IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 1 No. ACM 40091 12 July 2021

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **24 September 2021.** The record of trial was docketed with this Court on 27 May 2021. From the date of docketing to the present date, 46 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel

[redacted]

GRANTED
13 JULY 2021

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 12 July 2021.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

13 July 2021

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAKOTA R. BAKER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40091 Panel No. 1

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

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

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

[redacted]

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 July 2021.

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 1
Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force	)	No. ACM 40091
Appellant	)	15 September 2021

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **24 October 2021.** The record of trial was docketed with this Court on 27 May 2021. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 4 March 2021, at Sheppard Air Force Base, Texas, a general court-martial composed of a military judge alone found Airman First Class (A1C) Dakota R. Baker guilty, consistent with his pleas, of the following: (1) one charge with three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and (2) one charge and one specification of [illegible]nd viewing child pornography in violation of Article 134, UCMJ, 10 U.S.C.

GRANTED
17 SEP 2021

§ 934.[1] (R. at 18, 28, 150; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 16 Mar. 2021.) The military judge sentenced A1C Baker to a reduction to E-1, 15 months' confinement, and a dishonorable discharge.[2] (R. at 241.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 16 Mar. 2021.)

The record of trial consists of six prosecution exhibits, seven defense exhibits, and 19 appellate exhibits. The transcript is 247 pages. A1C Baker is currently in confinement.

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

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (DAF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
[redacted]

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

[2] The military judge sentenced A1C Baker to 12 months' confinement for Specification 1 of Charge I, 13 months' confinement for Specification 2 of Charge I, 14 months' confinement for Specification 3 of Charge I, and 15 months' confinement for the Specification of Charge II, with all confinement to run concurrently. (R. at 241.)

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 15 September 2021.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
[redacted]

16 September 2021

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAKOTA R. BAKER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40091 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 September 2021.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 1 No. ACM 40091 10 October 2021

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **23 November 2021.** The record of trial was docketed with this Court on 27 May 2021. From the date of docketing to the present date, 136 days have elapsed. On the date requested, 180 days will have elapsed.

On 4 March 2021, at Sheppard Air Force Base, Texas, a general court-martial composed of a military judge alone found Airman First Class (A1C) Dakota R. Baker guilty, consistent with his pleas, of the following: (1) one charge with three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and (2) one charge and one specification of receiving and viewing child pornography in violation of Article 134, UCMJ, 10 U.S.C.

U.S. AIR FORCE COURT OF CRIMINAL APPEALS

GRANTED
13 Oct 2021

§ 934.[1] (R. at 18, 28, 150; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 16 Mar. 2021.) The military judge sentenced A1C Baker to a reduction to E-1, 15 months' confinement, and a dishonorable discharge.[2] (R. at 241.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 16 Mar. 2021.)

The record of trial consists of six prosecution exhibits, seven defense exhibits, and 19 appellate exhibits. The transcript is 247 pages. A1C Baker is currently in confinement.

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

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

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

[2] The military judge sentenced A1C Baker to 12 months' confinement for Specification 1 of Charge I, 13 months' confinement for Specification 2 of Charge I, 14 months' confinement for Specification 3 of Charge I, and 15 months' confinement for the Specification of Charge II, with all confinement to run concurrently. (R. at 241.)

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 10 October 2021.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

13 October 2021

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAKOTA R. BAKER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40091 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 October 2021.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 1 No. ACM 40091 12 November 2021

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **23 December 2021.** The record of trial was docketed with this Court on 27 May 2021. From the date of docketing to the present date, 169 days have elapsed. On the date requested, 210 days will have elapsed.

On 4 March 2021, at Sheppard Air Force Base, Texas, a general court-martial composed of a military judge alone found Airman First Class (A1C) Dakota R. Baker guilty, consistent with his pleas, of the following: (1) one charge with three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of stice (UCMJ), 10 U.S.C. § 920b; and (2) one charge and one specification of d viewing child pornography in violation of Article 134, UCMJ, 10 U.S.C.

GRANTED

19 NOVEMBER 2021

§ 934.[1] (R. at 18, 28, 150; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 16 Mar. 2021.) The military judge sentenced A1C Baker to a reduction to E-1, 15 months' confinement, and a dishonorable discharge.[2] (R. at 241.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 16 Mar. 2021.)

The record of trial consists of six prosecution exhibits, seven defense exhibits, and 19 appellate exhibits. The transcript is 247 pages. A1C Baker is currently in confinement.

Counsel is currently assigned 25 cases, with nine pending initial brief before this Court. Six cases have priority over this case.

1. *United States v. Solomon*, ACM 39972. The record of trial consists of 29 prosecution exhibits, five defense exhibits, 152 appellate exhibits, and six court exhibits. The transcript is 2,113 pages. Counsel has completed review of the record and drafted the majority of the AOE.
2. *United States v. Reid*, ACM S32680. The record of trial consists of three prosecution exhibits, 10 defense exhibits, and 35 appellate exhibits. The transcript is 228 pages. Counsel has not yet begun review of this record.

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

[2] The military judge sentenced A1C Baker to 12 months' confinement for Specification 1 of Charge I, 13 months' confinement for Specification 2 of Charge I, 14 months' confinement for Specification 3 of Charge I, and 15 months' confinement for the Specification of Charge II, with all confinement to run concurrently. (R. at 241.)

3. *United States v. Lopez*, ACM S32681. The record of trial consists of five prosecution exhibits, five defense exhibits, and five appellate exhibits. The transcript is 119 pages. Counsel has not yet begun review of this record.
4. *United States v. Williams*, ACM 40028. The record of trial consists of three prosecution exhibits, 12 defense exhibits, and three appellate exhibits. The transcript is 131 pages. Counsel has not yet begun review of this record.
5. *United States v. Behunin*, ACM S32684. The record of trial consists of two prosecution exhibits, eight defense exhibits, and four appellate exhibits. The transcript is 168 pages. Counsel has not yet begun review of this record.
6. *United States v. Mock,* ACM 40072. The record of trial consists of three prosecution exhibits, 38 defense exhibits, and seven appellate exhibits. The transcript is 170 pages. Counsel has not yet begun review of this record.

Through no fault of A1C Baker, undersigned counsel has been working on other assigned matters and has yet to complete his review of A1C Baker's case. A1C Baker was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review CA1C Baker case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 12 November 2021.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

16 November 2021

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAKOTA R. BAKER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40091 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 November 2021.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Panel No. 1 No. ACM 40091 14 December 2021

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **22 January 2022.** The record of trial was docketed with this Court on 27 May 2021. From the date of docketing to the present date, 201 days have elapsed. On the date requested, 240 days will have elapsed.

On 4 March 2021, at Sheppard Air Force Base, Texas, a general court-martial composed of a military judge alone found Airman First Class (A1C) Dakota R. Baker guilty, consistent with his pleas, of the following: (1) one charge with three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and (2) one charge and one specification of receiving and viewing child pornography in violation of Article 134, UCMJ, 10 U.S.C.

GRANTED

17 DECEMBER 2021

§ 934.[1] (R. at 18, 28, 150; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 16 Mar. 2021.) The military judge sentenced A1C Baker to a reduction to E-1, 15 months' confinement, and a dishonorable discharge.[2] (R. at 241.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 16 Mar. 2021.)

The record of trial consists of six prosecution exhibits, seven defense exhibits, and 19 appellate exhibits. The transcript is 247 pages. A1C Baker is currently in confinement.

Counsel is currently assigned 25 cases, with ten pending initial brief before this Court. Six cases have priority over this case.

1. *United States v. Solomon*, ACM 39972. The record of trial consists of 29 prosecution exhibits, five defense exhibits, 152 appellate exhibits, and six court exhibits. The transcript is 2,113 pages. The AOE is complete and pending final client review.
2. *United States v. Reid*, ACM S32680. The record of trial consists of three prosecution exhibits, 10 defense exhibits, and 35 appellate exhibits. The transcript is 228 pages. The AOE is complete and counsel will file shortly.

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

[2] The military judge sentenced A1C Baker to 12 months' confinement for Specification 1 of Charge I, 13 months' confinement for Specification 2 of Charge I, 14 months' confinement for Specification 3 of Charge I, and 15 months' confinement for the Specification of Charge II, with all confinement to run concurrently. (R. at 241.)

3. *United States v. Lopez*, ACM S32681. The record of trial consists of five prosecution exhibits, five defense exhibits, and five appellate exhibits. The transcript is 119 pages. Counsel has completed review of most of this record.
4. *United States v. Williams*, ACM 40028. The record of trial consists of three prosecution exhibits, 12 defense exhibits, and three appellate exhibits. The transcript is 131 pages. Counsel has not yet begun review of this record.
5. *United States v. Behunin*, ACM S32684. The record of trial consists of two prosecution exhibits, eight defense exhibits, and four appellate exhibits. The transcript is 168 pages. Counsel has not yet begun review of this record.
6. *United States v. Mock,* ACM 40072. The record of trial consists of three prosecution exhibits, 38 defense exhibits, and seven appellate exhibits. The transcript is 170 pages. Counsel has not yet begun review of this record.

Through no fault of A1C Baker, undersigned counsel has been working on other assigned matters and has yet to complete his review of A1C Baker's case. A1C Baker was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review CA1C Baker case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 14 December 2021.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

16 December 2021

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAKOTA R. BAKER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40091 Panel No. 1

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

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

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

[redacted]
BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd, Ste 1190
Joint Base Andrews, MD 20762
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 December 2021.

[redacted]
BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)** Before Panel No. 1 No. ACM 40091 10 January 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **21 February 2022.** The record of trial was docketed with this Court on 27 May 2021. From the date of docketing to the present date, 228 days have elapsed. On the date requested, 270 days will have elapsed.

On 4 March 2021, at Sheppard Air Force Base, Texas, a general court-martial composed of a military judge alone found Airman First Class (A1C) Dakota R. Baker guilty, consistent with his pleas, of the following: (1) one charge with three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and (2) one charge and one specification of receiving and viewing child pornography in violation of Article 134, UCMJ, 10 U.S.C.

GRANTED
12 JAN 2022

§ 934.[1] (R. at 18, 28, 150; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 16 Mar. 2021.) The military judge sentenced A1C Baker to a reduction to E-1, 15 months' confinement, and a dishonorable discharge.[2] (R. at 241.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 16 Mar. 2021.)

The record of trial consists of six prosecution exhibits, seven defense exhibits, and 19 appellate exhibits. The transcript is 247 pages. A1C Baker is currently in confinement.

Counsel is currently assigned 24 cases, with seven pending initial brief before this Court. Three cases have priority over this case.

1. *United States v. Williams*, ACM 40028. The record of trial consists of three prosecution exhibits, 12 defense exhibits, and three appellate exhibits. The transcript is 131 pages. Counsel has completed review of this record and begun drafting the AOE.
2. *United States v. Behunin*, ACM S32684. The record of trial consists of two prosecution exhibits, eight defense exhibits, and four appellate exhibits. The transcript is 168 pages. Counsel has begun review of this record.

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

[2] The military judge sentenced A1C Baker to 12 months' confinement for Specification 1 of Charge I, 13 months' confinement for Specification 2 of Charge I, 14 months' confinement for Specification 3 of Charge I, and 15 months' confinement for the Specification of Charge II, with all confinement to run concurrently. (R. at 241.)

3. *United States v. Mock,* ACM 40072. The record of trial consists of three prosecution exhibits, 38 defense exhibits, and seven appellate exhibits. The transcript is 170 pages. Counsel has not yet begun review of this record.

Through no fault of A1C Baker, undersigned counsel has been working on other assigned matters and has yet to complete his review of A1C Baker's case. A1C Baker was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review A1C Baker's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 10 January 2022.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

12 January 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAKOTA R. BAKER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40091 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 January 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 1 No. ACM 40091 11 February 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **23 March 2022.** The record of trial was docketed with this Court on 27 May 2021. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 4 March 2021, at Sheppard Air Force Base, Texas, a general court-martial composed of a military judge alone found Airman First Class (A1C) Dakota R. Baker guilty, consistent with his pleas, of the following: (1) one charge with three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and (2) one charge and one specification of receiving and viewing child pornography in violation of Article 134, UCMJ, 10 U.S.C.

GRANTED
16 FEB 2022

§ 934.[1] (R. at 18, 28, 150; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 16 Mar. 2021.) The military judge sentenced A1C Baker to a reduction to E-1, 15 months' confinement, and a dishonorable discharge.[2] (R. at 241.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 16 Mar. 2021.)

The record of trial consists of 6 prosecution exhibits, 7 defense exhibits, and 19 appellate exhibits. The transcript is 247 pages. A1C Baker is currently in confinement.

Counsel is currently assigned 25 cases, with 9 pending initial brief before this Court. Five cases have priority over this case.

1. *United States v. Behunin*, ACM S32684. The record of trial consists of two prosecution exhibits, eight defense exhibits, and four appellate exhibits. The transcript is 168 pages. Counsel will file the AOE shortly.

2. United States v. Solomon, ACM 39972. The record of trial consists of 29 prosecution exhibits, 5 defense exhibits, 152 appellate exhibits, and 6 court exhibits. The transcript is 2,113 pages. An answer from the Government is due today, 11 February. Counsel anticipates a significant time required to provide a reply.

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

[2] The military judge sentenced A1C Baker to 12 months' confinement for Specification 1 of Charge I, 13 months' confinement for Specification 2 of Charge I, 14 months' confinement for Specification 3 of Charge I, and 15 months' confinement for the Specification of Charge II, with all confinement to run concurrently. (R. at 241.)

3. *United States v. Williams*, ACM 40028. The record of trial consists of three prosecution exhibits, 17 defense exhibits, and three appellate exhibits. The transcript is 131 pages. An answer from the Government is due 25 February, and Counsel will need to prioritize *Williams* when the reply is due.

4. *United States v. Covitz*, ACM 40193. The record of trial consists of 11 prosecution exhibits, 17 defense exhibits, 39 appellate exhibits, and 2 court exhibits. The transcript is 1159 pages. Counsel has begun review of the record of trial.

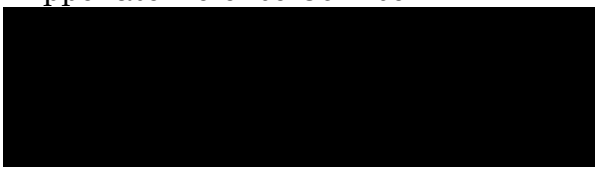
5. *United States v. Mock*, ACM 40072. The record of trial consists of 3 prosecution exhibits, 38 defense exhibits, and seven appellate exhibits. The transcript is 170 pages. Counsel has begun review of this record of trial.

Through no fault of A1C Baker, undersigned counsel has been working on other assigned matters and has yet to complete his review of A1C Baker's case. A1C Baker was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review A1C Baker's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 11 February 2022.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

15 February 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAKOTA R. BAKER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40091 Panel No. 1

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

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

The United States respectfully maintains that, short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed his review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 February 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 1
Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force	)	No. ACM 40091
Appellant	)	10 March 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **22 April 2022.** The record of trial was docketed with this Court on 27 May 2021. From the date of docketing to the present date, 287 days have elapsed. On the date requested, 330 days will have elapsed.

On 4 March 2021, at Sheppard Air Force Base, Texas, a general court-martial composed of a military judge alone found Airman First Class (A1C) Dakota R. Baker guilty, consistent with his pleas, of the following: (1) one charge with three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Justice (UCMJ), 10 U.S.C. § 920b; and (2) one charge and one specification of nd viewing child pornography in violation of Article 134, UCMJ, 10 U.S.C.

GRANTED
15 MAR 2022

§ 934.[1] (R. at 18, 28, 150; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 16 Mar. 2021.) The military judge sentenced A1C Baker to a reduction to E-1, 15 months' confinement, and a dishonorable discharge.[2] (R. at 241.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 16 Mar. 2021.)

The record of trial consists of 6 prosecution exhibits, 7 defense exhibits, and 19 appellate exhibits. The transcript is 247 pages. A1C Baker is currently in confinement.

Counsel is currently assigned 24 cases, with 9 pending initial brief before this Court. Three cases have priority over this case.

1. *United States v. Richard*, ACM 39918. The record of trial consists of 29 prosecution exhibits, 12 defense exhibits, 56 appellate exhibits, and 1 court exhibit. The transcript is 848 pages. CAAF granted review of this case on 24 February 2022, with a brief due on 26 March 2022. This has set back counsel's progress on this and other cases.

2. *United States v. Covitz*, ACM 40193. The record of trial consists of 11 prosecution exhibits, 17 defense exhibits, 39 appellate exhibits, and 2 court exhibits. The transcript is 1159 pages. Capt Covitz has retained civilian counsel. Undersigned

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

[2] The military judge sentenced A1C Baker to 12 months' confinement for Specification 1 of Charge I, 13 months' confinement for Specification 2 of Charge I, 14 months' confinement for Specification 3 of Charge I, and 15 months' confinement for the Specification of Charge II, with all confinement to run concurrently. (R. at 241.)

counsel is awaiting a notice of appearance from civilian counsel. Undersigned counsel has completed review of the record of trial and begun drafting the AOE.

3. *United States v. Mock,* ACM 40072. The record of trial consists of three prosecution exhibits, 38 defense exhibits, and seven appellate exhibits. The transcript is 170 pages. Counsel has begun review of this record.

Through no fault of A1C Baker, undersigned counsel has been working on other assigned matters and has yet to complete his review of A1C Baker's case. A1C Baker was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review A1C Baker's case and advise him regarding potential errors.

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

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 10 March 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

14 March 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAKOTA R. BAKER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40091 Panel No. 1

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

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

The United States respectfully maintains that, short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed his review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 14 March 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 1
Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force *Appellant*	)	No. ACM 40091 21 April 2022

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rule 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the following: Attachments 1 and 2 to Prosecution Exhibit 1, the Stipulation of Fact. Both trial counsel and trial defense counsel had access to the exhibits for the court-martial. Trial counsel requested that the military judge seal the attachment, and the military judge so ordered. (Record at 31, 33, 36–37.)

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examining these materials is reasonably necessary to fulfill appellate counsel's responsibilities, undersigned counsel asserts that viewing the referenced attachments is reasonably necessary to assesses whether it was provident to plead guilty to the offenses, and whether his defense counsel were effective for supporting the plea agreement.

To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. § 866(d), appellate defense counsel must therefore examine "the entire record."

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

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). Undersigned counsel must review the sealed materials to provide "competent appellate representation." *See id.* Accordingly, good cause exists in this case since undersigned counsel cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the attachments.

WHEREFORE, counsel requests that this Honorable Court grant this motion.

Respectfully submitted,

[redacted]
MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 21 April 2022.

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel


26 April 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAKOTA R. BAKER, USAF *Appellant.*	))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS – OUT-OF-TIME ACM 40091 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Materials. The United States does not object so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials. This motion response if being filed out-of-time because it fell through the cracks while JAJG was experiencing an extremely heavy workload.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 April 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	
	)	Before Panel No. 1
Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force	)	No. ACM 40091
Appellant	)	8 April 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **22 May 2022.** The record of trial was docketed with this Court on 27 May 2021. From the date of docketing to the present date, 316 days have elapsed. On the date requested, 360 days will have elapsed.

On 4 March 2021, at Sheppard Air Force Base, Texas, a general court-martial composed of a military judge alone found Airman First Class (A1C) Dakota R. Baker guilty, consistent with his pleas, of the following: (1) one charge with three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and (2) one charge and one specification of receiving and viewing child pornography in violation of Article 134, UCMJ, 10 U.S.C.

GRANTED
12 APR 2022

§ 934.[1] (R. at 18, 28, 150; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 16 Mar. 2021.) The military judge sentenced A1C Baker to a reduction to E-1, 15 months' confinement, and a dishonorable discharge.[2] (R. at 241.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 16 Mar. 2021.)

The record of trial consists of 6 prosecution exhibits, 7 defense exhibits, and 19 appellate exhibits. The transcript is 247 pages. A1C Baker is currently in confinement. Counsel has begun review of A1C Baker's record of trial. Counsel has previously planned leave scheduled from 11-15 April during his children's spring break.

Counsel is currently assigned 22 cases, with 9 pending initial brief before this Court. Four cases have priority over this case.

1. *United States v. Mock,* ACM 40072. The record of trial consists of 3 prosecution exhibits, 38 defense exhibits, and 7 appellate exhibits. The transcript is 170 pages. The brief is complete and counsel will submit upon client approval.

2. *United v. Harrington*, ACM 39825. The record of trial consists of 31 prosecution exhibits, 13 defense exhibits, 82 appellate exhibits, and 1 court exhibit. The transcript is 1159 pages. The CAAF granted review of this case on 14 March 2022,

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

[2] The military judge sentenced A1C Baker to 12 months' confinement for Specification 1 of Charge I, 13 months' confinement for Specification 2 of Charge I, 14 months' confinement for Specification 3 of Charge I, and 15 months' confinement for the Specification of Charge II, with all confinement to run concurrently. (R. at 241.)

with an initial brief due 13 April 2022. Counsel will also need to prepare a reply brief after the Government files its brief on approximately 14 May 2022.

3. *United States v. Richard*, ACM 39918. The record of trial consists of 29 prosecution exhibits, 12 defense exhibits, 56 appellate exhibits, and 1 court exhibit. The transcript is 848 pages. CAAF granted review of this case on 24 February 2022. Counsel will have ten days after the Government files its brief (estimated 24 April 2022) to submit a reply. Additionally, counsel will argue this case at CAAF on 10 May 2022.

4. *United States v. Covitz*, ACM 40193. The record of trial consists of 11 prosecution exhibits, 17 defense exhibits, 39 appellate exhibits, and 2 court exhibits. The transcript is 1159 pages. Counsel submitted the AOE on 4 April and anticipates preparing a reply during the one-week window from the Government's Answer (estimated at 4 May 2022).

Through no fault of A1C Baker, undersigned counsel has been working on other assigned matters and has yet to complete his review of A1C Baker's case. A1C Baker was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review A1C Baker's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 8 April 2022.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

11 April 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAKOTA R. BAKER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40091 Panel No. 1

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 11 April 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40091**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dakota R. BAKER	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 21 April 2022, Appellant's counsel moved to examine sealed materials, specifically, Attachments 1 and 2 to Prosecution Exhibit 1, a stipulation of fact. The attachments were sealed by the military judge who presided over Appellant's court-martial. Appellate defense counsel argues it is necessary to review the entire record, including these sealed materials, to ensure undersigned counsel provides "competent appellate representation" under Article 70, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 870 (*Manual for Courts-Martial*, *United States* (2019 ed.)) (2019 *MCM*).

The Government does not object to Appellant's motion, as long as the Government "can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials."

Materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial counsel or defense counsel, and sealed, may be examined by appellate counsel upon "a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct." Rule for Courts-Martial 1113(b)(3)(B)(i) (2019 *MCM*).

The sealed material that Appellant's counsel requests permission to examine were available to both trial counsel and defense counsel, and we find a colorable showing has been made that examination of the materials is reasonably necessary to fulfill the professional responsibilities Appellant's counsel owes to Appellant. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 29th day of April, 2022,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Attachments 1 and 2 to Prosecution Exhibit 1**, subject to the following conditions: To view these sealed material, counsel will coordinate with the court. No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available their contents to any other individual without the court's prior written authorization.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)** Before Panel No. 1 No. ACM 40091 9 May 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **21 June 2022.** The record of trial was docketed with this Court on 27 May 2021. From the date of docketing to the present date, 347 days have elapsed. On the date requested, 390 days will have elapsed.

On 4 March 2021, at Sheppard Air Force Base, Texas, a general court-martial composed of a military judge alone found Airman First Class (A1C) Dakota R. Baker guilty, consistent with his pleas, of the following: (1) one charge with three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and (2) one charge and one specification of r[illegible] and viewing child pornography in violation of Article 134, UCMJ, 10 U.S.C.

GRANTED
11 MAY 2022

§ 934.[1] (R. at 18, 28, 150; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 16 Mar. 2021.) The military judge sentenced A1C Baker to a reduction to E-1, 15 months' confinement, and a dishonorable discharge.[2] (R. at 241.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 16 Mar. 2021.)

The record of trial consists of 6 prosecution exhibits, 7 defense exhibits, and 19 appellate exhibits. The transcript is 247 pages. A1C Baker is currently in confinement.

Counsel is currently assigned 24 cases, with 9 pending initial brief before this Court. Two cases have priority over this case.

1. *United States v. Covitz*, ACM 40193. The record of trial consists of 11 prosecution exhibits, 17 defense exhibits, 39 appellate exhibits, and 2 court exhibits. The transcript is 1159 pages. Counsel anticipates the Government will file an Answer on 13 May 2022. Given the length and complexity of the case, counsel anticipates significant work on the reply.

2. *United States v. Harrington*, ACM 39825. The record of trial consists of 31 prosecution exhibits, 13 defense exhibits, 82 appellate exhibits, and 1 court exhibit. The transcript is 1159 pages. The CAAF granted review of this case on 14 March 2022.

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

[2] The military judge sentenced A1C Baker to 12 months' confinement for Specification 1 of Charge I, 13 months' confinement for Specification 2 of Charge I, 14 months' confinement for Specification 3 of Charge I, and 15 months' confinement for the Specification of Charge II, with all confinement to run concurrently. (R. at 241.)

The Government's Answer is also due on 13 May; counsel anticipates a significant workload to prepare a reply.

Through no fault of A1C Baker, undersigned counsel has been working on other assigned matters and has yet to complete his review of A1C Baker's case. A1C Baker was specifically informed of his right to timely appeal, was consulted with regard to this specific enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review A1C Baker's case and advise him regarding potential errors.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 9 May 2022.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

9 May 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) DAKOTA R. BAKER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40091 Panel No. 1

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

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

The United States respectfully maintains that, short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed his review of the record of trial at this late stage of the appellate process.

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

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 9 May 2022.

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force *Appellant*	)	No. ACM 40091
	)	21 June 2022

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

ASSIGNMENTS OF ERROR

I.

WHETHER A1C BAKER'S DISHONORABLE DISCHARGE IS INAPPROPRIATELY SEVERE.

II.

R.C.M. 1106(d)(3) PROVIDES AN ACCUSED FIVE DAYS TO RESPOND TO A VICTIM'S POST-TRIAL SUBMISSION OF MATTERS. DID THE CONVENING AUTHORITY VIOLATE BASIC DUE PROCESS RIGHTS WHEN SHE ACTED WITHOUT ALLOWING A1C BAKER TO RESPOND TO THE ARTICLE 6b REPRESENTATIVE'S POST-TRIAL SUBMISSION?

III.

WHETHER THE TRIAL COUNSEL COMMITTED PLAIN ERROR BY ARGUING VICTIM IMPACT WITH ZERO FOUNDATION AND CRITICIZING A1C BAKER'S APOLOGY FOR FAILING TO UNDERSTAND THE UNINTRODUCED VICTIM IMPACT.

STATEMENT OF THE CASE

On 4 March 2021, at Sheppard Air Force Base (AFB), Texas, a general court-martial composed of a military judge alone found Airman First Class (A1C) Dakota R. Baker guilty, consistent with his pleas, of the following: (1) one charge with three specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b; and (2) one charge and one specification of receiving and viewing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] (R. at 18, 28, 150; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 16 Mar. 2021.) The military judge sentenced A1C Baker to a reduction to E-1, 15 months' confinement, and a dishonorable discharge.[2] (R. at 241.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 16 Mar. 2021.)

STATEMENT OF FACTS

Background

A1C Baker grew up in St. Charles, Missouri, with his two siblings and caring parents. (Defense Exhibit (DE) G at 1.) He learned the value of hard work early, helping the family's financial situation by mowing lawns and shoveling snow. (*Id.*)

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

[2] The military judge sentenced A1C Baker to 12 months' confinement for Specification 1 of Charge I, 13 months' confinement for Specification 2 of Charge I, 14 months' confinement for Specification 3 of Charge I, and 15 months' confinement for the Specification of Charge II, with all confinement to run concurrently. (R. at 241.)

He had an active childhood, playing various sports. (*Id.*) He had to struggle to make it through high school, but proudly graduated and joined the Air Force soon thereafter. (*Id.*) He found it both exciting and challenging, but also worried that his heart condition might preclude him from doing what he wanted. (*Id.*) Ultimately, he persevered and graduated, earning the Most Improved Trainee award at Basic Training. (*Id.*)

His technical training at Sheppard proved much more difficult, leading him to wash back several times. (*Id.* at 2; Prosecution Exhibit (PE) 3, 4.) He struggled to "make it all fit," and felt increasingly alone. (DE G at 2.)

Charged Conduct

In March 2020, A1C Baker used the chat service "Omegle," which randomly pairs individuals, to chat with J.A. for approximately 20 minutes; at some point during the conversation, A1C Baker became aware that J.A. was an eight-year-old girl. (PE 1 at 2.) They switched to Instagram, where A1C Baker communicated indecent language to her, sent her a picture of his exposed penis, and requested and received a nude image from her. (PE 1 at 2–3.) Additionally, he received and viewed a video of J.A. touching her exposed genitalia. (PE 1 at 3.) The Air Force Office of Special Investigations (AFOSI) interviewed A1C Baker on 2 May 2020, and he admitted to his misconduct. (PE 1 at 4.)

Court-Martial

A1C Baker pleaded guilty pursuant to a plea agreement. (Appellate Exhibit (AE) XVI.) In his unsworn statement, A1C Baker explained that he immediately

deleted everything and knew he made "some horrible decisions." (DE G at 2.) He expressed remorse and recognized that he would have to "pay the price for [his] decisions." (*Id.*) He asked the military judge to sentence him to less than one year of confinement, as this would limit his sex offender registration requirements in Missouri to 15 years. (R. at 221; DE G at 2.)

A1C Baker also explained that, starting with the AFOSI investigation, he underwent extensive inpatient mental health treatment. (R. at 220.) A1C Baker's mother, who came to testify on his behalf, explained that his family could not find him and did not know where he was for about seven weeks. (R. at 216.) The Defense introduced a clinical psychologist's mental health evaluation of A1C Baker. (DE B.) The psychologist diagnosed A1C Baker with major depression with psychotic features and generalized anxiety disorder; however, he ruled out a diagnosis of pedophilia.[3] (DE B.) A clinic director explained that A1C Baker had three inpatient admissions due to self-harm. (DE C.) Despite A1C Baker's struggles, he continued to help others. Another patient at the inpatient facility, 2d Lt K.M., explained that A1C Baker provided him a source of encouragement as he worked through his own troubles. (DE D.)

[3] A1C Baker underwent a "sanity board" pursuant to R.C.M. 706. (AE IV.) The evaluating psychologist reached different conclusions on A1C Baker's diagnosis, but ultimately concluded A1C Baker did not have a severe mental disease or defect at the time of the alleged criminal conduct; was able to appreciate the nature, quality, and wrongfulness of his conduct; and could cooperate intelligently with his defense. (*Id.*)

The military judge sentenced A1C Baker to a reduction to E-1, 15 months confinement, and a dishonorable discharge. (R. at 241.)

ARGUMENT

I.

A1C BAKER'S DISHONORABLE DISCHARGE IS INAPPROPRIATELY SEVERE.

Standard of Review

This Court reviews sentence appropriateness *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

This Court "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [it] finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). Considerations include "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted). "The breadth of the power granted to the Courts of Criminal Appeals to review a case for sentence appropriateness is one of the unique and longstanding features of the [UCMJ]." *United States v. Hutchison*, 57 M.J. 231, 233 (C.A.A.F. 2002) (citations omitted). This Court's role in reviewing sentences under Article 66(d) is to "do justice," as distinguished from the discretionary power of the convening authority to grant mercy. *See United States v.*

Boone, 49 M.J. 187, 192 (C.A.A.F. 1998).

Analysis

A1C Baker's dishonorable discharge is inappropriately severe for at least two reasons: (1) the sentence fails to account for A1C Baker's mental struggles and their connection to the offenses; and, (2) the dishonorable discharge strips A1C Baker of benefits that are crucially important to his continued rehabilitation.

First, A1C Baker's offenses were inextricably tied to his mental struggles. A1C Baker does not challenge the results of the sanity board; rather, he argues that the military judge failed to properly consider his mental health as a matter in mitigation and extenuation to lessen the appropriate punishment. His mother testified that between Christmas 2019 and her visit to see him in February 2020—just before the misconduct—he "wasn't the same young man that left my house" after Christmas. (R. at 216.) The investigation triggered extensive mental health evaluation and treatment, the results of which illuminate the misconduct itself. In a July 2020 evaluation, a clinical psychologist diagnosed both major depressive disorder with psychotic features and generalized anxiety disorder. (DE B at 3.) The R.C.M. 706 evaluation in October 2020, which found A1C Baker competent at the time of the misconduct and able to participate in trial, identified his diagnosis as

adjustment disorder, unspecified.[4] Further, the director of Red River Hospital, where A1C Baker received treatment, explained that A1C Baker's "judgment is compromised by his psychopathology."[5] (DE C.) Specifically, his struggles with processing information in real time leaves him "highly suggestible." (*Id.*)

This helps to explain how he went from a random chat to the "horrible decision[]" to participate in sexual conversation with an eight-year-old child. (DE G at 2.) He explained in his unsworn statement that he simply wanted to "find someone real," "someone who wanted to talk to me." (*Id.*) A1C Baker faced the confluence of factors—loneliness, repeated wash backs in training, increasing alienation—all while his judgment was "compromised" by his mental health issues. His mental health evaluation provides further mitigation: a psychologist ruled out pedophilia. (DE B.) Thus, his behavior reflects his inhibited judgment rather than an intent to pursue

[4] A1C Baker stipulated that, at all relevant times, he "had no mental disease or defect that caused him to be unable to appreciate the nature, quality, and wrongfulness of his actions," and that "he understands the nature of the proceedings against him and has been able to participate in his own defense." (PE 1 at 4.) Though A1C Baker does not challenge the Sanity Board results, a stipulation to one's own mental health is improper and meaningless. Stipulating to an absence of mental health issues does not make them disappear.

[5] The military judge declined to consider the main substance of Defense Exhibit C because of reliability concerns. (R. at 203–05, 207–10.) A1C Baker maintains this decision was error. However, this is not raised as a separate Assignment of Error because this Court may consider the entire record and should consider the entirety of Defense Exhibit C.

children.[6] The lack of predatory steps towards J.A. explains why the Government produced zero evidence of any victim impact. A1C Baker's high suggestibility led to him to agree to the misconduct which, while serious, was brief; he quickly recognized his mistake and deleted everything. If he recognized the danger of the situation earlier, the conduct might never have occurred. His lapses during that conversation will now follow him for life because of the dishonorable discharge.

Second, given the scale of A1C Baker's challenges, the dishonorable discharge is inappropriately severe. The record explains in some detail the extensive mental health services he received. (DE B, C, G; R. at 220–21.) In his verbal unsworn, A1C Baker described the evolution in his mental thought process, wherein he can nowidentify bad feelings and thoughts before they become bad actions. (*Id.*) This shows the personal growth he underwent from the start of the investigation through the date of sentencing. That same growth should continue as he is released from confinement. But the dishonorable discharge makes such continuity unlikely. Instead, A1C Baker faces a future limited by a dishonorable discharge, where the military will ultimately not assist in A1C Baker's efforts to maintain a positive trajectory. Disapproving the dishonorable discharge will not change the time already

[6] The Government sought to introduce two pages of transcript from the AFOSI interview that purported to show A1C Baker had sent pictures to other underage girls. (R. at 157; PE 6 for Identification.) The military judge rejected the exhibit for a multitude of reasons," including that the transcript was uncertain enough that "[t]he Court is unconvinced of what exactly the Court has in its hands." (R. at 183–84.) The record of trial improperly lists this exhibit as admitted when it was emphatically rejected. (*Id.*; PE 6.)

served, but it will open the door for A1C Baker's continued rehabilitation.

WHEREFORE, A1C Baker respectfully requests this Honorable Court disapprove the dishonorable discharge.

II.

THE CONVENING AUTHORITY VIOLATED BASIC DUE PROCESS RIGHTS WHEN SHE ACTED BEFORE A1C BAKER COULD RESPOND TO THE ARTICLE 6b REPRESENTATIVE'S POST-TRIAL SUBMISSION OF MATTERS.

Standard of Review

This Court assesses proper post-trial processing *de novo*. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). When reviewing post-trial errors, this Court will grant relief if an appellant presents "some colorable showing of possible prejudice." *United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)).

Additional Facts

The military judge sentenced A1C Baker on 4 March 2021. (EOJ, ROT Vol. 1, 16 Mar. 2021.) That same day, A1C Baker signed a receipt for a submission of matters letter, which informed him that he had ten days to submit matters for convening authority consideration, and that he would receive any submissions from the victim in the case. (Receipt, 4 Mar. 2021, ROT Vol. 4; Submission of Matters for A1C Baker, 4 Mar. 2021, ROT Vol. 4.) Six days later, his defense counsel submitted matters to the convening authority. (Request for Clemency, 10 Mar. 2021, ROT Vol.

4.) His defense counsel requested that the convening authority disapprove confinement beyond 364 days.[7] (Request for Clemency, 10 Mar. 2021, ROT Vol. 4.)

At the court-martial, neither J.A. nor her mother (and Article 6b representative) Mrs. J.A. provided any information on victim impact. However, Mrs. J.A. provided an undated response to the defense clemency submission. (Response of Mrs. J.A., undated, ROT Vol. 4.) She submitted the matters on 14 March 2021, and the Staff Judge Advocate receipted for them on 15 March 2021. (2nd and 3rd endorsement to Victim Submission of Matters Memorandum, ROT Vol. 4.) In her response, Mrs. J.A. argued against reducing confinement. (Response of Mrs. J.A., undated, ROT Vol. 4.) She claimed that the convictions and sentence would never suffice to "reverse the harm he caused my daughter," and that the community had a "right to protect ourselves" by imposing the greater sex offender registration requirement. (*Id.*)

A1C Baker's defense counsel signed a receipt for this document on 15 March 2021. (Receipt from Maj E.N., 15 Mar. 2021, ROT Vol. 4.) There is no receipt from A1C Baker. (*See also* Declaration of Dakota Baker, dtd. 21 June 2022.) The convening authority took action the following day, which was also the day the military judge entered judgment. (Convening Authority Decision on Action, 16 Mar. 2021, ROT Vol. 4; EOJ, ROT Vol. 1, 16 Mar. 2021.) The convening authority acknowledged the accused's submission under R.C.M. 1106, but did not mention the victim's

[7] A1C Baker now recognizes that the convening authority lacked the power to grant this request. *See* Art. 60a(b)(1)(A), 10 U.S.C. § 860a(b)(1)(A).

submission under R.C.M. 1106A. (Convening Authority Decision on Action, 16 Mar. 2021, ROT Vol. 4.)

Law

Under R.C.M. 1106A(a), a victim may "submit matters to the convening authority for consideration in the exercise of the convening authority's powers under R.C.M. 1109 or 1110." "The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided *to the accused* as soon as practicable." R.C.M. 1106A(c)(3) (emphasis added). If a crime victim submits matters under R.C.M. 1106A, "the accused shall have five days from receipt of those matters to submit any matters in rebuttal." R.C.M. 1106(d)(3). "Before taking or declining to take any action on the sentence under this rule, the convening authority shall consider matters timely submitted under R.C.M. 1106 and 1106A, if any, by the accused and any crime victim." R.C.M. 1109(d)(3)(A). A convening authority "may not consider matters adverse to the accused without providing the accused an opportunity to respond." R.C.M. 1106A(c)(2)(B), Discussion.

"[T]he convening authority is an appellant's 'best hope for sentence relief.'" *United States v. Bischoff,* 74 M.J. 664, 669 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999)). "The essence of post-trial practice is basic fair play--notice and an opportunity to respond." *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996). "Serving victim clemency correspondence on the accused for comment before convening authority action protects an accused's due process rights under the Rules for Courts-Martial and preserves the actual and perceived

fairness of the military justice system." *United States v. Bartlett*, 64 M.J. 641, 649 (A. Ct. Crim. App. 2007).

This Court recently addressed this issue in *United States v. Halter*, No. ACM S32666, 2022 CCA LEXIS 9 (A.F. Ct. Crim. App. 6 Jan. 2022) (unpub. op.). In *Halter*, the victim submitted matters to the convening authority, who served those matters on the accused three days *after* the decision on action memorandum. *Id.* at *8. This Court wrote that "[t]his is not only clear error but a violation of Appellant's most basic due process rights under the Rules for Courts-Martial." *Id.* (citing *Bartlett*, 64 M.J. at 649).

For such post-trial errors, the CAAF requires the appellant "to demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter or explain' the new matter." *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). "[T]he threshold should be low, and if an appellant makes some colorable showing of possible prejudice, we will give that appellant the benefit of the doubt and 'we will not speculate on what the convening authority might have done' if defense counsel had been given an opportunity to comment." *Id.* at 323–34 (quoting *United States v. Jones*, 44 M.J. 242, 244 (C.A.A.F. 1996)). The low threshold for material prejudice "reflects the convening authority's vast power in granting clemency and is designed to avoid undue speculation as to how certain information might impact the convening authority's exercise of such broad discretion." *Scalo*, 60 M.J. at 437 (citation omitted). "If the appellant makes such a showing, the Court of Criminal Appeals must either provide meaningful relief or return the case to the Judge

Advocate General concerned for a remand to a convening authority" for new post-trial action. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

Analysis

The Government introduced no evidence of victim impact during presentencing. J.A. did not testify or provide a victim impact statement; nor did her mother, as J.A.'s Article 6b representative, provide any information. A1C Baker's defense counsel made this point during sentencing argument. (R. at 236.) Thus, when Mrs. J.A. raised victim impact for the first time *after trial*, A1C Baker had an absolute right to respond under R.C.M. 1106(d)(3). And yet he never signed receipt for the submission, and his defense counsel only signed a receipt the day before the convening authority issued the decision on action. Under R.C.M. 1106(d)(3), A1C Baker had five days to provide a response. As this Court recognized in *Halter*, making a decision on action without allowing an opportunity to respond was clear error. *See* unpub. op. at *8.

At the time of the decision on action, the convening authority would not have the transcript to validate or invalidate any claims. Nor is it realistic that the convening authority would have perused waived motions to find the evidence contradicting, or minimizing, any victim impact. As the defense explained in its Mil. R. Evid. 412 motion, J.A. engaged in chats and sent sexually explicit images and videos to four other individuals. (AE VII at 2–3.) In fact, the actual video attached to the stipulation of fact was not the video A1C Baker received; it was retrieved from a conversation with another person. (AE VII at 5; R. at 107.) While this does not

excuse his conduct, it explains the absence of victim impact, or at least minimizes the scope of such impact from *his* offenses. Given the opportunity to respond, A1C Baker's defense counsel could have raised these issues. Moreover, A1C Baker explained that he would have taken the opportunity to respond. (Declaration of Dakota Baker, 21 June 22.) But the convening authority acted prematurely.[8]

A1C Baker has demonstrated some colorable showing of possible prejudice. The low threshold for material prejudice is "designed to avoid undue speculation as to how certain information might impact the convening authority's exercise of such broad discretion." *Scalo*, 60 M.J. at 437. While A1C Baker's defense counsel requested relief the convening authority could not provide, there was alternative relief available in the form of restored rank. The convening authority, recognizing that she had no other options for granting relief, could have restored A1C Baker's rank in light of his defense counsel's submission of matters, which highlighted the extensive sex offender registry requirements A1C Baker would soon face. Consequently, this Court should either remand for new post-trial processing or, in light of the sentence's inappropriate severity, disapprove the dishonorable discharge.

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[8] The Convening Authority indicated that she considered A1C Baker's initial submission under R.C.M. 1106. (Convening Authority Decision on Action, 16 Mar. 2021, ROT Vol. 1.) However, the convening authority did not mention considering the R.C.M. 1106A submission from Mrs. J.A. (*Id.*) R.C.M. 1109(d)(3)(A) required the convening authority to consider Mrs. J.A.'s timely submission. This raises the broader question of what the convening authority actually considered and whether the decision on action was simply a template. This only strengthens the case to remand for post-trial processing.

WHEREFORE, A1C Baker respectfully requests that this Honorable Court provide meaningful sentencing relief or remand for new post-trial processing.

III.

WHETHER THE TRIAL COUNSEL COMMITTED PLAIN ERROR BY ARGUING VICTIM IMPACT WITH ZERO FOUNDATION AND CRITICIZING A1C BAKER'S APOLOGY FOR FAILING TO UNDERSTAND THE UNINTRODUCED VICTIM IMPACT.

Additional Facts

The Trial Counsel (TC) opened her sentencing argument by invoking victim impact:

> There is a very real victim in this case, JA, an 8-year-old girl, with her own family and her own community and her own aspirations and her own future. Those things aren't unique to Airman Baker, and her life has been fundamentally altered by this airman's actions. She's had to pay a certain price for those actions.

(R. at 224.) The TC later returned to the theme of victim impact when attacking A1C Baker's apology:

> And going back to this personal statement of Airman Baker, there is an apology to JA, and it's a one-line sentence. There is nothing in here that indicates he truly understands the impact that his actions have had on her. And if he doesn't understand that, there's nothing to say that he's been rehabilitated or that he doesn't deserve this harsh punishment, this dishonorable discharge, because Airman Baker was past a bad-conduct discharge the very first time he sent a lewd message to this girl, knowing she was 8 years old, and he was well past it every single act of misconduct after that.

(R. at 232.)

Standard of Review

Whether argument is improper is a question of law, reviewed *de novo*. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018). If defense counsel does not object, this Court reviews for plain error. *Id.* "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." *Id.* at 401 (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)).

Law

Improper argument, a facet of prosecutorial misconduct, "occurs when trial counsel oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (internal quotation marks, citation, and alterations omitted). Improper argument will yield relief only if the misconduct "actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice)." *Fletcher,* 62 M.J. at 178 (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)).

The Court of Military Appeals "has consistently cautioned counsel to 'limit' arguments on findings or sentencing 'to evidence in the record and to such fair inferences as may be drawn therefrom.'" *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993) (quoting *United States v. Nelson*, 1 M.J. 235, 239–40 (C.M.A. 1975)).

Trial counsel may comment on an accused's failure to express remorse, provided a proper foundation is laid. *United States v. Paxton*, 64 M.J 484, 487 (C.A.A.F. 2007). "As a general rule, the predicate foundation is that an accused has

either testified or has made an unsworn statement and has either expressed no remorse or his expression of remorse can be arguably construed as being shallow, artificial, or contrived." *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992) (citations omitted).

The Court of Appeals for the Armed Forces (CAAF) outlined a balancing approach of three factors for assessing prosecutorial misconduct's prejudicial effect: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Fletcher*, 62 M.J. at 184. When applying *Fletcher* to improper sentencing argument, this Court considers whether "trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the appellant was sentenced on the basis of the evidence alone." *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013) (citations, alterations, and internal quotation marks omitted).

Analysis

1. Arguing victim impact without evidence of victim impact.

The Government declined to introduce any evidence of victim impact: neither the stipulation of fact nor any other sentencing evidence suggests victim impact. J.A. did not testify or provide an impact statement. Thus, the TC had zero evidence or matters to form the foundation of her argument. Nonetheless, she baselessly argued that "[J.A.'s] her life has been fundamentally altered by this airman's actions. She's had to pay a certain price for those actions." (R. at 224.) This may or may not be true; either way, it is nowhere in the record.

When returning to this theme, the TC inexplicably blamed A1C Baker for failing to appreciate the victim impact. (R. at 232.) Perhaps if the Government introduced such evidence, he could have better appreciated the impact. It is improper to fail to introduce evidence and then blame an accused for failing to appreciate the absent evidence. Her argument was error, plain and obvious.

2. Arguing lack of remorse without a foundation.

The CAAF has recognized that a trial counsel may comment on an accused's lack of remorse, *provided a proper foundation is laid. Paxton*, 64 M.J. at 487; *Edwards*, 35 M.J. at 355. As noted above, the TC blamed A1C Baker for failing to understand the impact on J.A. (R. at 232.) Essentially, she faulted him for not apologizing enough for something he could not have known. This was not the proper foundation within the meaning of *Edwards*, which describe expressions of remorse "arguably construed as being shallow, artificial, or contrived." *Edwards*, 35 M.J. at 355. Moreover, the TC then directly connected A1C Baker's failure to understand the impact on J.A. to the dishonorable discharge. She argued that if he failed to understand the impact, "there's nothing to say that he's been rehabilitated or that he doesn't deserve this . . . dishonorable discharge." (R. at 232.) This, too, was plain and obvious error.

3. Prejudice

The trial counsel improperly argued victim impact without an evidentiary foundation and asked the military judge to adjudge a dishonorable discharge, in part, because A1C Baker failed to appreciate an impact he could not have known about.

Each was plain and obvious error, and collectively they resulted in material prejudice to A1C Baker in the form of a more severe sentence than the evidence justified. This Court cannot be certain that the military judge sentenced A1C Baker on the basis of the evidence alone. *See Halpin*, 71 M.J. at 480. Even with the particularly "high hurdle" of asserting plain error before a military judge, *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000), the military judge had several improper bases for issuing the sentence. The punitive discharge was inappropriately severe, *see* Assignment of Error I, *supra*, and the TC's improper arguments were likely contributors. Because this Court should have misgivings about whether A1C Baker was sentenced on the basis of the evidence alone, it should reassess the sentence.

WHEREFORE, A1C Baker respectfully requests this Honorable Court to reassess his sentence.

Respectfully submitted,

[redacted]YTH, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 21 June 2022.

[redacted]
MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 1
Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force *Appellant*	)	No. ACM 40091 21 June 2022

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

Pursuant to Rules 23(b) and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to attach the following document to the record: Declaration of A1C Dakota Baker, dated 21 June 2022 (1 page). This document is relevant to the question of whether A1C Baker received the Article 6b Representative's post-trial submission of matters in this case, and whether A1C Baker would have responded, if given the time guaranteed by R.C.M. 1106(d)(3). (Assignment of Error II.) His declaration explains the circumstances of his confinement, specifically access to his defense counsel, during the limited window he had to respond to Mrs. J.A.'s submission. In *United States v. Jessie*, 79 M.J. 437, 442, 445, (C.A.A.F. 2020), the Court of Appeals for the Armed Forces allowed consideration of matters outside the record if reasonably raised in the record. Here, the record contains Mrs. J.A.'s timely submission, the defense counsel's receipt, and the convening authority's premature action. (Record of Trial, Volume 4.) It does not, however, explain whether A1C Baker ever received or knew of the submission, which

GRANTED

7 JULY 2022

is why the document is relevant and necessary.

WHEREFORE, A1C Baker respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 21 June 2022.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME**
v.	)	Before Panel No. 1
Airman First Class (E-3) **DAKOTA R. BAKER** United States Air Force *Appellant*	)	No. ACM 40091 29 June 2022

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

Pursuant to Rule 23.3(m)(5)-(6) of this Court's Rules of Practice and Procedure, the United States respectfully requests that it be granted an enlargement of time of 9 days, until 30 July 2022, to provide its answer to Appellant's Assignments of Error.

This case was docketed with the Court on 27 May 2021. Since docketing, Appellant has requested and been granted 10 enlargements of time. Appellant filed his Assignments of Error with this Court on 21 June 2021, 390 days after docketing. This is the United States' first request for an enlargement of time. As of the date of this request, 398 days have elapsed. As of the new requested filing date, 429 days will have elapsed.

There is good cause for an enlargement of time in this case. This case will be assigned to a JAJG reservist who will begin a tour on 18 July 2022. Due to an extremely heavy workload in JAJG, deployments, separations, and PCS season, there is no other attorney who would be able to complete a brief sooner. An enlargement is necessary to ensure assigned counsel has su to finish drafting the United States' answer to all assignments of error and to all time for supervisory review.

GRANTED

7 JULY 2022

For these reasons, the United States respectfully requests until 30 July 2022 to file its answer brief. In the event that the answer is completed before 30 July 2022, the United States will file promptly with this Court. The United States requests this Honorable Court grant this Motion for Enlargement of Time.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 29 June 2022.

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S RESPONSE TO GOVERNMENT MOTION FOR ENLARGEMENT OF TIME** Before Panel No. 1 No. ACM 40091 29 June 2022

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

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, Appellant responds to the Government's Motion for Enlargement of Time. Appellant does not oppose the Government's Motion for Enlargement of Time.

WHEREFORE, Appellant respectfully responds to the Government's motion.

Respectfully submitted,

[redacted]
MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 29 June 2022.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	) **ANSWER TO ASSIGNMENT**) **OF ERRORS**
v.	) Before Panel No. 1
Airman First Class (E-3) **DAKOTA R. BAKER**, USAF	) No. ACM 40091
Appellant.	)

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

ISSUES PRESENTED

I.

WHETHER A1C BAKER'S DISHONORABLE DISCHARGE IS INAPPROPRIATELY SEVERE[?]

II.

R.C.M. 1106(d)(3) PROVIDES AN ACCUSED FIVE DAYS TO RESPOND TO A VICTIM'S POST-TRIAL SUBMISSION OF MATTERS. DID THE CONVENING AUTHORITY VIOLATED BASIC DUE PROCESS RIGHTS WHEN SHE ACTED WITHOUT ALLOWING A1C BAKER TO RESPOND TO THE ARTICLE 6b REPRESENTATIVE'S POST TRIAL SUBMISSION[?]

III.

WHETHER THE TRIAL COUNSEL COMMITTED PLAIN ERROR BY ARGUING VICTIM IMPACT WITH ZERO FOUNDATION AND CRITICIZING A1C BAKER'S APOLOGY FOR FAILING TO UNDERSTAND THE UNINTRODUCED VICTIM IMPACT[?]

STATEMENT OF THE CASE

The United States generally agrees with the Appellant's Statement of the Case. [1]

STATEMENT OF FACTS

Appellant arrived at his first duty station at Sheppard Air Force Base in November 2019 when he was 19 years old. (Pros. Ex. 1 at 1.) On 8 March 2020, Appellant accessed the website Omegle.com ("Omegle"), which is an online chat service that allows users to anonymously communicate in one-on-one chat session without registering an account. (Id. at 2.) While using Omegle on 8 March 2020, Appellant was randomly paired with J.A. during a chat session. (Id.) Appellant chatted with J.A. on Omegle for approximately twenty minutes, learning that she was eight years old. (Id.) Appellant told J.A. he was a member of the United States Air Force. (Id.) At some point the conversation moved from Omegle to Instagram. (Id.) Once on Instagram, Appellant asked J.A. the following questions:

"Have you ever saw [sic] a dick in your life?"

"What if [a dick] was inside u?"

"R u horny?", and

"R u touching your vagina?"[2]

(Id.) Also during this conversation, Appellant asked J.A. for a photograph of her "boobs," which J.A. sent to Appellant. (Id.) The photograph of J.A. showed a child with her shirt lifted up above her chest. (Id.) An undeveloped chest and areola are clearly visible in the image as well

[1] All references to the Military Rules of Evidence (Mil. R. Evid.), Rules for Courts-Martial (R.C.M.), and Uniform Code of Military Justice (UCMJ) are to the version in the 2019 version of the Manual for Courts-Martial, United States. (MCM).

[2] "R" is shorthand for "are." "U" is shorthand for "you."

as a small part of J.A.'s face. (Id.) Appellant responded to the photograph with the message, "You r 8 aren't u?" (Id.)

During the conversation on Instagram, Appellant sent J.A. a photograph of his penis. (Id. at 3.)

During either the Omegle or Instagram conversations with J.A., Appellant learned that J.A. would share a video of herself, which Appellant assumed would be sexual in nature. (Id.) Appellant asked J.A. to send him the video and then viewed the video. (Id.). Appellant received a video from J.A. which depicted her naked from the waist down. (Id.) Her legs were spread, revealing her genitalia, which contained no pubic hair. (Id.) Throughout the video, J.A. is using her index finger to penetrate her vagina. (Id.)

The Air Force Office of Special Investigations interviewed Appellant on 2 May 2020, and he admitted to his misconduct involving J.A. (Id. at 4.) Appellant also admitted to deleting the Instagram conversation with J.A. and then blocking her. (Id.)

Appellant pleaded guilty, in accordance with a plea agreement[3], to one charge with three specifications of sexual abuse of a child and one charge and one specification of receiving and viewing child pornography. (*Entry of Judgment (EOJ)*, 16 March 2021, ROT, Vol. 1.) In Appellant's unsworn statement, he said he felt sad about a girl and that, combined with his struggles in Tech School, he thought everything was falling apart, so he isolated himself and turned to porn. (Def. Ex. G at 2.) Appellant said he found himself on Omegle, just wanting to "be something to someone." (Id.) Appellant admitted "[t]hat person never should have been

[3] The plea agreement provided that in exchange for Appellant's guilty plea, he would receive a sentence of not less than eight months and not more than 18 months confinement on each charge and each specification, to run concurrently, and either a bad conduct or dishonorable discharge must be adjudged.

J.A." (Id.) Appellant explained, "The second she told me her age I should have immediately walked away. I didn't have to do this, and I allowed things to go way over the line." (Id.) Appellant also wrote his apology to the military judge, everyone else involved, "and especially to this little girl and her family." (Id. at 1.)

At all times relevant to the charges and specifications of sexual abuse of a child and receiving and viewing child pornography, Appellant agreed and admitted that he had no mental disease or defect that caused him to be unable to appreciate the nature, quality, and wrongfulness of his actions. (Pros. Ex. 1 at 4.)

ARGUMENT

I.

APPELLANT'S DISHONORABLE DISCHARGE WAS NOT INAPPROPRIATELY SEVERE

Standard of Review

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

Law and Analysis

Appellant's dishonorable discharge is not inappropriately severe. Rather, it fits his actions and the findings of guilt in this case. The appropriateness of a sentence is assessed "by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). Unlike the act of bestowing mercy through clemency, which was delegated to other hands by Congress, Courts of Criminal Appeals are entrusted with

the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

Appellant's dishonorable discharge is an appropriate punishment because Appellant, despite knowing J.A. was just eight years old, pursued her and engaged in an inappropriate and lewd conversation with her. Ultimately, Appellant requested and received child pornography from J.A. (Pros. Ex. 1 at 1-3.) Appellant's arguments regarding the dishonorable discharge fail to account for Appellant's own conduct. Appellant's argument focuses on the consequence of Appellant's dishonorable discharge – it does not address whether the dishonorable discharge was in fact an inappropriate sentence. That is because it is an appropriate sentence.

Appellant's first attempts to link his "mental struggles" to his decision to engage in the criminal misconduct. (App. Br. at 6.) This argument fails, however, given Appellant's outright admission that at all times relevant to the charges and specifications, Appellant agreed and admits that he had no mental disease or defect that caused him to be unable to appreciate the nature, quality, and wrongfulness of his actions. (Pros. Ex. 1 at 4.) Appellant was sad over a girlfriend and feeling like things were falling apart because of his struggles with Tech School, so he sought out pornography and a connection with someone online. (Def. Ex. G at 2.) The person he connected with was only eight years old. Appellant, knowing full well how old she was, did not step away from the conversation. Instead, he continued his conversation with her on a new social media platform and engaged in sexual innuendo with her. (Pros. Ex. 1 at 2.) Appellant himself said he never should have spoken to J.A. and that while he was in a "bad place … None of that excuses what I did." (Def. Ex. G at 2.) For Appellant to now argue that he was suffering from some sort of mental struggle that was "inextricably tied" (App. Br. at 6) to his offenses, is plainly contradictory to the facts.

While Appellant's mother stated that he had some changes since joining the Air Force (R. at 216.), the documented mental struggles that Appellant experienced occurred *after* the investigation into Appellant began. Appellant's diagnosis of major depressive disorder and generalized anxiety disorder were from evaluations after Appellant's 8 March 2020 conduct. (Def. Ex. B at 3.) Thus, little weight should be given to the argument that his diagnosis or his mental health condition was tied to the offenses. This is particularly true when Appellant himself agreed and admitted in the Stipulation of Facts that he was not suffering from a mental disease that contributed to the decisions he made involving J.A.

Appellant claims that "the scale of [his] challenges are the second reason the dishonorable discharge was inappropriately severe." (App. Br. at 8.) The United States does not agree Appellant's challenges are to such a nature or degree that the consequence of a dishonorable discharge is inappropriately severe. While the United States is not questioning Appellant's diagnosis of major depressive disorder and generalized anxiety disorder, there is nothing in the record to support he cannot continue to obtain the services he needs. If Appellant's condition is of such a nature that he requires continuing extensive mental health services, Appellant's dishonorable discharge does not stop him from doing that. It would seem Appellant is arguing that the dishonorable discharge would mean that he won't be able to get veteran's benefits that he would otherwise be eligible for. Appellant's conduct, however, is exactly the type of conduct which should not permit him to obtain the benefits available to veterans who serve honorably.

Appellant focuses his argument that the dishonorable discharge is inappropriately severe on his mental struggles. Appellant totally ignores the severity of his conduct and the aggravating factors associated with it. Appellant was at his first duty assignment for less than six months

when he decided to request and obtain child pornography from an *eight-year-old*. Appellant began a conversation with J.A. on Omegle, and once he knew she was only eight years old, he continued to speak to her, transitioning to a new platform. Appellant had a chance to walk away, but he did not. Instead, Appellant engaged in lewd conversation with J.A., sent her a picture of his penis, asked for a picture of her "boobs," and requested and received a video of her digitally penetrating her vagina. Appellant knew he was communicating with a child, but seemingly his desire to pursue his sexual interests was placed above the consideration that he was talking to a child. Appellant was facing a maximum penalty of 55 years of confinement. (R. at 121.) The reason this offense comes with such a severe penalty is because it is some of the most abhorrent and vile conduct. Appellant argues that he is not a pedophile, but asking a child to produce visual depictions of a minor engaged in sexually explicit conduct that is sent via the internet can have long-lasting implications for that child. "Child pornography is a continuing crime: it is 'a permanent record of the depicted child's abuse, and the harm to the child is exacerbated by [its] circulation.'" United States v. Barker, 77 M.J. 377, 381 (C.A.A.F. 2018) (citing Paroline v. United States, 572 U.S. 434, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014)) (alteration in original) (citation omitted). Even those "who 'merely' or 'passively' receive or possess child pornography directly contribute to [the child's] continuing victimization." United States v. Goff, 501 F.3d 250, 259 (3d Cir. 2007).

Appellant did more than merely possess or passively receive the images of J.A. Appellant sought out and obtained child pornography from an eight-year-old girl. Appellant admitted there was no mental disease that contributed to his decision to pursue J.A. and images of her. Appellant's punishment "fit[s] the offender" and his convictions. Appellant also agreed in his plea agreement to either a bad conduct discharge or a dishonorable discharge. "Absent

evidence to the contrary, [an] accused's own sentence proposal is a reasonable indication of its probable fairness to him." United States v. Cron, 73 M.J. 718, 737 n.9 (A.F. Ct. Crim.App. 2014) (quoting United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979)). Appellant clearly contemplated a dishonorable discharge, and one was demanded by his conduct and was not inappropriately severe. This Court should deny this assignment of error.

II.

ALTHOUGH THE CONVENING AUTHORITY ERRONEOUSLY MADE A DECISION ON ACTION BEFORE APPELLANT COULD RESPOND TO THE ARTICLE 6b REPRESENTATIVE'S POST-TRIAL SUBMISSION OF MATTERS, APPELLANT WAS NOT PREJUDICED BY THIS ERROR.

Additional Facts

The military judge sentenced Appellant on 4 March 2021. (*EOJ*, ROT Vol. 1, 16 March. 2021). On 10 March 2021, Appellant submitted his request for clemency to the convening authority. (Request for Clemency, ROT Vol. 4). J.A.'s mother submitted matters for the convening authority's consideration on 14 March 2021, and the Staff Judge Advocate acknowledge receipt of them on 15 March 2021. (Memorandum on Submission of Matters to Jadie C. Aranda, ROT Vol. 4). On 15 March 2021, trial defense counsel acknowledged receipt of J.A.'s submission of matters, but there was no acknowledgment of receipt from Appellant. (Acknowledgement of Receipt of Matters Submitted for Clemency – J.A., ROT Vol. 4). The convening authority made a decision on action on 16 March 2021. (Convening Authority Decision on Action, 16 March 2021, ROT Vol. 4).

Standard of Review

The standard of review for determining whether post-trial processing was properly completed is de novo. United States v. Miller, 82 M.J. 204, 207 (C.A.A.F. 2022) (citing United

States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000)). R.C.M. 1104(b)(2)(B) provides that either party must file a post-trial motion within five days of receiving the convening authority's action to address an asserted error in the convening authority's action. An accused's failure to file a post-trial motion within the allotted time forfeits his or her right to object to the accuracy of the convening authority's decision, absent plain error. Miller, 82 M.J. 204, 207. 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. McPherson, 81 M.J. 372, 377 (C.A.A.F. 2021).

Law and Analysis

When a crime victim has submitted a matter to the convening authority under R.C.M. 1106A, "The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to the accused as soon as practicable. R.C.M. 1106A(c)(3). "[T]he accused shall have five days from receipt of those matters to submit any matters in rebuttal." R.C.M. 1106(d)(3). Further, "[t]he convening authority may not consider matters adverse to the accused that were not admitted at the court-martial, with knowledge of which the accused is not chargeable, unless the accused is first notified and given an opportunity to rebut." R.C.M. 1109(d)(3)(C)(i).

R.C.M. 1106(d)(3) grants an accused "five days from receipt" of matters submitted by a crime victim to "submit matters in rebuttal." It does not specify how the accused must be notified to comply with the rule. *See* Id. Here, Appellant's trial defense counsel was notified of J.A.'s post-trial submission before the convening authority's consideration of same, but there was no evidence Appellant received J.A.'s submission, and the convening authority made a decision on action before the five days had elapsed since J.A.'s submission. Appellant did not

object under R.C.M. 1104(b)(2)(B) to the convening authority's decision on action occurring before he could submit a response to the victim matters, which would ordinarily forfeit his ability to object to the accuracy of action, absent plain error. *See* Miller, supra. However, the convening authority's premature decision on action was plain and obvious error.

Appellant was not prejudiced by the error.

Appellant was not, however, prejudiced by this error. "The test to determine whether relief is warranted for procedural error is material prejudice to a substantial right." United States v. Lopez, No. ACM S32597 (f rev), 2021 CCA LEXIS 349 at *25 (A.F. Ct. Crim. App. 9 July 2021) (unpub. op.) (Posch, J., concurring in part and in the result) (citing United States v. Alexander, 61 M.J. 266, 269 (C.A.A.F. 2005) ("where an error is procedural … we test for material prejudice to a substantial right to determine whether relief is warranted.")).

In his request for clemency, Appellant only asked the convening authority to reduce his confinement to less than one year. (Request for Clemency, ROT Vol. 4.) The convening authority had no authority to modify the adjudged confinement. Under R.C.M. 1109(c), for any court-martial involving an offense under Article 120b, UCMJ, the convening authority may modify a dishonorable discharge or a term of confinement of more than six months only as provided in subsections (e) and (f) of R.C.M. 1109. Subsections (e) and (f) relate to an accused's substantial assistance and a military judge's recommendation to the convening authority to suspend the sentence. Neither of those things applies in Appellant's case. Appellant was convicted under Article 120b and was sentenced to a dishonorable discharge and to a sentence in excess of six months. Appellant did not provide any substantial assistance that would permit the convening authority to modify his confinement, and the military judge did not recommend the convening authority suspend the sentence.

In his Declaration, Appellant claims he would have responded to J.A.'s submission to ensure that the convening authority had the "correct law and facts" before making a decision. (Appellant's Declaration, dated 21 June 2022) (Declaration). Appellant wanted to be able to respond to J.A.'s submission regarding victim impact and sex offender registration, stating "I am not certain her statements about sex offender registration were accurate." (Id.) While Appellant may have submitted a response to J.A., even to correct something that may have been inaccurate about sex offender registration, the convening authority still would have not been permitted to provide relief to Appellant because the convening authority could not take action on the findings or the sentence of confinement adjudged. The only action the convening authority could have taken related to reduction in rank, and Appellant did not request that. (Id.)

Additionally, while it is not clear exactly how Appellant would have addressed J.A.'s comments on victim impact, Appellant would seem to suggest that J.A.'s already being a "broken person" contradicted or minimized victim impact. Appellant states, "As defense explained in its Mil. R. Evid. 412 motion, J.A. engaged in chats and sent sexually explicit images and videos to four other individuals." (App. Br. at 13.) Appellant then concludes, "… it explains the absence of victim impact, or at least minimizes the scope of such impact from *his* offenses." (Id. at 14.) (emphasis in original) This argument, while troubling on its face given the age of the victim and the known harm to victims of child pornography, would not have been something the convening authority could consider under R.C.M. 1106(b)(2), as it is character evidence that was not admissible at trial. Appellant would not have been able to submit Mil. R. Evid. 412 evidence under R.C.M. 1106(b)(2). Because the convening authority could not have considered this information, Appellant was not prejudiced by not being given the opportunity to submit it.

While Appellant should have been given five days to provide a response to J.A.'s submission to the convening authority, the failure to do so did not prejudice Appellant. This Court should deny this assignment of error.

III.

TRIAL COUNSEL'S ARGUMENTS AT SENTENCING ABOUT VICTIM IMPACT AND APPELLANT'S LACK OF REMORSE WERE PROPER.

Additional Facts

Trial Counsel (TC) began her sentencing reminding the military judge that there were two names on charge sheet, one of them being the victim's. (R. at 224.) TC said:

> There is a very real victim in this case, J.A., an eight-year-old girl, with her own family and her own community and her own aspirations and her own future. Those things aren't unique to [Appellant], and her life has been fundamentally altered by this airman's actions. She's had to pay a certain price for those actions.

(Id.) TC also went on to say,

> And not only did [Appellant] exploit her, he showed this utter disregard for the impact that his actions were going to have on her. … This is going to be a part of her life experience for the rest of her life even though she didn't do anything wrong, even though she didn't commit any criminal misconduct.

(Id. at 231.)

TC also addressed Appellant's apology to J.A.

> … [T]here is an apology to J.A., and it's a one-line sentence. There is nothing in here that indicates he truly understands the impact that his actions have had on her. And if he doesn't understand that, there's nothing to say that he's been rehabilitated or that he doesn't deserve this harsh punishment, this dishonorable discharge, because [Appellant] was past a bad-conduct discharge the very first time he sent a lewd message to this girl, knowing she was 8 years old, and he was well past it very single act of misconduct after that.

(Id. at 232.) At no time during TC's argument did trial defense counsel (TDC) object to the argument and the military judge did not take any action sua sponte.

During TDC's closing argument, he said J.A. was a broken person, "based on common sense and our knowledge of human nature and the ways of the world," arguing that she was a victim before the case involving Appellant. (Id. at 235.) When TC objected to the argument including facts not in evidence, TDC responded that it was a "reasonable inference based on human nature. … common sense … and knowledge of … the ways of the world." (Id.) TC's objection was overruled. (Id.) TDC went on to argue that J.A. "… woke up that morning already broken" and stated there was "no evidence whatsoever of any impact in this case." (Id.)

Standard of Review

Improper argument is reviewed under a de novo standard. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019). When there is no objection, this Court reviews for plain error. Id. The burden of proof under plain error is on the appellant, who must show: (1) that there is error; (2) the error is clear or obvious; and (3) the error results in material prejudice to a substantial right of the accused. Id. (*quoting* United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)).

Law and Analysis

Prosecutorial misconduct is behavior that oversteps "the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." Berger v. United States, 295 U.S. 78, 84 (1935). It is defined as an action or inaction taken by a trial counsel in violation of a legal norm or standard. United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996).

"During sentencing argument, 'the trial counsel is at liberty to strike hard, but not foul, blows.'" United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013) (quoting United States v.

Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). "As a zealous advocate for the government, trial counsel may 'argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence.'" Id. In determining whether an argument is improper, the Court is to view it in its entire context. Baer, 53 M.J. at 239.

Improper argument does not automatically lead to relief on appeal. United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005). Fletcher identified three factors to determine whether the misconduct impacted the appellant's substantial rights and the integrity of his trial: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." Id. at 184.

A proper foundation is laid for trial counsel to comment on an accused's failure to show remorse when an accused has "made an unsworn statement and has either expressed no remorse or his expression of remorse can be arguably construed as being shallow, artificial, or contrived." United States v. Edwards, 35 M.J. 351, 355 (C.M.A. 1992) (citing United States v. Gibson, 30 M.J. 1138, 1139 (A.F.C.M.R. 1990) (second citation omitted)).

1. TC's comments about victim impact were proper.

Appellant challenges TC's argument regarding victim impact alleging it was improper because there was no evidence of any victim impact. (App. Br. at 17). Appellant similarly contends TC's comment about Appellant's lack of remorse lacked foundation. (Id.) Because Appellant did not object to trial counsels' sentencing arguments, this Court reviews for plain error to determine 1) if there was error; 2) if the error is clear or obvious; and 3) if the error results in material prejudice to a substantial right of the accused.

A. There was no error, plain or otherwise.

First, there was no error for TC to comment on the impact that Appellant's conduct would have on J.A. TC spoke about the nature and circumstances of the offense and then made a comment about J.A.'s life having been "fundamentally altered" by Appellant's actions. Making such a comment is a reasonable inference based on the entirety of the evidence in the record – such as Appellant knowing J.A. was eight years old when chatting with her on Omegle, and then continuing to talk to her on Instagram, using lewd and indecent language with her, asking her to show him her "boobs," showing her a picture of his penis, and requesting a video of her digitally penetrating herself. Given the circumstances of how Appellant came to be involved in J.A.'s life, it is a reasonable inference for TC to remark on Appellant's impact on her life. As stated above, child pornography offenses have lasting harm on the children depicted. Barker, 77 M.J. at 381. There was no error for TC's limited comment about the impact at sentencing. Because there was no error, that error was also not clear or obvious and likewise could not have materially prejudiced a substantial right of the accused. In looking at all of the factors under plain error review, it was not improper for TC to make a comment about the impact of Appellant's actions on J.A.

B. If there was plain or obvious error, trial counsel's comments were not prejudicial.

If, however, this Court does find there was plain or obvious error on the part of TC making the comment about the impact on J.A., those comments did not result in material prejudice to a substantial right of the accused. Appellant argues that the comments resulted in a more severe sentence than the evidence justified. There is nothing in the record to support that conclusion, however – it is mere speculation.

In looking at the first Fletcher factor, there was no severity to TC's comments on victim impact. TC only briefly mentioned the impact the offense had on J.A. The instances of

purported misconduct, as compared to the overall length of the argument, were minimal and were not spread out throughout the argument. It is particularly noteworthy that trial defense counsel countered TC's victim impact argument by arguing that J.A. was obviously *not* impacted by the Appellant's actions because she was already a "broken person" before meeting Appellant. TDC argued it was a reasonable inference to make based on human nature, common knowledge and the ways of the world. (R. at 235-36.) The same argument can be applied to TC's statement about the impact on J.A. In the case of victim impact, though, there is ample evidence to support the impact of child pornography offenses on children.

2. TC's comments about lack of remorse were proper.

Appellant also claims that TC's comment about Appellant's lack of remorse was improper. (App. Br. at 18.) Because Appellant did not object to trial counsels' sentencing arguments, this Court reviews for plain error to determine 1) if there was error; 2) if the error is clear or obvious; and 3) if the error results in material prejudice to a substantial right of the accused.

A. There was no error, plain or otherwise.

TC's comment was accurate regarding the one-line statement of apology to J.A. (Def. Ex. G at 1.) The remainder of TC's comments were reasonable inferences based on the content of Appellant's written unsworn statement and his verbal unsworn statement. TC had a proper foundation to make the lack-of-remorse argument because Appellant made an unsworn statement. Edwards, 35 M.J. at 355. TC argued that nothing in Appellant's written unsworn statement indicated he truly understood the impact of his actions, and TC argued that Appellant could not have been rehabilitated. (R. at 232.) It was proper for TC to comment on Appellant's lack of remorse because the focus of Appellant's unsworn statement, for almost three full pages,

was related to his personal history and the consequences of being on the sex offender registry. There was only one short paragraph apologizing to the victim and the court. (Def. Ex. G.) In his verbal unsworn statement, Appellant again summarily apologized to J.A. and then turned his focus to himself. (R. at 220-21.) This justified trial counsel's argument, and there was no plain error.

B. If there was plain or obvious error, trial counsel's comments were not prejudicial.

Considering the Fletcher factors, the comments about Appellant's lack of remorse were not severe (they were brief) and did not require any measures to correct. There were no objections by trial defense counsel, and the military judge did not take any corrective action sua sponte. The first Fletcher factor weighs in favor of the Government.

The lack of severity of the misconduct is further evidenced by the lack of measures to cure the misconduct – the second Fletcher factor. No curative measures were necessary because there was no objection by the trial defense counsel to Appellant's lack of remorse, and the military judge did not see a severe enough issue to intervene sua sponte. Appellant "faces a particularly high hurdle" to show plain error when the military judge is the sentencing authority. *See* United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000). "[T]he military judge is presumed to know what portions of argument are impermissible, absent clear evidence to the contrary." United States v. Hamilton, 78 M.J. 335, 343 (C.A.A.F. 2019). There is no evidence that trial counsel's comments impacted the military judge's ability to "filter [] out" improper argument." *See* Robbins, 52 M.J. at 457. The second Fletcher factor favors the government.

3. The third Fletcher factor weighs in favor of the government for both TC's comments about victim impact and Appellant's lack of remorse.

Turning to the last Fletcher factor – the weight of the evidence supporting the conviction – it becomes even more apparent that there was no prejudice to Appellant. Appellant entered

guilty pleas for his sexual conduct involving an eight-year-old child. During the Care inquiry, the military judge asked Appellant for each charge and for each specification what he did and why he was guilty. (R. at 40 - 120.) Over and over again, Appellant recounted that he met J.A. on Omegle, learned she was an eight-year-old child, moved his conversation to Instagram, and immediately began using lewd and indecent language to speak to her. (Id.) Appellant then asked J.A. for a picture of her breasts and ended his interaction with her after asking her to send a video of her penetrating herself. (Id.) Appellant further admitted he did all of this knowing the nature of his actions and the wrongfulness of them. (Pros. Ex. 1 at 4.) The evidence supporting the conviction was strong and Appellant's admission to the offenses left little doubt of the Appellant's guilt. The military judge was aware of the facts surrounding each offense. The evidence before the military judge more than supported the adjudged sentence, and Appellant was not prejudiced by this alleged error. The third Fletcher factor weighs in favor of the Government.

All three Fletcher factors weigh in favor of the Government. Therefore, this Court should find that even if there was plain or obvious error, it did not prejudice Appellant. This Court should deny Appellant's assignment of error.

CONCLUSION

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

[redacted]
LECIA E. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Air Force Legal Operations Agency
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 29 July 2022.

LECIA E. WRIGHT, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40091**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Dakota R. BAKER	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 2d day of August, 2022,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review.

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

KEY III, JAMES E., Colonel, Senior Appellate Military Judge
MERRIAM, ERIC P., Colonel, Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
	)	Before a Special Panel
v.	)	
	)	No. ACM 40091
Airman First Class (E-3) **DAKOTA R. BAKER,** United States Air Force *Appellant*	)	5 August 2022

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

Appellant, Airman First Class (A1C) Dakota R. Baker, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's Answer, dated 29 July 2022 (Ans.). In addition to the arguments in his opening brief, filed on 21 June 2022 (Op. Br.), A1C Baker submits the following arguments.

ARGUMENT

I.

A1C BAKER'S DISHONORABLE DISCHARGE IS INAPPROPRIATELY SEVERE.

The Government downplays the central thrust of A1C Baker's argument: the connection between his mental health struggles and his misconduct. (Ans. at 4–7.) This Court should disregard the Government's plea to ignore such an important issue.

First, the Government places excessive emphasis on A1C Baker's stipulation of fact, which stated that he did not have a "mental disease or defect that caused him

to be unable to appreciate the nature, quality, and wrongfulness of his actions." (Ans. at 5, 6, 7; Prosecution Exhibit (PE) 1 at 4.) As a starting point, the notion of stipulating to one's own mental health is dubious, at best. Even if this were valid, the Government ventures beyond the stipulation. It mentions the stipulation three times. The first accurately states the substance of the stipulation. (Ans. at 5 (citing PE 1 at 4).) But the second and third instances transform the stipulation to an admission that "there was no mental disease that *contributed to his decisions*." (Ans. at 6, 7 (emphasis added).) Note the change in language. The stipulation only spoke to lack of mental responsibility, which is fundamentally different than the broader sentencing question of whether his mental condition contributed to his decision-making or behavior.[1] This distinction matters.

Second, the Government argues this Court should afford his mental health condition little weight because documentation only begins after the incident. (Ans. at 6.) The premise of this argument is that A1C Baker's mental health issues only arose when the Air Force Office of Special Investigations (AFOSI) confronted him. This both misunderstands mental health and contradicts the evidence available. (*See* Defense Exhibits (DEs) B, C (giving no indication that mental health issues arose in response to the investigation).)

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[1] *See* Rule for Courts-Martial (R.C.M.) 916(k) (explaining the affirmative defense of "lack of mental responsibility," which applies where "at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts").

In sum, A1C Baker's mental health struggles, while not excuses for his conduct, should weigh heavily in this Court's determination of sentence appropriateness. This Court must consider the *particular* appellant when fulfilling its Article 66(d), UCMJ, responsibilities. *See United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). A1C Baker asks this Court to "do justice" and recognize that a dishonorable discharge is inappropriately severe. *See United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998).

WHEREFORE, A1C Baker respectfully requests this Honorable Court disapprove his dishonorable discharge.

II.

THE CONVENING AUTHORITY VIOLATED BASIC DUE PROCESS RIGHTS WHEN SHE ACTED BEFORE A1C BAKER COULD RESPOND TO THE ARTICLE 6b REPRESENTATIVE'S POST-TRIAL SUBMISSION OF MATTERS.

The Government, conceding plain and obvious error in the failure to allow A1C Baker the opportunity to respond to post-trial submissions, argues that the error did not prejudice him. (Ans. at 10–11.) The Government bases its rationale on two contentions, neither of which should sway this Court.

First, it argues that A1C Baker's failure to request clemency regarding his reduction in grade means the error caused no prejudice. Yet this case is unique: the analysis is complicated because A1C Baker's defense counsel requested a reduction in confinement, which the convening authority lacked the power to grant. (*See* Op. Br. at 10 n.7.) The convening authority did, however, possess power over the

reduction in grade.

In *United States v. Brubaker-Escobar*, the Court of Appeals for the Armed Forces (CAAF) found a procedural error where the convening authority failed to act on the appellant's sentence to a bad-conduct discharge and reduction to the grade of E-1. 81 M.J. 471, 474 (C.A.A.F. 2021). The CAAF found no prejudice from the error because: (1) the appellant never sought clemency from the convening authority; (2) the convening authority could not disturb the bad-conduct discharge; and (3) based on Army regulations, reduction to E-1 was automatic, thus the convening authority could not disturb the rank reduction. *Id.* This case is distinguishable. While A1C Baker did not specifically request disapproval of his reduction, such disapproval fell within the convening authority's powers. Unlike in the Army, the convening authority *could* have disapproved the reduction in grade if she wanted to provide relief.[2]

The Government's second argument questions what A1C Baker would have raised if given the opportunity to respond to Ms. JA's victim impact claim. (Ans. at 11.) It argues that, even if A1C Baker tried to rebut the claim of victim impact by noting that JA engaged in similar behavior with others, the convening authority could not consider these arguments. (*Id.*) The Government is correct that R.C.M. 1106(b)(2) bars the convening authority from considering victim character evidence

[2] *See* Department of the Air Force Instruction 51-201, *Administration of Military Justice*, ¶ A11.26.3 (18 Jan. 2019) ("The provisions of Article 58a do not apply to the Air Force. All reductions in grade are based upon adjudged and approved sentences.").

not admitted at trial. (Ans. at 11.) But at least some of it *was* admitted. The stipulation of fact makes clear that AFOSI did not recover the video that formed the basis of the child pornography specification from A1C Baker. (PE 1 at 4.) As the stipulation explains, the video was retrieved from messaging between JA and an unrelated third party. (*Id.*) Thus, A1C Baker would not have had to go beyond Prosecution Exhibit 1 to find the evidence needed for his argument.

The Government finds it "troubling" that A1C Baker would question the actual impact on JA. (Ans. at 11.) Yet A1C Baker's sentence should reflect the impact of his crimes, not the crimes of others. The purpose of sentencing is to impose "punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces." Art. 55(c)(1), UCMJ, 10 U.S.C. § 855(c)(1). This considers the impact on a victim. *Id.*; R.C.M. 1002(f). The truly "troubling" aspect here is that the Government can forego introducing *any* evidence of victim impact at trial; then solicit and deliver a statement from JA's mother, wherein she asks the convening authority to uphold the sentence, in part, because of purported victim impact; and ultimately not provide A1C Baker any opportunity to respond to these never before seen matters.

Neither of the Government's arguments on prejudice should suffice. This Court applies a low threshold for prejudice in post-trial processing, requiring only that A1C Baker demonstrate some colorable showing of possible prejudice. *United States v. Chatman*, 46 M.J. 321, 323–24 (C.A.A.F. 1997). Appellants receive the "benefit of the doubt" to avoid undue speculation on what a convening authority might

do if defense counsel had the opportunity to comment. *Id.* Respectfully, A1C Baker has met this standard and this Honorable Court should remand for new post-trial processing.

WHEREFORE, A1C Baker respectfully requests that this Honorable Court provide meaningful sentencing relief or remand for new post-trial processing.

III.

THE TRIAL COUNSEL COMMITTED PLAIN ERROR BY ARGUING VICTIM IMPACT WITH ZERO FOUNDATION AND CRITICIZING A1C BAKER'S APOLOGY FOR FAILING TO UNDERSTAND THE UNINTRODUCED VICTIM IMPACT.

Faced with the absence of evidence in the record, the Government relies on "reasonable inferences" and the concept that child pornography offenses have lasting harm. (Ans. at 15 (citing *United States v. Barker*, 77 M.J. 377, 381 (C.A.A.F. 2018)).) But neither can excuse the trial counsel's argument here.

The trial counsel argued that A1C Baker's conduct "fundamentally altered" JA's life. (R. at 224.) This statement lacked foundation because the Government declined to introduce any evidence on impact and JA did not give an unsworn statement. Nor can reasonable inferences support this argument. Trial counsel also argued that "she's had to pay a certain price for those actions." (R. at 224.) Again, no evidence supports this statement, and it implies a specific victim impact that the Government did not support with evidence.

The Government also argues no error from trial counsel's inexplicable condemnation of A1C Baker for failing to understand the impact his actions had on

JA. (Ans. at 16.) The trial counsel asked for the dishonorable discharge, in part, because A1C Baker's unsworn statement did not show anadequate understanding of that impact. (R. at 232.) The Government cites to *United States v. Edwards* as support, but *Edwards* applies where the "expression of remorse can be arguably construed as being shallow, artificial, or contrived." (Ans. at 16 (citing 35 M.J. 351, 355 (C.M.A. 1992).) Conversely, A1C Baker's unsworn statement was not shallow, artificial, or contrived. (*See* DE G at 1 ("To you and everyone else involved, and especially to this little girl and her family, I really am sorry.").) The application is particularly questionable here, as the trial counsel took A1C Baker to task for failing to appreciate the impact that the Government could not substantiate—in any way—at the court-martial.

WHEREFORE, A1C Baker respectfully requests this Honorable Court reassess his sentence.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 5 August 2022.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
[redacted]