IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	
	)	Before Panel No. 3
Staff Sergeant (E-5) **DAVID C. FORTUNE,** United States Air Force, *Appellant.*	)	No. ACM S32800
	)	23 December 2024

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

Pursuant to Rule 23.3(m)(1) and (2) of this Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **5 March 2025**. The record of trial was docketed with this Court on 5 November 2024. From the date of docketing to the present date, 48 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 23 December 2024.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

23 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DAVID C. FORTUNE, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32800 Panel No. 3

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32800**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
David C. FORTUNE	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 23 December 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposes the motion.

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

Accordingly, it is by the court on this 23d day of December, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **5 March 2025**.

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

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 3
Staff Sergeant (E-5) **DAVID C. FORTUNE,** United States Air Force, *Appellant.*	)	No. ACM S32800
	)	18 February 2025

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

Pursuant to Rule 23.3(m)(3) and (4) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **4 April 2025**. The record of trial was docketed with this Court on 5 November 2024. From the date of docketing to the present date, 105 days have elapsed. On the date requested, 150 days will have elapsed.

On 30 July 2024, at a special court-martial convened at Nellis AFB, Nevada, a military judge, consistent with Appellant's pleas, found him guilty of two specifications of making a false official statement, in violation of Article 107, Uniform Code of Military Justice (UCMJ); and one specification of larceny, in violation of Article 121, UCMJ.[1] R. at 1, 11, 18-19, 22-23, 67. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to pay a fine of $22,140.81, to serve six months of confinement if the fine was not paid by the day after Appellant received the entry of judgment, and to be discharged with a bad conduct discharge. R. at 101. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action – *United States v. Staff Sergeant David C. Fortune.*

[1] Three specifications of Article 107, UCMJ, and "the excepted words" of the larceny specification Appellant pled not guilty to were withdrawn and dismissed with prejudice. R. at 22, 67.

The trial transcript is 102 pages long. The electronic record of trial contains four Prosecution Exhibits, seven Defense Exhibits, and six Appellate Exhibits. Appellant is not currently confined.

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

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

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 18 February 2025.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

20 February 2025

0IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DAVID C. FORTUNE, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32800 Panel No. 3

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
[redacted]

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 February 2025.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 3
Staff Sergeant (E-5)	)	
DAVID C. FORTUNE,	)	No. ACM S32800
United States Air Force,	)	
Appellant.	)	24 March 2025

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

Pursuant to Rule 23.3(m)(3) and (4) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **4 May 2025**. The record of trial was docketed with this Court on 5 November 2024. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

On 30 July 2024, at a special court-martial convened at Nellis AFB, Nevada, a military judge, consistent with Appellant's pleas, found him guilty of two specifications of making a false official statement, in violation of Article 107, Uniform Code of Military Justice (UCMJ); and one specification of larceny, in violation of Article 121, UCMJ.[1] R. at 1, 11, 18, 19, 22-23, 67. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to pay a fine of $22,140.81, to serve six months of confinement if the fine was not paid by the day after Appellant received the entry of judgment, and to be discharged with a bad conduct discharge. R. at 101. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action – *United States v. Staff Sergeant David C. Fortune.*

[1] Three specifications of Article 107, UCMJ, and "the excepted words" of the larceny specification Appellant pled not guilty to were withdrawn and dismissed with prejudice. R. at 22, 67.

The trial transcript is 102 pages long. The electronic record of trial contains four Prosecution Exhibits, seven Defense Exhibits, and six Appellate Exhibits. Appellant is not currently confined.

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

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

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

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 24 March 2025.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 3
Staff Sergeant (E-5) **DAVID C. FORTUNE,** United States Air Force, *Appellant.*	)	No. ACM S32800
	)	24 March 2025

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

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

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

[redacted]

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

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 24 March 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel


IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (FOURTH)**
v.	)	
	)	Before Panel No. 3
Staff Sergeant (E-5)	)	
DAVID C. FORTUNE,	)	No. ACM S32800
United States Air Force,	)	
Appellant.	)	21 April 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **3 June 2025**. The record of trial was docketed with this Court on 5 November 2024. From the date of docketing to the present date, 167 days have elapsed. On the date requested, 210 days will have elapsed.

On 30 July 2024, at a special court-martial convened at Nellis AFB, Nevada, a military judge, consistent with Appellant's pleas, found him guilty of two specifications of making a false official statement, in violation of Article 107, Uniform Code of Military Justice (UCMJ); and one specification of larceny, in violation of Article 121, UCMJ.[1] R. at 1, 11, 18, 19, 22-23, 67. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to pay a fine of $22,140.81, to serve six months of confinement if the fine was not paid by the day after Appellant received the entry of judgment, and to be discharged with a bad conduct discharge. R. at 101. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action – *United States v. Staff Sergeant David C. Fortune.*

[1] Three specifications of Article 107, UCMJ, and "the excepted words" of the larceny specification Appellant pled not guilty to were withdrawn and dismissed with prejudice. R. at 22, 67.

The trial transcript is 102 pages long. The electronic record of trial contains four Prosecution Exhibits, seven Defense Exhibits, and six Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Undersigned counsel is currently assigned 38 cases; 20 cases are pending before this Court (17 cases are pending AOEs), and 18 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, undersigned counsel has nine cases prioritized over the present case:

1. *United States v. Kim*, No. ACM 24007 – Undersigned counsel is currently working the Reply brief in this case, which will be submitted to this Court by 25 April 2025.

2. *United States v. Brown*, No. ACM S32777 – This appellant moved to withdraw from appellate review after fully consulting with undersigned counsel after she was able to review the record. Unless and until this Court approves the withdrawal, this case remains prioritized above Appellant's.

3. *United States v. Ziesche*, No. ACM 24022 – The trial transcript is 174 pages long and the record of trial is four volumes comprised of four Prosecution Exhibits, 13 Defense Exhibits, and 16 Appellate Exhibits. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

4. *United States v. Thomas*, No. ACM 22083 - The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

5. *United States v. Tyson*, No. ACM 40617 – The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

6. *United States v. Watkins*, No. ACM 40639 - The trial transcript is 519 pages long and the record of trial is five volumes containing 14 Prosecution Exhibits, three Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

7. *United States v. Kristopik*, No. ACM 40674 - The trial transcript is 1,311 pages long. The electronic record of trial contains 10 Prosecution Exhibits, 20 Defense Exhibits, 118 Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

8. *United States v. Stone*, No. ACM S32797 - The trial transcript is 105 pages long and the electronic ROT is one volume of 386 pages. There are three Prosecution Exhibits, five Defense Exhibits, and four Appellate Exhibits. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

9. *United States v. English*, No. ACM 40703 - The record of trial is seven volumes consisting of five admitted Prosecution Exhibits, 15 Defense Exhibits, 32 Appellate Exhibits, and two Court Exhibits. The transcript is 546 pages. This appellant is currently confined. Undersigned has not yet completed her review of the record of trial.

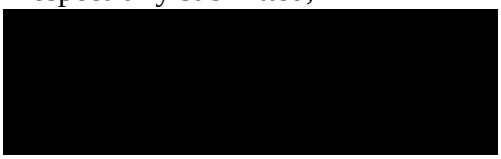
Appellant was advised of his right to a timely appeal. Appellant has been provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a

confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

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

Respectfully submitted,



SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 21 April 2025.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
Appellee,	)	OPPOSITION TO
	)	APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 3
Staff Sergeant (E-5)	)	
DAVID C. FORTUNE,	)	No. ACM S32800
United States Air Force.	)	
Appellant	)	23 April 2025

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 Assignments of Error in this case.

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

[redacted]
JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 April 2025.

[redacted]
JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32800**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
David C. FORTUNE	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 6th day of May, 2025,

ORDERED:

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

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **DAVID C. FORTUNE,** United States Air Force, *Appellant.*	)	No. ACM S32800
	)	19 May 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **3 July 2025**. The record of trial was docketed with this Court on 5 November 2024. From the date of docketing to the present date, 195 days have elapsed. On the date requested, 240 days will have elapsed.

On 30 July 2024, at a special court-martial convened at Nellis AFB, Nevada, a military judge, consistent with Appellant's pleas, found him guilty of two specifications of making a false official statement, in violation of Article 107, Uniform Code of Military Justice (UCMJ); and one specification of larceny, in violation of Article 121, UCMJ.[1] R. at 1, 11, 18, 19, 22-23, 67. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to pay a fine of $22,140.81, to serve six months of confinement if the fine was not paid by the day after Appellant received the entry of judgment, and to be discharged with a bad conduct discharge. R. at 101. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action – *United States v. Staff Sergeant David C. Fortune.*

[1] Three specifications of Article 107, UCMJ, and "the excepted words" of the larceny specification Appellant pled not guilty to were withdrawn and dismissed with prejudice. R. at 22, 67.

The trial transcript is 102 pages long. The electronic record of trial contains four Prosecution Exhibits, seven Defense Exhibits, and six Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Undersigned counsel is currently assigned 36 cases; 18 cases are pending before this Court (14 cases are pending AOEs), and 18 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, undersigned counsel has six cases prioritized over the present case:

1. *United States v. Ziesche*, No. ACM 24022 – The brief for this case is undergoing final review before filing this week.

2. *United States v. Thomas*, No. ACM 22083 - The record of trial is four volumes consisting of 14 Prosecution Exhibits, five Defense Exhibits, and 33 Appellate Exhibits. The verbatim transcript is 528 pages. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

3. *United States v. Tyson*, No. ACM 40617 – The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

4. *United States v. Watkins*, No. ACM 40639 - The trial transcript is 519 pages long and the record of trial is five volumes containing 14 Prosecution Exhibits, three Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

5. *United States v. Kristopik*, No. ACM 40674 - The trial transcript is 1,311 pages long. The electronic record of trial contains 10 Prosecution Exhibits, 20 Defense Exhibits, 118 Appellate

Exhibits, and one Court Exhibit. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

6. *United States v. English*, No. ACM 40703 - The record of trial is seven volumes consisting of five admitted Prosecution Exhibits, 15 Defense Exhibits, 32 Appellate Exhibits, and two Court Exhibits. The transcript is 546 pages. This appellant is currently confined. Undersigned has not yet completed her review of the record of trial.

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

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

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

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 19 May 2025.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
Appellee,	)	OPPOSITION TO
	)	APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5)	)	
DAVID C. FORTUNE,	)	No. ACM S32800
United States Air Force.	)	
Appellant	)	20 May 2025

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 Assignments of Error in this case.

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

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

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 May 2025.

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (SIXTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5)	)	
DAVID C. FORTUNE,	)	No. ACM S32800
United States Air Force,	)	
Appellant.	)	23 June 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **2 August 2025**. The record of trial was docketed with this Court on 5 November 2024. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 30 July 2024, at a special court-martial convened at Nellis AFB, Nevada, a military judge, consistent with Appellant's pleas, found him guilty of two specifications of making a false official statement, in violation of Article 107, Uniform Code of Military Justice (UCMJ); and one specification of larceny, in violation of Article 121, UCMJ.[1] R. at 1, 11, 18, 19, 22-23, 67. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to pay a fine of $22,140.81, to serve six months of confinement if the fine was not paid by the day after Appellant received the entry of judgment, and to be discharged with a bad conduct discharge. R. at 101. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action – *United States v. Staff Sergeant David C. Fortune.*

[1] Three specifications of Article 107, UCMJ, and "the excepted words" of the larceny specification Appellant pled not guilty to were withdrawn and dismissed with prejudice. R. at 22, 67.

The trial transcript is 102 pages long. The electronic record of trial contains four Prosecution Exhibits, seven Defense Exhibits, and six Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Undersigned counsel is currently assigned 39 cases; 19 cases are pending before this Court (14 cases are pending AOEs), and 20 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, undersigned counsel has five cases prioritized over the present case:

1. *United States v. Ziesche*, No. ACM 24022 – The Government's Answer Brief is due today, 23 June 2025. Upon receipt, undersigned counsel will coordinate with this appellant on whether a reply brief is warranted.

2. *United States v. Thomas*, No. ACM 22083 – Undersigned counsel has completed her review of the record and drafted the AOE. After final coordination with this appellant on any issues he would like to personally raise, the brief will be filed.

3. *United States v. Tyson*, No. ACM 40617 – The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

4. *United States v. Kristopik*, No. ACM 40674 - The trial transcript is 1,311 pages long. The electronic record of trial contains 10 Prosecution Exhibits, 20 Defense Exhibits, 118 Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

5. *United States v. English*, No. ACM 40703 - The record of trial is seven volumes consisting of five admitted Prosecution Exhibits, 15 Defense Exhibits, 32 Appellate Exhibits, and

two Court Exhibits. The transcript is 546 pages. This appellant is currently confined. Undersigned has not yet completed her review of the record of trial.

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

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

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

Respectfully submitted,

[redacted]
SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 23 June 2025.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
Appellee,	)	OPPOSITION TO
	)	APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5)	)	
DAVID C. FORTUNE,	)	No. ACM S32800
United States Air Force.	)	
Appellant	)	24 June 2025

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

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

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

[redacted]
JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

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 24 June 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **DAVID C. FORTUNE,** United States Air Force, *Appellant.*	)	No. ACM S32800
	)	21 July 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **1 September 2025**. The record of trial was docketed with this Court on 5 November 2024. From the date of docketing to the present date, 258 days have elapsed. On the date requested, 300 days will have elapsed.

On 30 July 2024, at a special court-martial convened at Nellis AFB, Nevada, a military judge, consistent with Appellant's pleas, found him guilty of two specifications of making a false official statement, in violation of Article 107, Uniform Code of Military Justice (UCMJ); and one specification of larceny, in violation of Article 121, UCMJ.[1] R. at 1, 11, 18, 19, 22-23, 67. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to pay a fine of $22,140.81, to serve six months of confinement if the fine was not paid by the day after Appellant received the entry of judgment, and to be discharged with a bad conduct discharge. R. at 101. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action – *United States v. Staff Sergeant David C. Fortune.*

[1] Three specifications of Article 107, UCMJ, and "the excepted words" of the larceny specification Appellant pled not guilty to were withdrawn and dismissed with prejudice. R. at 22, 67.

The trial transcript is 102 pages long. The electronic record of trial contains four Prosecution Exhibits, seven Defense Exhibits, and six Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Undersigned counsel is currently assigned 41 cases; 19 cases are pending before this Court (13 cases are pending AOEs), 21 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF) (including one supplement to a petition for grant of review), and one case is pending before the United States Supreme Court (for petition for writ of certiorari). Since Appellant's last EOT request, undersigned counsel completed briefing in *United States v. Ziesche*, No. ACM 24022, filed the AOE in *United States v. Thomas*, No. ACM 22083, and filed a petition for reconsideration—and a response to the Government's opposition—in *United States v. Johnson*, USCA Dkt. No. 24-0004/SF. To date, undersigned counsel has three cases prioritized over the present case:

1. *United States v. Tyson*, No. ACM 40617 – The trial transcript is 1,244 pages long and the electronic record of trial is three volumes containing 25 Prosecution Exhibits, 14 Defense Exhibits, one Court Exhibit, and 71 Appellate Exhibits. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

2. *United States v. Kristopik*, No. ACM 40674 - The trial transcript is 1,311 pages long. The electronic record of trial contains 10 Prosecution Exhibits, 20 Defense Exhibits, 118 Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial.

3. *United States v. English*, No. ACM 40703 - The record of trial is seven volumes consisting of five admitted Prosecution Exhibits, 15 Defense Exhibits, 32 Appellate Exhibits, and

two Court Exhibits. The transcript is 546 pages. This appellant is currently confined. Undersigned has not yet completed her review of the record of trial.

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

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

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

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 21 July 2025.

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES'
Appellee,	)	OPPOSITION TO
	)	APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5)	)	
DAVID C. FORTUNE,	)	No. ACM S32800
United States Air Force.	)	
Appellant	)	23 July 2025

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 to file an Assignment of Error in this case.

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

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

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 July 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32800**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
David C. FORTUNE	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 21 July 2025, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh), 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, prior filings in this case, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 25th day of July, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED**. Appellant shall file any assignments of error not later than **1 September 2025**.

Further requests by Appellant for enlargements of time may necessitate a status conference.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **DAVID C. FORTUNE,** United States Air Force, *Appellant.*	)	No. ACM S32800 17 August 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **1 October 2025**. The record of trial was docketed with this Court on 5 November 2024. From the date of docketing to the present date, 285 days have elapsed. On the date requested, 330 days will have elapsed.

On 30 July 2024, at a special court-martial convened at Nellis AFB, Nevada, a military judge, consistent with Appellant's pleas, found him guilty of two specifications of making a false official statement, in violation of Article 107, Uniform Code of Military Justice (UCMJ); and one specification of larceny, in violation of Article 121, UCMJ.[1] R. at 1, 11, 18, 19, 22-23, 67. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to pay a fine of $22,140.81, to serve six months of confinement if the fine was not paid by the day after Appellant received the entry of judgment, and to be discharged with a bad conduct discharge. R. at 101. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action – *United States v. Staff Sergeant David C. Fortune.*

[1] Three specifications of Article 107, UCMJ, and "the excepted words" of the larceny specification Appellant pled not guilty to were withdrawn and dismissed with prejudice. R. at 22, 67.

The trial transcript is 102 pages long. The electronic record of trial contains four Prosecution Exhibits, seven Defense Exhibits, and six Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Undersigned counsel is currently assigned 33 cases; 14 cases are pending before this Court (9 cases are pending AOEs), 6 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF) (including one supplement to a petition for grant of review), and 13 cases are pending before the Supreme Court of the United States (all pending filing a petition for a writ of certiorari). Of these thirteen cases before the Supreme Court, undersigned counsel anticipates two or three petitions for a writ of certiorari. Not all of these cases deal with 18 U.S.C. § 922 issues and even for the ones that do, some of the cases cannot be joined into a petition together.

Since Appellant's last EOT request, undersigned counsel completed review of *United States v. Tyson*, No. ACM 40617, a 3,099-page electronic record of trial. To date, undersigned counsel has four cases prioritized over the present case:

1. *United States v. Tyson*, No. ACM 40617 – Having completed review of this record, undersigned counsel is currently working the AOE. She has drafted nine of the anticipated eleven issues (the remaining issues require checking the record, scheduled for 18 August 2025). She is also finishing coordination with this appellant on the issues he intends to personally raise. The AOE will be submitted to this Court by the end of August.

2. *United States v. Marin* Perez, USCA Dkt. No. 25-0238/AF – Undersigned counsel submitted the petition for grant of review in this case on 8 August 2025. Undersigned counsel requested additional time to complete the supplement to the petition, which was granted. Undersigned counsel anticipates completing this short one-issue supplement after *Tyson* and then

moving directly to the next AOE. Undersigned counsel does not anticipate working on any of the cases before the Supreme Court until she reviews the next case listed below.

3. *United States v. Kristopik*, No. ACM 40674 - The trial transcript is 1,311 pages long. The electronic record of trial contains 10 Prosecution Exhibits, 20 Defense Exhibits, 118 Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial. However, civilian appellate defense counsel has completed review and drafted an AOE. This appellant has not waived undersigned counsel's review of the record, and thus undersigned counsel intends to review this record as soon as possible, to include before moving to any of the Supreme Court petitions.

4. *United States v. English*, No. ACM 40703 - The record of trial is seven volumes consisting of five admitted Prosecution Exhibits, 15 Defense Exhibits, 32 Appellate Exhibits, and two Court Exhibits. The transcript is 546 pages. This appellant is currently confined. Undersigned has not yet completed her review of the record of trial.

On top of the four priorities listed above, undersigned counsel will also be doing oral argument on 8 October 2025 for *United States v. Braum*, USCA Dkt. No. 25-0046/AF. Undersigned counsel anticipates being able to draft and format the various Supreme Court petitions while preparing for oral argument.

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

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

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

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 17 August 2025.

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

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.	)	Before Panel No. 2
Staff Sergeant (E-5) **DAVID C. FORTUNE,** United States Air Force, *Appellant.*	)	No. ACM S32800
	)	19 August 2025

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 to file an Assignment of Error in this case.

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

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

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

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 19 August 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **DAVID C. FORTUNE,** United States Air Force, *Appellant.*	)	No. ACM S32800 19 September 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **31 October 2025**. The record of trial was docketed with this Court on 5 November 2024. From the date of docketing to the present date, 318 days have elapsed. On the date requested, 360 days will have elapsed.

On 30 July 2024, at a special court-martial convened at Nellis AFB, Nevada, a military judge, consistent with Appellant's pleas, found him guilty of two specifications of making a false official statement, in violation of Article 107, Uniform Code of Military Justice (UCMJ); and one specification of larceny, in violation of Article 121, UCMJ.[1] R. at 1, 11, 18, 19, 22-23, 67. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, to pay a fine of $22,140.81, to serve six months of confinement if the fine was not paid by the day after Appellant received the entry of judgment, and to be discharged with a bad conduct discharge. R. at 101. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action – *United States v. Staff Sergeant David C. Fortune.*

[1] Three specifications of Article 107, UCMJ, and "the excepted words" of the larceny specification Appellant pled not guilty to were withdrawn and dismissed with prejudice. R. at 22, 67.

The trial transcript is 102 pages long. The electronic record of trial contains four Prosecution Exhibits, seven Defense Exhibits, and six Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel provides the following information. Undersigned counsel is currently assigned 21 cases; 12 cases are pending before this Court (7 cases are pending AOEs), 6 cases are pending before the United States Court of Appeals for the Armed Forces (CAAF) (two cases are pending action on petitions for reconsideration; one is pending a petition for a grant of review and supplement), and 3 cases are pending before the Supreme Court of the United States (all pending filing an individual petition for a writ of certiorari). Within the next month, two more cases are anticipated to move from pending at the CAAF to pending before the Supreme Court. These clients will also have individualized petitions for writs of certiorari.

Since Appellant's last request for an EOT, undersigned counsel filed an eleven-issue AOE in *United States v. Tyson*, No. ACM 40617, filed the supplement to the petition for grant of review in *United States v. Marin Perez*, USCA Dkt. No. 25-0238/AF, responded to the Government's petition for reconsideration in *United States v. Folts*, USCA Dkt. No. 25-0043/AF, filed a petition for reconsideration in *United States v. Casillas*, USCA Dk. No. 24-0089/AF, and conducted turnover on a number of cases relating to *United States v. Johnson*, USCA Dk. No. 24-0004/SF, that were pending before the Supreme Court (removing approximately nine cases from undersigned counsel's docket). The remaining cases undersigned counsel has pending before the Supreme Court are for individual clients, all on distinct issues.

To date, undersigned counsel has four cases prioritized over the present case:

1. *United States v. Kristopik*, No. ACM 40674 - The trial transcript is 1,311 pages long. The electronic record of trial contains 10 Prosecution Exhibits, 20 Defense Exhibits, 118 Appellate

Exhibits, and one Court Exhibit. This appellant is not currently confined. Undersigned has not yet completed her review of the record of trial. However, civilian appellate defense counsel has completed review and drafted an AOE. This appellant has not waived undersigned counsel's review of the record, and thus undersigned counsel intends to review this record as soon as possible. This AOE is due 7 October 2025. However, due to the Government filing a petition for reconsideration at the CAAF in *United States v. Folts*, USCA Dkt. No. 25-0043/AF, and a motion for reconsideration at this Court in *United States v. Kim*, No. ACM 24007, 2025 LX 340225 (A.F. Ct. Crim. App. Aug. 15, 2025), undersigned counsel's review of this record has been disrupted and delayed.

2. *United States v. Tyson*, No. ACM 40617 – The Government's answer to this appellant's AOE is due in early October. Undersigned counsel anticipates working a reply brief upon the Government filing its answer.

3. *United States v. Baumgartner*, Application No. 25A241 (before the Supreme Court) – The CAAF denied review of this case on 20 June 2025. This case is now pending a one-issue petition for a writ of certiorari before the Supreme Court. The petition is due 17 November 2025, but the filing must be completely drafted and formatted at least two weeks beforehand to ensure it is printed by an outside agency on time. Thus, realistically, this petition must be complete by the end of October 2025. This appellant was previously represented by a civilian counsel, but before the Supreme Court, undersigned counsel is his only representation.

4. *United States v. English*, No. ACM 40703 - The record of trial is seven volumes consisting of five admitted Prosecution Exhibits, 15 Defense Exhibits, 32 Appellate Exhibits, and two Court Exhibits. The transcript is 546 pages. This appellant is not currently confined. Undersigned counsel has not yet completed her review of the record of trial.

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

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

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

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 19 September 2025. [redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
[redacted]

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.	)	Before Panel No. 2
Staff Sergeant (E-5) **DAVID C. FORTUNE,** United States Air Force, *Appellant.*	)	No. ACM S32800
	)	22 September 2025

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 to file an Assignment of Error in this case.

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

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

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

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 Sep 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32800**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
David C. FORTUNE	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 19 September 2025, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposed the motion and noted that "[i]f Appellant's new delay request is granted, the defense delay in this case will be 360 days in length."

On 30 September 2025, the court held a status conference to discuss the progress of this case. Appellant was represented by Captain Samantha M. Castanien; Lieutenant Colonel Allen S. Abrams and Mr. Dwight Sullivan from the Appellate Defense Division were also present. Major Kate E. Lee represented the Government. In response to questions from the court, Captain Castanien provided additional information regarding her current workload before the United States Supreme Court, the United States Court of Appeals for the Armed Forces, and this court. Lieutenant Colonel Abrams also provided additional information on Capt Castanien's workload as well as others in the Appellate Defense Division. Maj Lee did not dispute any representation made by the Defense.

Accordingly, it is by the court on this 1st day of October, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **31 October 2025**.

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

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	BRIEF ON BEHALF OF APPELLANT
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **DAVID C. FORTUNE,** United States Air Force, *Appellant.*	)	No. ACM S32800
	)	31 October 2025

Assignment of Error

WHETHER APPELLANT'S GUILTY PLEA INQUIRY TO LARCENY WAS IMPROVIDENT WHEN HE STATED THAT HE BELIEVED HE WAS ENTITLED TO THE BASIC HOUSING ALLOWANCE AT THE WITH DEPENDENTS RATE HE RECEIVED BECAUSE HE HAD A CHILD WHOM HE FINANCIALLY SUPPORTED.

Statement of the Case

On 30 July 2024, SSgt David C. Fortune was tried by a military judge sitting alone as a special court-martial convened at Nellis AFB, Nevada. Consistent with his pleas, SSgt Fortune was found guilty of two specifications of making a false official statement, in violation of Article 107, Uniform Code of Military Justice (UCMJ); and one specification of larceny, in violation of Article 121, UCMJ.[1] R. at 1, 11, 18, 19, 22-23, 67.

The military judge sentenced SSgt Fortune to be reprimanded, to be reduced to the grade of E-4, to pay a fine of $22,140.81, to serve six months of confinement if the fine was not paid by the day after SSgt Fortune received the entry of judgment, and to be discharged with a bad conduct discharge. R. at 101.

The convening authority took no action on the findings or sentence. Convening Authority Decision on Action – *United States v. Staff Sergeant David C. Fortune.*

[1] Three specifications of Article 107, UCMJ, and "the excepted words" of the larceny specification Appellant pled not guilty to were withdrawn and dismissed with prejudice. R. at 22, 67.

Statement of Facts

Staff Sergeant Fortune married CS on 13 June 2013. The couple divorced on 29 July 2016. R. 32. Shortly after the divorce, SSgt Fortune notified his local Military Personnel Flight (MPF) at Davis Monthan Air Force Base of the divorce and provided a copy of his divorce decree. R32. The MPF failed to correctly process SSgt Fortune's paperwork, and CS continued to be listed as SSgt Fortune's dependent spouse for Basic Housing Allowance (BAH) calculation purposes. *Id*.

SSgt Fortune did not discover the error until he PCS'd from the base in 2020. R. 32-33. SSgt Fortune understood that the mistake caused him to receive BAH at the with dependent rate, but he believed the error was harmless because he had a dependent, which entitled him to BAH at the same rate. R. 32.

SSgt Fortune's son, ZL was born in 2007, and ZL's child support had been automatically deducted from SSgt Fortune's military pay since November 2007. R. 32. ZL was not registered in the Defense Enrollment Eligibility Reporting System (D.E.E.R.S.) as his dependent because ZL's mother refused to communicate and provide the necessary registration documentation. R. 33. SSgt Fortuned explained this rationale to the military judge: "I knew that my son was not enrolled in D.E.E.R.S., but as I thought, I was entitled to the dependent rate. I did not see the harm in receiving the BAH rate for dependents due to MPF, not updating my divorce from [CS]." R. 32.

Additional facts necessary for the resolution of the issue raised are included below.

Law

Standard of Review

This Court reviews a military judge's decision to accept a guilty plea for an abuse of discretion by applying the substantial basis test to determine whether the record shows a substantial basis in law or fact for questioning the guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Larceny

The elements of the offense to which Appellant pleaded guilty are: (1) that Appellant wrongfully took certain property from the possession of the owner; (2) that the property belonged to a certain person; (3) that the property was of a certain value, or of some value; 4) that the taking by Appellant was with the intent permanently to deprive another person of the use and benefit of the property or permanently to appropriate the property for her own use or the use of someone other than the owner; and (5) that the property was military property. Manual for Courts-Martial, United States (2023 ed.) (MCM), pt. IV, ¶ 64.b.(1).

A military judge abuses his discretion where he fails to obtain an adequate factual basis to support the plea. *Inabinette*, 66 M.J. at 322. Merely obtaining the accused's consent to the defined elements or eliciting legal conclusions is not enough. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002). Instead, to establish the providence of an accused's plea, the military judge must question the accused and elicit facts "about what he did or did not do, and what he intended . . . ." *United States v. Care,* 18 C.M.A. 535, 40 C.M.R. 247, 253 (1969). If the guilty plea inquiry raises a potential defense, the military judge must explain the defense and reject the plea if the defense is not negated. *United States v. Arnold*, 40 M.J. 744 (A.F. Ct. Crim. App. 1994).

Argument

APPELLANT'S *CARE* INQUIRY[2] WAS IMPROVIDENT BECAUSE HE BELIEVED HE WAS ENTITLED TO RECEIVE THE BAH HE CLAIMED; HE NEVER INTENDED TO STEAL MONEY TO WHICH HE WAS NOT OTHERWISE ENTITLED, AND THEREFORE, NEVER HAD THE REQUISITE CRIMINAL INTENT TO COMMIT LARCENY.

Guilt under Art. 121, UCMJ, larceny requires a specific intent to steal. An honest belief as to entitlement is a defense to larceny because it negates the specific intent to steal required by the statute. *See United States v. Binegar*, 55 M.J. 1, 5 (C.A.A.F. 2001)

At the very beginning of the *Care* inquiry, SSgt Fortune explained why his ex-wife continued to be listed as a dependent on the BAH forms after they divorced. R. 32. When the divorce was finalized, SSgt Fortune notified the MPF, but the change never took effect. SSgt Fortune did not notice this until he PCS'd from the base. *Id*. While SSgt Fortune knew his ex-wife was no longer his dependent, he explained that he "did not see the harm in receiving the BAH rate for dependents" because he has a son that he has been supporting since 2007. R. 32. SSgt Fortune explained that his financial support for his son was known to the Air Force because he had set up automatic deductions from his pay. *Id.*

Nine times during the *Care* inquiry, SSgt Fortune told the military judge that he believed he was entitled to BAH at the with dependent rate he claimed because of his son. R. 32, 34, 41, 44, 47-49. Each time, the military judge ignored his statement and failed to recognize and explain to SSgt Fortune that his belief of entitlement to the BAH he received contradicted the criminal intent element for larceny and was a defense larceny charge. *United States v. Arnold*, 40 M.J. 744 (A.F. Ct. Crim. App. 1994) (holding that if the guilty plea inquiry raises a potential defense, the military judge must explain the defense and reject the plea if the defense is not negated.).

---

[2] *Care*" refers to *United States v. Care,* 18 C.M.A. 535, 40 C.M.R. 247 (1969), and "*Care* inquiry" is used throughout this brief to mean providence inquiry.

Instead, the military judge's larceny inquiry focused on the misrepresentation that SSgt Fortune was married to CS. While SSgt Fortune's claim that CS was his dependent was false, SSgt Fortune's claim to BAH at the with dependent rate was not. The gravamen of larceny by false pretense is making a false claim that dupes the government into believing it has a payment obligation when no such obligation exists. *United States v. Howajrah*, 40 M.J. 672, 674 (N-M.C.M.R. 1994); *and United States v. Armstrong*, No. NMCCA 200400004, at *15 (N-M Ct. Crim. App. Dec. 19, 2005). The military judge failed to focus his inquiry on this element, failed to resolve the contradiction that a valid entitlement raised, and failed to explain any potential defenses this belief raised – all of which he was required to do before accepting SSgt Fortune's plea. *Arnold*, 40 M.J. 744. *See also United States v. Gunter*, 42 M.J. 292, 296 (C.A.A.F. 1995) (recognizing that a defense may exist to a larceny charge where a soldier takes property from another honestly believing that he has a superior claim of right to that specific property.).

In *Howajrah*, the court set aside and dismissed the larceny charge because the military judge did little more than establish that Howajrah's receipt of the housing allowance in question was predicated upon his false representations that he was married to Ms. Miller, whereas he was required to elicit sufficient facts to establish that the appellant's representations "amounted to a false pretense that enabled him to obtain" the housing allowance rate "*to which he would not have otherwise been entitled.*" 40 M.J. at 674. (emphasis original) citing to *United States v. Danley*, 21 C.M.A. 486, 45 C.M.R. 260, 263 (1972); *United States v. Antonelli*, 32 M.J. 122 (C.M.A. 1992); *United States v. Bolden*, 28 M.J. 127 (C.M.A. 1989).

There, the appellant (Howajrah) pleaded guilty to one specification each of fraudulent enlistment and larceny of $1,253.00 in housing allowances in violation of Articles 83 and 121, UCMJ. 40 M.J. at 672. Howajrah immigrated to the United States and enlisted in the U.S. Navy by assuming the identity of a roommate and by representing his roommate's alien identification

number as his own. *Id*. at 673. He also claimed a "Tawyna L. Miller" as his spouse on his dependent enrollment and received housing allowance payments at the with-dependents rate. During the providence inquiry, Howajrah admitted he was never married to Ms. Miller but told the military judge that he had a child that he supported in Egypt. *Id*. The court found the military judge's inquiry deficient because he failed to inquire into whether Howajrah would have received the same amount in housing allowance in the absence of any misrepresentations. *Id*. at 674.

As in *Howajrah*, here the military judge erroneously focused on the misrepresentation that SSgt Fortune was married to CS, but he was required to focus the inquiry on whether SSgt Fortune was entitled to BAH at the rate claimed regardless of the misrepresentation. *Id*. SSgt Fortune's acknowledgment that he was not entitled to receive BAH at the with dependent rate is a legal conclusion and does not establish facts necessary to support such a conclusion. *See United States v. Tenk*, 33 M.J. 765 (A.C.M.R. 1991). If SSgt Fortune was entitled to receive BAH at the with dependent rate, then he did not commit larceny – even though he misrepresented the true identity of his dependent to further his otherwise valid claim. *Id*. *See also*, *United States v. Carter*, 24 M.J. 280 (C.M.A. 1987). But the military judge ignored this line of inquiry, rendering SSgt Fortune's *Care* inquiry improvident.

Nine times SSgt Fortune explained that he believed he was entitled to the BAH he received. R. 32, 34, 41, 44, 47-49. Nine times SSgt Fortune essentially says he's not a thief – that he did not have the requisite mens rea to commit larceny. Yet, the military judge never once made any further inquiry or even acknowledged it. Larceny requires a specific intent to steal money or property (e.g., BAH) that a person is not otherwise entitled. *Danley*, 21 C.M.A. at 488. The requisite mens rea is negated where the accused believes he is entitled to BAH at the with dependent rate because he has a child for whom he is supporting. *United States v. Petrie*, 1 M.J. 332, 334 (C.M.A. 1976) (holding there is no intent to steal when a person takes property from another under a sincere belief

that the property is his own or that he is entitled to its possession because his obtaining is without the specific intent to deprive the other person wholly and permanently of property to which that other person has a superior right of possession.). *See also United States v. Armstrong*, No. NMCCA 200400004, 2005 CCA LEXIS 402, at *1 (N-M Ct. Crim. App. Dec. 19, 2005).

Armstrong involved a claim for retroactive BAH at the with dependent rate. The appellant (Armstrong) had a child before entering the military but did not receive the full BAH with dependent rate during his first two years in the Navy. 2005 CCA LEXIS 402 at *3. Upon learning of his entitlement, he sought retroactive payment of BAH and filed a claim. *Id.* To support his claim, Armstrong needed his child support documentation, but those documents had been destroyed in an accident. *Id*. at *5. To speed the process along, Armstrong altered a court document to read as if it had been filed with the court on an earlier date, thereby covering the retroactive period in question and supporting his claim. *Id*. It was this altered court document that gave rise to the larceny charge.

The court set aside the larceny charge because Armstrong's obtaining of the BAH at the with dependent rate was not wrongful. *Id*. at *12. For an obtaining to be wrongful, it must be done either without the consent of the rightful owner or by the use of false pretense. The court explained that usually, a false pretense is a ruse or misrepresentation of fact that fools the rightful owner into voluntarily giving over property on the false belief that the property is lawfully due to the thief. *Id*. at 13. For example, where a service member falsely claims to have a dependent for the purpose of obtaining with dependent BAH when, in fact, he does not. *Id*. Larceny by false pretenses occurs when the false pretense creates a false entitlement that dupes the Government into paying. *Id*. The mens rea of the larceny is established in the thief's intention to permanently deprive the Government of money that is supposed to be used to support dependents, but the thief knows he has no entitlement to such funds. *Id*. at 14.

Here, like *Armstrong*, SSgt Fortune took a shortcut, but he is not a thief. Like Armstrong, SSgt Fortune believed he was entitled to BAH at the with dependent rate. R. 32, 34, 41, 44, 47-49. SSgt Fortune was financially supporting his son each pay period through automatic deductions, but the child's mother had stymied his ability to enroll the child in the D.E.E.R.S. R. 32. As a workaround, SSgt Fortune continued identifying his ex-wife as his dependent instead of his son to obtain the additional BAH money to support ZL. While SSgt Fortune made false statements, he did not commit larceny. *Petrie*, 1 M.J. at 334; *Armstrong,* 2005 CCA LEXIS 40 at 14; *Howajrah*, 40 M.J. at 674; *Danley*, 45 C.M.R. at 263.

As in *Armstrong*, there is no evidence that SSgt Fortune tried to obtain any money in excess of what he believed he was entitled to. Armstrong falsified court documents to support his claim for retroactive BAH, and here, SSgt Fortune did not correct MPF's failure to remove his ex-wife from DEERS and continued identifying her as his dependent. But those misrepresentations did not create a false entitlement and were not done with the intent to steal or deprive the Government of money to which he did not believe he was entitled. In short, there was no intent to steal and no larceny. SSgt Fortune's plea to the contrary is improvident.

Conclusion

The fact that SSgt Fortune believed he was entitled to receive BAH at the with dependent rate because of his son is inconsistent with his guilty plea to larceny. Upon the first mention by SSgt Fortune of this belief, the military judge was required to inquire further into this entitlement. Nine times the military judge ignored this contradiction, failed to develop an adequate factual record as to whether SSgt Fortune had the requisite criminal intent, and failed to explain the potential defenses to the charged larceny his statements raised. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996); *United States v. Gunter,* 42 M.J. 292, 295-96 (C.A.A.F. 1995) (holding an honest belief in a superior claim of right is a potential defense to larceny.).

In short, the record demonstrates a substantial basis in law and fact for questioning SSgt Fortune's larceny plea, and the finding of guilt must be set aside and the specification dismissed. *United States v. Meeks*, 32 M.J. 1033, 1037-38 (A.F.C.M.R. 1991). Further, this Court should reassess SSgt Fortune's sentence and only approve the reprimand. See generally, *United States v. Winckelmann*, 73 M.J. 11, 15 (C.A.A.F. 2013).

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the finding of guilty to the larceny charge, set aside the sentence, and reassess SSgt Fortune's sentence and only approve the reprimand.

Respectfully submitted,

[redacted]

JA[redacted]l, USAFR
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 31 October 2025

Respectfully submitted,

JARETT MERK, Lt Col, USAFR
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **DAVID C. FORTUNE** United States Air Force *Appellant.*	)	No. ACM S32800 1 December 2025

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

ISSUE PRESENTED

WHETHER APPELLANT'S GUILTY PLEA INQUIRY TO LARCENY WAS IMPROVIDENT WHEN HE STATED THAT HE BELIEVED HE WAS ENTITLED TO THE BASIC HOUSING ALLOWANCE AT THE WITH DEPENDENTS RATE HE RECEIVED BECAUSE HE HAD A CHILD WHOM HE FINANCIALLY SUPPORTED.

STATEMENT OF CASE

On 5 April 2024, one charge with five specifications of false official statement in violation of Article 107, Uniform Code of Military Justice (UCMJ) and one charge with one specification of Larceny in violation of Article 121, UCMJ, were referred to a special court-martial against Appellant. (Charge Sheet, ROT, Vol. 1.) On 3 July 2024, Appellant made an offer for plea agreement, in which he agreed to plead guilty to Specifications 3 and 5 of Charge I for false official statement and the Specification of Charge II for larceny, modifying the specification to Appellant's substituted value of $19,236.69 instead of the originally charged amount of $27,492.00. (App. Ex. V.) In exchange for his plea, Appellant received the following benefits: (1) Specifications 1, 2, and 4 of Charge I would be withdrawn and dismissed with

prejudice after acceptance of the guilty plea; (2) a set value of $22,140.81 fine would be adjudged, (3) no additional fines, forfeitures of pay, or confinement in excess of 6 months' contingent confinement pending payment of the fine; and (4) no additional charges or specifications would be referred against Appellant for any potential misconduct discovered from the evidence in the control of the Government or that which was related to the misconduct that the Government was aware of at the time the offer was signed by the Convening Authority. (Id.) The offer for plea agreement was accepted by the convening authority on 4 July 2024. (Id.)

On 30 July 2024, Appellant was tried by military judge sitting alone at Nellis AFB, Nevada. Consistent with his pleas, he was found guilty of Specifications 3 and 5 of Charge I for making false official statements in violation of Article 107, UCMJ, and the Specification of Charge II for larceny of military property in violation of Article 121, UCMJ. (R. at 1, 11, 67.) Consistent with the terms of the plea agreement, the military judge sentenced Appellant to a reprimand, reduction to the grade of E-4, a fine of $22,140.81, to serve six months of confinement if the fine was not paid by the day after Appellant received the entry of judgement, and to be discharged with a bad conduct discharge. (R. at 101.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT, Vol. 1.)

STATEMENT OF FACTS

Appellant married CS in June 2013 and subsequently divorced on 29 July 2019. (R. at 32.) Appellant provided the decree of divorce to the military personnel flight (MPF) but did not complete his due diligence or follow up with MPF to ensure it was processed correctly. (Id.) Appellant also did not pay attention to his pay or check his pay to determine if his housing allowance had changed, despite knowing that there were different rates for with or without dependents. (Id.) Appellant has a child, ZL, and has been paying child support on behalf of his

son since 2007. (Id.) Upon Appellant's permanent change of station (PCS) from Davis Monthan Air Force Base to Kunsan Air Base, he discovered CS was still listed as his spouse. (Id.) In fear of getting into trouble for not previously ensuring his records were updated and believing it was harmless to receive the with-dependent rate, Appellant indicated on his PCS forms that he was still married to CS. (R. at 32-33.) When Appellant completed his PCS from Kunsan Air Base to Nellis Air Force Base, he again indicated that CS was his spouse to obtain the with-dependent housing allowance and further claimed PCS travel reimbursement at the with-dependent rate. (R. at 40.) Appellant did this, "in order to prevent myself from getting into trouble" for not accurately updating his records previously. (Id.) Appellant knew the wrongfulness of his actions when he did it, stating:

> Through the false statements I made when in-processing at Kunsan Air Base and again when I in-processed at Nellis Air Force Base, I received at least $19,236.69, which I was not entitled to. I have learned that while I was at Kunsan Air Base, that BAH I received I was not entitled to. While I had a dependent and I thought I was entitled to the BAH, it has come to my attention that since I did not have primary custody of my son, I was not in fact entitled to receive BAH while living in government-provided housing in Korea. Further, even if I was in fact entitled to BAH while I was at Kunsan Air Base, the way I received it for claiming [CS] as my dependent, when I [sic] was not, makes it improper. Additionally, at the time I made the statement about [CS] moving to Henderson, I received a payment that I was not entitled to. I knew at the time this payment was made that I was not in fact entitled to this payment. When I received payments totaling in at least $19,236.69, I knew the funds were coming from the Unted States Government, specifically the United States Air Force and were the property of the military. I intended to keep the funds and use them for my own purposes, thus permanently depriving the government of their use and benefits.

(R. at 47-48.)

During the plea colloquy, Appellant provided additional clarifying information on his state of mind and his understanding that his actions were wrong. "While there is a rational

reasoning as to why I did what I did, I recognize that the mistake by MPF resulting in my fear and the belief I was entitled to BAH with dependents were not defenses to my actions, but are mitigating factors for consideration." (R. at 49.) The military judge confirmed that Appellant was not lawfully entitled to his receipt of at least $19,236.69 of military funds and that he acquired the money through falsifying paperwork. (R. at 49-51.) Appellant also emphasized that his intent was to keep the money and keep receiving the benefit of the with-dependent rate. (R. at 47-53.) Finally, Appellant agreed that, had the government known the truth of his dependent status, he would not have received at least $19,236.69. (R. at 51-53.)

ARGUMENT

APPELLANT'S GUILTY PLEA TO LARCENY WAS PROVIDENT.

Standard of Review

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion and questions of law arising from the guilty plea are reviewed de novo. *See* United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (finding a provident plea). A military judge can abuse this discretion "if he fails to obtain from the accused an adequate factual basis to support the plea – an area which [the Court must] afford significant deference." Id. Pleas of guilty should not be set aside unless there is a substantial basis in law and fact for questioning the guilty plea. United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991).

This Court has explained that an abuse of discretion, in the guilty plea context, "occurs only when the decision of the military judge is arbitrary, clearly unreasonable, or clearly erroneous." United States v. McAfee, 64 M.J. at 678. The abuse of discretion standard requires then a mere difference of opinion. United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014).

Recently, our superior Court has reiterated this deferential standard – "We 'giv[e] broad discretion to military judge's in accepting [guilty] pleas.'" United States v. Navarro-Aguirre, 2025 CAAF LEXIS 614, at *20 (C.A.A.F. 24 July 2025) (internal citations omitted).

"[W]hen a plea of guilty is attacked for the first time on appeal, the facts will be reviewed in the light most favorable to the government." United States v. Arnold, 40 M.J. 744, 745 (A.F.C.M.R. 1994). When a military judge decides there is a factual basis to accept a guilty plea an appellate court "will defer to [the military judge]'s discretionary decision so long as that decision was within a range of reasonable possible decisions." United States v. Holmes, 65 M.J. 684, 686 (N.M. Ct. Crim. App. 2007).

Law and Analysis

The military judge did not abuse his discretion by finding Appellant's plea provident. When reviewing the adequacy of an appellant's plea, this Court must afford the military judge "significant deference" and uphold a guilty plea unless there is a "substantial basis" in law and fact for questioning the plea. Id.; *see* United States v. Hiser, 82 M.J. 60, 64 (C.A.A.F. 2022) (citing United States v. Prater, 32 M.J. at 436). Here, no "substantial basis" in law or fact exists to question Appellant's plea because, as described below, the military judge developed a factual basis to support each element of larceny, completed appropriate inquiry with Appellant, and was not obligated to advise Appellant on ignorance or mistake of law because it was not an available defense based on the facts of the case.

When taking a guilty plea, the military judge must ensure an accused understands the facts that support a guilty plea, be satisfied that the accused understands the law applicable to his facts, and conclude that the accused is actually guilty. *See* United States v. Care, 18 U.S.C.M.A. 535, 541 (C.M.A. 1969). "The factual predicate is sufficiently established if the factual

circumstances as revealed by the accused himself objectively support that plea." United States v. Castro, 81 M.J. 209, 215 (C.A.A.F. 2021) (citations omitted). In reviewing the providence of a guilty plea, courts consider the appellant's "colloquy with the military judge, as well [as] any inferences that may reasonably be drawn from it." United States v. Carr, 65 M.J. 39, 41 (C.A.A.F. 2007).

As a preliminary matter, this Court should strictly adhere to the abuse of discretion standard. Appellant made an advantageous plea agreement with the Government that included withdrawal and dismissal of three specifications of false official statement and allowed Appellant to avoid 12 months of confinement and forfeitures. (App. Ex. V.) In his offer, he specified the language of the charge and specification under Article 121 that he wanted to plead guilty to, excepting the amount "$27,492.00" from the Specification and substituting the amount "$19,236.69." (Id.) In his plea agreement, Appellant stated, "I assert that I am, in fact, guilty of the offense to which I am offering to plead guilty, and I understand that this agreement permits the government to avoid presentation in court of sufficient evidence to prove my guilt as to that offense." (Id.)

The plea colloquy accurately reflected and gave more context and corroboration of the stipulated facts, with no substantial inconsistencies or conflicts which would render the plea improvident. Despite making clear during his plea colloquy that Appellant had the requisite criminal intent or state of mind, Appellant now contends that the intent element for larceny—that the taking by Appellant was with the intent to permanently deprive the government of the use and benefit of the property—was not met. (App. Br. at 4-8) Manual for Courts-Martial, United

States (2023 ed) (MCM), Pt. IV, ¶ 64.b.(1).[1] It is not clear from Appellant's brief whether he contends that he did not have the requisite intent or that the taking was not wrongful[2] because he had an "honest" belief he was entitled to dependent rate BAH due to making child support payments to his son, ZL. (App. Br. at 4-8). Regardless, Appellant's argument fails for two reasons: (1) Appellant has failed to establish ZL ever qualified as his dependent and did not have a meritorious claim to any dependent rate BAH; and (2) ignorance or mistake of the law was not an available defense because Appellant had the requisite criminal state of mind—willfully perpetuating a lie to obtain additional pay he knew he was not entitled to because he knew his son was not in DEERS. The military judge obtained a sufficient factual basis to support the plea and did not abuse his discretion. Thus, the plea was provident.

Appellant failed to establish ZL as a qualifying dependent and did not have a meritorious claim to any dependent rate BAH

BAH is not an automatic entitlement. Rather, it is a benefit only for qualifying, registered and recognized dependents and is evaluated for eligibility before payout. Appellant was aware of the steps necessary to register a dependent in the Defense Enrollment Eligibility Reporting System (DEERS) and had failed to register his son, ZL, due to not having the required

[1] The elements of Larceny are (1) that Appellant wrongfully took certain property from the possession of the owner; (2) that the property belonged to a certain person; (3) that the property was of a certain value, or of some value; (4) that the taking by Appellant was with the intent to permanently deprive another person of the use and benefit of the property or permanently to appropriate the property for his own use or the use of someone other than the owner; and (5) that the property was military property. MCM, Pt. IV, ¶ 64.b.(1).

[2] A taking or withholding is wrongful only if done without the consent of the owner and with a criminal state of mind. Id. at ¶ 64.c.(1)(d); (R. at 45-46.) An obtaining is wrongful only when it is accomplished by false pretenses with a criminal state of mind. Id. at ¶ 64.c.(1)(d); (R. at 45-46.) Criminal false pretense is any misrepresentation of a fact by a person who knows to be untrue which is intended to deceive, which does in fact deceive, and which is the means by which value is obtained from another without compensation. Misrepresentation must be an important factor in causing the owner to part with the property. Id. at ¶ 64.c.(1)(d); (R. at 45-46.)

paperwork. (R. at 32.) Appellant was further aware of DEERS requirements because he registered CS as his dependent following their marriage in 2013. (App. Br. at 2; R. at 32.) Appellant only received dependent rate BAH after successfully registering CS as his dependent. (Id.) Appellant had gone through the process of attempting to register a dependent at least twice and would have reasonably been aware of the qualifying factors and steps necessary to trigger dependent rate BAH.

A service member simply claiming that they are entitled to dependent rate BAH is insufficient to establish that entitlement. In fact, simply having a spouse or child alone is insufficient to trigger dependent rate BAH:

> The statutory purpose of with dependent rate [BAH] is to at least partially reimburse service members for the expense of providing private quarters for their dependents when government quarters are not furnished, and not to grant the with dependent rate of [BAH] as a bonus merely for the technical status of being married or a parent.

United States v. Antonelli, 43 M.J. 183, 185 (C.A.A.F. 1995).

Entitlement to dependent rate BAH only attaches once a service member has complied with statutory and regulatory requirements to establish eligibility. After eligibility is determined, the appropriate rate must be reviewed and approved by the controlling authority before it is paid out. Without these procedures to first establish eligibility, the entitlement does not exist.

First, pursuant to 37 U.S.C. § 401(b)(1)(C), an illegitimate child only qualifies as a dependent when, "the member's parentage of the child is established in accordance with criteria prescribed in regulations by the Secretary concerned." The criteria for establishing parentage and criteria for the various BAH rates are further explained in Department of Defense Financial Management Regulation (DoD FMR) 7000.14-R, dated December 2019,Volume 7A, Chapter 26, para. 260301, which states "A Service member is not authorized a housing allowance for […] A

dependent for whom the Service member has not provided required proof of adequate support." In addition to establishing parentage, service members must provide further proof that the child is under the age of 21, is in the custody of someone other than the servicemember in question and is dependent on the servicemember for a substantial portion of his or her support. Id. at Table 26-9 All the required documents and proof are forwarded to the authorized Force Support Office for final determination and approval of eligibility. Id. Only after the determination of an eligible service member with an eligible dependent is confirmed, does the entitlement to BAH attach, and the appropriate rate is paid to the service member. Id.

Service members do not automatically qualify for the with-dependent rate and may only be entitled to a partial rate or BAH Differential (BAH-Diff). Yet, BAH-Diff is not an automatic entitlement, either:

> However, if the Service member is authorized BAH solely due to paying child support and the Service member is paying an amount equal to or greater than BAH-Diff, then he or she is authorized BAH-Diff. A service member is not authorized BAH-Diff if the child support payment is less than the service member's applicable pay grade BAH-Diff amount.

Id. at para. 260504.

Simply put, under DoD FMR 7000.14-R, Appellant may not be entitled to any dependent rate BAH based on support of his son at all. Appellant has put forth no evidence, testimony, documents, or proof which would establish eligibility for dependent rate BAH based on his financial support of ZL. Instead, Appellant relies on his 'technical status' of being a parent to trigger his entitlement. (App. Br. at 4-5). This is insufficient and incongruous with controlling case law, statutes, and regulation. Further, as discussed below, his actions and stated intent do not establish an honest belief of entitlement, but rather demonstrate criminal intent or state of mind.

In support of his position, Appellant relies heavily on United States v. Howajrah, 40 M.J. 672 (N.M.C.M.R. 1994); and United States v. Armstrong, No. NMCCA 200400004 (N-M Ct. Crim. App. Dec. 19, 2005) (unpub. op.), claiming parallels where larceny convictions were set aside where a bona fide entitlement to dependent rate BAH existed. (App. Br. at 4-8). However, in both Howajrah and Armstrong, entitlement to the dependent rate housing allowance was not in contention, significantly affecting the holding. In Howajrah, trial counsel explicitly conceded that the appellant was entitled to the with-dependent rate for the entirety of the charged time frame. 40 M.J. at 674-75. In Armstrong, the court noted that there was no evidence the appellant had any intent to obtain funds "in excess of those to which he was rightfully entitled by virtue of the support obligation." No. NMCCA 200400004 at *15. In both cases, it had already been established through proper channels or specifically conceded by trial counsel that the appellant had a meritorious claim to the dependent rate in the first place. This situation is different here where the record does not establish that Appellant was entitled to the dependent rate, and this Court should not be persuaded by these cases.

Appellant argued that his automatic child support payments for ZL since 2007 demonstrated the Air Force's awareness of their relationship. (R. at 32; App. Br. at 4.) However, merely having a biological child does not establish eligibility for dependent rate BAH, a fact Appellant understood given that he never received dependent rate BAH until his marriage to CS in 2013. (App. Br. at 2; R. at 32; *see* Antonelli, 43 M.J. at 185.) He knew that dependent status required enrollment in DEERS, yet he failed to enroll ZL due to lacking the necessary paperwork. (R. at 32.) Thus, Appellant was aware that (1) he could not lawfully obtain dependent rate BAH without enrolling ZL in DEERS, and (2) automatic child support payments alone were insufficient to establish entitlement. His reliance on the notion that he may have been

entitled to some BAH is misplaced; he never established a genuine claim, but instead attempted to exploit his technical status as a parent to justify ongoing theft of military property. Objectively, Appellant knew ZL was not enrolled in DEERS, deliberately falsified documents to perpetuate receipt of dependent rate BAH and PCS travel payments, and recognized the wrongfulness of his actions. His conduct—maintaining false pretenses for financial gain—demonstrates criminal intent to permanently deprive the military of pay. (R. at 33, 36, 40, 53.)

Through the plea colloquy, the military judge established all required elements. Appellant has no established meritorious claim to dependent rate BAH, and the military judge established a sufficient factual predicate to support the wrongfulness of Appellant's theft, Appellant's criminal state of mind, and Appellant's intent to permanently deprive the government of at least $19,236.69. *See* Castro, 81 M.J. at 215. Examining the record as a whole and the evidence provided therein, there is no substantial basis in law or fact to question the guilty plea. Prater, 32 M.J. at 436. The military judge did not abuse his discretion, and no relief should be granted.

Ignorance or mistake of law was not an available defense because Appellant had the requisite criminal intent or state of mind

Ordinarily, ignorance or mistake of the law is not a defense, except in very limited circumstances.

> If the accused, because of a mistake as to a separate nonpenal law, lacks the criminal intent or state of mind necessary to establish guilt, this may be a defense. For example, if the accused is under mistaken belief that the accused is entitled to take an item under property law, takes and item, this mistake of law (as to the accused's legal right) would, if genuine, be a defense to larceny.[…] For example, if an accused, acting on the advice of an official responsible for administering benefits that the accused is entitled to those benefits, applies for and receives those benefits, the accused may have a

> defense even though the accused was not legally eligible for the benefits.

R.C.M. 916(l)(1), Discussion.

This rule encompasses ignorance or mistake of general orders or regulations. Id. Appellant asserts that he had an 'honest' mistaken belief that he was entitled to dependent rate BAH due to making child support payments for ZL. (App. Br. at 4-8). However, the record and evidence reflect that this belief was not genuine and that Appellant had a criminal state of mind because he knew that he was not entitled to BAH unless ZL was enrolled in DEERS. Thus, any defense of ignorance or mistake of law was not available, and the military judge had no obligation to advise Appellant of an unavailable defense. *Cf.* Arnold, 40 M.J. at 744.

First, the record reflects that Appellant had the requisite criminal intent or state of mind. In other words, Appellant knew he was not entitled to dependent rate BAH for ZL, was not entitled to dependent rate BAH after he was no longer married to CS, and knew he was not entitled to additional pay for spousal travel during PCS. Appellant was well aware of the process to register a dependent in DEERS, saying "While completing the forms, I was informed that if I had dependents enrolled in DEERS, I would be able to get BAH for the location at which they lived." (R. at 33.) Appellant also stated, "I knew that I had a son that was not enrolled in DEERS" and explained that he had been unable to register his son in DEERS due to not having the requisite paperwork from ZL's mother. (Id.) This demonstrates a criminal state of mind because Appellant knew he was only entitled to BAH *if* his dependent were properly registered in DEERS, *and* he knew ZL had never been registered in DEERS.

Second, Appellant's conduct was motivated not only by the prospect of financial gain, but also by his fear of punishment for failing to maintain accurate records. During the plea colloquy, Appellant repeatedly—five separate times—expressed concern that he would face

consequences if it were discovered that CS was listed as his spouse when in fact they had divorced. (R. at 32, 36, 40, 41, 49.) This pattern of statements reveals a criminal state of mind: Appellant sought to conceal his perceived misconduct by submitting false statements, thereby perpetuating a lie that he believed would shield him from disciplinary action while simultaneously securing him unwarranted pay.

In circumstances where an accused *lacks* a criminal intent or state of mind necessary to establish guilt, ignorance or mistake of law may be a defense. *See* R.C.M. 916(l)(1), Discussion. However, by his words and actions, Appellant demonstrated his criminal intent, negating any ignorance or mistake of the law defense. Criminal intent can be inferred through several means. For example, any "affirmative action either to ensure the inappropriate continuation of the elevated allowances or to mislead officials in a way so as to co-opt a recoupment" constitutes larceny. United States v. Helms, 47 M.J. 1, *3 (C.A.A.F. 1997); *see also* Antonelli, 35 M.J. at 130-31. A mistaken delivery of property to a servicemember who realizes the mistake and later forms the intent to steal the property constitutes larceny. Helms, 47 M.J. At *3. Going further, "once a servicemember realizes that he or she is erroneously receiving pay or allowances and forms the intent to steal that property, the servicemember has committed larceny." Id.

As in Helms, Appellant took affirmative actions—falsifying documents—to ensure he continued to mislead the Air Force into paying him dependent rate BAH. (R. at 32-40, 47-51.) Appellant knew ZL was not enrolled in DEERS and that he had not received dependent rate BAH until his marriage to CS. (Id.) Appellant realized the overpayment as early as 2019, and perpetuated the lie, demonstrating his intent to steal the property rather than ensure his records were correct. (Id.) His criminal intent is most obvious by the false statements he made claiming CS was both his current spouse and had traveled with him to Nevada, garnering him additional

PCS expense payments. (Id.) This case fits the tests of proof under Helms, supporting Appellant's criminal state of mind. 47 M.J. at *3. Given the evidence showing Appellant had the requisite criminal intent or state of mind, any ignorance or mistake of law defense did not exist. The military judge did not have an obligation to explain and advise Appellant on a defense that did not exist. *Cf*. Arnold, 40 M.J. at 744.

As Appellant states in his brief, "the gravamen of larceny by false pretense is making a false claim that dupes the government into believing it has a payment obligation when no such obligation exists." (App. Br. at 5). That is precisely why Appellant is guilty of larceny. Appellant 'duped' the Government into paying out at least $19,236.69 that Appellant was not entitled to. Appellant acknowledged during the plea colloquy that if the Government had known the truth, the additional pay would not have been allocated to him. (R. at 51.) Appellant also acknowledged that he obtained the dependent rate BAH and additional PCS payment by and through deceit and false representations to the Government. (Id.) The additional PCS payment Appellant obtained through falsifying documents to state that CS had moved with him to Henderson, Nevada is particularly telling of his criminal intent. Appellant did not passively allow an error to financially benefit him, but took specific, measured steps to obtain PCS payments he knew he should not receive. This is demonstrative of an individual who has formed a criminal intent to obtain military property—money—through false pretenses and continued to do so until he was stopped.

In his brief, Appellant asserts that every time he stated he believed that he was entitled to dependent rate BAH because of his support of his son, the military judge erred by ignoring a reasonably raised defense. (App. Br. at 6). However, this defense was not reasonably raised because of the evidence presented established Appellant's criminal intent or state of mind,

negating this defense. The record establishes that Appellant knew he was entitled to BAH *if and only if* his dependent had been properly enrolled in DEERS, that Appellant never registered his son in DEERS, that Appellant was aware it was wrong for him to claim dependent rate BAH through his ex-wife, and that Appellant perpetuated a lie both for financial gain and to cover up his perceived misconduct of failure to keep his records updated.

At best, the record only supported that Appellant believed that he might have been entitled to dependent BAH *if* he properly enrolled his son in DEERS – something he acknowledged he was unable to do. This did not sufficiently raise the issue of whether a mistaken belief undermined Appellant's criminal state of mind. Appellant knew his current conditions did not entitle him to dependent BAH, yet falsified documents to claim it anyway. Appellant's internal justification to further his wrongful actions constituted only mitigating evidence for consideration on sentencing. (R. at 49.) This position also ignores the fact that Appellant explained he had obtained at least $19,236.69 through the false representation that CS was his wife, and he knew it was improper to claim BAH through CS when she was no longer his wife. (R. at 32, 34, 41, 44, 47-49.) This was not error on the military judge's part, but an appropriate colloquy into the specific facts and circumstances of the Specification and Charge of larceny in this case.

The factual circumstances as put forth by Appellant during the plea colloquy objectively support his plea. Castro, 81 M.J. at 215. Specifically, Appellant obtained military property through false pretenses—lying on official documents by stating CS was still his wife and had moved with him during a PCS—and had the specific intent to permanently deprive the military of the money he had received. Appellant's belief that he was entitled to BAH was not an honest one, but an internal justification for his actions which constituted a mitigating factor for

sentencing rather than an affirmative defense. *See* Carr, 65 M.J. at 41. Specifically, Appellant testified, "I knew at the time this payment was made that I was not in fact entitled to this payment […] I recognize that […] the belief I was entitled to BAH with dependents [was] not [a] defense[] to my actions." (R. at 48-49.) The military judge reasonably relied on the evidence presented and did not have an obligation to advise Appellant of a defense that did not exist, especially when viewed in the light of the abuse of discretion standard. Given the totality of the circumstances, the specific facts in this case, the lack of an honest belief in entitlement, and the significant deference given to military judges to solicit and establish an adequate factual basis, Appellant's plea was provident. Id. There is no substantial basis in law or fact to question the guilty plea. Prater, 32 M.J. at 436. Thus, the military judge did not abuse his discretion, and no relief should be granted.

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.

[redacted]

CATHERINE D. MUMFORD, Capt, USAF
Appellate Government Counsel

[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief

[redacted]

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 1 December 2025.

CATHERINE D. MUMFORD, Capt, USAF
Appellate Government Counsel


UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32800**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
David C. FORTUNE	)	**PANEL CHANGE**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 5th day of December, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from a Panel 2 and referred to a Special Panel for appellate review.

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

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
MENDELSON, JAMIE L., Lieutenant Colonel, Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	MOTION FOR ENLARGEMENT OF TIME, OUT OF TIME, TO FILE REPLY
v.	)	Before Special Panel
Staff Sergeant (E-5) **DAVID C. FORTUNE** United States Air Force *Appellant.*	)	No. ACM S32800 8 December 2025

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

Pursuant to Rule 23.3(m)(1) and (7) of this Honorable Court's Rules of Practice and Procedure, Appellant respectfully moves for a seven-day enlargement of time to file his Reply to the Government's Answer.

On 1 December 2025, the Government filed its Answer to Appellant's Assignment of Errors in the above-captioned case. Under Rule 18(d) of this Court's Rules of Practice, Appellant's Reply is due on 8 December 2025. This motion is captioned as out of time because fewer than seven days remain before the current deadline.

Good cause exists for the requested enlargement. Appellant is represented by undersigned counsel, a reservist who is not presently serving on active-duty orders. Undersigned counsel has been unable to perform either Active Duty or Individual Duty Training days due to increased operational demands at the Department of War, where he is employed as a civilian attorney. Counsel is currently addressing a substantial backlog in agency workload and administrative matters resulting from the recent lapse in appropriations, which delayed response deadlines by 43 days and shifted those obligations into the period allotted for preparing Appellant's Reply. Additionally, counsel's division is understaffed by two attorneys, significantly increasing counsel's caseload and limiting the ability to take personal or military leave.

Although undersigned counsel has reviewed the Government's Answer, he has not yet had

sufficient opportunity to complete the Reply. Counsel anticipates finalizing the Reply over the upcoming weekend and filing it on Monday, 15 December 2025.

WHEREFORE, Appellant respectfully requests that this Court GRANT a seven-day enlargement of time, up to and including 15 December 2025, for the filing of Appellant's Reply.

Respectfully submitted,

[redacted]

JARETT MERK, Lt Col, USAFR
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 1 December 2025.

Respectfully submitted,

[redacted]

JARETT MERK, Lt Col, USAFR
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **DAVID C. FORTUNE**, United States Air Force, *Appellant.*	)	UNITED STATES' NON-OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY – OUT OF TIME Before Panel No. 2 No. ACM S32800 10 December 2025

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 does not oppose Appellant's Motion for Enlargement of Time, Out of Time, to file a reply brief in this case.

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

[redacted]

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

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 10 December 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel


IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v **STAFF SERGEANT (E-5)** **DAVID C. FORTUNE**, United States Air Force, *Appellant*	APPELLANT'S REPLY Before Special Panel No. ACM S32800 15 December 2025

Reply to Government's Answer

This case is not about paperwork failures, administrative missteps, or even false statements standing alone. It is about whether a guilty plea to larceny may stand when the record fails to establish that the accused wrongfully obtained government property with a criminal state of mind. The government's Answer repeatedly attempts to shift the focus from entitlement to administrative compliance, from wrongfulness to misrepresentation, and from the military judge's duties to the accused's alleged failures. That framing is inconsistent with settled law and with the record of trial.

As demonstrated below, SSgt Fortune's guilty plea is improvident for multiple, independent reasons. First, a legitimate entitlement to Basic Allowance for Housing (BAH) at the with-dependent rate negates the wrongfulness element of larceny as a matter of law. Second, even assuming arguendo that SSgt Fortune was not entitled to that rate, the record plainly raised a mistake-of-fact defense that the military judge was required—but failed—to explore and resolve. Third, the burden to establish a factual basis for the plea rested with the military judge, not SSgt Fortune, and the record affirmatively demonstrates entitlement under controlling precedent and service regulation. Finally, the government's attempt to distinguish *Howajrah* and *Armstrong* misreads those cases and ignores their controlling principle:

misrepresentations do not constitute larceny absent receipt of money to which the accused had no lawful entitlement. Because the military judge failed to resolve these defects, there is a substantial basis in law and fact to question the providence of SSgt Fortune's plea.

1. <u>A legitimate entitlement to BAH at the with-dependent rate negates an essential element of larceny, rendering SSgt Fortune's plea improvident.</u>

The government fundamentally mischaracterizes Appellant's argument. The issue is not whether SSgt Fortune complied with administrative requirements for payment, but whether he possessed a legitimate entitlement to Basic Allowance for Housing at the with-dependent rate. If such an entitlement existed, larceny is legally impossible. *United States v. Binegar*, 55 M.J. 1, 4 (C.A.A.F. 2001).

Where an accused has a lawful entitlement to the property received, the element of wrongfulness is negated because the obtaining is not accompanied by a criminal state of mind. *Id.*; *United States v. Armstrong*, No. NMCCA 200400004, 2005 CCA LEXIS 402, at *1 (N-M. Ct. Crim. App. Dec. 19, 2005). This remains true even where payment is predicated on inaccurate or false representations. *United States v. Howajrah*, 40 M.J. 672, 674 (N-M.C.M.R. 1994).

Here, the military judge failed to elicit a sufficient factual basis to establish that SSgt Fortune lacked a legitimate entitlement to BAH at the with-dependent rate. To the contrary, SSgt Fortune stated that at the time he received the money, he believed he was entitled to it. That statement directly negates the element of wrongfulness by asserting an absence of criminal intent. Left unresolved, this contradiction renders the plea improvident because the record fails to establish every element of the offense. *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247, 253 (1969).

The military judge's reliance on SSgt Fortune's agreement with boilerplate questions asserting he was "not entitled" to the increased rate does not cure the defect. Such responses amount to legal conclusions, not factual admissions sufficient to support a guilty plea. *United States v. Tenk*, 33 M.J. 765 (A.C.M.R. 1991). It was the military judge's affirmative duty to inquire further and resolve whether SSgt Fortune in fact lacked entitlement—or to reject the plea altogether. *Howajrah*, 40 M.J. at 674. The military judge did neither rendering SSgt Fortune's plea improvident. *Id*.

2. <u>Even assuming SSgt Fortune was not actually entitled to BAH at the with-dependent rate, this plea remains improvident because the military judge failed to inquire into the mistake-of-fact defense raised by the record.</u>

Even if the record could support a finding that SSgt Fortune was not legally entitled to receive BAH at the with-dependent rate—a proposition Appellant does not concede—the military judge was still required to resolve whether mistake of fact negated criminal intent. *United States v. Riddle*, 67 M.J. 335, 340 (C.A.A.F. 2009).

SSgt Fortune repeatedly stated that, at the time he received the money, he believed he was entitled to BAH at the with-dependent rate. R. at 32–33. Those statements plainly raised mistake of fact as a potential defense. *United States v. Binegar*, 55 M.J. 1, 5 (C.A.A.F. 2001). Once such a defense is raised, a guilty plea may not be accepted unless the military judge is fully satisfied as to its providence. *Riddle*, 67 M.J. at 340.

Article 45(a), UCMJ, is unequivocal: if an accused "sets up matter inconsistent with the plea" at any point during the proceedings, the military judge must either resolve the inconsistency or reject the plea. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). A potential defense constitutes matter inconsistent with the plea as a matter of law. *Riddle*, 67 M.J. at 340.

An accused need not articulate facts establishing a complete defense to trigger the military judge's duty of further inquiry. *United States v. Phillippe*, 63 M.J. 307, 310 (C.A.A.F. 2006). Once the record raises a possible defense, the military judge must explore it by eliciting facts sufficient to determine its applicability. *Id.* at 310–11. If that inquiry fails to demonstrate that the defense is inapplicable, the military judge must explain the defense to the accused to ensure that any waiver is knowing and voluntary. *United States v. Harris*, 61 M.J. 391, 398 n.13 (C.A.A.F. 2005); *Phillippe*, 63 M.J. at 310.

The military judge here did none of this. He neither explored the factual basis of SSgt Fortune's asserted belief nor explained the mistake-of-fact defense before accepting the plea. That failure alone constitutes an abuse of discretion requiring reversal. *Riddle*, 67 M.J. at 340; *Phillippe*, 63 M.J. at 309–10.

The government attempts to excuse this failure by asserting that ignorance or mistake of fact applies only in limited circumstances, citing the discussion section of R.C.M. 916(l)(1). That assertion is patently incorrect. An honest belief in entitlement to BAH at the with-dependent rate raises a mistake-of-fact defense to larceny as a matter of settled law. *Binegar*, 55 M.J. at 5 ("We have long recognized that [larceny] requires … a specific intent to steal. Moreover, it also has long been recognized that an honest mistake of fact as to a soldier's entitlement or authorization to take property is a defense to a charge of larceny."); see also *United States v. Sicley*, 6 U.S.C.M.A. 402, 410–13, 20 C.M.R. 118, 126–29 (1955); *United States v. Rowan*, 4 U.S.C.M.A. 430, 16 C.M.R. 4 (1954), reaffirmed in *United States v. Gillenwater*, 43 M.J. 10 (C.A.A.F. 1995).

The government further argues that mistake of fact was "not reasonably raised because the evidence presented established Appellant's criminal intent or state of mind, negating this defense." Gov. Br. at 14–15. This argument misunderstands the legal trigger for a providence inquiry into the

defense. Whether the defense ultimately applies is not the threshold question. A potential defense—once raised—constitutes matter inconsistent with the plea and mandates further inquiry by the military judge. *Riddle*, 67 M.J. at 340; *Phillippe*, 63 M.J. at 310.

Here, the defense was plainly raised when SSgt Fortune stated that he believed he was entitled to BAH at the with-dependent rate at the time he received it. R. at 32–33. The military judge failed to recognize that legitimate entitlement**,** not the false pretenses used to induce payment, was the critical focus of the providence inquiry. Both the military judge and the government on appeal improperly conflate misrepresentations with criminal intent.

As *Howajrah* and *Armstrong* make clear, wrongfulness is not established merely by showing that an accused induced payment through false pretenses. There must be both false pretenses **and** no legitimate claim of entitlement to the money received. False representations do not negate an otherwise valid entitlement, and they likewise do not establish that an accused's belief in that entitlement was dishonest.

The government's recitation of every false statement SSgt Fortune made over the years is therefore beside the point. It is a transparent attempt to paint Appellant in a negative light and distract from the dispositive error: the military judge's failure to inquire into the factual basis of SSgt Fortune's asserted belief and to explain and dispel the mistake-of-fact defense before accepting the plea. That failure constitutes an abuse of discretion requiring reversal. *Riddle*, 67 M.J. at 340; *Phillippe*, 63 M.J. at 309–10.

3. <u>The military judge—not SSgt Fortune—was required to establish a factual basis during the providence inquiry regarding entitlement to BAH at the with-dependent rate.</u>

The government contends that SSgt Fortune's plea is provident because he failed to establish that ZL was a "qualifying dependent" and therefore "did not have a meritorious claim to

any dependent-rate BAH." Gov. Br. at 7. That argument fundamentally misunderstands the providence inquiry. It was not SSgt Fortune's burden to prove entitlement during the plea colloquy; it was the military judge's obligation to develop a factual record sufficient to establish each element of the offense.

Where an accused's responses to questions such as "tell me why you are guilty" either contradict an element of the offense or fail to establish it, the military judge must inquire further to resolve the inconsistency or reject the plea. *Howajrah*, 40 M.J. at 674. The government's suggestion that an improvident plea should nevertheless stand because SSgt Fortune failed to generate a sufficiently developed factual record inverts—and perverts—the providence inquiry standard.

What is more, the factual record affirmatively demonstrates that SSgt Fortune was entitled to BAH at the with-dependent rate. Under binding Court of Appeals for the Armed Forces precedent, a qualifying familial relationship combined with financial support establishes entitlement to the increased BAH rate. *United States v. Antonelli*, 43 M.J. 183, 185 (C.A.A.F. 1995). Both elements were established during SSgt Fortune's providence inquiry.

SSgt Fortune explained that he has a son, ZL, born on 16 October 2007. R. at 32. He further explained that he had been paying child support since November 2007 through an automatic payroll deduction administered by the Defense Finance and Accounting Service (DFAS). *Id.* SSgt Fortune stated that he believed ZL qualified as his dependent for both BAH and healthcare purposes and that he would have enrolled ZL in the Defense Enrollment Eligibility System (DEERS) but for the mother's failure to provide necessary paperwork. R. at 33.

The government never disputed these facts. To the contrary, trial counsel affirmatively conceded during sentencing that ZL was SSgt Fortune's "dependent son." R. at 94. Trial counsel did not argue that SSgt Fortune was substantively ineligible for dependent-rate BAH; instead, trial counsel argued that ZL was "just another example of how he has failed to update DEERS." R. at 95. That argument presumes entitlement and focuses only on administrative compliance.

On appeal, the government now attempts to retreat from that concession by asserting that DEERS enrollment itself creates entitlement to BAH at the with-dependent rate. Gov. Br. at 7. That contention conflates entitlement with administrative processing. DEERS registration does not create entitlement; it is merely a mechanism by which the government verifies and pays an already-existing entitlement. A service member may be legally entitled to dependent-rate BAH based on a qualifying dependent and financial support even if administrative steps necessary to perfect payment have not been completed. The record therefore establishes entitlement under controlling precedent, creating an unresolved contradiction that the military judge failed to address—rendering the plea improvident.

The government further attempts to salvage its position by invoking statutes and the Department of Defense Financial Management Regulation (DoD FMR) 7000.14-R—authorities never raised or discussed at trial. The government asserts: "Simply put, under DoD FMR 7000.14-R, Appellant **may not** be entitled to any dependent-rate BAH based on support of his son at all." Gov. Br. at 9 (emphasis added). This equivocal phrasing itself underscores the defect in the providence inquiry: the record never resolved whether SSgt Fortune was entitled to BAH, yet the plea was accepted anyway.

The government also misapplies the DoD FMR. Even under a correct application of the regulation, ZL qualifies as a dependent for BAH purposes. The DoD FMR expressly provides that a

child born out of wedlock is considered a "primary dependent." DoD FMR 7000.14-R, Vol. 7A, para. 260305.

To the extent additional proof of parentage were required, paragraph 3.5.1.3 specifies the necessary documentation. For a child born out of wedlock, this may include a birth certificate naming the service member, court order, or a sworn affidavit of parentage. "Where the child is not in the service member's custody, the case is treated under the BAH-Differential rules."

Here, parentage was conceded by the government at trial. R. at 94. Moreover, child support was automatically deducted from SSgt Fortune's pay. R. at 32–33. Under DFAS regulations, such a deduction requires a court or child support enforcement order. See DFAS Garnishment Guidance; 5 C.F.R. § 581.102 (implementing 42 U.S.C. § 659). Thus, the record strongly supports the conclusion that ZL satisfied the parentage and support requirements of the regulation.

Although ZL did not reside with SSgt Fortune, that fact is not disqualifying.[1] A service member may receive with-dependent BAH for a child not in his custody if he provides financial support equal to or greater than the BAH-Differential rate. DoD FMR 7000.14-R, Vol. 7A, para. 260305.

The government's reliance on paragraph 260504 is misplaced. Critically, the government omits the paragraph's opening sentence, which limits its applicability to service members assigned to single-type government quarters who would otherwise receive only no BAH or BAH-Partial. That provision does not apply to SSgt Fortune. Paragraph 260504 addresses entitlement for service

[1] SSgt Fortune's statements reflect that he was led to believe otherwise, further reinforcing the mistake-of-fact issues the military judge failed to address. R. 47-48.

members living in government quarters—not those living off base and otherwise eligible for full BAH .

The government's interpretation would yield an absurd result: that a service member with an illegitimate child would be entitled to no BAH at all**,** not even the without-dependent rate. That result is not only illogical but directly contradicts the government's theory at trial, which alleged SSgt Fortune was entitled to without-dependent BAH but improperly received the with-dependent rate. R. 90-94.

Accordingly, contrary to the government's argument, SSgt Fortune was eligible under both governing precedent and the service regulation the government now invokes. At a minimum, the record raised material contradictions regarding entitlement that the military judge was required to resolve. It was not SSgt Fortune's obligation to "put forth evidence, testimony, documents, or proof" to establish eligibility. Gov. Br. at 9. That responsibility rested squarely with the military judge.

Because SSgt Fortune was entitled to BAH at the with-dependent rate—or, at the very least, because the record raised unresolved contradictions as to that entitlement—the wrongfulness element of larceny was not sufficiently established. His guilty plea therefore fails to establish every element of the offense and is improvident. *United States v. Care*, 18 C.M.A. 535.

4. <u>The government's attempt to distinguish *Howajrah* and *Armstrong* is misplaced and partially inaccurate.</u>

The government attempts to distinguish *Howajrah*, 40 M.J. 672 and *Armstrong*, 2005 CCA LEXIS 402, by asserting that entitlement to dependent-rate housing allowances was not at issue in those cases. According to the government, "In *Howajrah*, trial counsel explicitly conceded that the

appellant was entitled to the with-dependent rate for the entirety of the charged time frame." Gov. Br. at 8. That assertion is incorrect.

In *Howajrah*, trial counsel conceded only that the appellant was entitled to the with-dependent Variable Housing Allowance (VHA) while his wife was alive. 40 M.J. at 673–74. The appellant was charged with larceny for continuing to receive the same allowance after her death, during the charged time frame. Thus, contrary to the government's claim, trial counsel did not concede entitlement during the charged period. Entitlement was squarely at issue.

More importantly, however, the government's distinction misses the point. Whether entitlement was conceded or disputed is legally irrelevant to the holdings of *Howajrah* and *Armstrong*. Those cases stand for a broader and controlling principle: false representations, standing alone, cannot sustain a larceny conviction where the accused had an otherwise legitimate entitlement to the allowance received**.**

As this Court recognized in *Howajrah* and reaffirmed in *Armstrong*, misrepresentations may facilitate or induce payment, but they do not establish larceny unless they result in the accused receiving money to which he was not otherwise entitled**.** See *Howajrah*, 40 M.J. at 674; *Armstrong*, 2005 CCA LEXIS 402, at *1. The wrongfulness element of larceny turns on entitlement—not on the presence of false statements in the administrative process.

SSgt Fortune's alleged misconduct mirrors the conduct at issue in *Howajrah* and *Armstrong*. As in those cases, SSgt Fortune made misrepresentations—here, falsely claiming he remained married to CS—that allegedly induced payment at the with-dependent rate. But inducement alone is insufficient. If SSgt Fortune was otherwise entitled to receive BAH at

the with-dependent rate based on his dependent son, ZL, then his misrepresentations do not render the receipt wrongful and cannot support a conviction for larceny by false pretenses.

Put differently, if SSgt Fortune was entitled to dependent-rate BAH because of ZL, then falsely claiming a different qualifying basis (a marital relationship with CS) to obtain the same allowance does not transform the payment into larceny. That is precisely what *Howajrah* and *Armstrong* hold.

The government attempts to sidestep this principle by treating entitlement as a separate and antecedent issue that must be conceded before these cases apply. That is incorrect. The holdings do not depend on a government concession; they depend on whether the accused had a legitimate entitlement as a matter of law. As demonstrated above, trial counsel here conceded that ZL was SSgt Fortune's "dependent son" and focused solely on alleged administrative failures rather than disputing substantive entitlement. Moreover, as shown in Section 3, ZL qualified as a dependent for BAH purposes under both controlling precedent and the DoD FMR.

Accordingly, this case falls squarely within the rule articulated in *Howajrah* and *Armstrong*. Because SSgt Fortune had a legitimate entitlement to BAH at the with-dependent rate—or, at minimum, because the record raised unresolved contradictions regarding entitlement—his receipt of the allowance was not wrongful. The government's attempt to distinguish these cases fails, and their holdings provide a substantial basis in law to question the providence of SSgt Fortune's guilty plea.

Conclusion

The record in this case never established that SSgt Fortune wrongfully obtained BAH with a criminal state of mind, and it repeatedly raised unresolved contradictions that the military judge

was obligated to address. Whether viewed through the lens of legitimate entitlement, mistake of fact, the military judge's affirmative duties during the providence inquiry, or the controlling authority of *Howajrah* and *Armstrong*, the result is the same: the plea fails to establish every element of larceny and cannot be sustained under *Care* and Article 45(a), UCMJ. Because the military judge accepted the plea without resolving these defects or explaining the applicable defenses, he abused his discretion. Thus there is a substantial basis in law to question the plea and this Court should therefore set aside the finding of guilty.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the finding of guilty to the larceny charge, set aside the sentence, and reassess SSgt Fortune's sentence and only approve the reprimand.

Respectfully submitted,

JARETT MERK, Lt Col, USAFR
Appellate Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 15 December 2025

Respectfully submitted,

JARETT MERK, Lt Col, USAFR
Appellate Defense Counsel
[redacted]