

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	MOTION FOR ENLARGEMENT OF
<i>Appellee</i>	)	TIME (FIRST)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3)	)	No. ACM S32724
ALEXANDER J. DUNLEAVY)	
United States Air Force	)	12 May 2022
<i>Appellant</i>)	

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **27 July 2022**. The record of trial was docketed with this Court on 29 March 2022. From docketing to the present date, 44 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,



ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 May 2022.

Respectfully submitted,



ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



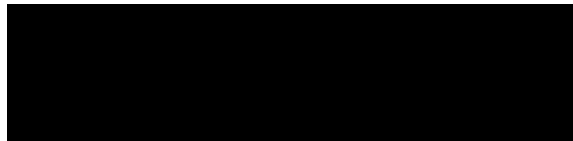
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman First Class (E-3)	)	ACM S32724
ALEXANDER J. DUNLEAVY, USAF,)	
<i>Appellant.</i>	)	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.

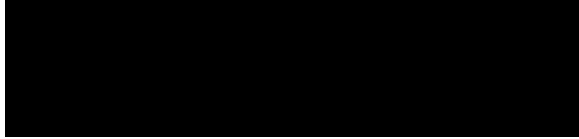


MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force



CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force
Appellate Defense Division on 13 May 2022.



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



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	MOTION FOR ENLARGEMENT
<i>Appellee</i>	)	OF TIME (SECOND)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3)	)	No. ACM S32724
ALEXANDER J. DUNLEAVY)	
United States Air Force	)	20 July 2022
<i>Appellant</i>)	

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **26 August 2022**. The record of trial was docketed with this Court on 29 March 2022. From docketing to the present date, 133 days have elapsed. On the date requested, 150 days will have elapsed.

On 16 February 2022 at Dover Air Force Base, DE, Appellant was convicted, consistent with his pleas, of one charge and three specifications of wrongful use of various substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ).¹ Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Alexander J. Dunleavy*, dated 22 March 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to 53 days confinement, reduction to E-1, reprimand, and a bad conduct discharge. *Id.* The convening authority took no action on the findings of the case and approved the sentence in its entirety. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Alexander J. Dunleavy*, dated 14 March 2022.

The record of trial consists of three prosecution exhibits, three defense exhibits; five

¹ One charge and specification alleging a violation of Article 86, UCMJ, were withdrawn and dismissed with prejudice. R. at EOJ.

appellate exhibits; the transcript is 90 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

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

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

Respectfully submitted,



ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 20 July 2022.

Respectfully submitted,

[REDACTED]

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[REDACTED]

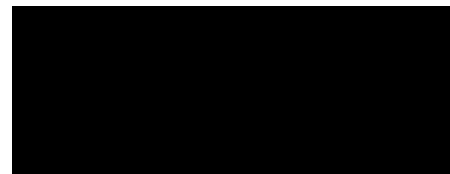
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman First Class (E-3)	)	ACM S32724
ALEXANDER J. DUNLEAVY, USAF,)	
<i>Appellant.</i>	)	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.



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



CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force
Appellate Defense Division on 22 July 2022.



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



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	MOTION FOR ENLARGEMENT
<i>Appellee</i>	)	OF TIME (THIRD)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3)	)	No. ACM S32724
ALEXANDER J. DUNLEAVY)	
United States Air Force	)	19 August 2022
<i>Appellant</i>)	

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **25 September 2022**. The record of trial was docketed with this Court on 29 March 2022. From docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 16 February 2022 at Dover Air Force Base, DE, Appellant was convicted, consistent with his pleas, of one charge and three specifications of wrongful use of various substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ).¹ Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Alexander J. Dunleavy*, dated 22 March 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to 53 days confinement, reduction to E-1, reprimand, and a bad conduct discharge. *Id.* The convening authority took no action on the findings of the case and approved the sentence in its entirety. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Alexander J. Dunleavy*, dated 14 March 2022.

The record of trial consists of three prosecution exhibits, three defense exhibits; five

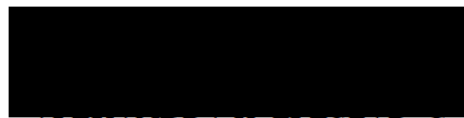
¹ One charge and specification alleging a violation of Article 86, UCMJ, were withdrawn and dismissed with prejudice. R. at EOJ.

appellate exhibits; the transcript is 90 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

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

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

Respectfully submitted,



ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 19 August 2022.

Respectfully submitted,

[REDACTED]

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[REDACTED]

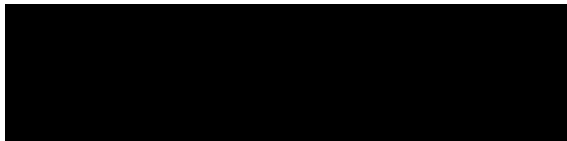
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman First Class (E-3)	)	ACM S32724
ALEXANDER J. DUNLEAVY, USAF,)	
<i>Appellant.</i>	)	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.

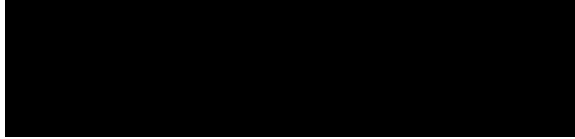


MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force



CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force
Appellate Defense Division on 19 August 2022.



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



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	MOTION FOR ENLARGEMENT
	)	OF TIME (FOURTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3)	)	No. ACM S32724
ALEXANDER J. DUNLEAVY)	
United States Air Force	)	14 September 2022
<i>Appellant</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **25 October 2022**. The record of trial was docketed with this Court on 29 March 2022. From docketing to the present date, 169 days have elapsed. On the date requested, 210 days will have elapsed.

On 16 February 2022 at Dover Air Force Base, DE, Appellant was convicted, consistent with his pleas, of one charge and three specifications of wrongful use of various substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ).¹ Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Alexander J. Dunleavy*, dated 22 March 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to 53 days confinement, reduction to E-1, reprimand, and a bad conduct discharge. *Id.* The convening authority took no action on the findings of the case and approved the sentence in its entirety. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Alexander J. Dunleavy*, dated 14 March 2022.

The record of trial consists of three prosecution exhibits, three defense exhibits; five

¹ One charge and specification alleging a violation of Article 86, UCMJ, were withdrawn and dismissed with prejudice. R. at EOJ.

appellate exhibits; the transcript is 90 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Counsel is currently assigned 15 cases, seven of which are pending initial AOE's before this Court. Three cases currently have priority over Appellant's for review and submission of the initial AOE to this Court:

1. *United States v. Garron*, ACM No. 40239 – The record of trial consists of six prosecution exhibits; thirteen defense exhibits; three appellate exhibits; and one court exhibit; the transcript is 69 pages. Counsel has reviewed the record absent sealed materials, identified potential assignments of error, and has begun, but not yet completed drafting of the AOE in this case. Absent exceptional circumstances, Counsel anticipates filing this AOE by the current 23 September 2022 deadline.

2. *United States v. Stradtmann*, ACM No. 40237 – The record of trial consists of 35 prosecution exhibits, 12 defense exhibits, 116 appellate exhibits, and 3 court exhibits; the transcript is 871 pages. Counsel has not yet begun review of this Appellant's case.

3. *United States v. Lee*, ACM No. 40258 – The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Counsel has not yet begun review of this Appellant's case.

Additionally, Counsel anticipates the following responsibilities may slightly delay review of these cases in the coming month:

1. *United States v. Tarnowski*, ACM No. 40110 – Counsel anticipates drafting and filing a Reply to the Government's Answer between 19 September and 26 September.

2. *United States v. Injerd*, ACM No. 40111 – Counsel anticipates assisting in drafting and filing a Reply to the Government's Answer between 20 September and 27 September.

3. *United States v. Thompson*, ACM No. 40019, Dkt. No. 22-0098 – Counsel anticipates preparing for oral argument between late September to mid-October, for argument before the Court of Appeals for the Armed Forces on 13 October 2022.

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

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

Respectfully submitted,



ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 14 September 2022.

Respectfully submitted,

[REDACTED]

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[REDACTED]

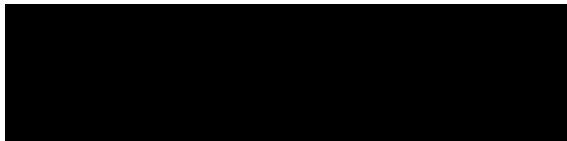
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman First Class (E-3)	)	ACM S32724
ALEXANDER J. DUNLEAVY, USAF,)	
<i>Appellant.</i>	)	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.

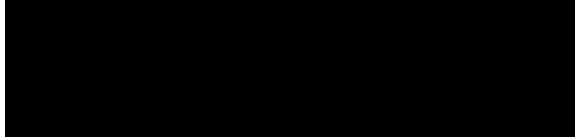


MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force



CERTIFICATE OF FILING AND SERVICE

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



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



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	MOTION FOR ENLARGEMENT
<i>Appellee</i>	)	OF TIME (FIFTH)
	)	FILED OUT OF TIME
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3)	)	No. ACM S32724
ALEXANDER J. DUNLEAVY)	
United States Air Force	)	19 October 2022
<i>Appellant</i>)	

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

Pursuant to Rule 23.3(m)(3), (6), and (7) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **24 November 2022**. The record of trial was docketed with this Court on 29 March 2022. From docketing to the present date, 204 days have elapsed. On the date requested, 240 days will have elapsed.

Good cause exists for filing this motion out of time. Between 10 and 13 October 2022, undersigned counsel was preparing for and presenting oral argument before the Court of Appeals for the Armed Forces in *United States v. Thompson*, ACM No. 40019, Dkt. No. 22-0098. Following oral argument on 13 October, undersigned counsel was on pre-approved leave between 14 and 16 October. Undersigned counsel’s travel was delayed, resulting in arrival on the early morning of 17 October. Counsel immediately began work on the Reply Brief on Behalf of Appellant in *United States v. Bousman*, ACM No. 40174, due this Friday, 21 October 2022. Given travel and prioritized focus on an earlier due Reply Brief, Counsel inadvertently overlooked the deadline for this Motion for Enlargement of Time, however submitted the instant filing immediately upon realizing the error and will take steps to ensure the deadline is not missed again.

On 16 February 2022 at Dover Air Force Base, DE, Appellant was convicted, consistent with his pleas, of one charge and three specifications of wrongful use of various substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ).¹ Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Alexander J. Dunleavy*, dated 22 March 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to 53 days confinement, reduction to E-1, reprimand, and a bad conduct discharge. *Id.* The convening authority took no action on the findings of the case and approved the sentence in its entirety. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Alexander J. Dunleavy*, dated 14 March 2022.

The record of trial consists of three prosecution exhibits, three defense exhibits; five appellate exhibits; the transcript is 90 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Counsel is currently assigned 18 cases, nine of which are pending initial AOE's before this Court. One case currently has priority over Appellant's for review and submission of the initial AOE to this Court: *United States v. Stradtman*, ACM No. 40237. The record of trial consists of 35 prosecution exhibits, 12 defense exhibits, 116 appellate exhibits, and 3 court exhibits; the transcript is 871 pages. Counsel has begun, but not yet completed review of this Appellant's case, having reviewed through page 73 of the transcript, three motions, and pretrial documents.

Additionally, Counsel anticipates the following responsibilities may slightly delay review of these cases in the coming month:

1. Appellate Litigation Training TDY – 26-28 October 2022. Counsel anticipates losing three days of review for temporary duty and associated training in Chapel Hill, North Carolina.

¹ One charge and specification alleging a violation of Article 86, UCMJ, were withdrawn and dismissed with prejudice. R. at EOJ.

2. *United States v. Garron*, ACM No. 40239 –Counsel anticipates drafting and filing the Reply Brief in this case between 23-30 October 2022.

Through no fault of Appellant’s, undersigned counsel has been working on other assigned matters and has not yet started her review of Appellant’s case. For good cause shown, an enlargement of time filed out of time is necessary to allow undersigned counsel to review Appellant’s case and advise Appellant regarding potential errors.

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

Respectfully submitted,



ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 19 October 2022.

Respectfully submitted,

[REDACTED]

ALEXANDRA K. FLESZAR, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[REDACTED]

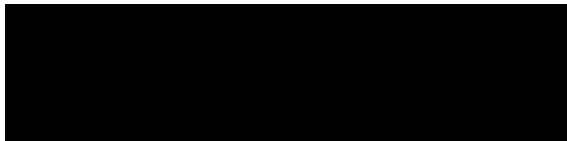
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME - OUT OF TIME
)	
Airman First Class (E-3)	)	ACM S32724
ALEXANDER J. DUNLEAVY, USAF,)	
<i>Appellant.</i>	)	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, Out of Time, to file an Assignment of Error in this case.

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

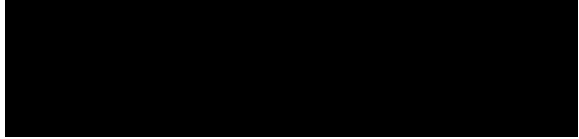


MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force



CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 October 2022.



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



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

UNITED STATES	)	No. ACM S32724
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Alexander J. DUNLEAVY)	
Airman First Class (E-3))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 1

On 19 October 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) Out of Time requesting an additional 30 days to submit Appellant’s assignments of error. The Government opposes the motion.

The court has considered Appellant’s motion, the Government’s opposition, case law, and this court’s Rules of Practice and Procedure. Accordingly, it is by the court on this 21st day of October, 2022,

ORDERED:

Appellant’s Motion for Enlargement of Time (Fifth) Out of Time is **GRANTED**. Appellant shall file any assignments of error not later than **24 November 2022**.

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



FOR THE COURT



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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	MOTION FOR ENLARGEMENT
<i>Appellee</i>	)	(SIXTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3)	)	No. ACM S32724
ALEXANDER J. DUNLEAVY)	
United States Air Force	)	7 November 2022
<i>Appellant</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **24 December 2022**. The record of trial was docketed with this Court on 29 March 2022. From docketing to the present date, 223 days have elapsed. On the date requested, 270 days will have elapsed.

On 16 February 2022 at Dover Air Force Base, DE, Appellant was convicted, consistent with his pleas, of one charge and three specifications of wrongful use of various substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ).¹ Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Alexander J. Dunleavy*, dated 22 March 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to 53 days confinement, reduction to E-1, reprimand, and a bad conduct discharge. *Id.* The convening authority took no action on the findings of the case and approved the sentence in its entirety. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Alexander J. Dunleavy*, dated 14 March 2022.

The record of trial consists of three prosecution exhibits, three defense exhibits; five

¹ One charge and specification alleging a violation of Article 86, UCMJ, were withdrawn and dismissed with prejudice. R. at EOJ.

appellate exhibits; the transcript is 90 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Counsel is currently assigned 19 cases, nine of which are pending initial AOE's before this Court. Three cases currently have priority over Appellant's for review and submission of the initial AOE to this Court:

1. *United States v. Bench*, Dkt. No. 21-0341 – Counsel anticipates filing a petition for writ of certiorari to the United States Supreme Court by 7 December 2022.

2. *United States v. Stradtman*, ACM No. 40237 – The record of trial consists of 35 prosecution exhibits, 12 defense exhibits, 116 appellate exhibits, and 3 court exhibits; the transcript is 871 pages. Counsel has begun review of this Appellant's case, having reviewed more than a third of the record.

3. *United States v. Lee*, ACM No. 40258 – The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Counsel has not yet begun review of this Appellant's case.

Additionally, Counsel anticipates work in *United States v. Bousman*, ACM No. 40174 may slightly delay review of this case. Counsel has filed a motion for reconsideration of this appellant's request to file a supplemental AOE and supplemental AOE. Should this Court grant that request, counsel anticipates filing a Reply to the Government's Answer within 30 days of this Court's ruling. Should the motion for reconsideration be denied, counsel anticipates filing an appropriate motion to supplement the original Reply in this case.

Finally, undersigned counsel recognizes this request for enlargement of time could be considered early, as there are more than two weeks remaining in the current time period for submission of Appellant's AOE. However, counsel currently anticipates undergoing surgery

within the next month for a recent unanticipated health diagnosis. Counsel anticipates losing several days of review and drafting time both for medical appointments related to the surgery as well as for recovery time. The recovery time following the surgery is currently unknown, as it will depend on the type and success of the surgery; however, counsel anticipates losing a week of review and drafting time at minimum. Counsel is therefore requesting an enlargement of time in an abundance of caution in considering the foregoing information. Should additional requests for enlargement of time become necessary prior to return from convalescent leave, undersigned counsel will ensure completion through assignment of co-counsel.

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

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

Respectfully submitted,





ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 November 2022.

Respectfully submitted,


ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division


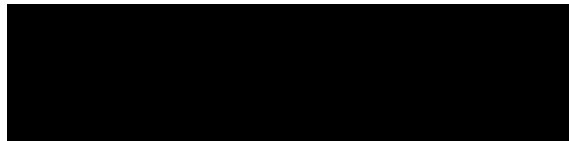
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Airman First Class (E-3)	)	ACM S32724
ALEXANDER J. DUNLEAVY, USAF,)	
<i>Appellant.</i>	)	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.

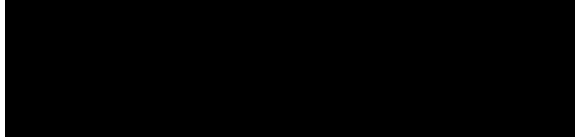


MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force



CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force
Appellate Defense Division on 8 November 2022.



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



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	MOTION FOR ENLARGEMENT
<i>Appellee</i>	)	(SEVENTH)
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3)	)	No. ACM S32724
ALEXANDER J. DUNLEAVY)	
United States Air Force	)	7 December 2022
<i>Appellant</i>)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement period of 30 days, which will end on **23 January 2023**. The record of trial was docketed with this Court on 29 March 2022. From docketing to the present date, 253 days have elapsed. On the date requested, 300 days will have elapsed.

On 16 February 2022 at Dover Air Force Base, DE, Appellant was convicted, consistent with his pleas, of one charge and three specifications of wrongful use of various substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ).¹ Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Alexander J. Dunleavy*, dated 22 March 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to 53 days confinement, reduction to E-1, reprimand, and a bad conduct discharge. *Id.* The convening authority took no action on the findings of the case and approved the sentence in its entirety. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Alexander J. Dunleavy*, dated 14 March 2022.

¹ One charge and specification alleging a violation of Article 86, UCMJ, were withdrawn and dismissed with prejudice. R. at EOJ.

The record of trial consists of three prosecution exhibits, three defense exhibits; five appellate exhibits; the transcript is 90 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Counsel is currently assigned 18 cases, nine of which are pending initial AOE's before this Court. Two cases currently have priority over Appellant's for review and submission of the initial AOE to this Court:

1. *United States v. Stradtman*, ACM No. 40237 – The record of trial consists of 35 prosecution exhibits, 12 defense exhibits, 116 appellate exhibits, and 3 court exhibits; the transcript is 871 pages. Counsel has begun review of this Appellant's case, having reviewed through page 392 of the transcript as well as the motions, responses, and rulings in the case.

2. *United States v. Lee*, ACM No. 40258 – The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Counsel has not yet begun review of this Appellant's case.

Undersigned counsel recognizes this request for enlargement of time could be considered early, as there are more than two weeks remaining in the current time period for submission of the AOE. However, counsel received a recent unanticipated health diagnosis that will ultimately require two surgeries. The first is scheduled for 8 December 2022 and will require 30 days of convalescent leave for follow-up treatment and recovery. Though counsel anticipates having access to email in this time, significant drafting and review time will be lost. Additionally, there is some risk that depending on the outcome of the surgery, alternative counsel may need to be assigned. In an abundance of caution, counsel is requesting this enlargement of time both because the current deadline falls within the period of convalescent leave and to ensure there is sufficient time for the Appellate Defense Division to assign new counsel, should this ultimately be required.

Appellant has been informed of these developments and the delay in review that will result from counsel's convalescent leave. Appellant specifically consents to this request for enlargement of time and affirmatively seeks to maintain undersigned counsel as his defense attorney. Should additional requests for enlargement of time become necessary prior to return from convalescent leave and/or treatment, undersigned counsel will ensure completion through assignment of new or co-counsel.

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

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

Respectfully submitted,



ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 December 2022.

Respectfully submitted,

[REDACTED]

ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[REDACTED]

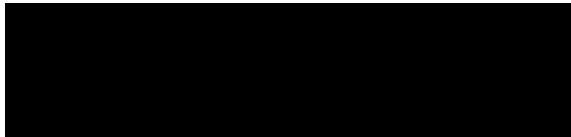
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' RESPONSE
<i>Appellee,</i>	)	TO APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.)	
)	
Airman First Class (E-3)	)	ACM S32724
ALEXANDER J. DUNLEAVY, USAF,)	
<i>Appellant.</i>	)	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 does not oppose Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case. Due to Appellant's counsel's unexpected upcoming surgery, the United States does not oppose this request for an enlargement of time. However, the United States will likely oppose future enlargements of time when counsel or co-counsel becomes available to work on this brief.

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

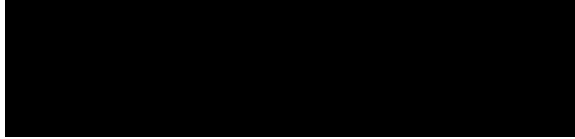


MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force



CERTIFICATE OF FILING AND SERVICE

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



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



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	
<i>Appellee,</i>	)	UNITED STATES' ANSWER TO
	)	ASSIGNMENTS OF ERROR
v.)	
)	
Airman First Class (E-3)	)	Before Panel No. 1
ALEXANDER J. DUNLEAVY, USAF,)	
<i>Appellant.</i>	)	No. ACM S32724

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

ISSUE PRESENTED¹

**IS THE RECORD OF TRIAL INCOMPLETE IF THE 1ST
INDORSEMENT TO THE CHARGE SHEET OMITTS A
BICKEL TEST PERTINENT TO THE CONVICTION?**

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case.

STATEMENT OF FACTS

On the original charge sheet, Appellant was charged with one specification of absence without leave under Article 86, UCMJ and three specifications of wrongful drug use under Article 112a, UCMJ. (Charge Sheet, ROT, Vol. 1.) The three specifications of drug use charged Appellant with the following:

- **Specification 1:** wrongful use of cocaine between on or about 18 August and 17 September 2021
- **Specification 2:** wrongful use of 3,4-Methylenedioxyamphetamine between on or about 3 September and 17 September 2021

¹ This assignment of error is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

- **Specification 3:** wrongful use of Delta-8-Tetrahydrocannabinol (Delta-8-THC) between on or about 27 August 2021 and on or about 18 October 2021.

(Id.)

The first indorsement to the charge sheet listed five attachments:

1. Personal Data Sheet, dated 19 November 2021, 1 page
2. Security Forces ROI, dated 16 September 2021, 23 pages
3. Positive Bickel Report, dated 18 October 2021, 8 pages
4. Positive Bickel Report, dated 15 November 2021, 8 pages
5. SFOI Interview, 1 disk

(First indorsement to charge sheet, ROT, Vol. 2.)

Attachment 4 to the first indorsement is indeed an 8-page document. (Id.) It is a Brooks laboratory report dated 15 November 2021 showing the results of a urine sample taken from Appellant on 25 October 2021. (Id.) The results show a positive for “THC8 28.” (Id.) But based on the memorandum dated 25 October 2021, included on the third page of the attachment, the urinalysis at issue appears to have been conducted as the result of a random collection rather than a “Bickel” test. (Compare First indorsement, Attachment 4 at page 3 to First indorsement, Attachment 3 at 3.)

At trial, Appellant pled guilty to all three drug specifications in Charge II. In support of the guilty plea, the government entered into evidence Prosecution Exhibit 1, a stipulation of fact signed by Appellant. (Pros. Ex. 1.) As support for Charge II, Specification 3 (wrongful divers use of Delta-8-THC), Appellant admitted in the stipulation of fact that he provided a urinalysis sample for a “Bickel” test on 17 September 2021 and that the sample tested positive for Delta-8-THC at a level of 582 ng/ml. (Id. at 3). He also admitted in the stipulation of fact that he provided a urinalysis sample for another “Bickel” test on 19 October 2021 and that the sample tested positive for Delta-8-THC at a level of 36 ng/ml. (Id. at 3.)

At trial, Appellant did not assert any errors in the preferral process or in pretrial discovery. And as part of his plea agreement, he agreed to “waive all waivable motions as authorized under the Rules for Courts-Martial (R.C.M.) and applicable case law.” (App. Ex. IV at 2.)”

ARGUMENT

THE RECORD IN THIS CASE IS SUBSTANTIALLY COMPLETE, AND THERE WAS NO PREJUDICE TO APPELLANT.

Standard of Review

Whether the record of trial (ROT) is incomplete is a question of law that the Court reviews de novo. United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general or special court-martial that results in a punitive discharge or more than six months of confinement. Article 54(c)(2), UCMJ.

Rule for Courts-Martial (R.C.M.) 1112(b) addresses the required contents of the record of trial. The record of trial in a special court-martial must contain “[t]he original charge sheet or a duplicate.” R.C.M. 1112(b)(2). R.C.M. 1112(d)(2) states that “[a] record of trial is complete if it complies with the requirements of subsection (b).” Subsection (b) does not list the first indorsement to the charge sheet as a required component of the record of trial.

R.C.M. 1112(f) addresses certain matters that the court reporter must attach to the record before it is forwarded for appellate review. The Rule does not list the first indorsement to the charge sheet as one of these matters.

Appellate courts understand that inevitably records will be imperfect, and therefore review for substantial omissions. *See* United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982). This Court determines what constitutes a substantial omission on a case-by-case basis. United States v. Abrams, 50 M.J. 361, 363 (C.A.A.F. 1999) (citation omitted). “Omissions are quantitatively substantial unless the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.” United States v. Davenport, 73 M.J. 373, 377 (C.A.A.F. 2014) (internal citations and quotations omitted).

A substantial omission renders a record incomplete and raises a presumption of prejudice that the Government must rebut. Henry, 53 M.J. at 111 (citing United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not raise a presumption of prejudice or affect the record’s characterization as complete. Id. A substantial omission may not be prejudicial if the appellate courts are able to conduct an informed review. United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001); *see also* United States v. Morrill, ARMY 20140197, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App. 31 October 2016) (unpub. op.) (finding the record “adequate to permit informed review by this court and any other reviewing authorities”) (citation omitted).

Analysis

Appellant asserts that the omission of a urinalysis report from his second Bickel test from 19 October 2021 “renders the record incomplete and warrants relief.” (App. Br. Appx. at 2.) He claims prejudice from the omission because it constituted “evidence pertinent to his appeal, plea agreement, and plea and Care inquiries.” (Id.) Appellant is not entitled to relief for three reasons. First, the first indorsement to the charge sheet is not a required part of the record under

R.C.M. 1112, so Appellant cannot prove that a missing attachment to the first indorsement renders his record incomplete. Second, even if the first indorsement were required to be included in the ROT, Appellant cannot show that Attachment 4 to the first indorsement is actually missing. Third and finally, the absence of Attachment 4 to the first indorsement, even if a substantial omission, would not prejudice Appellant because this Court would still be able to conduct an informed review of Appellant's case.

1. A record of trial is complete without the first indorsement to the charge sheet and its attachments.

R.C.M. 1112(b) contains no requirement that the first indorsement to the charge sheet be included in the record of trial. R.C.M. 1112(d)(2) states that a "record of trial is complete if it complies with the requirements of "R.C.M. 1112(b)." Since Appellant's record of trial complied with R.C.M. 1112(b), it was "complete" despite any omission of an attachment to the first indorsement to the charge sheet.

R.C.M. 1112(f) lists a series of matters that the court reporter must attach to the record of trial for appellate review. R.C.M. 1112(f) does not list the first indorsement to the charge sheet as one of those matters. Thus, even if the absence of these matters could render a record of trial incomplete, Appellant's record would not be incomplete, because it also complies with R.C.M. 1112(f). In sum, since Appellant's record of trial is substantially complete, he is not entitled to relief.

2. Attachment 4 to the first indorsement is properly included in the ROT – it is simply mislabeled as a "Bickel test" on the first indorsement's list of attachments.

Even if the first indorsement to the charge sheet must be included in a "complete" record of trial, Appellant's record of trial is still complete. Despite Appellant's contention, the first indorsement contains all listed attachments. Attachment 4 is described as a Bickel report, dated

15 November 2021 that is 8 pages long. What is actually attached as Attachment 4 is a report dated 15 November 2021 that is 8 pages long – but it is a report from a random urinalysis, not a Bickel test. Page 1 of Attachment 4 shows that the urine sample at issue in the 15 November report was taken on 25 October 2021. While the stipulation of fact reveals the existence of an additional urinalysis – a second Bickel test of a sample taken on 19 October 2021 – there is no indication that the report from that Bickel test was dated 15 November 2021 or that it was 8 pages in length. As a result, the most logical conclusion for this Court to draw is that the government intended Attachment 4 to the first indorsement to be the 8-page 15 November 2021 urinalysis report from the random test, but the test was accidentally mischaracterized as a Bickel test in the attachments list. Appellant has not proven that the government intended to attach the second Bickel report (of unknown date or length) to the first indorsement, and therefore has not proven that either the first indorsement or his record of trial is incomplete. Thus, he is not entitled to relief on the basis of an incomplete record.

c. Even if the second Bickel test was supposed to be included in the ROT as Attachment 4, and is missing and substantial, Appellant is not prejudiced because this Court can still conduct an informed review of Appellant’s trial.

Appellant does not offer any argument that the alleged omission of the second Bickel test was a substantial omission. (App. Br. Appx. at 2.) He merely argues that he suffered prejudice either way. (Id.) But even if Attachment 4 was supposed to be the second Bickel test and is both missing and a substantial omission, Appellant cannot prove he was prejudiced. This Court can still conduct an informed review of Appellant’s court-martial.

To start, there is nothing related to this issue for this Court to review, because Appellant waived the issue at trial. “An unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings” because “[b]y entering a plea of guilty, the accused is not

simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.” United States v. Hardy, 77 M.J. 438, 442 (C.A.A.F. 2018) (internal citations omitted). Whether Attachment 4 was mislabeled or whether the first indorsement included the wrong attachment, it constituted a nonjurisdictional defect. Any error was clerical or administrative, and this Court has found clerical and administrative errors to be nonjurisdictional in nature. *See* United States v. Kellough, 19 M.J. 871, 874 (A.F.C.M.R. 1985). Moreover, R.C.M. 201(b) lays out the requisites of court-martial jurisdiction. Although the Rule requires the court-martial to be convened by an official empowered to convene it and that each charge be referred to it by competent authority, the Rule does not recognize any particular preferral procedure as being necessary for jurisdiction. *See* R.C.M. 201(b)(1)-(5). Thus, any error in the first indorsement or preferral process here was nonjurisdictional and waived by Appellant’s unconditional guilty plea.

Appellant also agreed to waive all waivable motions as part of his plea agreement. R.C.M. 905(b)(1) provides that objections based on nonjurisdictional defects in preferral must be made before entry of pleas. R.C.M. 905(e)(1), in turn, makes clear that such motions maybe affirmatively waived. Appellant’s agreement to waive all waivable motions was thus an affirmative waiver of any defects in the first indorsement to the charge sheet.

Since Appellant waived any issue of defective preferral this Court can conduct an informed review of his record of trial even if the correct version of Attachment 4 to the first indorsement to the charge sheet is missing.

Even if this Court desired to review the propriety of the preferral, it can still conduct an informed review of the issue based on the current contents of the ROT. There are two possible explanations for the discrepancy with Attachment 4. First, and most likely, the government

simply mislabeled the test from 25 October 2021 as a “Bickel” test, rather than a random urinalysis. Second, and less likely, the government mistakenly included and forwarded the 25 October random test results as part of the first indorsement, instead of the 19 October Bickel test results. But either way, Attachment 4, as contained in the existing record of trial, still supported the commander’s decision to prefer Charge II, Specification 3. That specification alleged that Appellant wrongfully used Delta-8-THC on divers occasions between on or about 27 August 2021 and on or about 18 October 2021. While Attachment 4 showed a positive Delta-8-THC result from a sample taken on 25 October 2021, Attachment 3 documented an earlier positive urinalysis for Delta-8-THC from a sample taken on 17 September 2021. Together, these attachments gave the preferring commander adequate reason to believe Appellant used Delta-8-THC on divers occasions – in other words, that the matters set forth in Specification 3 were “true, to the best of [his] knowledge and belief,” as required by Article 30(b)(2), UCMJ. Notwithstanding any error related to Attachment 4 of the first indorsement, the preferral of Charge II, Specification 3 was supported by the evidence contained in the first indorsement and was proper. Appellant would not have succeeded on any motion claiming defective preferral, even if he had raised one (rather than waived it) at his trial.

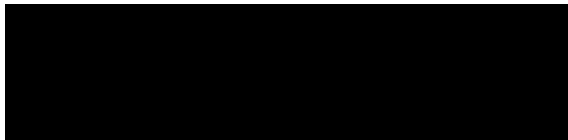
Appellant also offhandedly suggests that the second positive Bickel report from 19 October 2021 “does not appear to have been disclosed.” (App. Br. Appx. at 2.) Yet Appellant attaches no affidavit or declaration from himself or his trial defense counsel stating that they never received the results of the 19 October Bickel test in pretrial discovery. Appellant made no motion at trial complaining that he did not receive the results of that test. It also seems highly unlikely that Appellant would have agreed to a stipulation of fact about the results of the 19 October Bickel test, if he and his trial defense counsel had not received the results of that Bickel

test before trial. In any event, R.C.M. 1112 contains no requirement for all pretrial discovery to be included in the record of trial, so the absence of the 19 October Bickel test does not render Appellant's record incomplete.

Since this Court can still conduct an informed review of Appellant's court-martial, Appellant has suffered no prejudice from the alleged omission from the ROT of the second Bickel test as Attachment 4 to the first indorsement. His assignment of error should be denied.

CONCLUSION

For these reasons, the United States respectfully asks this Court to deny Appellant's claims and affirm the findings and sentence.



MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
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 10 February 2023.



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



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	BRIEF ON BEHALF OF
<i>Appellee,</i>	)	APPELLANT
)	
v.	)	Before Panel No. 1
)	
Airman First Class (E-3)	)	No. ACM S32724
ALEXANDER J. DUNLEAVY,)	
United States Air Force	)	11 January 2023
<i>Appellant</i>)	

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

ASSIGNMENT OF ERROR

**IS THE RECORD OF TRIAL INCOMPLETE IF THE
1ST INDORSEMENT TO THE CHARGE SHEET OMITTS A
BICKEL TEST PERTINENT TO THE CONVICTION?¹**

STATEMENT OF THE CASE

On 16 February 2022, at Dover Air Force Base (AFB), Delaware, a military judge sitting as a special court-martial convicted Appellant, Airman First Class Alexander J. Dunleavy (A1C Dunleavy), consistent with his pleas, of one charge and three specifications of wrongful use of cocaine, 3, 4-Methylenedioxyamphetamine (MDMA), and Delta-8-Tetrahydrocannabinol (“Delta-8-THC”) respectively, in violation of Article 112a, Uniform Code of Military Justice (UCMJ).² Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Alexander J. Dunleavy*, dated 22 March 2022. The military judge sentenced A1C Dunleavy to 53 days

¹ A1C Dunleavy raises this issue personally pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). See Appendix.

² References to the UCMJ, Military Rules of Evidence, and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial*, United States (2019 ed.).

confinement, reduction to E-1, a reprimand, and a bad conduct discharge. *Id.* The convening authority took no action on the findings of the case and approved the sentence in its entirety. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Alexander J. Dunleavy*, dated 14 March 2022. A1C Dunleavy did not submit matters in clemency or request deferment. R. at Vol. 1, Email Subject: US v. Dunleavy – Submission of Matters, dated 2 March 2022.

STATEMENT OF FACTS

A1C Dunleavy was born in Harrisburg, Pennsylvania in December 2000. Defense Exhibit (DE) B. He was the oldest of four siblings, one of whom passed away as a toddler. *Id.* Through much of his academic career, his grades were average to low, and he had a few minor disciplinary issues in middle school. *Id.* After he realized he wanted to join the Air Force, however, he made honors his senior year of high school. *Id.* He was sworn in through the delayed entry program and earned multiple flight achievements as the flight's element leader in Basic Military Training. *Id.* He completed technical school as a Distinguished Graduate with the second highest grade point average of his class. *Id.* A1C Dunleavy was then stationed at Dover AFB on 18 March 2020. *Id.*

On or about 18 August 2021, A1C Dunleavy attended a house party where one of the guests offered him cocaine. Prosecution Exhibit (PE) 1. A1C Dunleavy inhaled approximately half a line through his nose. PE 1, R. at 29. On 19 August 2021, A1C Dunleavy was randomly selected and provided a urinalysis sample which tested positive for cocaine. PE 1.

On or about 15 September 2021, A1C Dunleavy bought and consumed “less than a dime” sized amount of what he believed to be cocaine. PE 1; R. at 29. On 17 September 2021, he provided a urinalysis sample pursuant to a follow-up inspection order (“*Bickel* test”) which tested positive for cocaine and MDMA. PE 1.

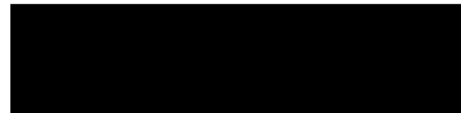
In August 2021, A1C Dunleavy purchased a vape pen and cartridge which contained Delta-8-THC. *Id.* He used the vape approximately once per week between August and October 2021. *Id.* On 19 October 2021, A1C Dunleavy provided a urinalysis sample pursuant to a *Bickel* test which tested positive for Delta-8-THC. *Id.*

The convening authority referred and preferred charges on 19 November 2021. DD Form 458, *Charge Sheet*, dated 19 November 2021. The fourth attachment of the 1st Indorsement to the Charge Sheet is listed as a “Positive Bickel Report, dated 15 November 2021[.]” R. at Vol. 2, 1st Indorsement to the Charge Sheet, dated 19 November 2021 (“1st Indorsement”). However, the attached report dated 15 November 2021 is associated with a sample collected from A1C Dunleavy on 25 October 2021, pursuant to his random selection for urinalysis on this date. *Id.* at Attachment 4. None of the attachments to the 1st Indorsement contain a urinalysis report for the second *Bickel* test sample taken 19 October 2021, on which A1C Dunleavy’s conviction for Charge I, Specification 3 is based. *See generally* 1st Indorsement and Attachments; PE 1.

ERRORS & ARGUMENT

Undersigned appellate defense counsel attests she has, on behalf of A1C Dunleavy, carefully examined the record of trial in this case. A1C Dunleavy does not admit that the findings and sentence are correct in law and fact, and raises one issue on appeal pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Appendix. The case is otherwise submitted to this Honorable Court on its merits.

Respectfully Submitted,



ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 11 January 2023.

Respectfully submitted,

[REDACTED]

ALEXANDRA K. FLESZAR, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[REDACTED]

APPENDIX

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

ARGUMENT

THE RECORD OF TRIAL IS INCOMPLETE IF THE 1ST INDORSEMENT TO THE CHARGE SHEET OMITTS A BICKEL TEST PERTINENT TO THE CONVICTION.

Standard of Review

Whether the record of trial is incomplete is a question of law reviewed *de novo*. *United States v. Henry*, 53 M.J. 108, 110-11 (C.A.A.F. 2000) (citations omitted).

Law and Analysis

Article 54(c)(2), UCMJ, requires that a complete record of proceedings and testimony shall be prepared in any case where the sentence includes a discharge. Under R.C.M. 1112(b)(2), the record of trial must include the Charge Sheet. When charges are forwarded with a view to trial by special court-martial, “they should be forwarded by a letter of transmittal or indorsement. To the extent practicable without unduly delaying forwarding the charges, the letter should include or carry as enclosures: a summary of the available evidence relating to each offense” R.C.M. 401(c)(2), Discussion. Generally, Government counsel “shall provide the defense with copies of, or if impracticable, permit the defense to inspect the charges and any matters that accompanied the charges when they were preferred.” R.C.M. 404A(a)(1).

A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. *Henry*, 53 M.J at 111 (citations omitted). However, “[i]nsubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record’s characterization as a complete one.” *Id.* (holding that four missing prosecution exhibits were insubstantial omissions when other exhibits of similar sexually explicit material were included).

The omission of the urinalysis report based on a second *Bickel* test from 19 October 2021 is one which renders the record incomplete and warrants relief. *See* Article 54(c); *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). This is evidence upon which A1C Dunleavy apparently based his guilty plea for Charge I, Specification 3, and *Care* and plea agreement inquiries. *See* R. at 12, 23, 48-49; *see also* PE 1. Though a second positive “*Bickel* Report” was listed in the 1st Indorsement, this *Bickel* Report does not appear to have been disclosed, as the fourth attachment was the result of a random urinalysis test. *See* R. at Vol. 2, 1st Indorsement; R.C.M. 401(c)(2), Discussion.

Regardless of whether substantial or insubstantial, the omission prejudiced A1C Dunleavy, as evidence pertinent to his appeal, plea agreement, and plea and *Care* inquiries is not included in the record. The CAAF has disapproved portions of sentences where a record is substantially lacking. *See Stoffer*, 53 M.J. at 27. Here, this Court should disapprove 53 days of A1C Dunleavy’s confinement based on the omission; or in the alternative, remand the case to the military judge to correct the record.

WHEREFORE, A1C Dunleavy respectfully requests this Honorable Court to disapprove the 53 days of confinement for Specification 3 of Charge I. In the alternative, A1C Dunleavy requests this Honorable Court remand his case to the military judge to complete the record by ordering the 19 October 2021 *Bickel* test be produced and attached.