that she was selected as an alternate for OTS, but SN was not selected for OTS. (Pros. Ex. 1 at 9; R. at 90). In October 2020, SN reached out to Appellant to see if she was still an alternate. (Pros. Ex. 1 at 10). Appellant told her she was no longer needed. (Id.). Appellant never submitted SN's paperwork or application. (Id.).

SN testified that multiple people in her family served in the armed forces. (R. at 169). And SN testified that after she found out about Appellant's lies, she felt "[a]nger, shock, frustration, just disbelief." (R. at 173). She explained, "[I]t was a dream of mine and I found out that it wasn't even—the answer that I got wasn't even true; an answer that I had been trying to get since 2017." (Id.). SN stated she tells anyone who wants to join the Air Force "of my experience because I don't want someone to go through what I had to do." (R. at 174-175).

In her victim impact statement, SN explained that the travel expenses to attend multiple appointments impacted her finances. (Court Ex. E). She recounted the stress and mental toll Appellant took on her by deceiving her, and ultimately, he denied her a genuine opportunity to apply to become an Air Force officer. (Id.). Because of the mental toll Appellant's actions took on her, SN did not try to apply again with an honest recruiter. (Id.).

[1] Appellant erroneously refers to the victim of Charge II, Specification 6 as SD, but her initials are SN. None of Appellant's eight victims have the initials SD.

Charge II, Specification 7: False Official Statements to MM

In August and October 2019, MM began communicating with Appellant in his official role as an Air Force recruiter. (Pros Ex. 1 at 10). In January or February 2021, Appellant told MM that she was selected as an alternate for OTS, but MM was not selected as an alternate. (Pros. Ex. 1 at 10; R. at 97).

In her victim impact statement, MM recounted the time and income she lost taking time off work to gather application materials that Appellant requested, attend appointments that were cancelled last minute, and attend interviews that MM did not realize were fake at the time. (Court Ex. F). She and her family are now fearful that another individual has access to their personal information. (Court Ex. F). Her view of the Air Force, and her family's view – to include that of her Air Force veteran father – were altered. "I no longer have the same respect for this branch of government that I once did." (Court Ex. F at 1).

Charge II, Specification 8: False Official Statements to MJ

In early 2020, MJ expressed interest in joining the Air Force by going to the recruiting website and contacting a recruiter. (Pros. Ex. 1 at 11). In January 2020, MJ first encountered Appellant in his official role as an Air Force recruiter. (R. at 185). Per Appellant's requests, MJ sent Appellant several documents, social security numbers, security clearance information, and transcripts. (Pros. Ex. 1 at 11; R. at 187). Appellant never submitted any of MJ's paperwork to join the Air Force. (Id.)

In January or February 2021, Appellant told MJ that he had an appointment at the Military Entrance Processing Station five hours away. (Pros. Ex. 1 at 11; R. at 187). On the day of the appointment, MJ drove about four hours when he received a call from Appellant that the

appointment was cancelled. (Pros. Ex. 1 at 11; R. at 188). This statement was untrue; no such appointment was ever scheduled. (Pros. Ex. 1 at 11).

MJ testified that because of Appellant's statements, he chose a month-to-month lease rather than a lower priced long-term lease, and he passed up other job opportunities in anticipation of joining the Air Force. (R. at 189). In his victim impact statement, MJ – a Navy veteran looking to join the Air Force – explained the anger, confusion, and distress he experienced as Appellant led him to believe he was applying to the Air Force. (Court Ex. G). Appellant misled MJ over the course of a year. (Id.). MJ said, "[H]e could have told me I didn't make it to the next phase and stopped 'recruiting me' but he kept going . . . There was always a new phase or a next step he had me looking forward to." (Id.) MJ also expressed his distrust of Air Force officials – even those calling to set up interviews with him and to organize his attendance at the court-martial. (Id.).

Additional facts necessary for the disposition of these issues are set forth in the argument sections below.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR BY ACCEPTING VICTIM IMPACT STATEMENTS THAT ADDRESSED VICTIM IMPACT DIRECTLY RELATING TO OR ARISING FROM THE OFFENSE OF WHICH THE ACCUSED WAS FOUND GUILTY.

Additional Facts

Seven of Appellant's eight victims provided written victim impact statements. (R. at 242-243; Court Ex. A-G). EH, IB, JD, and SN read their written victim impact statements aloud. (R. at 270-295).

EH's Victim Impact Statement

In his victim impact statement, EH said, "While all calculations cannot be exactly monetized due to the length of time our communication has spanned, my financial loss due to Mr. Schneider's actions are in excess of 100 thousand dollars." (Court Ex. A at 1; R. at 274). Trial defense counsel objected to the statement as highly speculative and argued under Mil. R. Evid. 403 that the information was not probative yet highly prejudicial. (R. at 246). The military judge overruled the objection, and stated, "All right. I will overrule the objection. Because of the prefatory clause there that indicates that calculations can't be exactly monetized. I view this as an estimation by Dr. [EH] and will give it an appropriate weight as a result." (R. at 247).

EH also discuss Appellant's impact on EH's social life, "However, after enduring continual changes with information and schedules the relationship ultimately ended due to her interpretation of my character throughout this process and the inability to marry into an erratic life." (Court Ex. A at 2; R. at 274). Trial defense counsel objected to this portion of the victim impact statement. (R. at 247-248). The military judge overruled the objection and stated, "So, again, I think I can give that the appropriate weight. It is what this witness believes contributed to the loss of that relationship, which is something that he believes was directly related to this particular offense." (R. at 250).

After objecting to the above portions of EH's victim impact statement, the military judge asked if trial defense counsel had any additional objections to Court Exhibit A, and trial defense counsel responded, "No, Your Honor." (R. at 250). In his victim impact statement, EH also said, "[I]t is my belief that he should be held accountable for this to the fullest extent of the Uniform Code of Military Justice." (Court Ex. A at 2). Trial defense counsel said they had no

objection to this statement, and they did not object after hearing EH read his statement aloud. (R. at 246, 250, 276).

Capt IB's Victim Impact Statement

In his unsworn victim impact statement, IB stated, "Within weeks of us finding out about [Appellant's] scheme, we were notified that out identities were stolen. To this day we do not know if he was in on it. For months after we found out, my wife asked if we were safe." (Court Ex. B at 3; R. at 283). Trial defense counsel objected to the statement, and the military judge overruled the objection. (R. at 253). The military judge decided, "Whoever stole his identity though is different from, the sort of fear or wondering or concern that this victim has expressed." (Id.). The military judge then explained:

> So, I don't read this as asserting, that [Appellant] was in anyway responsible. Instead, I view it as, this particular victim saying that, in light of the particular offense, and then this other thing happening to him--his identity being stolen--it just made him wonder if it could have been related.

(Id.).

SN's Victim Impact Statement

SN provided a written and oral unsworn statement. (Court Ex. E; R. at 290-295). In her victim impact statement, SN said, "Allowing TSgt Schneider to continue to serve in any capacity or to receive any benefits provided from the Air Force is an insult to those who genuinely serve or have served our country." (Court Ex. E). Trial defense counsel objected to a different portion of SN's victim impact statement, but when asked if they had any other objections, trial defense counsel responded, "No, Your Honor." (R. at 262). Trial defense counsel said they had no objection to this statement, and they did not object after hearing SN read her statement aloud. (R. at 262, 295).

MJ's Victim Impact Statement

In his victim impact statement, MJ stated, "Because of this, he should get the maximum penalty allowed." (Court Ex. G). Trial defense counsel objected to the statement because it was "too close to the victim asking for and opining on a specific sentence." (R. at 263). The military judge agreed with trial defense counsel and sustained the objection. (R. at 268). When asked if they had any other objections to Court Exhibit G, trial defense counsel said, "No, Your Honor." (R. at 268). MJ's written victim impact statement did say, "Because of all this a lesser punishment would not be appropriate." (Court Ex. G). MJ did not read his victim impact statement aloud.

Standard of Review

This Court reviews a military judge's decision to accept a victim impact statement for an abuse of discretion. United States v. Barker, 77 M.J. 377, 383 (C.A.A.F. 2018). A military judge abuses his discretion when he accepts a victim impact statement based on an erroneous view of the law. Id. (citations omitted).

When an Appellant fails to object to the admission of a victim impact statement at trial, this Court reviews for plain error. United States v. Tellor, No. ACM 39770 (f rev), 2021 CCA LEXIS 444, at *17 (A.F. Ct. Crim. App. 1 September 2021) (unpub. op.). To prevail under the plain error standard, "an appellant must show '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" Id. at *18 (quoting United States v. Erickson, 65 M.J. 221, 223 (C.A.A.F. 2007)).

Whether an appellant has waived an issue is a legal question that this Court reviews de novo. United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020). "Waiver is the intentional relinquishment or abandonment of a known right." United States v. Gladue, 67 M.J. 311, 313

(C.A.A.F. 2009). "[A] valid waiver leaves no error for [the Court] to correct on appeal." United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009) (internal quotation marks omitted) (citation omitted). After reviewing the entire record, the Court may decide to pierce waiver if it is necessary for a complete Article 66 review, but piercing waiver is not required. United States v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016).

Law

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." R.C.M. 1001(c)(2). A crime victim of an offense has the right to be reasonably heard at an accused's presentencing proceeding relating to that offense. R.C.M. 1001(c)(1). "Victim impact" is defined as "any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(B); *see also* Barker, 77 M.J. at 383 (limiting the scope of victim unsworn statements to victim impact as defined in the Rules for Courts-Martial). The word "any" means "every," "all," or "unmeasured or unlimited in amount, number, or extent." Any, MERRIAM WEBSTER'S DICTIONARY (2024 online ed.). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" United States v. Gonzales, 520 U.S. 1, 5 (1997) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)). The Supreme Court only limits the expansive interpretation of the term if "language limiting the breadth of that word" is in the statute. Id.

In non-capital cases, a crime victim can exercise his or her right to be reasonably heard by making "a sworn statement, an unsworn statement, or both." R.C.M. 1001(c)(2)(D)(ii). A

victim impact statement "may only include victim impact and matters in mitigation. The statement may not include a recommendation of a specific sentence." R.C.M. 1001(c)(3).

"When the Court finds error in the admission of sentencing evidence (or sentencing matters), the test for prejudice is 'whether the error substantially influenced the adjudged sentence.'" (United States v. Edwards, 82 M.J. 239, 246 (C.A.A.F 2022)(citing United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018) (internal quotation marks omitted). To determine whether the error had a substantial influence on a sentence, this Court considers four factors: "(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 (internal citations omitted). "An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." Id. (citing United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007)).

Analysis

A. EH's statements were not erroneous because they fell within the scope of proper financial, social, and psychological victim impact.

Appellant claims that "[w]ithout specific details for how [Appellant's] actions caused such an alarming financial impact, the military judge could only speculate about how the criminal conduct could have directly caused it." (App. Br. at 9). The financial impact was not speculative, it was EH's estimate of Appellant's financial impact. Proper victim impact "includes *any* financial . . . impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(D)(emphasis added). EH was allowed to discuss "any financial . . . impact" Appellant had on him. R.C.M. 1001(c)(2)(B). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some

indiscriminately of whatever kind.'" Gonzales, 520 U.S. at 5. In other words, EH could discuss all financial impacts arising from the offense of which Appellant was found guilty.

Appellant's argument ignores EH's sworn sentencing testimony – to which trial defense counsel did not object – during which EH explained in part why his estimate was so high. (R. at 273). And Appellant's argument ignores the numbers provided in EH's victim impact statement. (Court Ex. A). EH's employer had a loan reimbursement program that would have reimbursed him about $62,500. (R. at 273). Upon learning of his acceptance into OTS, EH quit his job and in doing so forfeited about $62,000 in loan reimbursement. (Id.). He also testified that he estimated his lost wages for 15 weeks to be about $20,000. (Id.). EH also listed other financial impacts because of Appellant's false statement such as travel expenses, uniform purchases, and preparatory materials for OTS. (Id.). EH did not provide financial statements to the court, but R.C.M. 1001(c) does not require such proof in a victim unsworn statement. The military judge had both EH's sworn and unsworn statements before him to determine the accuracy of EH's financial claims to then weigh the information appropriately to sentence Appellant.

EH's financial impact statement fell squarely within the limits of R.C.M. 1001(c) and it was not erroneous. Thus, the military judge did not abuse his discretion by considering it. Even if the victim impact statement was erroneous, the error did not provide "new ammunition against" Appellant because EH testified under oath and subject to cross-examination during the government's sentencing case-in-chief about the financial loss he experienced. Barker, 77 M.J. at 384; (R. at 273).

Appellant points to EH's statement about his loss of a romantic relationship because of Appellant as error. (App. Br. at 9.). It is not error because it constitutes social and psychological victim impact under R.C.M. 1001(c)(2)(B). EH stated that his romantic relationship ended

because of "continual changes with information and schedules" and "due to her interpretation of my character throughout this process and the inability to marry into an erratic life." (Court Ex. A at 2). Proper victim impact "includes *any* . . . social, psychological . . . impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(D) (emphasis added). EH directly connected the social and psychological impact to the turmoil that Appellant's lies caused. EH explained that the constant uncertainty Appellant created in his professional life harmed his social life, and he believed that uncertainty was caused by Appellant's lies. (Court Ex. A). Thus, the military judge did not abuse his discretion in considering the statement as an opinion of a victim because the victim impact statement fell squarely within the definition of victim impact under R.C.M. 1001(c)(2)(B).

In his victim impact statement, EH said, "[I]t is my belief that he should be held accountable for this to the fullest extent of the Uniform Code of Military Justice." (Court Ex. A at 2). Trial defense counsel waived this objection when they intentionally relinquished a known right to object by saying they had no additional objections to EH's victim impact statements. Gladue, 67 M.J. at 313; (R. at 250). This was "a valid waiver [that] leaves no error for [the Court] to correct on appeal." Campos, 67 M.J. at 332.

Even if this Court decides to pierce the valid waiver, the statement is not erroneous. It is not a *specific* recommendation for a particular sentence as prohibited by R.C.M. 1001(c)(3). EH provides his opinion – his "belief" – that Appellant "should be held accountable to the fullest extent of the UCMJ." (Court Ex. A at 2). Nowhere in that statement does he provide an amount of confinement, a recommendation for a punitive discharge, reduction in grade, or a forfeiture amount. The statement is vague and does not even use the terms punishment, sentence, or

penalty to suggest a sentencing recommendation. "To the fullest extent of the UCMJ" is a broad statement that encompasses all statutes, case law, rules, and procedures used in the UCMJ. This would include anything authorized by the UCMJ like all maximum and minimum sentences, and arguably the military judge's discretion to sentence an individual in accordance with the evidence provided. EH's statement shows a desire for Appellant to be held accountable but he does not provide a specific sentencing recommendation. The statement was not erroneous. Thus, the military judge did not abuse his discretion in considering it.

B. IB's statements were not erroneous because they fell within the scope of proper financial and psychological victim impact.

In his unsworn victim impact statement, IB stated, "Within weeks of us finding out about [Appellant's] scheme, we were notified that out identities were stolen. To this day we do not know if he was in on it. For months after we found out, my wife asked if we were safe." (Court Ex. B at 3). Trial defense counsel objected to the statement. (R. at 250). Thus, the issue was preserved and is reviewed for plain error. Tellor, No. ACM 39770 (f rev), 2021 CCA LEXIS 444, at *17.

Proper victim impact "includes *any* psychological . . . impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(D)(emphasis added). Here the psychological fear IB and his wife experienced was a directly resulted from Appellant's actions and constituted proper victim impact.

Appellant claims the statement alleges uncharged conduct that should have been barred from consideration by the military judge. (App. Br. at 11). But IB stated under oath on cross-examination, that he did not know who stole his identity, and he did not know if it was Appellant. (R. at 210). And when trial defense counsel objected to IB's victim unsworn statement when IB said his identity was stolen, the military judge overruled the objection,

and reasoned that no evidence was presented that Appellant was responsible for the identity theft. (R. at 253). The military judge decided, "Whoever stole his identity though is different from, the sort of fear or wondering or concern that this victim has expressed." (Id.). The military judge then explained:

> So, I don't read this as asserting, that [Appellant] was in anyway responsible. Instead, I view it as, this particular victim saying that, in light of the particular offense, and then this other thing happening to him--his identity being stolen--it just made him wonder if it could have been related.

(Id.). By identifying the difference between the stolen identity and the fear caused by Appellant's actions, the military judge laid out his understanding of the statement and how he would frame the statement during his deliberations on the sentence. This was not clearly unreasonable exercise of discretion. And the military judge did not sentence Appellant based on IB's statement about identity theft because there was no evidence Appellant was the responsible party. No error occurred because the military judge did not consider the statement as uncharged misconduct.

Appellant also claims, that IB's "general assertion of financial harm was without the foundation necessary to show a direct connection." (App Br at 11). IB testified, under oath about the financial impact of Appellant's false statements. He testified that Appellant told IB to sell his house and buy a new one in St. Louis where he would be stationed. (Pros. Ex. 1; R. at 209). IB did so and lost the $1400 of earnest money when he realized his commission was not real. (R. at 209). IB testified to the travel expenses, lost job opportunities and wages, and expenses of moving their items into a storage unit. (R. at 200, 207). IB did not provide financial statements to the court in support of his statements, but R.C.M. 1001(c) does not require such proof in a victim unsworn statement.

Proper victim impact "includes *any* financial . . . impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(D)(emphasis added). IB was allowed to discuss "any financial . . . impact" Appellant had on him. R.C.M. 1001(c)(2)(B). And Capt IB's testimony about Appellant's financial impact fell squarely within the limits of R.C.M. 1001(c), and it was not erroneous. Thus, the military judge did not abuse his discretion by considering it. Even if the statement was erroneous, the error did not provide "new ammunition against [] appellant" because IB testified under oath and subject to cross-examination during the government's sentencing case-in-chief. Barker, 77 M.J. at 384; (R. at 202, 207, 209).

C. Appellant waived any objection to SN's victim impact statement at trial. Even if this Court pierces waiver, SN's victim impact statement did not provide a specific sentencing recommendation.

SN stated in her unsworn, "Allowing [Appellant] to continue to serve in any capacity or to receive any benefits provided from the Air Force is an insult to those who genuinely serve or have served our country." (Court Ex. E). Trial defense counsel objected to a different portion of SN's victim impact statement, but then affirmatively waived any additional objections to SN's unsworn statement. The military judge asked if they had any additional objections to Court Ex. E, and trial defense counsel replied, "No objection, Your Honor." (R. at 263). "[A] valid waiver leaves no error for [the Court] to correct on appeal," and this Court should decline to review this alleged error. Campos, 67 M.J. at 332.

After reviewing the entire record, the Court may decide to pierce waiver if it is necessary for a complete Article 66 review, but this Court should decline to do so. Chin, 75 M.J. at 223. If this Court decides to pierce waiver and review for plain error, no relief is warranted because no error occurred. Appellant contends this statement amounts to a specific recommendation for a

punitive discharge, and the recommendation violates R.C.M. 1001(c)(3). (App. Br. at 11). But it is not a specific recommendation under R.C.M. 1001(c)(3). The statement was SN's opinion that Appellant's service and the crime he committed against her were "an insult to those who genuinely serve or have served our country." She expressed her distaste for Appellant in the form of an opinion but not a specific sentencing recommendation.

Even if the statement was akin to a sentencing recommendation, Appellant did not experience any prejudice because of the statement. "[A]ppellant's plea agreement, which he knowingly and voluntarily entered into with the advice of defense counsel, authorized the exact sentence that he received in this case." United States v. Conner, 2024 CCA LEXIS 42, *9 (A. Ct. Crim. App. 24 January 2024) (unpub. op.). There is no evidence in the record that this one sentence from one of eight victims influenced the military judge in such a way as to substantially influence the sentence.

D. Appellant waived any objection to MJ's victim impact statement at trial. Even if this Court pierces waiver, there was not a substantial influence on the sentence.

MJ stated in his victim impact statement said, "Because of all this a lesser punishment would not be appropriate." (Court Ex. G). Trial defense counsel objected to a different portion of MJ's victim impact statement, but then affirmatively waived any additional objections to his victim impact statement. The military judge asked if they had any additional objections to Court Ex. E, and trial defense counsel replied, "No, Your Honor." (R. at 268). "[A] valid waiver leaves no error for [the Court] to correct on appeal," and this Court should decline to review this alleged error. Campos, 67 M.J. at 332.

Even if the statement was akin to a sentencing recommendation, Appellant did not experience any prejudice because of the statement. "[A]ppellant's plea agreement, which he knowingly and voluntarily entered into with the advice of defense counsel, authorized the exact

sentence that he received in this case." Conner, 2024 CCA LEXIS 42, *9. There is no evidence in the record that this one sentence from one of eight victims influenced the military judge in such a way as to substantially influence the sentence.

The military judge did not err by accepting victim impact statements that addressed victim impact directly relating to or arising from the offense of which the accused was found guilty. This court should deny this assignment of error.

II.

APPELLANT'S SENTENCE WAS NOT INAPPROPRIATELY SEVERE.

Additional Facts

The maximum punishment authorized under the law, based solely on Appellant's guilty plea, was a dishonorable discharge, confinement for 40 years, reduction in grade to E-1, and total forfeitures. (R. at 112); Manual for Courts-Martial, A12-3 (2019 ed.). According to the plea agreement, the military judge could sentence Appellant to a maximum of 365 days confinement for each specification, with all confinement running concurrently. (App. Ex. IV at 2). During the plea agreement inquiry, Appellant said he understood the maximum punishment available to him. (R. at 112). With the plea agreement, Appellant was only exposed to 2.5% of the available confinement under the law.

During the plea agreement inquiry, the military judge explained the confinement term and concurrent confinement for each offense, and then he explained that no other sentencing restrictions applied:

> [Military Judge]: So considering the types of punishment that can be imposed by a court-martial, do you understand that the plea agreement does not prevent the court from imposing a sentence that could include a dishonorable discharge, a bad conduct discharge, reduction in rank, or forfeitures of pay and allowances?

[Appellant]: Yes, Your Honor.

(R. at 128). The government incorporates the facts from Issue I into this issue.

Standard of Review

This Court reviews sentence appropriateness de novo. United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (*per curiam*) (citation omitted). 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

Sentence appropriateness is assessed "by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although this Court has great discretion to determine whether a sentence is appropriate, the Court lacks any authority to grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, CCAs 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).

"[T]he experienced and professional military lawyers who find themselves appointed as trial judges and judges on the courts of military review have a solid feel for the range of punishments typically meted out in courts-martial." United States v. Ballard, 20 M.J. 282, 286 (C.M.R. 1985). The military judge's sentence was within the lawful bounds of the Manual's sentencing restrictions authorized for each offense. Subject to limitations in the Manual for Courts-Martial, "the sentence to be adjudged is a matter within the discretion of the court-

martial." R.C.M. 1002(a). "A court-martial may adjudge any punishment authorized in [the] Manual in order to achieve the purposes of sentencing … including the maximum punishment or any lesser punishment…" R.C.M. 1002(a).

The military judge showed his discernment when he only gave Appellant a bad conduct discharge when a dishonorable discharge was authorized. (App. Ex. VI at 2). A bad conduct discharge is "a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature." R.C.M. 1003(b)(8)(C). A bad-conduct discharge does not require some level of severity. In fact, the exact opposite is true; multiple minor infractions could warrant a bad-conduct discharge. A bad-conduct discharge "is also appropriate for an accused who has been convicted *repeatedly of minor offenses* and whose punitive separation appears to be necessary." R.C.M. 1003(b)(8)(C)(emphasis added). Here Appellant repeatedly lied to OTS applicants stringing them along over the course of years. This is repeated bad conduct that warrants a bad-conduct discharge.

Appellant's sentence should be affirmed as entered on the Entry of Judgment because Appellant received the punishment he deserved. This Court should find the reasons Appellant advanced as to why his sentence is inappropriately severe as unpersuasive, distinctly and in the aggregate. Appellant advances four reasons why he should receive leniency: (1) the sentence imposed was incompatible with Appellant's service record; (2) the total matters contained in the record chiefly concerned Appellant's severe illness; (3) the nature and seriousness of the offenses is undermined by the lack of malicious intent; and (4) Appellant is a good candidate for a reduced sentence.

Appellant's arguments fail, and Appellant's sentence is appropriate for the following two reasons. First, Appellant's service record and matters in mitigation do not outweigh the injury

Appellant caused to eight people and the Air Force's reputation over two years. Second, reducing a sentence for good behavior is a matter in clemency which is outside the purview of this Court.

A. Appellant's service record and matters in mitigation do not outweigh the injury Appellant caused to eight people and the Air Force's reputation over two years.

Appellant's service record does not defy the severity of the sentence as Appellant claims. (App. Br. at 15). Appellant won some recruiter awards over the course of his career, and he made a positive impression on some individuals who were willing to write him character letters. (Def. Ex. A-Z). These were indicators that Appellant was good at his recruiting job – until he chose to lie to eight recruits over two years. But his work did not constitute "particular acts of good conduct or bravery" capable of outweighing the impact of his crimes. R.C.M. 1001(d)(1)(B). He lied to eight OTS applicants and deprived each of a genuine opportunity to join the Air Force. Upon learning of Appellant's deceit, those applicants now have a tainted view of the Air Force and for the two that joined a diminished appreciation for their own service. (R. at xx).

At trial, Appellant sought to minimize his culpability by attributing his actions to external conditions. During his guilty plea inquiry, Appellant claimed:

> At the time when I made false statements to him, the other people involved in this case, I was going through a mental health crisis. I was in the middle of the COVID-19 pandemic and I was drinking extensively every day. The conditions that were conflicting me led me to operate in a survival mode where I struggled to fully grasp the nature and consequences of my actions.

(R. at 40; *See also* R. at 55, 65, 74, 81, 91, 105). Then again on appeal, Appellant blames his mental health struggles, claiming, his severe alcohol abuse disorder led to behavior that

contradicted his sober character. (App. Br. at 16). But Appellant's argument is not supported by any medical evidence in the record.

Appellant's struggles did not force him or pressure him to lie to eight people continuously for two years about their applications to join the Air Force. (Pros. Ex. 1). He *chose* to lie. He took the time to request important documents from each victim, to provide the steps in the application process, and to help explain the application process. (Pros. Ex. 1). But instead of submitting the applications, he just told people they were accepted to attend OTS, were alternates for OTS, or had an appointment at MEPS when they were not or did not. (Pros. Ex. 1). Then those eight victims detrimentally relied on an Air Force recruiter's official statements to make financial, professional, and personal life choices believing they would become military members. Alcohol does not force a person to lie like Appellant did.

Appellant also claims, "The absence of any intention by [Appellant] to harm anyone mitigates against the sentence adjudged." (App. Br. at 16). But the law does not require malicious intent for false official statement. It requires an intent to deceive, and Appellant possessed that intent eight times over. MCM, pt. IV, ¶41.b(1)(d). And in this case, it did caused harm to eight people who detrimentally relied on Appellant's official statements. Appellant was not required to provide a motive for his actions to ensure a provident plea, and he did not provide one. And his lack of articulated motive is not mitigation. Appellant should have known his actions would be incredibly harmful as people rearranged their lives based on his lies.

Appellant presented details of his struggles with alcoholism in his unsworn statement. (Court Ex. Z; R. at 333-338). The evidence of Appellant's mental state at the time of the offenses was available to the military judge as matters in mitigation and extenuation. R.C.M. 1001(d)(1)(A). And Appellant's guilty plea to all eight specifications was mitigation that the

military judge could consider. United States v. Edwards, 35 M.J. 351, 355 (C.M.A. 1992). The military judge received the matters in mitigation and extenuation, considered it, and weighed it against the offense and victim impact. Ultimately, the military judge only gave Appellant a bad conduct discharge when a dishonorable discharge was authorized, and he did not adjudge forfeitures. (App. Ex. VI at 2; *Entry of Judgment*, dated 3 January 2023, ROT, Vol. 1).

Appellant's arguments have already been judged and an appropriate sentence was crafted based on the whole of the case. Appellant asks this court to engage in an act of clemency, which is not permitted under the law. The adjudged sentence of 12 months confinement and a bad-conduct discharge was not inappropriately severe.

B. Reducing a sentence for good behavior is a matter in clemency which is outside the purview of this Court.

Although this Court has great discretion to determine whether a sentence is appropriate, the Court lacks any authority to grant mercy. Nerad, 69 M.J. at 146. Appellant claims his "sentence is inconsistent with the moral character he demonstrated following his mental health treatment. . . This expression of character defies the severe sentence that was imposed against him." (App. Br. at 17). This is a request for clemency which is the purview of the convening authority, not the Court of Criminal Appeals. Nerad, 69 M.J. at 146. Appellant already provided this information to the convening authority in his submission of matters. (*Submission of Matters*, dated 4 November 2022, ROT, Vol 2). The convening authority did not see fit to provide Appellant relief. (*Convening Authority Decision on Action*, dated 16 December 2022, ROT, Vol. 1). Neither should this Court.

In addition, Appellant discussed these alleged acts of contrition that occurred between his mental health treatment and trial during his guilty plea inquiry. (R. at 45). These facts were available for the military judge's consideration as potential mitigation. (Id.). The alleged acts of

contrition made after he was caught lying by his leadership were already considered by the sentencing authority. (Id.). This Court should decline to participate in an act of clemency. No relief is warranted on these grounds.

This Court should find Appellant's arguments unpersuasive and his sentence of 12 months confinement and a bad-conduct discharge appropriate. Appellant's claim does not warrant leniency. This Court should deny this assignment of error.

III.

APPELLANT WAIVED ANY OBJECTION TO PROSECUTION EXHIBIT 3 AND, IN ANY EVENT, THE RECORD OF TRIAL IS COMPLETE AND ANY ARGUABLE OMISSION WAS INSUBSTANTIAL AND HARMLESS.

Additional Facts

Prosecution Exhibit 3, pages 5 and 6, are Appellant's referral EPR, and page 8 is the memorandum to Appellant notifying him of the same. Page 7 cites the reason it is a referral EPR, "You were caught willfully misleading Air Force applicants in December 2018 and November 2019." Pros. Ex. 3, p. 7.

During the court-martial, after trial counsel described and offered Prosecution Exhibit 3 for admission, the military judge asked trial defense counsel, "Defense Counsel, any objection to Prosecution Exhibit 3 for Identification?" and the circuit defense counsel replied, "No, Your Honor." R. at 141-42.

Standard of Review

The Court reviews questions of whether a record is complete de novo. United States v. Davenport, 73 M.J. 373, 376 (C.A.A.F. 2014).

Law and Analysis

Appellant claims the record of trial is incomplete because three pages of Prosecution Exhibit 3 related to his referral enlisted performance reports (EPR) are blurry and not fully legible. (App. Br. at 17-19; see Pros. Ex. 3, pages 5, 6, 8.) The argument is without merit.

During Appellant's court-martial, he raised no objection to the legibility of the documents, to the presence or absence of any response to the referral EPR, or to any other basis for admission, so any objection was waived. United States v. Ahern, 76 M.J. 194, 198 (C.A.A.F. 2017) ("appellant's affirmative statements that he had no objection to the admission of evidence "operate[s] to extinguish his right to complain about [the evidence's] admission on appeal") (internal citation omitted).

Moreover, Prosecution Exhibit 3 is not missing from the record of trial. The exhibit is present in the record, which is therefore complete.[2] Even if an illegible document could render it an "omission," appellate courts have long understood that, inevitably, records will be imperfect, so they only review for substantial omissions. United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982).

The threshold question is whether a missing item is substantial, either qualitatively or quantitatively. Davenport, 73 M.J. at 377 (internal citation omitted). "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." United States v. Henry, 53 M.J. 108, 111 (C.A.A.F. 2000). "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's

[2] Although it is not entirely clear on page 8 of Prosecution Exhibit 3 whether Appellant selected to provide a response, there are noticeable marks around the words "did not" consistent with him having circled those words before the words "provide written matters in response." Moreover, there is no written response following the referral EPR in the exhibit, and there is a presumption of regularity for official documents. United States v. Ayers, 54 M.J. 85, 90-91 (C.A.A.F. 2000).

characterization as a complete one." Id. Omissions may be quantitatively insubstantial when, considering the entire record, it is "so unimportant and so uninfluential . . . that it approaches nothingness." Davenport, 73 M.J. at 377.

In Henry, the Court of Appeals for the Armed Forces listed examples of several "substantial omissions," which raise a presumption of prejudice that the government must rebut, such as transcript portions with sidebars regarding admission of evidence and argument concerning court member challenges, evidence used to show *mens rea*, three defense exhibits, and videotape of mitigation evidence. 53 M.J. at 111 (internal citations omitted). The Court also listed examples of several "insubstantial omissions," which do not raise a presumption of prejudice or affect that record's characterization as complete, such as photographic evidence of stolen property, a court member's written question, and an accused's personnel record. Id. (internal citations omitted).

In United States v. Fields, 74 M.J. 619 (A.F. Ct. Crim. App. 2015), the Court's opinion noted that the record of trial lacked a legible copy of the appellant's Article 15 nonjudicial punishment. Id. at 626, n. 5. However, the Court found it to be "insubstantial." Id. (citing Henry, 53 M.J. at 111). Appellant's referral EPR should also be considered "insubstantial."

In Appellant's case, a small portion of his personnel record, that is, his referral EPR, was admitted, without objection. Although not completely legible, the referral EPR clearly related to the same conduct for which he was convicted at court-martial. Moreover, the negative information would have been more harmful if legible, so he benefited from the situation.

In summary, Appellant waived any objection to Prosecution Exhibit 3 and, in any event, the record of trial is complete, and any arguable omission was insubstantial and harmless.

IV.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF THIS COURT DID POSSESS JURISDICTION TO REVIEW THIS ISSUE, THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT CORRECTLY ANNOTATED THAT APPELLANT'S CONVICTION REQUIRED THAT HE BE CRIMINALLY INDEXED PER THE FIREARM PROHIBITION UNDER 18 U.S.C. § 922.

Law and Analysis

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him because he was convicted of a non-violent offense. (App. Br. at 19-24.) Appellant asserts that any prohibitions on the possession of firearms imposed because of a non-violent offense runs afoul of the Second Amendment, U.S. CONST. AMEND. II, the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (analyzing New York's concealed carry regime), and the Fifth Circuit Court of Appeals' decision regarding 18 U.S.C. § 922(g)(8) in United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023). Appellant's constitutional argument is without merit. *See, e.g.*, United States v. Denney, No. ACM 40360, 2024 CCA LEXIS 101 (A.F. Ct. Crim. App. 8 March 2024) (finding no discussion or relief merited for similar arguments) (*per curiam*) (unpub. op.) (internal citations omitted).

The Gun Control Act of 1968, 18 U.S.C. § 922, makes it unlawful for any person, *inter alia*, "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. Id. at § 922(g)(1). Appellant was found guilty of one Charge and eight Specifications of Making a False Official Statement, in violation of Article

107, UCMJ, which is a crime punishable by imprisonment for a term exceeding one year, that is, by five years of confinement. MCM, pt. IV, ¶41.d(1) (2019 ed.).[3]

A. This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922, because that requirement is not part of the findings or sentence.

This Court lacks jurisdiction under Article 66, UCMJ, to order the correction of the Statement of Trial Results or Entry of Judgment on the grounds requested by Appellant. In United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021), this Court held that it "lacks authority under Article 66, UCMJ, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition" in a court-martial order. Yet Appellant argues here that, because the Court of Appeals for the Armed Forces (CAAF) in United States v. Lemire, 82 M.J. 263, n.* (C.A.A.F. 2022) (decision without published opinion), ordered the Army to correct a promulgating order that annotated an appellant as a sex offender, this Court now has the authority to modify his Statement of Trial Results and Entry of Judgment. (App. Br. at 8). Appellant argues that CAAF's decision in Lemire reveals three things: (1) That CAAF has the authority to correct administrative errors in promulgating orders; (2) by extension, CAAF believes that the service courts of criminal appeal (CCAs) have power to correct administrative errors under Article 66, UCMJ; and (3) CAAF believes both appellate courts have the authority to address constitutional errors in promulgating orders even if they amount to collateral consequences of a conviction. (Id.)

[3] Persons *accused* of any offense punishable by imprisonment for a term exceeding one year, which has been referred to a general court-martial, also may not possess a firearm. *See* Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, dated 14 April 2022, para. 29.30.8 (citing 18 U.S.C. § 922(n)).

Appellant bases his argument solely on an asterisk footnote to a summary decision without a published opinion issued by CAAF that contained no analysis or reasoning why correction was a viable remedy in that case. *See* Lemire, 82 M.J. 263, n.*. This Court has previously declined to rely on such an incomplete analysis. In Lepore, 81 M.J. at 762, this Court even declined to rely on its own past opinion in United States v. Dawson, 65 M.J. 848 (A.F. Ct. Crim. App. 2007), because that opinion contained no jurisdictional analysis when the Court summarily ordered the correction of the promulgating order. Appellant asks this Court to follow a mere footnote in a decision without a published opinion, which contains no analysis of jurisdiction and no language indicating that correction of a Statement of Trial Results or Entry of Judgment is proper.

Rule 30.4(a) of this Court's Rules of Practice and Procedure states:

> Published opinions are those that call attention to a rule of law or procedure that appears to be overlooked or misinterpreted or those that make a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the Court's decision to the public, the parties, military practitioners, and judicial authorities.

Because the Lemire decision from CAAF does not call attention to a rule of law or procedure and does not provide any rationale, it does not qualify as "precedent" and should not be followed. In any event, Lemire involved sex offender registration, not firearms prohibitions. CAAF indeed ordered removal of the designation for sex offender registration from a promulgating order, but its decision did not adjudicate the constitutional question posed here, which is unrelated to the actual findings and sentence in the case. This Court should therefore not read Lemire as requiring an evaluation of the constitutionality of firearms prohibitions for convicted Airmen, or the propriety of the Air Force's regulations requiring indexing.

This Court's jurisdiction is defined entirely by Article 66, UCMJ, which specifically limits its authority to only act "with respect to the findings and sentence as entered into the record. . . ." Article 66(d)(1)(A); *see generally* United States v. Arness, 74 M.J. 441 (C.A.A.F. 2015) (discussing that CCAs are courts of limited jurisdiction, defined entirely by statute). Article 66, UCMJ, provides no statutory authority for this Court to act on the collateral consequences of conviction. In Lepore, this Court noted the many times it has held that it lacked jurisdiction where appellants sought relief for "alleged deficiencies unrelated to the legality or appropriateness of the court-martial findings or sentence." 81 M.J. at 762 (citations omitted). This Court should reach the same conclusion here.

Although this Court has the authority to modify errors in an entry of judgment under R.C.M. 1111(c)(2), the authority is limited to modifying errors in the performance of its duties and responsibilities, so that authority does not extend to determining the constitutionality of a collateral consequence. Further, the question Appellant asks this Court to determine is fundamentally different from the situations in which our sister courts have corrected errors on promulgating orders. For example, in United States v. Pennington, No. 20190605, 2021 CCA LEXIS 101, at *5 (A. Ct. Crim. App. 2 March 2021) (unpub. op.), the Army Court of Criminal Appeals ordered modification of the statement of trial results in that case to correct erroneous dates, the wording in charges, the reflection of pleas the appellant entered, and other such clerical corrections. The errors corrected in Pennington are the types of errors that R.C.M. 1111(c)(2) is in place to correct.

Moreover, both the Navy-Marine Corps and the Air Force Courts of Criminal Appeal have held that matters outside the UCMJ and MCM, such as Defense Incident-Based Reporting System (DIBRS) codes and indexing requirements under 18 U.S.C. § 922, are outside their

authority under Article 66, UCMJ. *See* United States v. Baratta, 77 M.J. 691 (N-M. Corps Ct. Crim. App. 2018); Lepore, 81 M.J. at 763. Both courts reasoned that they only possessed jurisdiction to act with respect to the findings and sentence as approved by the convening authority. Id. But here, even under the updates made to Article 66(d), UCMJ, this Court's jurisdiction is still limited to acting "with respect to the findings and sentence as entered into the record." 10 U.S.C. § 866(d). The annotation on the first indorsements to the Entry of Judgment and Statement of Trial Results is simply not a part of the finding or sentence entered into the record. Nor does R.C.M. 918 list the firearm prohibition requirements from 18 U.S.C. § 922(g) as part of a court-martial finding. Thus, 18 U.S.C. § 922(g)'s firearm prohibitions and the indexing requirements that follow that statute are well outside the scope of this Court's jurisdiction.

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

Even if this Court has jurisdiction to review this issue, Appellant is not entitled to relief. The Staff Judge Advocate (SJA) followed the appropriate Air Force regulations in signing the first indorsement to the Statement of Trial Results and Entry of Judgment. Appellant received a conviction for a qualifying offense under 18 U.S.C. § 922(g)(1). *See* DAFI 51-201, dated 14 April 2022, para. 29.32.

Furthermore, para. 29.30. to that DAFI, which applies in this case, shows the SJA correctly annotated the firearm prohibition on the first indorsement:

> If a service member is convicted at a GCM of a crime for which the maximum punishment exceeds a period of one year, this prohibition is triggered regardless of the term of confinement adjudged or approved.

Para. 29.30.1.1.

> Persons who have been discharged from the Armed Forces under dishonorable conditions . . . This condition is memorialized on the STR and EoJ, which must be distributed in accordance with the STR/EoJ Distribution List … This prohibition does not take effect until after the discharge is executed.

Para. 29.30.5.

Appellant's convictions and sentences qualified him for criminal indexing per 18 U.S.C. § 922(g)(1), and the first indorsements to the Entry of Judgment and Statement of Trial Results properly annotated the prohibition in accordance with DAFI 51-201.[4] Thus, there is no error for this Court to correct.

C. The Firearm Possession Prohibitions in the Gun Control Act of 1968 are Constitutional.

In Bruen, the Supreme Court held the standard for applying the Second Amendment is:

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

142 S. Ct, at 2129-2130. In his concurrence, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008) (finding that the Second Amendment is an individual, not collective, right), and McDonald v. City of Chicago, 561 U.S. 742 (2010) (applying that right to the states), that the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2162 (Kavanaugh, J., concurring) (citations

[4] While the Statement of Trial Results and Entry of Judgment Indorsements indeed annotate the firearm prohibition, they are not what legally mandates the indexing. DAFI 51-201 is the regulation that requires indexing and contains the detailed requirements that mandate notification to relevant law enforcement agencies. Appellant's challenge here is thus misplaced.

omitted). Accordingly, the proper interpretation of the Second Amendment allows for a "variety" of gun regulations. Id. (citing Heller, 554 U.S. at 636).

The majority opinions in Heller and McDonald also stand for the principle that the right secured by the Second Amendment is not unlimited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose …. *[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons* and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 573 (emphasis added).

Appellant acknowledges that both Bruen and Heller limit the application of the Second Amendment to "law abiding, responsible citizens." App. Br. at 6. Even so, Appellant nonetheless cites to United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), for the proposition that the Government cannot prove that Appellant's firearm prohibition for a non-violent offense is in keeping with the United States' historical tradition of firearm regulation. Id. But this is contrary to what the Fifth Circuit in Rahimi held. That court concluded that the term "law abiding, responsible citizens," was "shorthand in explaining that [Heller's] holding … should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]" Rahimi, 61 F.4th at 451 (citing Heller, 554 U.S. at 626-627). The Rahimi court went on to assert that Bruen's reference to "ordinary, law abiding" citizens was no different than Heller—it was meant to exclude "from the Court's discussion groups that have historically been stripped of their Second Amendment Rights[.]" Id. The Court determined that defendant Rahimi did not fall into that category of felons prohibited from owning a firearm at the time he

was convicted of violating the firearm prohibition under 18 U.S.C. § 922(g)(8), since Rahimi was only subject to an agreed-upon domestic violence restraining order at the time he was convicted. Id. at 452. Thus, he did not have a felony conviction at the time he was charged with illegal possession of a firearm. Id. The Fifth Circuit thus found that the Government had not shown that 18 U.S.C. § 922(g)(8)'s restriction of his Second Amendment rights "fit [] within our Nation's historical traditional of firearm regulation." Id. at 460.

The appellant in Rahimi was in a fundamentally different position than Appellant here. In this case, Appellant has been convicted of an offense punishable by well over a year of confinement (*i.e.*, a felony). He is thus prohibited from owning a firearm under 18 U.S.C. § 922(g)(1). Both the Supreme Court and the Fifth Circuit acknowledge that felony convictions are part of the United States' longstanding tradition on firearm prohibitions. Moreover, these cases do not distinguish between violent and non-violent felonies—prior to Bruen, the Fifth Circuit opined, "[i]rrespective of whether [an] offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens." United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004). The Court found that limiting a felon's ability to keep and possess firearms was not inconsistent with the "right of Americans generally to individually keep and bear their private arms as historically understood" in the United States. Id.; *accord* Folajtar v. Attorney General of the United States, 980 F.3d 897 (3rd Cir. 2020) (upholding the constitutionality of 18 U.S.C. § 922(g)(1) as applied to felons—including non-violent felons—based upon the Second Amendment's history and tradition). Thus, whether Appellant's crime constituted a violent or non-violent offense would not matter for purposes of restricting Appellant's ability to own a firearm.

Appellant's eight convictions for Making a False Official Statement, which were punishable by more than one year of confinement, prove that he falls squarely into the categories of individuals that should be prohibited from possessing a firearm. Thus, the Indorsements in the Entry of Judgment and Statement of Trial Results correctly annotated that Appellant is subject to the prohibitions of 18 U.S.C. § 922. Appellant is not entitled to relief.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 9 May 2024.

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