

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

<b>UNITED STATES</b>	)	<b>APPELLANT’S CONSENT MOTION</b>
	)	<b>TO SUSPEND RULE 23.3(m)(2)</b>
<i>Appellee</i>	)	<b>AND APPELLANT’S MOTION FOR</b>
	)	<b>ENLARGEMENT OF TIME (FIRST)</b>
v.	)	
	)	
Airman First Class (E-3)	)	Before Panel 3
<b>NOAH D. BOGERT</b>	)	
United States Air Force	)	No. ACM 40855
<i>Appellant</i>	)	
	)	28 August 2025

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

Pursuant to Rules 32 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals and 23.3(r) of this Honorable Court’s Rules of Practice and Procedure, and with consent of the Government, Airman First Class Noah D. Bogert (Appellant) hereby moves this Court to suspend the portion of Rule 23.3(m)(2) which provides that “[a]n appellant’s first motion for enlargement may be granted for up to 60 calendar days . . . .” Additionally, pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court’s Rules of Practice and Procedure, Appellant moves for his first enlargement of time to file an Assignment of Error (AOE); Appellant specifically moves this Court to grant a 120-day enlargement of time. The requested enlargement for a period of 120 days will end on **19 January 2026**. This case was docketed with this Court on 23 July 2025. From the date of docketing to the present date, thirty-six days have elapsed. On the date requested, 180 days will have elapsed. Appellate Government Counsel have been consulted about this motion and consent to the suspension of Rule 23.3(m)(2) requested by Appellant.

On 10 March 2025, Appellant was tried by a general court-martial consisting of a military judge alone at Holloman Air Force Base, New Mexico. Record (R.) at 1. Consistent with his pleas, the military judge found Appellant guilty of negligent manslaughter, in violation of

Article 119, Uniform Code of Military Justice, 10. U.S.C. § 919. R. at 17, 101. On 10 March 2025, the military judge sentenced Appellant to a dishonorable discharge, 42 months of confinement, and reduction to pay grade E-1. R. at 258. The convening authority took no action on the findings or the sentence and waived automatic forfeitures for a period of six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – United States v. Airman First Class Noah D. Bogert.

The digital record of trial is 970 pages, consisting of eight appellate exhibits, five prosecution exhibits, eleven defense exhibits, and one court exhibit. The transcript is 259 pages. Appellant is currently confined. Undersigned counsel has not yet completed her review of this case.

Undersigned counsel is currently assigned thirteen cases; thirteen of those cases are pending before this Court (thirteen cases are pending AOE's). Seven cases have priority over this case:

1. *United States v. Anderson*, ACM No. 40850 – The digital record of trial is 2411 pages consisting of twenty-five appellate exhibits, twelve prosecution exhibits, seven defense exhibits, and one court exhibit. The transcript is 757 pages long. Appellant is currently confined. Undersigned counsel has not completed her review of the record in this case.
2. *United States v. Broadway*, ACM No. 40834 – The digital record of trial is 1557 pages consisting of twenty-nine appellate exhibits, twenty-seven prosecution exhibits, and seven defense exhibits. The transcript is 744 pages long. Appellant is currently confined. Undersigned counsel has not completed her review of the record in this case.

3. *United States v. Fowler*, ACM No. S32821 – The digital record of trial is 346 pages consisting of three appellate exhibits and four prosecution exhibits. The transcript is seventy-nine pages long. Appellant is not currently confined. Undersigned counsel has not completed her review of the record in this case.
4. *United States v. Fife*, ACM No. 40829 – The digital record of trial is 837 pages consisting of twenty-two appellate exhibits, three prosecution exhibits, six defense exhibits, and one court exhibit. The transcript is 319 pages long. Appellant is currently confined. Undersigned counsel has not completed her review of the record in this case.
5. *United States v. Tiexeira*, ACM No. 40831 – The digital record of trial is 1530 pages consisting of forty appellate exhibits, five prosecution exhibits, and fourteen defense exhibits. The transcript is 146 pages long. Appellant is currently confined. Undersigned counsel has not completed her review of the record in this case.
6. *United States v. Marin*, ACM No. 40831 – The digital record of trial is 2287 pages, consisting of fifty-one appellate exhibits, sixteen prosecution exhibits, and sixteen defense exhibits. The transcript is 788 pages. Appellant is currently confined. Undersigned counsel has not completed her review of the record in this case.
7. *United States v. Rice*, ACM No. 40851 – The digital record of trial is 610 pages, consisting of twenty appellate exhibits, three prosecution exhibits, eleven defense exhibits, and one court exhibit. The transcript is 234 pages. Appellant is currently confined. Undersigned counsel has not completed her review of the record in this case.

Through no fault of Appellant, undersigned counsel has been unable to prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to prepare a brief for Appellant's case. Furthermore, the cumulative time spent filing requests for enlargements of time takes focus away from substantive work on behalf of Appellant and the undersigned counsel's other clients, twelve of whom are pending initial AOE's before this Court. Given her caseload, the undersigned counsel spends one to two hours a week on motions for enlargements of time. This time could otherwise be spent working on substantive matters for Appellant's case and other cases pending initial AOE's before this Court. An enlargement of 120 days would allow counsel to focus on reviewing Appellant's record of trial, identifying potential errors, advising Appellant of his options, and filing a brief, rather than on preparing and filing multiple motions for enlargements of time.

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

**WHEREFORE**, Appellant respectfully requests this Honorable Court, with consent of the Government, grant this consent motion and suspend the provision of Rule 23.3(m)(2) that caps an appellant's first motion for enlargement at 60 days. Appellant further requests this Honorable Court grant a 120-day enlargement of time. In the event this Court denies the Consent Motion to Suspend Rule 23.3(m)(2), Appellant respectfully requests this Honorable Court grant the Motion for Enlargement of Time (First) in accordance with the provisions of Rule 23.3(m)(2).

Respectfully submitted,



OLGA STANFORD, *OL* Capt, USAF  
Appellate Defense Counsel



**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were electronically delivered to the Court and served on the Air Force Government Trial and Appellate Operations Division on 28 August 2025.

Respectfully submitted,

A large black rectangular redaction box covering the signature of Olga Stanford.

OLGA STANFORD, Capt, USAF  
Appellate Defense Counsel

Four horizontal black rectangular redaction boxes covering contact information, likely a phone number and email address.

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

UNITED STATES	)	No. ACM 40855
<i>Appellee</i>	)	
	)	
v.	)	
	)	<b>ORDER</b>
Noah D. BOGERT	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	<b>Panel 3</b>

On 28 August 2025, counsel for Appellant moved this court to suspend the portion of Rule 23.3(m)(2) which provides for “up to 60 days” for Appellant’s first enlargement of time, and “to grant a 120-day enlargement of time” to file Appellant’s assignments of error brief, making the brief due not later than 19 January 2026. *See* JT. CT. CRIM. APP. R. 32, A.F. CT. CRIM. APP. R. 23.3(m)(2). Appellate government counsel consents to this suspension of Rule 23.3(m)(2).

In the event this court denies Appellant’s request for a 120-day enlargement of time, counsel for Appellant requests a 60-day enlargement of time, making the brief due not later than 20 November 2025.

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

Accordingly, it is by the court on this 2d day of September, 2025,

**ORDERED:**

Appellant’s Motion to Suspend Rule 23.3(m)(2) is **DENIED**.

Appellant’s Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **20 November 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



CAROL K. JOYCE  
Clerk of the Court

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

**UNITED STATES**

*Appellee*

v.

Airman First Class (E-3)

**Noah D. BOGERT**

United States Air Force

*Appellant*

**BRIEF ON BEHALF OF APPELLANT**

Before Panel No. 2

No. ACM 40855

20 November 2025

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

Olga Stanford  
Capt, U.S. Air Force  
Appellate Defense Counsel

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

## ASSIGNMENTS OF ERROR

- I. The military judge abused his discretion when he overruled the Defense's objection and allowed all twenty-four photographs in Prosecution Exhibit 3 into evidence.**
- II. The military judge abused his discretion when he ruled that the Government may enter as evidence in aggravation testimony that violated R.C.M. 1001(b)(4).**
- III. The military judge plainly erred in allowing the Government to elicit statements requesting a strong punishment for A1C Bogert in violation of R.C.M. 1001(b)(4).**
- IV. Because his sentencing decision was informed by considerations of improper evidence and testimony, the sentence imposed by the military judge violates the law.**

## STATEMENT OF STATUTORY JURISDICTION

Airman First Class (A1C) Noah D. Bogert’s approved sentence includes a dishonorable discharge and confinement for two years or more. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3).<sup>1</sup>

## STATEMENT OF THE CASE

A military judge sitting as a general court-martial convicted A1C Noah D. Bogert, pursuant to his pleas, of involuntary manslaughter by culpable negligence in violation of Article 119, UCMJ, 10 U.S.C. § 919. R. at 17, 101. The military judge sentenced him to a dishonorable discharge, confinement for forty-two months, and reduction to the grade of E-1. R. at 258. The convening authority took no action on the findings or sentence, but deferred A1C Bogert’s reduction in grade until the entry of judgment was signed by the military judge and waived automatic forfeitures for a period of six months to be paid to AS, the spouse of A1C Bogert. Record of Trial, Vol. 1, Convening Authority Decision on Action – *United States v. Airman First Class Noah D. Bogert*.

## STATEMENT OF FACTS

### A. Events Surrounding the Charged Misconduct

A1C Bogert joined the United States Air Force on 22 November 2021. Prosecution Exhibit (Pros. Ex.) 1. Prior to enlisting, A1C Bogert married his high school sweetheart, AS. Def. Ex. K. Upon completion of basic training and technical school, A1C Bogert received orders for his first duty station—Holloman Air Force Base (AFB), New Mexico. *Id.* He and his wife moved to Alamogordo, New Mexico. R. at 46.

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<sup>1</sup> Unless otherwise indicated, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2024 ed.) (hereinafter *MCM*).

A1C Bogert met BA, a fellow airman, in technical school. R. at 230. Both A1C Bogert and BA received orders to Holloman AFB and were assigned to the same squadron. R. at 230. Their relationship developed into a friendship, and A1C Bogert viewed BA as his first and closest friend at Holloman AFB. R. at 230. A1C Bogert and BA shared a love of outdoors and a keen interest in firearms. R. at 230. Because BA lived in the dorms, A1C Bogert's home became their default place to spend time when they were not hiking or exploring the local area. R. at 230.

BA stored his weapons at A1C Bogert's home. R. at 231. Frequently, they would clean their weapons together and practice room clearing procedures. R. at 231. During these simulated clearing procedures, A1C Bogert would take his weapon off safe "when encountering a simulated threat." R. at 47.

In March 2023, A1C Bogert and BA deployed and served together on their deployment. R. at 230–31. Although they worked opposite shifts, they shared a room and spent their free time together. R. at 231. The deployment brought A1C Bogert and BA even closer, and A1C Bogert began to view BA as an important part of his life and as more of a brother than simply a friend. R. at 231.

On 11 February 2024, A1C Bogert and AS drove to El Paso, Texas, to pick BA up from the airport. R. at 46. On the way back, they stopped at Cabela's, a sporting goods store, where BA bought a stock attachment for his shotgun. R. at 46.

When they came back to A1C Bogert's house, BA went to A1C Bogert's bedroom to see if the stock attachment he bought would fit on one of A1C Bogert's guns. R. at 46. At the time, A1C Bogert was in the kitchen. R. at 46. While in the kitchen, he heard BA "pull back the

charging handle and send the bolt forward,” which led him to believe that BA “cleared the rifle.” R. at 46.

Shortly after, BA came into the kitchen with that same gun and handed it to A1C Bogert. R. at 46. A1C Bogert “attempted to clear it and visually inspect the chamber by pulling the charging handle back.” R. at 46. He believed he had “successfully cleared the rifle and that [he] had fully inspected the chamber to confirm that the rifle was not loaded.” R. at 46.

Unfortunately, A1C Bogert “did not pull the charging handle back far enough to actually see if there was a round in the chamber or to properly clear the rifle” before he began a practice room clearing procedure of his residence. R. at 46–47. As he approached BA, A1C Bogert called “‘contact front’ and turned the weapon off safe, and pulled the trigger.” R. at 47. The gun fired and the round that was still in the chamber struck BA in the chest. R. at 47. After he was struck, BA stumbled and fell to the ground. R. at 47.

A1C Bogert “immediately called 9-1-1 and . . . tried to put pressure on the wound to stop the bleeding” in an attempt to provide life-saving support to BA. R. at 47. Unfortunately, by the time the police arrived, BA was already deceased. R. at 47. A1C Bogert “was respectful” toward both the civilian and the military law enforcement, consented to multiple interviews, “admitted to his actions on multiple occasions . . . [,] and was fully cooperative with the investigation.” R. at 48; Pros. Ex. 1 at 4.

## **B. Government Sentencing Evidence**

During the Government’s sentencing case, the senior trial counsel introduced Pros. Ex. 3, a compilation of twenty-four photographs showing BA throughout his life. R. at 135. A1C Bogert’s defense counsel objected to the exhibit, arguing that it was not relevant and that it constituted improper matters in aggravation as victim impact under R.C.M. 1001(b)(4) and Mil. R. Evid. 403. R. at 136.

Relying on *United States v. Taylor*, 41 M.J. 701 (A.F. Ct. Crim. App. 1995), the military judge overruled the Defense’s objection and found that the proffered exhibit was appropriate and relevant evidence in aggravation pursuant to R.C.M. 1001. R. at 140–41. The military judge explained that the photographs are “evidence that is directly resulting from the crime[ of] which A1C Bogert has been convicted” as they add “some perspective to the person who cannot be here.” R. at 141. The military judge also found that the probative value of the photographs was not outweighed by the danger of unfair prejudice. R. at 141–42.

During his ruling on the admissibility of the twenty-four photographs, the military judge issued an additional ruling, clarifying how the Government may use the exhibit: “The Court finds that *coupled with the testimony of the witness* such evidence is appropriate victim evidence pursuant to [R.C.M.] 1001(b).” R. at 141 (emphasis added). Pursuant to R.C.M. 1001(b)(4), the Government called multiple members of BA’s family to testify about the impact that BA’s death had on their lives. *See generally* R. at 127–90. Each described multiple photographs in the slide show and reminisced about the events depicted there. *See id.*

#### TA’s Testimony

TA, BA’s mother, explained that the photograph on page 1 of Pros. Ex. 3 captured “the first time that [her daughters] got to meet their baby brother.” R. at 145; Pros. Ex. 3 at 1. TA went on to describe photographs of a family vacation when BA was a child, a photograph of his graduation from Basic Military Training, photographs of BA with his friends, and a photograph taken after BA returned from deployment. R. at 145–47; Pros. Ex. 3 at 6, 12, 13, 18, 19. Finally, TA said the last picture in the slide show was “priceless” to her because “that was the last picture that [she] took of [her] three kids together.” R. at 147; Pros. Ex. 3 at 24.

In the conclusion of her testimony, the senior trial counsel asked TA if there was “anything else that [she] would like to say to the judge for him to know as he considers an appropriate sentence in this case.” R. at 156. In response, TA described the loss of BA’s potential future and concluded by saying, “I just would like, as we move forward with this sentencing, that we keep in mind that this was a great loss. He was 21 years old. He had his whole future ahead of him.” R. at 156–57.

#### CL’s Testimony

Next, the Government called CL, BA’s older sister. R. at 158. Like TA, she also discussed BA’s baby photograph where she and her sister were “getting to see him for the first time.” R. at 160; Pros. Ex. 3 at 1. She reminisced about a photograph of a hunting trip, explaining that “this photo[graph] will be very meaningful to [her] dad, but it’s also very meaningful to [her] because the person that took this picture is [her] husband.” R. at 161; Pros. Ex. 3 at 7. She continued, “So in that picture, my husband went with my dad and my brother on a hunting trip. It’s in an area that my husband loves to hunt, and so he took my dad and my brother there. And so it’s just very meaningful to me . . . .” R. at 161; Pros. Ex. 3 at 7.

CL also talked at length about a photograph of BA’s graduation from military training, informing the court that “[t]his is one of [her] favorite pictures.” R. at 164; Pros. Ex. 3 at 20.

She went on to say:

[E]verybody went through and had gone through and graduated; but then at the end, they had said that they were going to award one of the airmen with the distinguished graduate of that class. My sister and I had no idea and he had no idea that he was getting this. And so they read off the qualifications of how you become that, and they were very impressive, and then my sister and I heard our brother’s name called, and I just can’t even explain like how proud we were. We were just so proud of him because we knew he took it so seriously.

R. at 164; Pros. Ex. 3 at 20. According to CL, the next picture in the slide show was after BA's graduation that his family insisted on to memorialize him with both the certificate of training and the distinguished graduate award. R. at 165; Pros. Ex. 3 at 21. CL described the photograph on page 22 as another picture taken after BA's graduation and mentioned different photographs not included in the slide show where BA had his technical school pin that CL pinned on him, explaining that the picture was "really special" to her. R. at 165–66; Pros. Ex. 3 at 22.

The Government concluded CL's summation of the photographs by returning to family pictures: a photograph of BA holding CL's infant daughter whom he met for the first time; a holiday photograph with CL's son that would become their family's last Christmas photograph with BA; and the last photograph of the three siblings together. R. at 168–71; Pros. Ex. 3 at 11, 17, 24.

The trial counsel concluded her direct examination of CL by asking if there was "anything else that [she] would like . . . the judge to know as he [considers] the right sentence to impose in this case." R. at 177. CL responded, in part:

[S]ince [BA's] passing, we've reconnected with some of his childhood friends and high school friends, and then we've gotten to meet a lot of the airmen. And I can honestly say of all of [BA's] friends that I've met, there's not a single one that I haven't liked. A lot of them I've adored and loved. I think my brother had a really good judge of character, and he surrounded himself with really neat people. And I know he was friends with [A1C Bogert], and that does mean something to me because I don't think my brother—he didn't pick—he picked out good friends.

But having said that, what is said here today about [BA] or about [A1C Bogert], I think should carry very little weight. I think what carries the most weight is what happened on February 11th. [A1C Bogert] picked up a gun. He did not clear it. He pointed it at my brother. He took it off safety, and he pulled the trigger. None of that should have ever happened. He was 21 years old, and he is gone. And I do not say that out of malice, and I do not say that out of hatred or revenge. I say that because those actions were deliberate, and they were choices that he made, and I think those should carry a severe consequence. And I say that because actions have consequences, and my brother deserves that justice. Thank you, Your Honor.

R. at 178–79.

#### RA's Testimony

RA, BA's other sister, was the third member of BA's family called by the Government. R. at 181. When asked about one of their childhood photographs, RA explained that the picture was taken on Halloween and showed BA "dressed up as a dinosaur" and RA "dressed up as a princess." R. at 183; Pros. Ex. 3 at 3. RA went on to say, "I remember every holiday just being so special. My mom put a lot of magic into our holidays and into our childhood." R. at 183. RA also discussed the photograph showing BA's return from a deployment and described in detail a night when she, BA, and her fiancé stayed up discussing personal faith. R. at 185–86; Pros. Ex. 3 at 23. When asked whether "there [is] anything else that [she] would like the judge to know in considering the appropriate sentence for this case," RA responded, in part, "there will be justice for what happened for him . . . ." R. at 188.

#### JA's Testimony

The last member of BA's family to testify was JA, BA's father. R. at 190. He described a photograph showing BA in Little League baseball that JA helped to coach. R. at 193; Pros. Ex. 3 at 4. Then, he explained that another photograph of BA was taken during "my nephew's wedding in Cheyenne, Wyoming." R. at 193; Pros. Ex. 3 at 5. RA also discussed a hunting trip where BA shot his "first buck," a photograph of BA "hanging out" with JA, and a photograph from BA's technical school graduation that JA could not attend. R. at 194–95; Pros. Ex. 3 at 7, 15, 20.

Just as with previous witnesses, the Government inquired whether there was "anything else . . . that [he] would like to tell the judge, for him to know as he determines an appropriate

sentence for this crime.” R. at 198. JM responded, in part, that “there just needs to be justice, of course, done, fair, but just.” R. at 198–99.

## ARGUMENT

### **I. The military judge abused his discretion when he overruled the Defense’s objection and allowed all twenty-four photographs in Prosecution Exhibit 3 into evidence.**

#### **A. Standard of Review**

This Court reviews the military judge’s ruling on the admissibility of evidence for abuse of discretion. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). “A military judge abuses his discretion when he admits evidence based on an erroneous view of the law.” *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019) (citing *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018)).

#### **B. Law and Analysis**

R.C.M. 1001(b)(4) sets out the general parameters of permissible evidence of aggravation the Government may introduce at sentencing:

The trial counsel may present evidence as to any aggravating circumstance *directly relating to or resulting from* the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused . . . .”

(Emphasis added). Admissibility of aggravation evidence is limited by two factors: the requirement that such evidence is “‘directly relat[ed]’ to the offenses of which the accused has been found guilty” and that it pass the balancing test under Mil. R. Evid. 403. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). Furthermore, the Government has an “interest in counteracting the mitigating evidence which the defendant is entitled to put in . . . .” *Taylor*, 41 M.J. at 705 (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987) (White J., dissenting), *overruled by Payne v. Tennessee*, 501 U. S. 808 (1991)).

“When the Court finds error in the admission of sentencing evidence (or sentencing matters), the test for prejudice is whether the error substantially influenced the adjudged sentence.” *United States v. Edwards*, 82 M.J. 239, 246 (C.A.A.F. 2022) (internal quotation marks and citations omitted). This Court assesses whether an error substantially influenced the sentence by considering four factors: “(1) the strength of the Government’s case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.” *Hamilton*, 78 M.J. at 343 (internal quotation marks and citations omitted). “[A]n error is more likely to have prejudiced an appellant if the information conveyed as a result of the error was not already obvious from what was presented at trial.” *Edwards*, 82 M.J. at 247. Notably, it is “harder for the Government to meet its burden of showing that a sentencing error did not have a substantial influence on a sentence than it is to show that an error did not have a substantial influence on the findings.” *Id.*

In allowing the twenty-four photographs of BA at various stages in life to come into evidence over Defense’s objection, the military judge relied on a case that never contemplated either the number or the nature of photographs that the Government sought to introduce here. In *Taylor*, the Government introduced one photograph of the decedent during his life—a photo of him in basic training. 41 M.J. at 705. By contrast ten of the twenty-four photographs in Pros. Ex. 3 are photographs depicting BA during various stages of his life, some of them years before his death. Of the remaining fourteen photos, only photographs nineteen through twenty-two show anything remotely similar to the basic training photograph at issue in *Taylor*.

When it comes to evidence in aggravation, the Government is limited to only that evidence which directly relates to or results from the offenses of which the accused was convicted. R.C.M. 1001(b)(4). When the offense results in the loss of a life, it is appropriate to

show the decedent as they looked before death. *See United States v. Curtis*, 44 M.J. 106, 140–41 (C.A.A.F. 1996) (finding no error where the military judge allowed the Government to introduce decedent’s wedding photograph); *Taylor*, 41 M.J. at 705. However, the Government does not need twenty-four photographs to make that comparison, especially when nearly half of the photographs in question predate the tragedy by years or decades. “The meaning of ‘directly related’ under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted.” *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). Furthermore, “the strength of the connection required between admitted aggravation evidence and the charged offense” is substantial and the two must be “closely related in time.” *See id.* at 281–82. The photographs from BA’s life were not directly related to the charged misconduct as these images were not close temporally and were not evidence of how his death impacted his loved ones. *See R.C.M. 1001(b)(4); Hardison*, 64 M.J. at 281–82. While the probative value of these images was low, the danger of unfair prejudice to A1C Bogert was high because the photographs had an undue tendency to suggest a decision on the improper basis of emotion. *See Mil. R. Evid. 403*. Here, the military judge admitted Pros. Ex. 3 after performing a Mil. R. Evid. 403 balancing test that was informed by an erroneous view of the law and thus abused his discretion.

Relief is warranted for that error because, under the four-factor prejudice analysis, the Government cannot meet its burden of “showing that the error did not have a substantial influence on the sentence.” *Edwards*, 82 M.J. at 247.

Here, without the improperly admitted exhibit, the Government did not have a strong case in sentencing. The testimony of BA’s loved ones pursuant to R.C.M. 1001(b)(4), even excluding the inadmissible portions discussed *infra*, was powerful, but impact on loved ones is

evidence in aggravation that the Government has in all cases where there has been a loss of a life. At the same time, it was undisputed that A1C Bogert did not intend to kill or injure his friend and felt deep personal grief and remorse for what happened. Furthermore, A1C Bogert had no disciplinary actions, no prior convictions, and did not engage in any collateral misconduct admissible under Mil. R. Evid. 404(b). *See* R.C.M. 1001(b)(2)–(3). The Government was unable to introduce derogative evidence as A1C Bogert had no history of misconduct prior to BA’s death, did not engage in dishonest or dishonorable behavior to minimize his guilt or avoid responsibility, and did not engage in misconduct following BA’s death despite the stress of the upcoming trial and the grief over the loss of his best friend. Therefore, the first factor weighs in favor of A1C Bogert.

By contrast, the Defense presented a strong sentencing case relative to the Government’s case. The Defense entered evidence that A1C Bogert was able to accomplish much in his short four-year career, Def. Ex. C–D; continued to serve with pride despite knowing that his time in the Air Force was coming to an end, Def. Ex. E–J; and showed strong rehabilitative potential, *id.* In his four years in the Air Force, A1C Bogert deployed in support of Operation Inherent Resolve and earned the Air and Space Achievement medal for his meritorious service. Defense Exhibit (Def. Ex.) C at 2. He was coined twice: once by the 54th Training Squadron Commander for his stellar performance as a defender; and once by the Command Chaplain, Headquarters, Air Education and Training Command, for his contributions to the mission of the Holloman AFB Chapel where he was reassigned pending trial. *Id.* at 3. A1C Bogert’s work with the chapel’s Phoenix Airman program was so exemplary that Chaplain (Lieutenant Colonel) KS saw A1C Bogert as a great role model to other airmen and took a rare-for-him step of writing a character letter. Def. Ex. E at 1. Chaplain KS’s faith in A1C Bogert was so great that he would

gladly continue to serve with A1C Bogert “for many years without any reservation whatsoever” and “would deploy with him by [his] side.” *Id.* at 2. A1C Bogert also had support from his parents and his wife, all of whom love him unconditionally and are willing to do everything it takes to make sure that A1C Bogert has the support that he needs to continue being a contributing member of society when he is released from confinement. R. at 212–224; Def. Ex. J. Most importantly, A1C Bogert expressed to the Court that he feels sincere remorse for BA’s death and overwhelming grief for the loss of a friend whom he considered a brother. Def. Ex. K at 3.

The third factor also weighs in favor of this Court finding that A1C Bogert was prejudiced by the erroneously admitted exhibit. The challenged exhibit was not part of the investigative materials and was not attached to the stipulation of fact. *See* Pros. Ex. 1. But for the military judge’s error in believing he was allowed to consider all twenty-four photographs in Pros. Ex. 3, they would not have become part of the record for his consideration when determining A1C Bogert’s sentence. The Government introduced these pictures to evoke a strong emotional response from the military judge, and the effectiveness of that strategy is reflected in A1C Bogert’s sentence. *Compare* Appellate Exhibit (App. Ex.) III at 2 (stipulating a sentencing range of thirty to forty-eight months and placing no limits on the discharge characterization), *with* Statement of Trial Results at 2 (adjudging confinement for forty-two months and dishonorable discharge).

Likewise, the fourth factor weighs in favor of A1C Bogert. The Government used its resources to compile and organize the collection of photographs, which it presented both as a hard copy exhibit and as a slide show during the family’s testimony, undoubtedly with the intent to influence A1C Bogert’s sentence. Pros. Ex. 3; App. Ex. VII. The Government also heavily

relied upon those photographs during the testimony of the four members of BA’s family whom the Government called in its sentencing case. R. at 145–48, 160–66, 168–71, 183–85, 193–96; *see also United States v. Washington*, 80 M.J. 106, 111 (C.A.A.F. 2020) (“When assessing the materiality and quality of the evidence, this Court considers the particular factual circumstances of each case” including “the extent to which the evidence contributed to the government’s case . . . .”) (citations omitted).

Given the improper and inflammatory nature of the erroneously admitted photo exhibit, this Court cannot be confident that Pros. Ex. 3 did not have substantial influence on the sentence.

**WHEREFORE**, A1C Bogert respectfully requests that this Honorable Court exercise its authority under sections (A) or (D) of Article 66(e)(1) UCMJ, 10 U.S.C. § 866(e)(1), and provide appropriate sentencing relief by approving a bad-conduct discharge and reducing his term of confinement to thirty months.

## **II. The military judge abused his discretion when he ruled that the Government may enter as evidence in aggravation testimony that violated R.C.M. 1001(b)(4).**

### **A. Standard of Review**

This Court reviews the military judge’s ruling on the admissibility of evidence for abuse of discretion. *Johnson*, 46 M.J. at 10. “A military judge abuses his discretion when he admits evidence based on an erroneous view of the law.” *Hamilton*, 78 M.J. at 340 (citing *Barker*, 77 M.J. at 383).

### **B. Law and Analysis**

The military judge’s ruling to allow the Government to elicit family lore about BA was an abuse of discretion because it allowed the Government to introduce statements that were not permitted under R.C.M. 1001(b)(4) or under R.C.M. 1001(c)(2)(B), leading to a sentencing decision tainted by inadmissible information. “[V]ictim impact includes any financial, social,

psychological, or medical impact on the crime victim relating to or arising from the offense of which the accused has been found guilty.” R.C.M. 1001(c)(2)(B). “The right to make an unsworn statement solely belongs to the victim or the victim’s designee and cannot be transferred to trial counsel.” *Edwards*, 82 M.J. at 241 (citing *Hamilton*, 78 M.J. at 342; *Barker*, 77 M.J. at 378. R.C.M. 1001(c)(2)(B) “requires unsworn statements to be either ‘oral, written, or both,’” and does not contemplate “acoustic music or pictures.” *Id.* Crucially, a victim impact statement “is not a mechanism whereby the government may slip in evidence in aggravation that that would otherwise be prohibited by the Military Rules of Evidence, or information that does not relate to the impact from the offense of which the accused is convicted.” *Hamilton*, 78 M.J. at 342.

While the Government may admit evidence of victim impact in presentencing, it should be noted that “the Government admits aggravation evidence, to include victim impact statements, under R.C.M. 1001(b)(4), and victims exercise their right to reasonably be heard at presentencing under R.C.M. [1001(c)(2)(B)].” *Barker*, 77 M.J. at 382. For the purposes of R.C.M. 1001(c)(2)(B), “[p]resentation of the victim’s unsworn statement via a question-and-answer format with trial counsel violates the Rules for Courts-Martial because it contravenes the principle that an unsworn victim statement belongs solely to the victim or the victim’s designee.” *United States v. Harrington*, 83 M.J. 408, 418 (C.A.A.F. 2023).

Both the military judge and the trial counsel appeared to be aware of the Court of Appeals for the Armed Forces’ (CAAF) ruling in *Edwards*, where the Court held that military judge erred by allowing the trial counsel to play a video created with substantial assistance from the Government as part of victim matters under R.C.M. 1001A(e), *Manual for Courts Martial*,

(2016 ed.).<sup>2</sup> 82 M.J. at 246; R. at 143 (Before allowing the trial counsel to play the slide show, the military judge asked “It’s just the photos? There’s no additional—”). However, it would be inappropriate to simply view *Edwards* as a cautionary tale on producing videos during victim impact statements. Rather, *Edwards* reaffirmed a framework for how to understand and distinguish victim matters admitted through a victim’s unsworn statement from victim matters offered by the Government under R.C.M. 1001(b)(4). 82 M.J. 239 (first quoting *Barker*, 77 M.J. at 378, then quoting *Hamilton*, 74 M.J. at 342.) While *Edwards* affirmed that the Government may offer victim impact statements in aggravation under R.C.M. 1001(b)(4), nothing in *Edwards* suggests that the Government may introduce statements that do not meet the requirements of either R.C.M. 1001(b)(4) or R.C.M. 1001(c)(2)(B). See generally, *Edwards*, 82 M.J. 239. Yet that is precisely what the Government did here.

The military judge abused his discretion when, after overruling Defense’s objection to Pros. Ex. 3., he also ruled that the family’s testimony about each photograph was part and parcel of this evidence. R. at 141 (“The Court finds that *coupled with the testimony of the witness* such evidence is appropriate victim evidence pursuant to [R.C.M.] 1001(b).” (Emphasis added)). The testimony elicited by the Government from BA’s mother, father, and sisters described BA’s sisters meeting him for the first time at the hospital, R. at 145, 160; family vacations taken in years past, R. at 145–46; memories from a hunting trip, R. at 161, 194; and past visits, family events, and holidays, R. at 168–71, 183, 185–86, 193–94. While all are cherished memories of shared happiness, they are not “aggravating circumstance[s] *directly relating to or resulting from* the offense[ ] of which [A1C Bogert] has been found guilty.” R.C.M. 1001(b)(4) (emphasis added). Neither the Government nor the military judge cited to a single case to support their

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<sup>2</sup> R.C.M. 1001A(e) has been renumbered as R.C.M. 1001(c)(2)(B) in the 2024 *MCM*.

belief that testimony describing photographs that span a decedent's life is appropriate evidence in aggravation despite the unambiguous language of R.C.M. 1001(b)(4). *See Hardison*, 64 M.J. at 281–82. The military judge's ruling that these statements were admissible and that he expected to hear them as a natural accompaniment to the photos in Pros. Ex. 3 was based on an improper view of the law and was an abuse of discretion. *See R.* at 141.

Relief is warranted for that error because, under the four-factor prejudice analysis, the Government cannot meet its burden of “showing that the error did not have a substantial influence on the sentence.” *Edwards*, 82 M.J. at 247.

The first factor, the strength of the Government's sentencing case, and the second factor, the strength of Defense's sentencing case relative to the Government's case, both weigh in favor of A1C Bogert as discussed in Issue I.

The third factor also weighs in favor of this Court finding that A1C Bogert was prejudiced by the erroneously admitted testimony. The testimony about A1C Bogert's life from birth to the last photo taken with his family were not available from any other source. Absent the military judge's erroneous ruling, these statements would not have come into the record in any other way, to include the victim impact statement as they are not evidence of “any *financial, social, psychological, or medical* impact” on BA's mother, father, or sisters, “relating to or arising from the offense of which [A1C Bogert] has been found guilty.” R.C.M. 1001(c)(2)(B) (emphasis added). Furthermore, because R.C.M. 1001(c)(2)(B) “requires unsworn statements to be either ‘oral, written, or both,’” these four witnesses would not have been able to share with the military judge this snippet of their family album even if each of them was making a victim impact statement in their individual capacity under Article 6b, UCMJ, 10 U.S.C. § 806b. *See Edwards*, 82 M.J. at 241. But for the military judge's error in believing he was allowed to

consider these statements, they would not have become part of the record for his consideration when determining A1C Bogert's sentence. The Government introduced this emotionally charged testimony to evoke a strong emotional response from the military judge and the effectiveness of that strategy is reflected in A1C Bogert's sentence. *Compare* App. Ex. III at 2 (stipulating a sentencing range of thirty to forty-eight months and placing no limits on the discharge characterization), *with* Statement of Trial Results at 2 (adjudging confinement for forty-two months and dishonorable discharge).

Similarly, the fourth factor weighs in favor of A1C Bogert. In addition to selecting and compiling the photographs, Government used its resources to interview and prepare these witnesses, undoubtedly with the intent to influence A1C Bogert's sentence. Uncoincidentally, this improper testimony formed a significant portion of the Government's sentencing case. R. at 145–48, 160–66, 168–71, 183–85, 193–96; *see Washington*, 80 M.J. at 111 (citations omitted).

Given the clearly improper and inflammatory nature of the statements elicited by the Government from the four members of BA's family, this Court cannot be confident that their testimony did not have substantial influence on the sentence.

**WHEREFORE**, A1C Bogert respectfully requests that this Honorable Court exercise its authority under sections (A) or (D) of Article 66(e)(1) UCMJ, and provide appropriate sentencing relief by approving a bad conduct discharge and reducing his term of confinement to thirty months.

### **III. The military judge plainly erred in allowing the Government to elicit statements requesting a strong punishment for A1C Bogert in violation of R.C.M. 1001(b)(4).**

#### **A. Standard of Review**

“Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error.” *United States v. Knapp*, 73

M.J. 33, 36 (C.A.A.F. 2014) (citations omitted). “Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused.” *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005) (citations omitted). “[A] military judge is presumed to know the law and apply it correctly absent clear evidence to the contrary.” *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008) (citation omitted).

## **B. Law and Analysis**

The military judge plainly erred when he allowed the Government to introduce, without any regard for the clearly articulated constraints of R.C.M. 1001(b)(4), statements addressing the sentence to be adjudged. *See generally Edwards*, 82 M.J. 239. During the direct examination of BA’s family members, the Government asked each of the four witnesses if they had anything they would like the military judge “to know as he considers an appropriate sentence in [A1C Bogert’s] case.” R. at 156, 177, 188, 198. Each witness responded in a manner consistent with a sentencing recommendation that crime victims may make pursuant to R.C.M. 1001(c)(2)(B) when providing a victim impact statement, but not consistent with matters in aggravation under R.C.M. 1001(b)(4). *Compare* R.C.M. 1001(c)(2)(D)(i), Discussion, *with* R.C.M. 1001(b)(4). In response, TA told the judge that she would like, “as we move forward with this sentencing, that we keep in mind that this was a great loss.” R. at 156–57. CL was more explicit in her sentencing recommendation, telling the military judge that mitigating evidence presented by A1C Bogert “should carry little weight” and that his actions “should carry a severe consequence . . . . because actions have consequences, and [her] brother deserves that justice.” R. at 178–79. RA was more succinct, expressing her certainty that “there will be justice for what happened for him . . . .” R. at 188. JA echoed that sentiment, stating, “there just needs to be justice, of course, done, fair, but just.” R. at 198–99.

Each of these statements was intended to convince the military judge to adjudge a sentence at the higher end of the sentencing cap and to determine that a dishonorable as opposed to bad-conduct discharge characterization was appropriate. These statements were wholly divorced from anything even remotely akin to matters in aggravation as defined by R.C.M. 1001(b)(4). Allowing this testimony was error and the error was plain and obvious. *See Fletcher*, 62 M.J. 175.

Relief is warranted for that repeated error because, under the four-factor prejudice analysis, the Government cannot meet its burden of “showing that the error did not have a substantial influence on the sentence.” *Edwards*, 82 M.J. at 247.

The first factor, the strength of the Government’s sentencing case, and the second factor, the strength of Defense’s sentencing case relative to the Government’s case, both weigh in favor of A1C Bogert as discussed in Issue I.

The third factor also weighs in favor of this Court finding that A1C Bogert was prejudiced by the erroneously admitted testimony. Comments on an appropriate sentence by the four witnesses were not available from any other source. While more than one individual may serve as victim’s representative in the event of death or incapacity, R.C.M. 801(a)(6), the Government requested one victim representative, TA, who would assume BA’s rights under Article 6b, UCMJ—a request that the military judge granted prior to the start of the trial. App. Ex. V–IV. As BA’s Article 6b, UCMJ, representative, TA provided a victim impact statement where she made a request for a “higher sentence.” Court Ex. 1; R. at 207–08. However, it was wholly inappropriate for the trial counsel to elicit a separate recommendation from TA during the Government’s sentencing case, especially when that recommendation advised the military judge on what should be foremost in his mind as the military judge moved forward with sentencing. R.

at 156–57. Advising the military judge on how to view the evidence goes beyond a request for a more severe sentence and is outside the scope of R.C.M. 1001(c)(2). Thus, this testimony would not have been available from any other source had the military judge correctly applied the law. As neither CL, RA, nor JA were designated as victim representatives under Article 6b, UCMJ, they would not have had the opportunity to make a victim impact statement under R.C.M. 1001(c)(2)(B) and thus could not make a sentencing recommendation pursuant to R.C.M. 1001(c)(2)(D)(i). *See Edwards*, 82 M.J. at 245 (finding that the right to make an unsworn victim statement “is separate and distinct from the government’s right to offer victim impact statements in aggravation, under R.C.M. 1001(b)(4)”).

But for the military judge’s clear and obvious error, these statements would not have become part of the record for his consideration when determining A1C Bogert’s sentence. The Government introduced this emotionally charged testimony to evoke a strong emotional response from the military judge and the effectiveness of that strategy is reflected in A1C Bogert’s sentence. *Compare* App. Ex. III at 2 (stipulating a sentencing range of thirty to forty-eight months and placing no limits on the discharge characterization) *with* Statement of Trial Results at 2 (adjudging confinement for forty-two months and dishonorable discharge). There can be little doubt that the military judge improperly considered these statements because, during trial, the military judge *sua sponte* sought to exclude or outright preempt evidence he believed to be prohibited by law. *See R.* at 143 (*sua sponte* asking the senior trial counsel, “It’s just the photos? There’s no additional—”). Yet here, the Government asked four family members four separate times to opine on an appropriate sentence, and each of those times the military judge said nothing.

Similarly, the fourth factor weighs in favor of A1C Bogert. The Government used its resources to interview and prepare these witnesses, undoubtedly with the intent to influence A1C Bogert's sentence. At the end of each witness's testimony, the Government consistently and methodically asked them to advise the military judge on the sentence, indicating that this line of questioning was intentional and pre-planned.<sup>3</sup> R. at 156, 177, 188, 198. Furthermore, this improper testimony formed a significant portion of Government's sentencing case. R. at 145–48, 160–66, 168–71, 183–85, 193–96; *see Washington*, 80 M.J. at 111 (citations omitted).

Given the improper and inflammatory nature of the statements elicited by the Government from the four members of BA's family, this Court cannot be confident that their testimony did not have substantial influence on the sentence.

**WHEREFORE**, A1C Bogert respectfully requests that this Honorable Court exercise its authority under sections (A) or (D) of Article 66(e)(1) UCMJ, 10 U.S.C. § 866(e)(1) and provide appropriate sentencing relief by approving a bad conduct discharge and reducing his term of confinement to thirty months.

**IV. Because his sentencing decision was informed by considerations of improper evidence and testimony, the sentence imposed by the military judge violates the law.**

**A. Additional Facts**

In its sentencing case, the Defense presented compelling evidence of A1C Bogert's remorse and of extenuating circumstances surrounding the convicted offense. The Defense also offered evidence of A1C Bogert's father's rapidly diminishing health. A1C Bogert's father, TB,

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<sup>3</sup> By introducing statements that can only be made under R.C.M. 1001(c)(2)(B) as matters in aggravation under R.C.M. 1001(b)(4), the Government also violated the thrust of the CAAF's holding in *Harrington* that "[p]resentation of the victim's unsworn statement via a question-and-answer format with trial counsel violates the Rules for Courts-Martial because it contravenes the principle that an unsworn victim statement belongs solely to the victim or the victim's designee." 83 M.J. at 418.

had multiple strokes that resulted in parts of his brain dying. R. at 222. As of A1C Bogert’s trial, his prognosis was not promising—his doctors told him there was little they could do and to “enjoy what life [he] ha[d] left.” *Id.* It is likely that TB will die while A1C Bogert is still in confinement. R. at 223.

### **B. Standard of Review**

“The courts of appeals review sentencing decisions for unreasonableness.” *United States v. Booker*, 543 U.S. 220, 264 (2005). Reasonableness is reviewed for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 56 (2007).

### **C. Law and Analysis**

When this Court considers sentence appropriateness, it may consider “whether the sentence violates the law.” Article 66(e)(1)(A), UCMJ, 10 U.S.C. § 866(e)(1)(A). Additionally, “[i]n considering a sentence on appeal, . . . the Court of Criminal Appeals may consider . . . whether the sentence is plainly unreasonable.” Article 66(e)(1)(D), UCMJ, 10 U.S.C. § 866(e)(1)(D). However, Article 66(e) does not define what it means to violate the law or to be plainly unreasonable. At least in part, the “violates the law” provision fits into traditional notions of error correction, consistent Article 59(a), UCMJ, 10 U.S.C. § 859(a). However, Article 66(e) plainly (and presumably intentionally) parallels its counterpart applied in Article III criminal proceedings under 18 U.S.C. § 3742, which has the benefit of robust case law developed over the last three decades.

“A sentence is ‘imposed in violation of law’ when it contravenes a statutory or constitutional provision or is in some other way unlawful.” *In re Sealed Case*, 449 F.3d 118, 122 (D.C. Cir. 2006), *cert. denied*, 550 U.S. 927 (2007). A sentence that is “based on some illegal reason” or “influenced by unlawful considerations” is imposed “in violation of law.” *Id.* (first quoting *United States v. Sammoury*, 74 F.3d 1341, 1343 (D.C. Cir. 1996), then quoting *United*

*States v. Townsend*, 173 F.3d 558, 566 (D.C. Cir. 1999)). Additionally, an unreasonable sentence is one that is “imposed in violation of law.” *United States v. Gonzalez*, 62 F.4th 954, 958 (5th Cir. 2023).

Given that Article 66(e) does not specify whether prohibition of plainly unreasonable sentences applies to category or non-category offenses, this Court should apply the unreasonableness standard and evaluate the sentencing decisions by military judges for abuse of discretion. Federal courts of appeals “evaluate the reasonableness of the sentence using the standards of appellate review applicable to criminal sentences generally.” *United States v. Sanchez*, 900 F.3d 678, 682 (5th Cir. 2018) (citing *Gall*, 552 U.S. at 50–51 (2007) (“[A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the 18 U.S.C. § 3553(a) factors to determine whether they support the sentence requested by a party”). Furthermore, “[a]fter settling on the appropriate sentence, [the judge] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.” *Gall* 552 U.S. at 50 (citation omitted).

While some federal circuit courts of appeals either adopted the reasonableness standard for all sentences or have held that “unreasonable” and “plainly unreasonable” are indistinguishable, others maintain that “plainly unreasonable” is still a valid standard post-*Booker*. See *United States v. Miller*, 634 F.3d 841, 843 (5th Cir. 2011) (citing *Booker*, 543 U.S. at 259–62) (finding that while “*Booker* rendered the Sentencing Guidelines advisory, and directed courts to review sentences under a reasonableness standard,” it left a gap open to interpretation in cases where Sentencing Guidelines do not apply, enabling some jurisdiction to

apply the “plainly unreasonable” standard in those cases).<sup>4</sup> Both jurisdictions begin their inquiry by asking whether the sentence is reasonable under the abuse of discretion standard. *See Sanchez*, 900 F.3d at 682 (quoting *United States v. Winding*, 817 F.3d 910, 913 (5th Cir. 2016) (“the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard”). However, the jurisdictions that utilize the plainly unreasonable standard will “vacate the sentence only if the identified error is ‘obvious under existing law,’ such that the sentence is not just unreasonable but plainly unreasonable.” *Sanchez*, 900 F.3d at 682 (quoting *Miller*, 634 F.3d at 843). Notably the courts that still hold to the plainly unreasonable standard apply it only in select cases, such as review of sentence revocation, and utilize the reasonableness standard for sentences imposed under the Sentencing Guidelines. *United States v. Finley*, 51 F.3d 288, 293 (4th Cir. 2008). These courts also apply the plainly unreasonable standard for offences that do not have established federal sentencing guidelines. *See id.* at 294. The latter application is precluded by Article 66(e)(1)(B)(i), UCMJ, 10 U.S.C. § 866(e)(1)(B)(i) in the military justice system, which preserves the old Article 66(e) sentence review for non-category offenses. Therefore, this Court should decline to follow the heightened plainly unreasonable standard and adopt the less deferential reasonableness standard. This approach ensures that sentences for category offenses receive the same standard of review as offenses imposed under the Sentencing Guidelines—abuse of discretion. *See Booker*, 543 U.S. at 259–62.

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<sup>4</sup> *Comparing United States v. Flemming*, 397 F.3d 95, 99 (2nd Cir. 2005), and *United States v. Miqbel*, 444 F.3d 1173, 1176 n.5 (9th Cir. 2006) (both adopting reasonableness standard), with *United States v. Crudup*, 461 F.3d 433, 437–39 (4th Cir. 2006), and *United States v. Kizeart*, 505 F.3d 672, 674–75 (7th Cir. 2007) (both maintaining the plainly unreasonable standard); also citing *United States v. Sweeting*, 437 F.3d 1105, 1106–07 (11th Cir. 2006), and *United States v. Cotton*, 399 F.3d 913, 916 (8th Cir. 2005) (both finding that the two standards are functionally the same).

A1C Bogert is entitled to relief under Article 66(e)(1)(A), UCMJ, because the military judge imposed a sentence in violation of the law. Improperly admitted photographs and testimony about the history behind those photographs, discussed in Issues I–II, demonstrate that the military judge was “influenced by unlawful considerations” and imposed A1C Bogert’s sentence “in violation of law.” *See In re Sealed Case*, 449 F.3d at 168 (citations omitted); R. at 141 (“The Court finds that *coupled with the testimony of the witness* such evidence is appropriate victim evidence pursuant to [R.C.M.] 1001(b).” (Emphasis added)). Additionally, as discussed in Issue II, the military judge’s clear and obvious error in allowing the Government to repeatedly introduce emotionally charged testimony recommending a harsher punishment for A1C Bogert serves as further evidence that the deliberative process which led to A1C Bogert’s sentence contravened a R.C.M. 1001(b) and was thus unlawful. *See In re Sealed Case*, 449 F.3d at 168; 10 U.S.C. § 66(e)(1)(A).

Even if this court finds no prejudicial error in Issues I–III, the sentence announced by the military judge should be reconsidered because it was “plainly unreasonable” under Article 66(e)(1)(D), UCMJ. Congress’ update to Article 66(e), UCMJ, 10 U.S.C. § 866(e), made it closely analogous to 18 U.S.C. § 3742. The similarities between the two statutes are substantial and should render Article 66(e), UCMJ, subject to established case law from the Supreme Court of the United States. That precedent is unambiguous: “[a]fter settling on the appropriate sentence, [the judge] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.” *Gall*, 552 U.S. at 50 (citation omitted). Here, because the military judge did not explain his sentencing decision, this Court should find that the sentence imposed is plainly unreasonable regardless of which interpretation of “plainly unreasonable” this Court adopts.

Furthermore, because the military judge failed to comply with *Gall* and did not provide an explanation for the sentence he adjudged, this Court cannot be certain that he considered the Defense’s evidence and argument. *See Taylor-Sanders*, 88 F.3d 516, 524 (4th Cir. 2023) (finding that “a district court’s failure to consider a nonfrivolous argument at sentencing might mean that a sentence is imposed in violation of law”). This failure is especially egregious as it violates A1C Bogert’s due process rights. *See United States v. Plasencia*, 886 F.3d 1336, 1343 (11th Cir. 2018) (quoting *United States v. Jules*, 595 F.3d 1239, 1243 (11th Cir. 2010) (The “defendant’s primary due process interest at sentencing is the right not to be sentenced on the basis of *invalid premises* or inaccurate information.” (Emphasis added))).

Although the gravity of BA’s death is indisputable, that was not an outcome that A1C Bogert ever intended or wished for—BA was his best friend, someone whom A1C Bogert saw as a brother. Def. Ex. K; R. at 230–32. When he saw that BA was shot, A1C Bogert immediately called 9-1-1 and attempted to provide lifesaving measures. R. at 47. He did not attempt to conceal what happened, did not try to minimize his role in his friend’s death, and cooperated with every level of law enforcement. R. at 48; Pros. Ex. 1 at 4.

A1C Bogert had been an exemplary Airman during his short career. He deployed in support of Operation Inherent Resolve, earning the Air and Space Achievement medal for his meritorious service. Defense Exhibit (Def. Ex.) C at 2. A1C Bogert was coined by two field grade officers: the 54th Training Squadron Commander for his stellar performance as a defender; and the Command Chaplain, Headquarters, Air Education and Training command, for his contributions to the mission of the Holloman AFB Chapel. *Id.* at 3. These awards speak not only to his commitment to the Air Force, but also to his incredible rehabilitative potential evidenced by his determination to continue contributing and serving despite knowing that his

future likely held a criminal conviction, jail time, and a separation from service. *Id.*; Def. Ex. E at 1. Even in the face of his own struggles, A1C Bogert became a leader in the Phoenix Airman program at the Holloman AFB Chapel, helping airmen who were facing trial or disciplinary actions. Def. Ex. E at 1. At every step of the way, A1C Bogert demonstrated contrition, remorse, and showed incredible rehabilitative potential.

The military judge had no reason to believe that A1C Bogert was a danger to society or a violent criminal at high risk of reoffending. Given A1C Bogert's strong sentencing case and absent an explanation for the sentence imposed, this Court should find his sentence plainly unreasonable. *See* Article 66(e)(1)(D), UCMJ; *Taylor-Sanders*, 88 F.3d 516, 524

**WHEREFORE**, A1C Bogert respectfully requests that this Honorable Court exercise its authority under sections (A) or (D) of Article 66(e)(1) UCMJ, 10 U.S.C. § 866(e)(1) and provide appropriate sentencing relief by approving a bad-conduct discharge and reducing his term of confinement to thirty months.

Respectfully submitted,

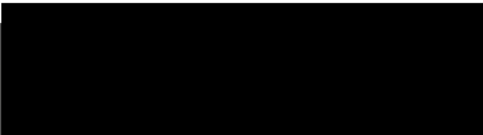
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OLGA STANFORD, Capt., USAF  
Appellate Defense Counsel

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were electronically delivered to the Court and served on the Air Force Government Trial and Appellate Operations Division on 20 November 2025.



OLGA STANFORD, Capt., USAF  
Appellate Defense Counsel



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

<b>UNITED STATES,</b>	)	UNITED STATES' ANSWER
<i>Appellee,</i>	)	TO ASSIGNMENTS OF ERROR
	)	
v.	)	Before Panel No. 2
	)	
Airman First Class (E-3)	)	No. ACM 40855
<b>NOAH D. BOGERT,</b>	)	
United States Air Force,	)	22 December 2025
<i>Appellant.</i>	)	

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

**ISSUES PRESENTED**

**I.**

**[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE OVERRULED THE DEFENSE'S OBJECTION AND ALLOWED ALL TWENTY-FOUR PHOTOGRAPHS IN PROSECUTION EXHIBIT 3 INTO EVIDENCE.**

**II.**

**[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE RULED THAT THE GOVERNMENT MAY ENTER AS EVIDENCE IN AGGRAVATION TESTIMONY THAT VIOLATED R.C.M. 1001(B)(4).**

**III.**

**[WHETHER] THE MILITARY JUDGE PLAINLY ERRED IN ALLOWING THE GOVERNMENT TO ELICIT STATEMENTS REQUESTING A STRONG PUNISHMENT FOR APPELLANT IN VIOLATION OF R.C.M. 1001(B)(4).**

**IV.**

**[WHETHER,] BECAUSE HIS SENTENCING DECISION WAS INFORMED BY CONSIDERATIONS OF IMPROPER EVIDENCE AND TESTIMONY, THE SENTENCE IMPOSED BY THE MILITARY JUDGE VIOLATES THE LAW.**

## STATEMENT OF CASE

Pursuant to Appellant’s pleas, a military judge, sitting alone, convicted him of involuntary manslaughter by culpable negligence in violation of Article 119, UCMJ.<sup>1</sup> (*Entry of Judgment*, 22 April 2025, eROT Vol. 1.) The military judge sentenced Appellant to a dishonorable discharge, confinement for forty-two months, and a reduction in rank to the grade of E-1. (Id.) The convening authority took no action on the findings and sentence, but deferred Appellant’s reduction in grade until the entry of judgment was signed, and waived automatic forfeitures for a period of six months that was paid to Appellant’s spouse. (Id.)

## STATEMENT OF FACTS

### *Appellant shot and killed a fellow Airman*

On 11 February 2024, Appellant shot and killed BA, a fellow member of the 49th Security Forces Squadron. (Pros. Ex. 1 at 1.) On this day, Appellant pointed his personally-owned AR-15 style rifle at BA, which resulted in a fatal accident. (Id.) Appellant was experienced with handling firearms operations and safety precautions. He was taught to “treat all firearms as loaded at all times” and “never point a weapon at anything you are not willing to shoot.” (Pros. Ex. 1 at 2.) Still, Appellant pointed his assault rifle at his friend, pulled the trigger, and killed his friend. (Pros. Ex. 1 at 1-2.)

Appellant during the Care<sup>2</sup> inquiry described that on the day of the fatality, he, along with his wife, picked up BA from the airport in El Paso, Texas. (R. at 46.) On their way to Alamogordo, New Mexico, Appellant and BA stopped at Cabela’s where BA bought a stock

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<sup>1</sup> All references to the punitive articles, Mil. R. Evid. and Rules for Courts-Martial are to the Manual for Courts-Martial United States (2024. ed.).

<sup>2</sup> United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

attachment for his shotgun. (Id.) Once Appellant, his wife, and BA arrived at Appellant's house, BA "tried putting the buttstock on [Appellant's] rifle to see if it would be compatible." (Id.) While BA was handling the firearm in the Appellant's bedroom, Appellant was in the kitchen. (Id.) Appellant heard BA "pull back the charging handle and send the bolt forward, so [Appellant] thought that BA cleared the rifle." (Id.) BA then left Appellant's bedroom, took the stock attachment off Appellant's rifle and joined Appellant in the kitchen. (Id.) Appellant admitted that he thought that he successfully cleared the rifle and inspected the chamber to confirm that that rifle was not loaded, and explained the following turn of events:

However, I did not pull the charging handle back far enough to actually see if there was a round in the chamber or to properly clear the rifle. I then proceeded to clear my residence. This was something that [BA] and I would do sometimes simulating the clearing procedures that we were taught in our Security Forces training. When I would do this clearing procedure, I would start with my weapon on safe, but I would take it off safe when encountering a simulated threat.

On this day, I started the clearing procedure in my bedroom. I made my way to the kitchen, which is where [BA] was. As [BA] stood about less six -- less than six feet away from me, I said "contact front," turned the weapon off of safe, and pulled the trigger. A bullet came out of the rifle and struck [BA] in the chest.

(R. at 46-47.)

Next, Appellant said that it took him a second to realize what happened. (R. at 46.) BA told Appellant, "You shot me, call 9-1-1." (Pros. Ex. 1 at 3.) Appellant then called 9-1-1 and tried to put pressure on the wound to stop the bleeding. (R. at 47.) Law enforcement arrived a few minutes later, but BA "was already deceased." (Id.)

Appellant admitted that his "decision to take the weapon off safe [mode] and pull the trigger at another human being was not only negligent, but also reckless." (R. at 52.) Further, Appellant understood that he failed to demonstrate proper firearm safety by not ensuring that the

weapon was properly cleared. (Id.) Appellant told the military judge that he was taught in Security Forces technical school to properly clear a weapon and to “pull the charging handle back far enough to eject or see the round in the chamber.” (R. at 59.) But Appellant admitted that he got “too comfortable in the motions of clearing the rifle, and. . . was not careful enough in actually checking the rifle.” (Id.) Appellant’s failure to clear the weapon resulted in Appellant shooting and killing BA. (Id. at 60.)

The autopsy report revealed that the cause of BA’s death was a gunshot wound to the chest. (Pros. Ex. 1, attachment 4.) Appellant fully cooperated during the investigation, and admitted his deadly actions to law enforcement. (Pros. Ex. 1. at 4.)

#### ***Appellant’s Plea Agreement***

Appellant proposed a plea agreement which limited his punitive exposure from the potential maximum punishment of 10 years of confinement. (App. Ex. III at 3-4.) The government accepted the plea agreement. (Id.) In exchange for Appellant’s plea of guilty to involuntary manslaughter by culpable negligence, the military judge had to enter a sentence with the following limitations:

Minimum confinement of thirty (30) months and maximum confinement for forty-eight (48) months.

No other sentence limitations are imposed for any other lawful punishment that may be adjudged.

(App. Ex. III at 2.)

## *Sentencing Proceedings*

### *Prosecution Sentencing Evidence*

The government called five witnesses to testify, including BA's parents, TA and JA, and his two sisters, CL and RA. BA's family referred to the photographs contained in Prosecution Exhibit 3 throughout their testimony. TSgt KD, a member from BA's unit, testified about the impact BA's death had on the unit. (R. at 116.) This admissibility of TSgt KD's testimony is not contested on appeal. The government also introduced Prosecution Exhibit 3, which contained 24 photos of BA throughout his life with family and friends. (R. at 135.)

### *BA's Mother's Testimony*

TA, the victim's mother, testified under oath during presentencing proceedings. TA began discussing her pregnancy with BA and testified that her and her husband "were absolutely elated" when they found out that she was pregnant with a little boy. (R. at 128.) BA brought so much joy to the family. (Id.) BA had two older sisters – CL and RA. (Id.) As a child, BA loved dinosaurs and the Toy Story film franchise. (Id.) Towards the end of high school, TA explained that BA looked into joining the military because he could gain experience in law enforcement. (R. at 130-31.) TA explained that BA "absolutely had dreams and goals and plans for his future." (R. at 133.) BA talked to his mother about wanting to get married and having "kids someday." (R. at 134.)

In preparation for Appellant's court-martial, TA prepared a collection of pictures throughout BA's life (Prosecution Exhibit 3). (R. at 134-35.) The photographs contained many memories from BA's life including, but not limited to, BA's siblings meeting him for the first time, family trips to Washington D.C., BA's graduation from military training, BA with friends

from Holloman Air Force Base, BA's return from deployment, and BA's last picture with his sister's taken about six to seven months prior to BA's death. (R. at 145-47.)

TA described the last time she saw her son was the day he died. (R. at 148.) She and her husband, JA, dropped BA off at the airport after BA's two-week visit home. (Id.) The next day, a commander, another officer from the Air Force, and a chaplain arrived at her doorstep and told her and her husband that BA "died due to a gunshot wound to the chest." (R. at 152.) No further explanation was provided to TA at that time. (Id.) This initially did not make any sense to TA because she did not think that BA would "take his own life like that." (R. at 153.) While TA was on her way to drive to tell her oldest daughter in person about BA's death, the commander called and explained that BA's death was caused by an accidental shooting at Appellant's residence. (R. at 154.)

When special trial counsel asked about the impact of BA's death, TA responded:

Well somebody recently told me that the greater love that you have for somebody, the deeper the grief is. And I loved [BA] with all of my heart, and so my entire heart feels broken and I miss him so incredibly much. It's a very painful thing. I still wake up every day with dried tears on my eyes, and it's because I miss him so much, and it's been so hard not having him here this year and it's been so hard watching my family go through what they've gone through. Like, [BA] was my husband's – I mean, those two are like best buddies. They were best friends. They did everything together. He was – [BA] was a little mini-John. And the girls, I mean, they've had major milestones in their life this past year. [CL] had a baby. [RA] got engaged. And those are joyful moments, but we go into them with a heavy heart because [BA] is not here to share that joy with us anymore.

(R. at 155-56.)

Lastly, TA wanted the judge to consider that "as we move forward with this sentencing, that we keep in mind that this was a great loss. He was 21 years old. He had his whole future ahead of him." (R. at 156-57.)

*CL's Testimony*

CL, BA's oldest sister also testified. She discussed memories of growing up with BA. Because she was nine years older than BA, CL remembered the day BA was born. (R. at 158.) CL remembered tears in her dad's eyes when she first met BA. (R. at 159.) When discussing the first time she met her baby brother, CL referred to the picture of when she got to hold BA for the first time. (R. at 160; Pros. Ex. 3 at 1.)

One of CL's favorite memories that she had with her brother was his graduation from technical school in San Antonio, Texas. (R. at 162.) CL was very proud that her brother received the distinguished graduate award. (R. at 164.) CL discussed a photograph of BA receiving this award and loved the picture because her brother was always very stoic and serious, and the picture showed BA's "little grin and this smirk." (R. at 164; Pros. Ex. 3 at 20.)

CL also talked about memories of BA and her two oldest children, such as her last Christmas with her brother as depicted in Prosecution Exhibit 3. (R. at 168-69; Pros. Ex. 3 at 17, 11.) CL was pregnant when BA passed, so her youngest daughter never met her uncle. (R. at 169.) CL said, "it breaks my heart for my kids because they're so little, and they have so few interactions with their uncle, and they won't have anymore." (Id.)

CL discussed that she was in contact with her brother every single day. (R. at 167.) The family had a group SnapChat messaging thread where CL frequently shared pictures of her children. (Id.) CL testified that she thought that her brother "would have made a career of being in the Air Force." (Id.) CL regretted that she did not take any pictures of BA during his last visit home in February 2024. (R. at 170.) But CL was grateful that her mother hired a photographer to take family photos, and CL referenced the last photograph she has with her brother reflected in Prosecution Exhibit 3 page 24. (R. at 170.)

CL testified about her last interaction with BA. BA said goodbye and told CL “love you.” (R. at 173.) Next, CL explained how she first found out about BA’s death. Her mom hugged her and said, “I’m sorry, but your brother passed away.” (R. at 175.) CL’s initial reaction was, “[i]t just seemed so unreal. It just didn’t seem possible.” (Id.)

When discussing the impact of BA’s death, CL stated the following:

So I have thought about my brother every single day, multiple times a day for over a year, and sometimes -- sometimes I just cry. I’m sad. Sometimes I think about happy things and I smile, and I kind of just think fondly of him. And sometimes, I just get sick to my stomach, like, I just feel ill, and I miss him and I love him, and I will miss him the rest of my life, but the worst part has been watching my parents. My -- I’m a mother and, yes, he was my brother, and I’ve lost a brother, but I know what that love is for your child. I know what it is to love a child, and there’s no love that compares to that. There’s nothing like it.

And the pain that I see on my parents’ face -- I mean, the first few months after my brother passed, I didn’t think my dad was ever going to stop crying. I just thought he is going to be in pain the rest of his life, and I worry about them both. I just worry about their hearts emotionally, but, like, physically, I just worry about the toll of this loss on them. And, you know, they still smile and they still laugh, but even when they smile and they laugh, you can still see that they hurt. And selfishly, for my sister and I, we lost our brother, but we lost who our parents were. They’ll never be the same. Like, we have our parents, and they are the best parents in the entire world. There’s -- they are the best. They gave us such an amazing childhood, and they still -- even as we’re adults, they support us and they love us so well, and they will be there with us, but they will be there broken and sad. And I just -- I hate that for them. I hate that so much. I hate that.

(R. at 176-77.) Lastly, CL ended her testimony discussing justice for her brother:

But having said that, what is said here today about [BA] or about [Appellant], I think should carry very little weight. I think what carries the most weight is what happened on February 11th. [Appellant] picked up a gun. He did not clear it. He pointed it at my brother. He took it off safety, and he pulled the trigger. None of that should have ever happened. He was 21 years old, and he is gone. And I do not say that out of malice, and I do not say that out

of hatred or revenge. I say that because those actions were deliberate, and they were choices that he made, and I think those should carry a severe consequence. And I say that because actions have consequences, and my brother deserves that justice. Thank you, Your Honor.

(R. at 178-79.)

*RA's Testimony*

RA, BA's sister, also testified, and discussed that her and BA "were really close" growing up. (R. at 182.) Even though they had different interests – she liked Polly Pockets and Barbies and BA liked dinosaurs – they "still were able to combine the two of them and play together, and [RA] would play Polly Pockets in a dinosaur world." (Id.) RA explained that BA's death "was a very hard thing to go through. This is a really great loss for me. He has been my rock and my support in all of my life. No one has supported me more than my brother has."

(R. at 182.)

Throughout her testimony, RA discussed photographs contained in Prosecution Exhibit 3. She talked about the Halloween picture where BA was dressed up as a dinosaur, and she was dressed up as a princess. (R. at 183; Pros. Ex. 3 at 3.) RA also talked about BA's trip back home after his deployment in Jordan. (R. at 184.) BA just turned 21 a week prior to the trip, and RA was excited to celebrate his birthday and decorated her house for him. (Id.) RA talked about a photograph taken together with BA from that trip. (R. at 184; Pros. Ex. 3 at 23.)

RA remembered seeing BA for the last time before he was killed. RA gave him a hug and told him that she loved him. (R. at 186.) RA left to go back to school and explained that she had a weird feeling in that she wanted more time with her brother, but she continued to drive back to school. (Id.) RA regretted not turning back to spend more time with her brother. (Id.)

RA found about BA's death over a Zoom call with her family. RA relayed the following reaction: "I think I fell to the ground just crying my eyes out, and that's pretty much all I remember from that call." (Id.) Regarding the lasting impact RA stated:

It's been a very huge, huge impact on me. Every day, I fight to try to stay positive and try to keep going forward without my best friend by my side, without my biggest supporter there for me. Having to watch my family go through this, that's probably been one of the worst events to come out of it. I've gotten engaged, and the one person I want to share it with isn't here anymore. The one person that was supposed to be a part of it all, isn't here anymore.

(R. at 188.) When asked if there was anything else that RA would like the judge to know, RA said:

All I have to say is my brother would have done amazing things in this world if he was here. And, you know, the -- there will be justice for what happened for him, but my family and I will live in this prison for the rest of our lives. We'll never be able to escape it, and -- yeah, that's all I have.

(Id.)

#### *JA's Testimony*

Finally, JA, BA's father, testified about the impact of his son's death and how his son was the last relative to be able to carry on the family name. (R. at 193.) JA said that he and BA were best of friends and had similar hobbies together, such as an interest in cars, guns, knives, and fishing. (R. at 190.) JA testified about BA's decision to join the Air Force. JA was so proud of his son because he was a big fan of the military. (R. at 191-92.)

Like the rest of the family, JA talked about memories he had with BA and reviewed photographs with special trial counsel. JA coached BA's little league baseball team. (R. at 193; Pros. Ex. 3 at 4.) Prosecution Exhibit 3 also contained a photograph of JA, his father, and BA,

(R. at 193.) JA also recalled BA's first buck that BA shot during a hunting trip. (R. at 194; Pros. Ex. 3 at 7.)

When JA heard about BA's death he felt in "shock. Complete shock for months if not still." (R. at 197.) Special trial counsel asked JA what the shock felt like: "Numbness, loss, disappointment in myself. Something makes -- wished I would have been there to stop that bullet for him. I wished it would've been me." (R. at 198.) JA said that he is not as happy as he used to be. (Id.) When asked if he had anything else for the military judge to consider, JA said, "And there just needs to be justice, of course, done, fair, but just. I guess that's it." (R. at 198-99.)

At the close of the government's presentencing case, the military judge made the following note on the record:

Insomuch as any evidence that has been elicited as aggravation might be what is often referred to as "Golden Rule evidence," the Court is aware of the improper and impermissible use of evidence in that fashion, and would cite to United States v. Baer, 53 MJ 235, that's a C.A.A.F. case from 2000.

(R. at 200.)

*TA's Unsworn Victim Impact Statement*

BA's mother, TA, who was the designated Article 6b Representative, gave an oral unsworn victim impact statement. (R. at 201; Ct. Ex. A.) Regarding the sentence recommendation TA said:

I am hoping that the judge today gives [Appellant] a higher sentence, and I don't say that out of spite, anger, or revenge. I say that because: One, [BA] deserves that justice, someone can't take his life recklessly and not pay consequences for it; and two, you deserve to have a sentence that you can live out and then feel like you paid a fair sentence for your crime.

(R. at 208.)

## ARGUMENT

### I.

**THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE OVERRULED THE DEFENSE'S OBJECTION AND ALLOWED ALL TWENTY-FOUR PHOTOGRAPHS IN PROSECUTION EXHIBIT 3 INTO EVIDENCE.**

#### *Additional Facts*

The defense objected to the admission of Prosecution Exhibit 3 (24 photographs of BA throughout his life) on the basis that it was not relevant nor proper matters in aggravation as victim impact under R.C.M. 1001(b)(4) and Mil. R. Evid. 403. (R. at 136.) The military judge, relying on United States v. Taylor, 41 M.J. 701 (A.F. Ct. Crim App. 1995) overruled the defense's objection and found that Prosecution Exhibit 3 was relevant evidence in aggravation:

First, the Court finds that this evidence is evidence that is directly resulting from the crimes to which the accused has been convicted. The accused has pled guilty and has been found guilty of involuntary manslaughter by culpable negligence. These photos depict the victim of the accused's crime, who is no longer with us, and adds some perspective to the person who cannot be here. The Court finds that coupled with the testimony of the witness such evidence is appropriate victim evidence pursuant to 1001(b).

The Court then has to look at the balancing test under Military Rule of Evidence 403 as sentencing evidence is subject to the limitations of said balancing test. Looking at the probative value, the Court does find that there is probative value to the evidence being offered by the government. This, again, helps illustrate the testimony of the witness on the stand, the mother of the victim. It also helps the Court better appreciate the victim of the crime. The Court does have some concern that there is some cumulative nature to this evidence. In doing so, the Court notes that there is more than one picture -- 24 photos, more than a picture of the age of the victim. I don't know if that in and of itself is problematic, but it is a consideration of the Court. The Court also has to consider whether such evidence is likely to inflame the passions of the sentencing authority, a common concern in cases of this type, especially when dealing with pictures of victims. The Court in reviewing thoroughly the individual photos

contained in Prosecution Exhibit 3 for identification finds that while there is some prejudicial effect, the Court is not convinced that the prejudicial effect substantially outweighs the probative value of this evidence. At a minimum, the Court does not feel that this is a question of admissibility, but perhaps a question of weight. Counsel are always welcome to, and often do, argue weight that the Court should give particular pieces of evidence, and this case is no different.

(R. at 140-41.)

### *Standard of Review*

This Court reviews a military judge’s decision to admit evidence for an abuse of discretion. United States v. Hamilton, 78 M.J. 335, 340 (C.A.A.F. 2019). “Abuse of discretion occurs when the military judge: (1) bases a ruling on findings of fact that are not supported by the evidence; (2) uses incorrect legal principles; (3) applies correct legal principles in a clearly unreasonable way; or (4) does not consider important facts.” United States v. Ramirez, 84 M.J. 173, 176 (C.A.A.F. 2024).

### *Law*

“Trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from offenses of which the accused has been found guilty.” R.C.M. 1001(b)(4). “Evidence in aggravation includes, but not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of the offense committed by the accused. . . .” Id. Case law also highlights the importance of the principle that a sentencing authority to consider victim impact when determining a sentence.

“The prosecution has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and particularly to his family.” Taylor, 41 M.J. at 705. Likewise, the Supreme

Court has noted that “states remain free, in capital cases, *as well as others*, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.” Payne v. Tennessee, 501 U.S. 808, 824-25 (1991) (emphasis added). The assessment of harm caused by a defendant as a result of the crime charged has been an important concern of criminal law in determining an appropriate sentence. Id. (citing Booth v. Maryland, 482 U.S. 496, 507 (1987)).

The Sentencing authority “can only make intelligent decisions about sentences when they are aware of the *full measure of loss suffered by all of the victims, including the family and the close community.*” United States v. Pearson, 17 M.J. 149, 152-53 (C.M.A. 1984) (emphasis added). Victims of murder are not faceless individuals. *See* United States v. Curtis, 44 M.J. 106, 140 (C.A.A.F. 1996) (holding that the admission of a wedding photo that portrayed what the victims looked like in comparison to the homicide exhibits were proper sentencing exhibits).

### *Analysis*

The military judge did not abuse his discretion in admitting Prosecution Exhibit 3. Personalizing the victim throughout his life is an important part of sentencing in death cases. *See* Payne, 501 U.S. at 824-25; Taylor, 41 M.J. at 705. The military judge correctly found that the photographs were directly related to the crime which Appellant was convicted – involuntary manslaughter – because the “photos depict[ed] the victim of [Appellant’s] crime, who is no longer with us, and adds some perspective to the person who cannot be here.” (R. at 141.) To capture the full measure of the loss suffered by BA’s family, the photographs depicted glimpses of BA throughout his life and showed the sentencing authority the family’s life with BA and life without BA. *See* Pearson, 17 M.J. at 152-53. Thus, the military judge’s ruling was not an abuse

of discretion because to fully understand the depth of grief suffered by BA's family and society at large, the photographs provided vital context to portray who BA was as a son, brother, friend, and member of the Air Force prior to his death.

Appellant avers that the military judge erroneously relied on a case, United States v. Taylor, that never contemplated either the number or nature of photographs that the government introduced. (App. Br. at 10.) This argument lacks merit. In Taylor, the appellant was convicted of premeditated murder, and the prosecution presented pictures of the victim's deceased body during findings. 41 M.J. at 702, 705. During presentencing, the prosecution presented a picture of the victim's Basic Air Force Training photo, along with the testimony of his sister and brother, to bring back to life the victim depicted in "the bloated, bloody image" introduced during findings. Id. at 705. This Court found no error in the military judge's ruling allowing the admission of the sentencing evidence – the victim's Air Force Training photo – because the prosecution had a legitimate interest in presenting that the death presents a unique loss to society, particularly a unique loss to family members. Id. In other words, it is permissible for the prosecution to remind the sentencer that the victim in a death case should be considered as who they were as a living person and not simply a corpse. *See id.*

Just because the military judge admitted 24 photos throughout BA's life, while the Taylor case only contemplated one photograph, did not render the military judge's ruling an abuse of discretion as Appellant contends. (*See* App. Br. at 10.) Appellant does not dispute that it was appropriate to show what BA looked like before death, but he argues that the government did not need 24 photographs "especially when nearly half of the photographs in question predate the tragedy by years or decades." (App. Br. at 10-11.) Appellant fails to cite authority to support this argument. In fact, precedents such as Payne, Pearson, Curtis, and Taylor highlight the

importance to showcase a victim's life prior to his or her death. Like Taylor, where the prosecution admitted evidence of the victim's deceased body and wanted to show the victim in a living state, so did the prosecution here. Prosecution Exhibit 1, Attachment 5, showed images of BA's lifeless body in a pile of blood on Appellant's dining room floor. In contrast to that photograph of the crime scene, the prosecution had a legitimate reason to show the sentencing authority who BA was prior to this fatal incident by introducing Prosecution Exhibit 3. *See Taylor*, 41 M.J. at 705.

The photographs were reflections of different memories and accolades of BA's life. The photographs accompanied the family's sworn testimony and provided context and visualizations of the impact BA's death had on his family. The photographs conceptualized their memories with BA and a future without him, showcasing the impact directly related to the crime Appellant was convicted of – involuntary manslaughter. R.C.M. 1001(b)(4). BA will not be present at RA's wedding, and will no longer attend Christmas gatherings, hunt with his dad, hangout with friends, or take another family photo with his sisters. (*See Pros. Ex. 3 at 7, 8, 11, 12, 13, 24.*)

Appellant relies on United States v. Hardison, 64 M.J. 279, 281-82 (C.A.A.F. 2007) for the proposition that the matters in aggravation and the charged conduct must be closely related in time, type, and/or often outcome to the convicted crimes. (App. Br. at 11.) While this may be true, the context of Hardison is distinguishable from this case. Hardison analyzed matters in aggravation as it related to a continuous course of conduct and how this type of aggravation evidence must be "directly related" to the offense for purposes of R.C.M. 1001(b)(4). Among other cases, Hardison cites United States v. Metz, 34 M.J. 349 (C.M.A. 1992) holding that when the appellant argued and struck his wife that was a continuous course of conduct eventually leading to the appellant's wife's death; and United States v. Nourse, 55 M.J. 229 (C.A.A.F. 2001)

holding that uncharged thefts were properly admitted in aggravation because they illustrated that the uncharged misconduct was part of the same course of conduct which the accused committed against the same victim – a larceny. 64 M.J. at 282. Hardison, and the cases cited within dealt with matters in aggravation related to a continuous course of conduct and therefore conduct being closely related in time or type to the convicted crimes was an important factor to determine admissibility. Here, we do not have that type of aggravating evidence; the matters in aggravation at issue here were victim impact “evidence of financial, social, physiological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused. . . .” R.C.M. 1001(b)(4). Thus, Appellant’s reliance on Hardison, and his argument that the nearly half of the pictures predated BA’s death by years or decades and therefore not closely related in time or not directly related to the crime is unpersuasive nor the correct lens to review this assignment of error. So it was not an abuse of discretion for the military judge to find the photographs admissible as proper victim matters in aggravation under 1001(b)(4).

Not only were the photographs proper matters in aggravation, but also admissible evidence under Mil. R. Evid. 403. This Court should afford great deference to the military judge’s detailed Mil. R. Evid. 403 ruling. (R. at 141-42.) The military judge found the evidence probative in that it helped illustrate the testimony of the witnesses on the stand. (R. at 141.) Further, it helped the trial court “better appreciate the victim of the crime.” (Id.) While the military judge did have some concern that there was some cumulative nature to this evidence and understood that sentencing evidence of this type could inflame the passions of the sentencing authority, he ultimately concluded that any prejudicial effect did not substantially outweigh the probative value. (R. at 142.) Lastly, the military judge did not feel that this was a question of admissibility, but rather a question of weight. (Id.) A military judge who conducts a proper

balancing test under Mil. R. Evid. 403 will not be overturned unless there is a clear abuse of discretion. United States v. Ponce, 75 M.J. 630, 634 (C.A.A.F. 2016). The military judge here should receive significant deference because he articulated his balancing test on the record. *See id.* For these reasons, the military judge conducted a proper Mil. R. Evid. 403 balancing test, and did not abuse his discretion in admitting the evidence.

Assuming the military judge abused his discretion in admitting the photographs, Appellant did not suffer any prejudice because the error did not substantially influence the sentence. United States v. Campos, 85 M.J. 310, 316 (C.A.A.F. 2025). When assessing prejudice, this Court applies the following four factors: 1) the strength of the government's case; 2) the strength of the defense's case; 3) the materiality of the evidence; and 4) the quality of the evidence. *Id.* at 317.

The government's case was strong. The circumstances of the crime itself were aggravating. Appellant was a Security Forces member who received frequent training on handling firearms. (Pros. Ex. 1 at 1-2.) Appellant knew how to clear a gun and ensure that a chamber had no ammunition. On the day of BA's death, Appellant admitted that he was "reckless" and only partially pulled back the charging handle to clear the weapon. (R. at 52; Pros. Ex 1 at 3.) Appellant also admitted that he was "too comfortable in the motions of clearing the rifle, and. . . was not careful enough in actually checking the rifle." (R. at 59.) Although the shooting was accidental, Appellant's voluntary actions to not properly clear the weapon as trained resulted in BA's death.

Although the defense's case was strong because Appellant took responsibility for BA's death by pleading guilty and had strong rehabilitative potential, this evidence still did not

overcome this tragic fatality. Appellant took BA's life due to his own recklessness and voluntary action not to properly clear the weapon. Thus, the first two factors favor the government.

Regarding the materiality and relevance of the pictures, they paled in comparison to the circumstances of the crime itself. Appellant who received significant training in firearms left that knowledge at the door when he recklessly simulated an exercise and pointed his assault rifle at BA and pulled the trigger. Appellant knew that he should never point a weapon at anything that he was not willing to shoot and that he should treat all firearms as always loaded. (Pros. Ex. 1 at 2.) The materiality was lower because it added little to the egregious crime that took BA's life. The quality of the evidence was also lower than the other evidence – albeit photographs of the victim throughout his life. The military judge was unlikely to give the photographs much weight, understanding that sentencing evidence of this nature can inflame the passions of the sentence authority. (R. at 142.) Further, after the government's sentencing case, the military judge noted on the record that the “[c]ourt was aware of the improper and impermissible use of evidence in that fashion.” (R. at 200.) This demonstrated that the military judge understood the law and would only consider appropriate matters admissible in sentencing. The military judge here was presumed to know the law and any error had no impact on the sentence. *See United States v. Cunningham*, 83 M.J. 367, 372 (C.A.AF. 2023) ([I]t is highly relevant when analyzing the effect of error on the sentence that the case was tried before a military judge, who is presumed to know the law.”) (internal citations omitted). The final two factors also favor the government.

Lastly, Appellant's sentence was within the terms of the plea agreement that Appellant initiated. (App. Ex III at 3.) The plea agreement allowed the military judge to adjudge a punitive discharge and a term of confinement not to exceed 48 months. The military judge

sentenced Appellant to only 42 months of confinement and a dishonorable discharge. An accused's willingness to enter into a plea agreement with certain punishment limits is an indication of an appropriate sentence. *See United States v. Arroyo*, 2025 CAAF LEXIS 688, at \*2 (C.A.A.F. 19 August 2025) (“AFCCA may – to ascertain the fairness and this appropriateness of an adjudged sentence – consider the context in which the parties reached the plea agreement, including the benefits from that agreement to the accused.”). Appellant, per the terms of the plea agreement, avoided a possible maximum term of confinement of 10 years. (App. Ex. III at 2); Manual for Courts-Martial, United States part IV. para. 57.2.(2) (2024 ed.) (MCM). Appellant also agreed that a dishonorable discharge was a lawful sentence. (App. Ex. III at 2.) Assuming error, Appellant suffered no prejudice. This Court should deny this assignment of error.

## II.

### **THE MILITARY JUDGE DID NOT PLAINLY ERR WHEN HE RULED THAT THE GOVERNMENT MAY ENTER AS EVIDENCE IN AGGRAVATION TESTIMONY THAT VIOLATED R.C.M. 1001(B)(4).**

#### *Additional Facts*

The defense did not object to the testimony of TA, CL, RA, and JA.

#### *Standard of Review*

Given the lack of objection, the proper standard of review is plain error. Hardison, 64 M.J. at 281. Thus, Appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain, clear, or obvious; and (3) the error resulted in material prejudice to the substantial rights of the accused. Id.

### *Law & Analysis*

The United States incorporates the law included in Issue I. The right to make an unsworn victim impact statement belongs to the victim or the victim’s designee. United States v. Edwards, 82 M.J. 239, 241 (C.A.A.F. 2022). But it is also well-established that the government has the “right to offer victim impact statements in aggravation, under R.C.M. 1001(b)(4).” Id. at 245 (citing United States v. Barker, 77 M.J. 377, 378 (C.A.A.F. 2018)).

Appellant’s basis for this assignment of error is that after the military judge found that Prosecution Exhibit 3 was admissible, the military judge also abused his discretion when he ruled that the “family’s testimony about each photograph was part and parcel of this evidence” (Prosecution Exhibit 3). (App. Br. at 16 citing R. at 141.) Appellant contends that the prosecution introduced statements that did not meet the requirements of R.C.M. 1001(b)(4) or R.C.M. 1001(c)(2)(B) because the testimony – although cherished memories – was not “aggravating circumstances directly related to resulting from the offense.” (App. Br. at 16.)

Appellant asserts that the prosecution and military judge did not cite a single case to support that testimony describing photographs was appropriate evidence in aggravation. (App. Br. at 16-17.) But the military judge relied on Taylor, which noted that the government has a legitimate interest in reminding the sentencing authority who the victim was as an individual whose death presented a unique loss to his family. 41 M.J. at 704. Other case law also supports the concept of the prosecution humanizing a victim of murder or manslaughter. *See Payne*, 501 U.S. at 824-25; Pearson, 17 M.J. at 152-53; Curtis, 44 M.J. at 140. A permissible way to present this evidence to humanize a victim who is no longer alive is through witness testimony, photographs, or testimony describing photographs – or any mode of evidence permissible by R.C.M. 1001(b)(4) and R.C.M. 1001(c). The prosecution admitted the photographs and

testimony within the bounds of R.C.M. 1001(b)(4). In Cunningham, our superior Court found that a PowerPoint presentation of photographs of the deceased presented during victim impact statements under R.C.M. 1001(c) were improper victim matters. 83 M.J. at 371. But the Court recognized that the same photographs were properly admitted as evidence in presentencing proceedings along with witness testimony as victim impact under R.C.M. 1001(b)(4) that illustrated the devastation that resulted from the appellant's deadly act. Thus, it was not plain error for to allow the family to testify about the impact of Appellant's crimes.

The cherished memories depicted by the family's sworn testimony was directly related or resulting from Appellant's offense of involuntary manslaughter. But for Appellant's actions, BA would still be alive and able to continue making memories with family and friends. Appellant does not cite authority that the family's testimony was inadmissible as matters in aggravation, indicating that it was not plain and obvious error to allow the family to testify about BA's life. To understand the impact of BA's death, the context of BA's life – including the memories – was imperative to understand the family's grief. *See Pearson*, 17 M.J. at 152-53 (affirming that the sentence authority should understand the full measure of the loss resulting in death cases). The testimony contested was proper victim impact evidence under R.C.M. 1001(b)(4). *See Edwards*, 82 M.J. at 241. The military judge did not plainly err in allowing the testimony of BA's family.

Assuming plain and obvious error, Appellant did not meet his burden demonstrating prejudice. The family's testimony did not substantially influence the sentence. Campos, 85 M.J. at 316. As discussed in Issue I, the first two factors of the prejudice analysis favors the government – the government's case was strong. The materiality of the evidence in question, the testimony, was lower compared to the crime itself. Even absent the family's testimony, Appellant still admitted that his "reckless" conduct ended BA's life. (R. at 52.) That alone

supported the sentence adjudged. Appellant argues that the victim impact elicited in the testimony would not have been introduced into the record at all because the family's victim impact was not evidence of financial, social, psychological, or medical impact. (App. Br. at 17.) This is an incorrect view of the law applied to the facts. There was no denying that the testimony of BA's family displayed immense grief and emotional harm as a result of Appellant's crime illustrating the psychological impact they experienced. Thus, the military judge did not plainly err when allowing the family members to testify about their sorrow because it fell squarely within social and psychological impact under R.C.M. 1001(b)(4).

Finally, the quality of the evidence was also lower compared to the rest of Appellant's court-martial. Appellant pleaded guilty and his admissions of how BA died as a result of his irresponsible voluntary actions supported BA's sentence of a dishonorable discharge, 42 months confinement, and reduction to the grade of E-1. The family's testimony did not substantially influence the sentence especially considering Appellant's guilty plea where he admitted that his voluntary reckless actions killed BA. And notably, the sentence adjudged was within the plea agreement terms that Appellant bargained for. (App. Ex. III at 3.) For these reasons, Appellant suffered no prejudice, and fails to meet his burden under the plain error standard. This Court should deny this assignment of error.

### III.

#### **THE MILITARY JUDGE DID NOT PLAINLY ERR IN ALLOWING THE GOVERNMENT TO ELICIT STATEMENTS REQUESTING A STRONG PUNISHMENT FOR APPELLANT IN VIOLATION OF R.C.M. 1001(B)(4).**

#### *Standard of Review*

The United States adopts the plain error standard outlined in Issue II.

### *Law & Analysis*

The United States incorporates the law in Issue I regarding matters in aggravation under R.C.M. 1001(b)(4). In noncapital cases, a crime victim has the right to make sworn or unsworn statements, or both. R.C.M. 1001(c)(2)(D)(ii). A crime victim “is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty. . . .” R.C.M. 1001(c)(2)(a). “Victim impact includes any financial, social, psychological, or medical impact of the crime relating to or arising from the offense of which the accused has been found.” R.C.M. 1001(c)(2)(B). The President has defined the terms “crime victim” and “victim impact” broadly, and there is no requirement that the victim for purposes of R.C.M. 1001(c) be a named victim in the offense. *See United States v. Amos*, 2025 CCA Lexis 277, at \*14 (N.M. Ct. App. 24 June 2025) (unpub. op.) Simply put, an individual who meets the criteria of a crime victim under R.C.M. 1001(c) need not be a named victim on the charge sheet or a designee under Article 6b. *United States v. Miller*, 82 M.J. 788, 790 (N.M. Ct. App. 2022).

TA, CL, RA, and JA testified under oath. BA’s family member’s testified to both matters in aggravation under R.C.M. 1001(b)(4) and “victim impact” under R.C.M. 1001(c). The rules allow for victims of crimes to make sworn statements under oath, which was done here. R.C.M. 1001(c)(2)(D)(ii). There was no denying that BA’s family were victims for purposes of R.C.M. 1001(c), given the emotional harm suffered because of BA’s death. The new version of R.C.M. 1001(c) allowing victims to recommend a specific sentence applied in Appellant’s case because his crime occurred after 27 December 2023. *See* National Defense Authorization Act (NDAA) for Fiscal Year 2022, Public Law No. 117-81, 135 Stat. 1541, Section 539E. Thus, it was permissible for trial counsel to ask BA’s family about a recommendation as to the sentence. *See*

R.C.M. 1001(c)(1). In all, it was not plain and obvious error for BA's family to recommend or vaguely discuss a sentence recommendation.

When discussing a sentence recommendation, the testimony was minimal and did not reach the threshold of a specific sentence recommendation – limiting the prejudicial effect because a specific sentence was not recommended by any witness. TA in her sworn testimony told the military judge that “as we move forward with this sentencing, that we keep in mind that this was a great loss.” (R. at 156-57.) CL stated that Appellant's actions “should carry a severe consequence,” but also noted that the presentencing evidence presented by both sides should carry little weight and that the military judge should consider the crime itself when Appellant's deliberate actions of not clearing the weapon killed her brother. (R. at 178-79.) RA said that “there will be justice for what happened to [BA].” (R. at 188.) JA talked about that “there just needs to be justice, of course, done fair, but just.” (R. at 198-99.) TA in her unsworn victim impact statement hoped “that the judge today gives [Appellant] a higher sentence. . . [Appellant] deserve[s] to have a sentence that [he] can live out and then feel like [he] paid a fair sentence for [his] crime.” (R. at 208.) The discussions about a sentence recommendation were general and when considered as a whole requested the judge to impose a just and fair sentence. It logically follows that if the rule allows a specific sentence recommendation, a victim can make a general sentence recommendation. R.C.M. 1001(c)(3).

Appellant contends that these statements recommending a sentence, were not matters in aggravation as defined by R.C.M. 1001(b)(4) and therefore inadmissible. (App. Br. at 20.) But Appellant fails to recognize that BA's family members sworn testimony was also admissible under victim impact in line with R.C.M. 1001(c). The family had the right to be heard and

recommend a sentence. Thus, the military judge did not plainly err in allowing the family to testify about a sentence recommendation.

Assuming error, Appellant suffered no prejudice. The family's sentence recommendation did not substantially influence the sentence. As discussed in Assignment of Error I and II, the first two factors favor the government. The materiality of the evidence in question was low, especially when there was no specific recommendation for a specific sentence – such as a term of confinement or a specific punitive discharge. The family discussed generally that Appellant should receive a just sentence and the sentence should mirror the severe consequences of his actions. The quality of the evidence was also low; the sentence recommendation portion of the testimonies was limited to a single comment and paled in comparison to the rest of the government's sentencing case.

In sum, the family's testimony did not substantially influence the sentence, and did not influence the military judge to render a term of confinement still below the maximum allowed per the plea agreement. The strength of the government's sentencing case was strong even without the testimony from TA, CL, RA, and JA and accompanied photographs. The sentence imposed was within the plea agreement terms. Appellant suffered no prejudice and fails to meet his burden under the plain error standard. This Court should deny this assignment of error.

#### IV.

**APPELLANT'S SENTENCE WAS NOT  
INAPPROPRIATELY SEVERE.**

#### *Standard of Review*

For sentence appropriateness, this Court reviews whether the sentence was plainly unreasonable. Article 66(e)(1)(D).

### *Law & Analysis*

Congress amended Article 66, UCMJ, in the NDAA for Fiscal year 2022, specifically allowing for the Courts of Criminal Appeals to evaluate sentences for offenses committed on or after 28 December 2023 under the “plainly unreasonable” standard. NDAA for Fiscal Year 2022, Public Law No. 117-81, 135 Stat. 1541, Section 539E. Appellant committed his crime on 11 February 2024 so this version of Article 66, UCMJ, applies.

There is no military case law that has defined the plainly unreasonable standard for sentence appropriateness under the new Article 66, UCMJ. But with the facts of this case, this Court need not define the term. See United States v. Simms, 2025 CCA LEXIS 500, at 5 (N.M. Ct. Crim. App. 5 November 2025) (unpub. op.) (finding that a sentence was not plainly unreasonable, under the new Article 66, UCMJ, standard given that the sentence was within the plea agreement terms and declined to define plainly unreasonable). Per the plea agreement in this case, Appellant’s negotiated sentence was an appropriate sentence for involuntary manslaughter. The term of confinement was within the range negotiated for, and the plea agreement allowed the sentencing authority to adjudicate a punitive discharge. “An accused’s own sentence proposal is a reasonable indication of the sentence’s probable fairness to the accused.” Arroyo, 2025 CAAF LEXIS, at 2 (C.A.A.F. 2025).

Appellant’s sentence was appropriate because it was within the bounds of the maximum punishment outlined by the President, maximum punishment per the plea agreement, and well within the sentencing parameters. The maximum punishment for involuntary manslaughter is dishonorable discharge, forfeiture of all pay and allowances and ten years of confinement. MCM pt. IV, para. 57.(d)(2). Appellant’s plea agreement limited the sentence to 48 months (4 years), and allowed the sentencing authority to adjudicate a punitive discharge that included a

dishonorable discharge. (App. Ex. III at 2.) Appellant’s crime was a category three offense, and the confinement range for a category three offense is 30 to 120 months – 2.5 to 10 years.

Sentencing Parameter Table, MCM A12B, Offense Category Chart, MCM A12C. A military judge may reject a plea agreement that proposed a sentence outside the sentencing parameters that was plainly unreasonable. Article 53a(b)(1). But here the sentence limitations per the plea were within the sentencing parameters.

The military judge adjudicated a term of confinement of 42 months – six months less than the plea agreement cap. Appellant’s sentence, per his plea agreement was appropriate. A term of confinement of 42 months can be an appropriate sentence for other crimes, such as sexual assaults, domestic violence, and abuse of a child – let alone involuntary manslaughter. Further, Appellant understood the terms of his plea, (R. at 98) and understood that the sentencing authority could adjudicate a punitive discharge, such as a dishonorable discharge. (R. at 87). Given the nature of the crime that stole BA’s life, a dishonorable discharge was an appropriate punishment. Appellant was a member of Security Forces who pointed an assault rifle at his friend and pulled the trigger knowing that he did not clear the weapon as trained.

Even looking at the plain language of the unambiguous term “plainly unreasonable,” Appellant’s sentence did not defy the term. *See United States v. Valentin-Andino*, 85 M.J. 361, 365 (C.A.A.F. 2025) (finding no basis to apply canons of statutory interpretation where the statutory language is unambiguous “with an easily graspable meaning”). “Plainly unreasonable” has a graspable meaning – “plainly” means with clarity of perception or comprehension, and “unreasonable” means not governed by or acting according to reason. Plainly, Unreasonable MERRIAM WEBSTER DICTIONARY (Online Ed. 2025). Appellant’s sentence was not

plainly unreasonable because according to reason – the plea agreement – Appellant benefitted from the plea agreement that drastically reduced his term of confinement.

Appellant argues that the military judge erred when he did not explain his sentencing decision as required by Gall v. United States, 552 U.S. 38 (2007) (analyzing an appropriate sentence under the Federal Sentencing Guidelines). (App. Br. at 26.) In Gall, the district court judge made a lengthy statement on the record explaining his sentence and a detailed sentencing memorandum. Id. at 43. In federal courts, district court judges must explain an unusually lenient or an unusually harsh sentence outside the guideline range. Id. at 46.

Appellant's reliance on Gall lacks merit. A military judge is only required to explain his sentence when he imposes a sentence outside the sentencing parameter guidelines. Article 56(c)(2)(B). Appellant's crime was a category three offense, and he received a term of confinement within these parameters – 42 months. *See* Sentencing Parameter Table, MCM A12B, Offense Category Chart, MCM A12C. Appellant's confinement term, per the plea agreement, was well within the sentencing parameters and did not require the military judge to explain his sentence. In any event, Appellant fails to articulate why this lack of explanation is indicative of a plainly unreasonable sentence.

Appellant also argues that this Court cannot be confident that the military judge did not consider the defense's sentencing case – mitigating evidence. (App. Br. at 27.) But this Court can infer that the military judge took into consideration Appellant's responsibility of the crime and his rehabilitative potential because he did not adjudicate the maximum term of confinement allowed by the plea agreement. Appellant's favorable plea agreement – that drastically reduced his maximum term of confinement – reflected Appellant's cooperation throughout the investigation and willingness to take responsibility for BA's death. Logically speaking, if the

military judge did not find Appellant’s sentencing case mitigating, then it would follow that the military judge would adjudicate the maximum sentence allowed by the plea agreement terms.

In sum, Appellant’s adjudicated sentence was appropriate and not plainly unreasonable. This Court should not provide Appellant’s requested sentencing relief of approving a bad-conduct discharge and reducing Appellant’s term of confinement to 30 months. Instead, this Court should affirm the sentence adjudged by the military judge – 42 months of confinement, a dishonorable discharge, total forfeitures of all pay and allowances, and a reduction to the grade of E-1. This Court should deny this assignment of error.

**CONCLUSION**

The United States respectfully requests that this Honorable Court deny Appellant’s assignments of error and affirm the finding and sentence in this case.

[REDACTED]

VANESSA BAIROS, Maj, USAF  
Appellate Government Counsel

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

MARY ELLEN PAYNE  
Associate Chief

[REDACTED]  
[REDACTED]  
[REDACTED]  
[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 22 December 2025.

[REDACTED]

VANESSA BAIROS, Maj, USAF  
Appellate Government Counsel

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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

UNITED STATES	)	No. ACM 40855
<i>Appellee</i>	)	
	)	
v.	)	
	)	<b>ORDER</b>
Noah D. BOGERT	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	<b>Panel 2</b>

On 23 December 2025, Appellant’s counsel submitted a Motion for Enlargement of Time to File Reply Brief (First). Appellant’s counsel requested an enlargement of time for 30 days and explained that she was on leave from 17 December 2025 through 7 January 2026, when the reply brief was due on 29 December 2025. Appellant’s counsel further explains that upon her return to duty, this reply brief will be her first priority.

The Government partially opposes and notes that reply briefs are due not later than seven days after the Government files an answer. *See* JT. CT. CRIM. APP. R. 18(d). The Government does not oppose an enlargement of time not to exceed 14 January 2026.

The court has considered the Appellant’s Motion for Enlargement of Time to File Reply Brief (First), the Government’s partial opposition, and this court’s Rules of Practice and Procedure.

Accordingly, it is by the court on this 30th day of December, 2025,

**ORDERED:**

The Appellant’s Motion for Enlargement of Time to File Reply Brief (First) is **DENIED IN PART** and **GRANTED IN PART**. The Appellant shall file his Reply brief not later than **14 January 2026**.



FOR THE COURT



JACOB B. HOEFERKAMP, Capt, USAF  
Chief Commissioner

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

<b>UNITED STATES</b>	)	<b>APPELLANT’S MOTION FOR</b>
<i>Appellee</i>	)	<b>ENLARGEMENT OF TIME TO FILE</b>
	)	<b>REPLY BRIEF (FIRST)</b>
v.	)	
	)	
Airman First Class (E-3)	)	Before Panel 2
<b>NOAH D. BOGERT</b>	)	
United States Air Force	)	No. ACM 40855
<i>Appellant</i>	)	
	)	23 December 2025

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

Pursuant to Rules 23.3(m)(1) and (3) of this Honorable Court’s Rules of Practice and Procedure, A1C Noah D. Bogert moves for his first enlargement of time to file a Reply. This is his second motion for enlargement of time in his case overall. Appellant requests an enlargement for a period of 30 days, which will end on **28 January 2026**. This case was docketed with this Court on 23 July 2025. From the date of docketing to the present date, 153 days have elapsed. On the date requested, 189 days will have elapsed.

On 10 March 2025, Appellant was tried by a general court-martial consisting of a military judge alone at Holloman Air Force Base, New Mexico. Record (R.) at 1. Consistent with his pleas, the military judge found Appellant guilty of negligent manslaughter, in violation of Article 119, Uniform Code of Military Justice, 10. U.S.C. § 919. R. at 17, 101. On 10 March 2025, the military judge sentenced Appellant to a dishonorable discharge, 42 months of confinement, and reduction to pay grade E-1. R. at 258. The convening authority took no action on the findings or the sentence and waived automatic forfeitures for a period of six months. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – United States v. Airman First Class Noah D. Bogert. The digital record of trial is 970 pages, consisting of eight

appellate exhibits, five prosecution exhibits, eleven defense exhibits, and one court exhibit. The transcript is 259 pages. Appellant is currently confined.


On 20 November 2025, Appellant filed his Assignment of Error brief. On 22 December 2025, the Government filed its Answer. The deadline to file Appellant's Reply brief is 29 December 2025.

Counsel has OCONUS leave scheduled from 17 December 2025 through 7 January 2026. Upon her return, submitting Appellant's reply in this case will be her first priority. Appellant has provided limited consent to disclose confidential communications, wherein:

- (1) Appellant has been advised of his right to a timely appeal.
- (2) Appellant has been advised of this request for enlargement of time.
- (3) Appellant has been apprised of the status of undersigned counsel's progress on his case.
- (4) Appellant has specifically consented to this enlargement of time.

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

Respectfully submitted,



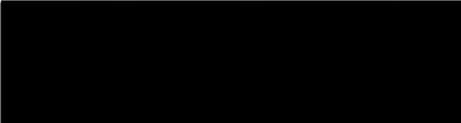
OLGA STANFORD, Capt, USAF  
Appellate Defense Counsel



**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were electronically delivered to the Court and served on the Air Force Government Trial and Appellate Operations Division on 23 December 2025.

Respectfully submitted,



OLGA STANFORD, Capt, USAF  
Appellate Defense Counsel



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

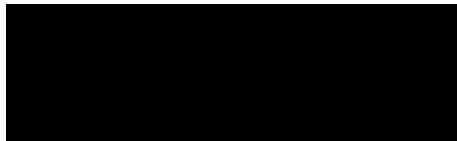
<b>UNITED STATES,</b>	)	UNITED STATES’ PARTIAL
	)	OPPOSITION TO
<i>Appellee,</i>	)	APPELLANT’S MOTION FOR
	)	ENLARGEMENT OF TIME
v.	)	TO FILE REPLY BRIEF
	)	
	)	Before Panel No. 2
Airman First Class (E-3)	)	
<b>NOAH D. BOGERT,</b>	)	No. ACM 40855
United States Air Force.	)	
<i>Appellant</i>	)	29 December 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 enters its partial opposition to Appellant’s Motion for Enlargement of Time to file a Reply Brief in this case.

In the request for enlargement of time, Appellant’s counsel mentioned being on leave OCONUS from 17 December 2025 – 7 January 2026. Under Rule 18(d) of this Court’s Rules of Practice and Procedure, “Appellate counsel for an accused may file a reply brief no later than 7 days after the filing of a response brief on behalf of the United States.” Appellant’s counsel did not explain why she cannot comply with the 7-day standard to file a reply brief after returning from OCONUS leave given that this case is her first priority. The United States does not oppose a 7-day enlargement of time starting when Appellant’s counsel returns to duty on 8 January 2026. Thus, the United States does not oppose an enlargement of time not to exceed 14 January 2026.

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

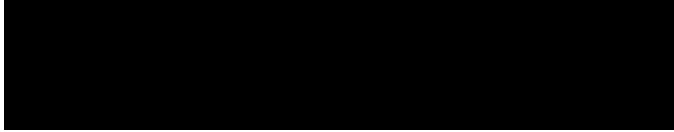


VANESSA BAIROS, Maj, USAF  
Appellate Government Counsel



**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 29 December 2025.



VANESSA BAIROS, Maj, USAF  
Appellate Government Counsel



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

<b>UNITED STATES</b>	)	<b>No. ACM 40855</b>
<i>Appellee</i>	)	
	)	
<b>v.</b>	)	
	)	<b>NOTICE OF</b>
<b>Noah D. BOGERT</b>	)	<b>PANEL CHANGE</b>
<b>Airman First Class (E-3)</b>	)	
<b>U.S. Air Force</b>	)	
<i>Appellant</i>	)	

It is by the court on this 12th day of January, 2026,

**ORDERED:**

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

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

DOUGLAS, KRISTINE M., Colonel, Senior Appellate Military Judge  
RAMÍREZ, ROBERTO, Lieutenant Colonel, Appellate Military Judge  
KUBLER, JOSEPH J., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.



FOR THE COURT



TANICA S. BAGMON  
Appellate Court Paralegal

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

UNITED STATES,	)	<b>REPLY TO APPELLEE’S ANSWER TO ASSIGNMENTS OF ERROR</b>
	)	
<i>Appellee,</i>	)	
	)	
v.	)	
	)	Before Special Panel
Airman First Class (E-3)	)	
<b>Noah D. BOGERT</b>	)	No. ACM 40855
United States Air Force,	)	
<i>Appellant.</i>	)	14 January 2026

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

Pursuant to Rule 18(d)(2) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant, Airman First Class (A1C) Noah D. Bogert, replies to the United States’ answer filed on 22 December 2025 (Gov. Ans.).

**ARGUMENT**

**I. The military judge abused his discretion when he admitted all photographs in Prosecution Exhibit 3 because his ruling was outside of the scope of existing case law and evidenced an incorrect understanding of the law.**

In its attempt to justify the military judge’s erroneous decision to admit all twenty-four photographs in Prosecution Exhibit (Pros. Ex.) 3, the Government ignores the substantial difference between the evidence that the military judge admitted and the evidence that the service courts of criminal appeals (CCAs) previously found acceptable. Additionally, the Government overlooks the procedural posture of the cases it cites.

“While we always start with a presumption that military judges know the law, . . . the presumption must give way when there are persuasive contrary indications.” *United States v. Cunningham*, 83 M.J. 367, 376 (citing *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007)) (Maggs, J., dissenting). Here, the military judge interpreted this Court’s decision in *United*

*States v. Taylor*, permitting the use of a single photograph from basic training to show what the victim looked like before his death, as license to disregard the plain requirement of Rule for Courts-Martial (R.C.M.) 1001(b)(4) \* that the evidence in aggravation must be directly related to the convicted offenses. See *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). However, nothing in this Court’s narrow ruling in *Taylor* permits such an interpretation. See *United States v. Taylor*, 41 M.J. 701, 705 (A.F. Ct. Crim. App. 1995).

In *Taylor*, the evidence at issue was a single photograph of the victim taken in basic training. 41 M.J. at 705 (A.F. Ct. Crim. App. 1995). That photo and only that photo was used for the purposes of “bring[ing] to life” the decedent who, up until that point, was depicted through the crime scene photographs. *Id.* This Court arrived at its decision by relying on *Payne v. Tennessee*, where the Supreme Court of the United States found that a grandmother’s testimony about decedent’s child missing his mother was necessary to provide a proper context for the offense. 501 U.S. 808, 826 (1991). Both *Taylor* and *Payne* are narrow and facts-specific rulings, and neither provides substantial legal basis to admit an array of twenty-four photos that show BA at every stage in life beginning with his birth. Therefore, the presumption that the military judge knew the law must give way to the overwhelming evidence to the contrary. *Erickson*, 65 M.J. at 225 (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)).

Furthermore, the wide mosaic of supporting cases cited by the Government is illusory. In *Cunningham*, the Court of Appeals for the Armed Forces (CAAF) never considered the question of whether the evidence used during the victim’s unsworn statement was previously properly admitted under R.C.M. 1001(b)(4). See 83 M.J. at 370. While the matters at issue in *Cunningham*

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\* Unless otherwise indicated, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2024 ed.) (hereinafter *MCM*).

were introduced both as aggravation evidence and later as part of the victim’s unsworn statement, the issue before the CAAF only had to do with the latter use in victim’s unsworn. *Id.* The Government essentially asks this Court to place a passing reference to a prosecution exhibit on the same footing as CAAF opining on an issue it granted. But even if this Court was to do as Government asks, *Cunningham* would still be unhelpful here because the photos admitted by the Government in *Cunningham* were three post-assault photos of the infant victim and his grieving mother, not over two decades’ worth of photographs as is the case here. *Id.* at 371. Thus, *Cunningham* has little to no bearing on the outcome in this case.

*Curtis* is equally unhelpful. In *Curtis*, the Government entered one photo, ostensibly showing the victims as they were before they died. *United States v. Curtis*, 44 M.J. 106, 140 (C.A.A.F. 1996) (finding that “[t]he wedding photo (pros. ex. 1) show[ed] what the victims looked like in comparison to the homicide exhibits”). By contrast, the military judge in this case admitted twenty-four photos, many showcasing BA’s childhood and early teen years. Furthermore, in *Curtis*, trial defense counsel made no objection to the photograph. *Id.* In this case, A1C Bogert’s defense counsel preserved the issue by making a timely objection. R. at 136. But even assuming *arguendo* that a timely objection at trial would not have changed CAAF’s decision, *Curtis* would still be unhelpful because it did not address the problem alleged in this case—the number of photographs and their date range of twenty years.

On the other hand, *Harrison*, while dissimilar factually, provides a bright-line rule for the kind of evidence admissible under R.C.M. 1001(b)(4). Contrary to the Government’s assertion, Gov. Ans. at 17, this bright-line rule is not limited to the evidence of uncharged misconduct. It would be highly irregular to apply different criteria for admissibility to each type of evidence in aggravation contemplated by R.C.M. 1001(b)(4). Unsurprisingly, the *Hardison* opinion makes no

such distinction: “There are two primary limitations on the admission of *aggravation evidence*. First, such evidence must be ‘*directly relating*’ to the offenses of which the accused has been found guilty.” *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (emphasis added). Yet despite this clear requirement, nearly half of the photos in Pros. Ex. 3 predate BA’s death by years to decades. Indeed, the Government’s own brief later illustrates the difficulty of logically connecting the “directly relating to” requirement with the photographs that were taken many years prior to BA’s death: “The cherished memories depicted by the family’s sworn testimony *was* [sic] *directly related or resulting from Appellant’s offense* of involuntary manslaughter.” See Gov. Ans. at 22 (Emphasis added). This attempt to connect a victim’s childhood to an offense committed decades later impossibly strains the “directly relating to” requirement of R.C.M. 1001(b)(4).

In *United States v. Pearson*, the Court of Military Appeals emphasized the importance of “sound discretion” on the part of the military judge to avoid “[e]motional displays by aggrieved family members . . . [that] can quickly exceed the limits of propriety and equate to the bloody shirt being waved.” 17 M.J. 149, 153 (C.M.A. 1984). Yet, that is precisely what the military judge allowed in this case by admitting all twenty-four photographs depicting BA’s life from the time of his birth to his death. Pros. Ex. 3; R. at 140–41. A substantial portion of these photographs was not directly related to the offense because the photos showed BA at stages in life that significantly predated his tragic and untimely death. A1C Bogert did not cut short the life of an infant, a toddler, a young child, or a teenager in high school—he is responsible for the death of a young man in his early twenties, Attachment 4 to Pros. Ex. 1 at 1, and the Government should have been limited to photographs that depicted BA at that stage in his life.

Because the military judge “admit[ted] evidence based on an erroneous view of the law,” this Court should find that he abused his discretion. *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019) (citing *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018)).

**III. The military judge plainly erred in allowing the Government to elicit statements requesting strong punishment because in doing so he treated R.C.M. 1001(b)(4) and R.C.M. 1001(c) as interchangeable.**

In asserting that “Appellant fails to recognize that BA’s family members sworn testimony was also admissible under victim impact in line with R.C.M. 1001(c),” Gov. Ans. at 23, the Government perfectly illustrates the fatal error in the military judge’s treatment of R.C.M. 1001(b)(4) and R.C.M. 1001(c). Those rules are distinct and separate and are subject to their own distinct and separate requirements. The Government is correct in stating that under R.C.M. 1001(c), crime victims and their designees have certain rights. Gov. Ans. at 24. R.C.M. 1001(c)(1)(2)(D)(ii) permits victims or their representatives to make a sworn or an unsworn statement in noncapital cases. However, the Government conflates the mere act of swearing in a witness by a trial counsel, as permitted by R.C.M. 1001(c)(1)(2)(D)(ii), with the question-and-answer dialogue between the trial counsel and a victim *after* the Government rested its case. *See United States v. Harrington*, 83 M.J. 408, 418 (C.A.A.F. 2023) (“Presentation of the victim’s unsworn statement via a question-and-answer format with trial counsel violates the Rules for Courts-Martial because it contravenes the principle that an unsworn victim statement belongs solely to the victim or the victim’s designee.”). Furthermore, while R.C.M. 1001(c)(1)(2)(D)(ii) allows a victim or a victim’s designee to make a sentence recommendation, R.C.M. 1001(b)(4) does not. When they made their sentencing recommendations, BA’s family members were not making victim impact statements under R.C.M. 1001(c)—they were testifying for the Government under R.C.M. 1001(b)(4) and were limited by its rules to “evidence of financial, social,

psychological, and medical impact” and other aggravating circumstance “*directly relating to or resulting from* the [convicted] offenses.” (Emphasis added); *see* R. at 127–200.

R.C.M. 1001 is not a collection of interchangeable rules and requirements that the Government gets to mix and match when the things it wants to do differ from what a specific paragraph of the rule allows. BA’s family members could not make a sentencing recommendation while testifying under R.C.M. 1001(b)(4), and R.C.M. 1001(c)(1)(2)(D)(ii) cannot save the Government from this blunder. First R.C.M. 1001(c)(1)(2)(D)(ii) does not apply because these statements were not made during the portion of the trial when this rule governs. Second, only BA’s mother could exercise this right under R.C.M. 1001(c) because the Government did not seek the appointment of any other family member as BA’s Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b, representative. Appellate Exhibit IV; R. at 108–09. And finally, the method by which these sentencing recommendations were made—a question-and-answer session with the trial counsel—is prohibited by R.C.M. 1001(c). *See Harrington*, 83 M.J. at 418.

Moreover, even if these sentence recommendations could somehow be procedurally shoehorned into R.C.M. 1001(c), their substance was wholly improper. The witnesses usurped the role of counsel, arguing to the military judge “that we keep in mind that this was a great loss” and that A1C Bogert’s mitigation “should carry little weight.” R. at 156–57, 178–79. The right to be heard under R.C.M. 1001(c) is not a license to instruct the court on how to weigh evidence or to deliver a supplemental closing argument for the Government. In allowing this testimony, the military judge made an error, and that error was plain and obvious.

**IV. The sentence adjudged was imposed in violation of law and was plainly unreasonable given the facts of this case.**

“[T]he sentence agreed to by Appellant in the plea agreement is a reasonable—but not dispositive— indication of the sentence’s fairness to Appellant.” *United States v. Arroyo*, No. 24-

0212, 2025 CAAF LEXIS 688, at \*11 (C.A.A.F. Aug. 19, 2025) (citing *United States v. Hendon*, 6 M.J. 171, 175 (C.M.A. 1979) (plurality opinion)). Given the errors that riddled A1C Bogert’s sentencing proceeding, discussed above and in Appellant’s Brief, this Court cannot be certain that the military judge’s decision was informed solely by admissible sentencing evidence.

The Government’s assertion that its case was strong because A1C Bogert took his friend’s life “due to his own recklessness and voluntary action,” Gov. Ans. at 18–19, would make it impossible for any Airman convicted of involuntary manslaughter by culpable negligence to succeed under the factors enumerated in *Hamilton*, 78 M.J. at 343. The facts of this case clearly show that A1C Bogert had a momentary lapse of judgement that ended his friend’s life—he did not act with intentional disregard for the safety and wellbeing of others and had no history of doing so. His lapse in judgement when he should have known better form the basis of “culpable negligence,” but once convicted, he should not face a harsher punishment merely because of his career field. *See* Gov. Ans. at 18. A1C Bogert’s character, his remorse, his sincere grief and regret over the loss of someone who was like a brother to him, and his willingness to take accountability all weigh in his favor. *See* Def. Ex. C–J, K at 3; R. at 212–24.

The military judge in this case abused his discretion in admitting all photographs in Pros. Ex. 3 and compounded his error by allowing BA’s family members to offer illustrative testimony regarding each photograph. It strains the credulity to assert that the military judge’s decision did not substantially influence A1C Bogert’s sentence, Gov. Ans. at 18, when he stated on the record: “The Court finds that *coupled with the testimony of the witness* such evidence is appropriate victim evidence pursuant to [R.C.M.] 1001(b),” R. at 141 (emphasis added). To conclude otherwise would imply that even when a military judge finds that the victim evidence is “appropriate,” such evidence nonetheless holds little sway over the trial court’s sentencing decision. Likewise, when

the military judge repeatedly committed the same plain error by allowing four witnesses testifying back-to-back to offer their sentencing recommendations in violation of the plain language of R.C.M. 1001(b)(4), it would be illogical to assume that this judge's sentencing decision was not impacted by improper testimony. The logical conclusion in this case must be that the deliberative process which led to A1C Bogert's sentence contravened R.C.M. 1001(b) and thus his sentence violates the law. *See* Article 66(e)(1)(A), UCMJ, 10 U.S.C. § 866(e)(1)(A); *In re Sealed Case*, 449 F.3d 118, 122 (D.C. Cir. 2006), *cert. denied*, 550 U.S. 927 (2007) (“A sentence is ‘imposed in violation of law’ when it contravenes a statutory or constitutional provision or is in some other way unlawful.”).

This accumulation of error does more than just prejudice A1C Bogert; it violates his fundamental due process right “not to be sentenced on the basis of invalid premises or inaccurate information.” *United States v. Plasencia*, 886 F.3d 1336, 1343 (11th Cir. 2018). Here, the military judge announced on the record that his sentencing calculus was infected by the improperly admitted evidence, stating he considered the photographs “coupled with the testimony” of the witnesses. R. at 141. When the record itself confirms that the sentence rests upon such invalid premises—and is further tainted by impermissible punishment recommendations—this Court cannot be confident the sentence was not “imposed in violation of law.” *In re Sealed Case*, 449 F.3d at 122.

This court should also find that A1C Bogert's sentence is plainly unreasonable. Article 66(e)(1)(D), UCMJ, 10 U.S.C. § 866(e)(1)(D). The amendments to the sentencing review under Article 66, UCMJ, 10 U.S.C. § 866, made pursuant to the National Defense Authorization Act for Fiscal Year 2022, 117 P.L. 81 135 Stat. 1541, § 539E, apply to cases where all convicted offenses were committed on or after 27 December 2023. The Government seems to assert that this Court

should not attempt to define the plainly unreasonable standard merely because the CCAs have not had the opportunity to propose a definition or have recently declined to do so in an unpublished opinion. Gov. Ans. at 27 (citing *United States v. Simms*, No. 202400341, 2025 CCA LEXIS 500, at \*5 (N-M Ct. Crim. App. Nov. 5, 2025)). However, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Moreover, Merriam-Webster’s Dictionary should not be the authority that guides this Court’s decision when the federal circuit courts have been split for nearly two decades over the definition of “plainly unreasonable” and the applicable standard. See Appellant’s Brief at 22–25 (Discussing how various circuit courts treat the “plainly unreasonable” language post-*United States v. Booker*, 543 U.S. 220, 264 (2005), and noting that while a circuit split exists, barring certain exceptions, reasonableness is reviewed for abuse of discretion, see *Gall v. United States*, 552 U.S. 38, 56 (2007).).

The National Defense Authorization Act for Fiscal Year 2022 greatly curtailed the powers of the service appellate courts to review sentences. Compare *United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010) (finding that while a CCA may “set[ ] aside a finding or sentence that is correct in law and fact,” it must “explain why the finding is unreasonable, based on a legal standard”), with Article 66(e), UCMJ, 10 U.S.C. § 866(e) (in relevant part, limiting appellate review to instances where the sentence violates the law or is plainly unreasonable). As amended, Article 66(e), UCMJ, vests considerable power in trial judges. That power must be subject to checks and balances, especially now that the CCAs can no longer substitute their judgement for that of the trial court. See *Nerad*, 69 M.J. at 144 (quoting *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (finding that “UCMJ, authority [is] an ‘awesome, plenary de novo power of review [that] grants unto the Court . . . authority to, indeed, ‘substitute its judgment’ for that of the

military judge. . . . [and] for that of the court members” (alterations in original)). As the Uniform Code of Military Justice becomes increasingly aligned with federal criminal law, it also shifts military jurisprudence towards federal precedent. *See Ortiz v. United States*, 585 U.S. 427, 435 (2018) (finding that “the judicial character and constitutional pedigree of the court-martial system enable [the Supreme Court of the United States], in exercising appellate jurisdiction, to review the decisions of the court sitting at its apex). Thus, separately from the prejudice analysis discussed above and in Appellant’s Brief, this Court should find that the sentence imposed is plainly unreasonable because the military judge failed to “adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing” as required by *Gall*, 552 U.S. at 50.

The Government’s invitation for this Court to simply “infer” that the mitigating evidence was considered is a call for the exact appellate guesswork that the Supreme Court has prohibited. *See id.*; Gov. Ans. at 29–30. Meaningful review, as envisioned by *Gall*, cannot be built on a foundation of inference—it requires an articulated rationale so an appellate court can see the “reasonableness of the sentence” and “promote the perception of fair sentencing.” *Gall*, 552 U.S. at 50. Without it, particularly where the proceedings were so thoroughly tainted by error, this Court is left with nothing but speculation.

The errors in this case were not isolated missteps; rather, they were cumulative and mutually reinforcing. An erroneous ruling on the photographs led to a trial segment dominated by improper illustrative testimony, which was punctuated by repeated, impermissible punishment recommendations. When a sentence is the product of such a deeply flawed process—one tainted from start to finish—it is by definition unreasonable and imposed in violation of law. Confidence

in the fairness of military justice requires a sentence that rests on a solid foundation of law and fact, not on appellate guesswork. A1C Bogert's sentence lacks that foundation.

The Government's argument regarding Article 56(c)(2)(B) is a red herring. Gov. Ans. at 29. That provision mandates an explanation for a sentence falling outside the guideline parameters. It in no way speaks to—much less negates—the separate and distinct requirement under Article 66(e) for a sentence to be substantively and procedurally reasonable. Procedural reasonableness, as federal jurisprudence has long held, demands an explanation sufficient for meaningful appellate review. *See Gall*, 552 U.S. at 50. By mirroring the federal review statute, the amendments to Article 66 imported this bedrock principle, regardless of whether a sentence falls within a given range.

A1C Bogert respectfully requests that this Honorable Court exercise its authority under sections (A) or (D) of Article 66(e)(1) UCMJ, 10 U.S.C. § 866(e)(1), and provide appropriate sentencing relief by approving a bad-conduct discharge and reducing his term of confinement to thirty months.

Respectfully submitted,



OLGA STANFORD, Capt., USAF  
Appellate Defense Counsel



**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 14 January 2026.

Respectfully submitted,



OLGA STANFORD, Capt., USAF  
Appellate Defense Counsel

