IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON,** United States Air Force *Appellant*	)	No. ACM 40297 30 August 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **5 November 2022**. The record of trial was docketed with this Court on 8 July 2022. From the date of docketing to the present date, 53 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]

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 30 August 2022.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

30 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) EVERETT W. EMERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40297 Panel No. 2

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

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

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

[redacted]

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 30 August 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 *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON,** United States Air Force *Appellant*	)	No. ACM 40297 28 October 2022

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 an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 December 2022**. The record of trial was docketed with this Court on 8 July 2022. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 24 August 2021, 6 April 2022, and 16 May 2022, at a general court-martial convened at Wright-Patterson Air Force Base, Ohio, Maj Emerson was found guilty, consistent with his pleas, of two specifications of possessing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), two specifications of violating a lawful order in violation of Article 92, UCMJ; and was found not guilty of two specifications of possessing child pornography in violation of Article 134, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 19 May 2022. The military judge sentenced Maj Emerson to be dismissed and thirty months of confinement. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. The convening authority waived all of the automatic forfeitures for a period of six months to be paid to Mrs. Emerson for the benefit of herself and their dependent

children in accordance with the plea agreement. ROT Vol. 1, *Convening Authority Decision on Action*, 22 April 2022. Maj Emerson is currently confined at Naval Consolidated Brig at Charleston, SC.

The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, twenty-seven appellate exhibits, and no court exhibit.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the submission of an Assignments of Error brief for good cause shown.

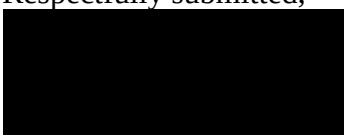
Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 28 October 2022.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

31 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) EVERETT W. EMERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40297 Panel No. 2

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

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

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

[redacted]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 31 October 2022.

[redacted]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
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*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON,** United States Air Force *Appellant*	)	No. ACM 40297 28 November 2022

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 an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **4 January 2023**. The record of trial was docketed with this Court on 8 July 2022. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 24 August 2021, 6 April 2022, and 16 May 2022, at a general court-martial convened at Wright-Patterson Air Force Base, Ohio, Maj Emerson was found guilty, consistent with his pleas, of two specifications of possessing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), two specifications of violating a lawful order in violation of Article 92, UCMJ; and was found not guilty of two specifications of possessing child pornography in violation of Article 134, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 19 May 2022. The military judge sentenced Maj Emerson to be dismissed and thirty months of confinement. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. The convening authority waived all of the automatic forfeitures for a period of six months to be paid to Mrs. Emerson for the benefit of herself and their dependent

children in accordance with the plea agreement. ROT Vol. 1, *Convening Authority Decision on Action*, 22 April 2022. Maj Emerson is currently confined at Naval Consolidated Brig at Charleston, SC.

The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, twenty-seven appellate exhibits, and no court exhibit.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

HEATHER M. CAINE, 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 28 November 2022.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

29 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) EVERETT W. EMERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40297 Panel No. 2

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

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

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

[redacted]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
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*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON,** United States Air Force *Appellant*	)	No. ACM 40297 28 December 2022

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 an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **3 February 2023**. The record of trial was docketed with this Court on 8 July 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 24 August 2021, 6 April 2022, and 16 May 2022, at a general court-martial convened at Wright-Patterson Air Force Base, Ohio, Appellant was found guilty, consistent with his pleas, of two specifications of possessing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), two specifications of violating a lawful order in violation of Article 92, UCMJ; and was found not guilty of two specifications of possessing child pornography in violation of Article 134, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 19 May 2022. The military judge sentenced Appellant to be dismissed and thirty months of confinement. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, *Convening Authority Decision on Action*, 22 April 2022. The convening authority

waived all of the automatic forfeitures for a period of six months to be paid to Mrs. Emerson for the benefit of herself and their dependent children in accordance with the plea agreement. *Id.*

The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits. Appellant is currently confined at Naval Consolidated Brig at Charleston, SC.

Undersigned counsel is currently assigned 16 cases, with 12 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Nine cases have priority over the present case:

1. *United States v. Smith*, ACM 40013: The CAAF granted review on 21 October 2022. The Reply Brief on Behalf of Appellant is due to the CAAF on 4 January 2023.
2. *United States v. Guihama*, ACM 40039: The petition for grant of review is due to the CAAF on 17 January 2023.
3. *United States v. Flores,* ACM 40294: The trial transcript is 171 pages long and the record of trial is comprised of three volumes containing six prosecution exhibits, zero defense exhibits, 16 appellate exhibits, and zero court exhibits. Counsel is reviewing the record of trial.
4. *United States v. Arroyo,* ACM 40321: The trial transcript is 154 pages long and the record of trial is comprised of three volumes containing three prosecution exhibits, 20 defense exhibits, 26 appellate exhibits, and one court exhibit. Counsel is reviewing the record of trial.
5. *United States v. Edwards*, ACM 40349: The trial transcript is 1505 pages long and the

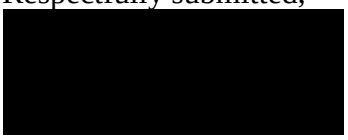
record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit. Counsel is reviewing the record of trial.

6. *United States v. Milla*, ACM 40307: The trial transcript is 210 pages long and the record of trial is comprised of five volumes containing three prosecution exhibits, nine defense exhibits, 22 appellate exhibits, and zero court exhibits. Counsel is reviewing the record of trial.
7. *United States v. Walker*, ACM S32737: The trial transcript is 90 pages long and the record of trial is comprised of three volumes containing four prosecution exhibits, eight defense exhibits, three appellate exhibits, and zero court exhibits. Counsel is reviewing the record of trial.
8. *United States v. Henderson*, ACM 40338: The trial transcript is 634 pages long and the record of trial is comprised of five volumes containing 18 prosecution exhibits, six defense exhibits, 36 appellate exhibits, and two court exhibits. Counsel is reviewing the record of trial.
9. *United States v. Greene-Watson*, ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit. Counsel is reviewing the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 28 December 2022.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

29 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) EVERETT W. EMERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40297 Panel No. 2

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

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

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

[redacted]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON,** United States Air Force *Appellant*	)	No. ACM 40297 27 January 2023

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 an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 March 2023**. The record of trial was docketed with this Court on 8 July 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 24 August 2021, 6 April 2022, and 16 May 2022, at a general court-martial convened at Wright-Patterson Air Force Base, Ohio, Appellant was found guilty, consistent with his pleas, of two specifications of possessing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), two specifications of violating a lawful order in violation of Article 92, UCMJ; and was found not guilty of two specifications of possessing child pornography in violation of Article 134, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 19 May 2022. The military judge sentenced Appellant to be dismissed and thirty months of confinement. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, *Convening Authority Decision on Action*, 22 April 2022. The convening authority

waived all of the automatic forfeitures for a period of six months to be paid to Mrs. Emerson for the benefit of herself and their dependent children in accordance with the plea agreement. *Id.*

The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits. Appellant is currently confined at Naval Consolidated Brig at Charleston, SC.

Undersigned counsel is currently assigned 16 cases, with 11 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Six cases have priority over the present case:

1. *United States v. Guihama*, ACM 40039: Counsel is currently drafting the Supplement to Petition for Grant of Review, which is due to the CAAF on 2 February 2023.
2. *United States v. Arroyo,* ACM 40321: The trial transcript is 154 pages long and the record of trial is comprised of three volumes containing three prosecution exhibits, 20 defense exhibits, 26 appellate exhibits, and one court exhibit. Counsel is reviewing the record of trial.
3. *United States v. Cabuhat, Jr.*, ACM 40191: Oral argument was ordered on three issues in this case, which is to be scheduled in March 2023.
4. *United States v. Walker,* ACM S32737: The trial transcript is 90 pages long and the record of trial is comprised of three volumes containing four prosecution exhibits, eight defense exhibits, three appellate exhibits, and zero court exhibits. Counsel is reviewing the record of trial.
5. *United States v. Edwards,* ACM 40349: The trial transcript is 1505 pages long and the

record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit. Counsel is reviewing the record of trial.

6. *United States v. Greene-Watson*, ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit. Counsel is reviewing the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

[redacted]

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 27 January 2023.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

30 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) EVERETT W. EMERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40297 Panel No. 2

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

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

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

[redacted]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 30 January 2023.

[redacted]

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40297**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Everett W. EMERSON	)	
Major (O-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 27 January 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 31st day of January, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **5 March 2023**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON,** United States Air Force *Appellant*	)	No. ACM 40297 24 February 2023

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 an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **4 April 2023**. The record of trial was docketed with this Court on 8 July 2022. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed.

On 24 August 2021, 6 April 2022, and 16 May 2022, at a general court-martial convened at Wright-Patterson Air Force Base, Ohio, Appellant was found guilty, consistent with his pleas, of two specifications of possessing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), two specifications of violating a lawful order in violation of Article 92, UCMJ; and was found not guilty of two specifications of possessing child pornography in violation of Article 134, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 19 May 2022. The military judge sentenced Appellant to be dismissed and thirty months of confinement. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, *Convening Authority Decision on Action*, 22 April 2022. The convening authority

waived all of the automatic forfeitures for a period of six months to be paid to Mrs. Emerson for the benefit of herself and their dependent children in accordance with the plea agreement. *Id.*

The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits. Appellant is currently confined at Naval Consolidated Brig at Charleston, SC.

Undersigned counsel is currently assigned 16 cases, with 11 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Five cases have priority over the present case:

1. *United States v. Arroyo,* ACM 40321: The trial transcript is 154 pages long and the record of trial is comprised of three volumes containing three prosecution exhibits, 20 defense exhibits, 26 appellate exhibits, and one court exhibit. Counsel has reviewed the record of trial and the Assignments of Error is near completion.
2. *United States v. Cabuhat, Jr.*, ACM 40191: Oral argument was ordered on three issues in this case and is scheduled for 22 March 2023.
3. *United States v. Walker,* ACM S32737: The trial transcript is 90 pages long and the record of trial is comprised of three volumes containing four prosecution exhibits, eight defense exhibits, three appellate exhibits, and zero court exhibits.
4. *United States v. Edwards,* ACM 40349: The trial transcript is 1505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit.
5. *United States v. Greene-Watson,* ACM 40293: The trial transcript is 536 pages long and

the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 24 February 2023.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

27 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) EVERETT W. EMERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40297 Panel No. 2

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

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

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

[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 27 February 2023.

[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 FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON,** United States Air Force *Appellant*	)	No. ACM 40297 27 March 2023

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 an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **4 May 2023**. The record of trial was docketed with this Court on 8 July 2022. From the date of docketing to the present date, 262 days have elapsed. On the date requested, 300 days will have elapsed.

On 24 August 2021, 6 April 2022, and 16 May 2022, at a general court-martial convened at Wright-Patterson Air Force Base, Ohio, Appellant was found guilty, consistent with his pleas, of two specifications of possessing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), two specifications of violating a lawful order in violation of Article 92, UCMJ; and was found not guilty of two specifications of possessing child pornography in violation of Article 134, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 19 May 2022. The military judge sentenced Appellant to be dismissed and thirty months of confinement. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, *Convening Authority Decision on Action*, 22 April 2022. The convening authority

waived all of the automatic forfeitures for a period of six months to be paid to Mrs. Emerson for the benefit of herself and their dependent children in accordance with the plea agreement. *Id.*

The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits. Appellant is currently confined at Naval Consolidated Brig at Charleston, SC.

Undersigned counsel is currently assigned 15 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Four cases have priority over the present case:

1. *United States v. Arroyo*, ACM 40321: The Answer was filed in this case today, 27 March 2023. Counsel is reviewing the Answer and will be drafting the Reply, which is due Monday, 3 April 2023.
2. *United States v. Walker*, ACM S32737: The trial transcript is 90 pages long and the record of trial is comprised of three volumes containing four prosecution exhibits, eight defense exhibits, three appellate exhibits, and zero court exhibits. Counsel has started review of the Record of Trial in this case and will begin writing the Assignment(s) of Error after the review is complete.
3. *United States v. Edwards*, ACM 40349: The trial transcript is 1505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit.
4. *United States v. Greene-Watson*, ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12

defense exhibits, 46 appellate exhibits, and one court exhibit.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 27 March 2023.

Respectfully submitted,

[redacted]

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

28 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) EVERETT W. EMERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40297 Panel No. 2

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

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

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

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

[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 28 March 2023.

[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 40297**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Everett W. EMERSON	)	
Major (O-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 27 March 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 28th day of March, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED**. Appellant shall file any assignments of error not later than **4 May 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, the court will continue to closely examine any further requests for an enlargement of time.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON,** United States Air Force *Appellant*	)	No. ACM 40297 27 April 2023

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 an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **3 June 2023**. The record of trial was docketed with this Court on 8 July 2022. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 24 August 2021, 6 April 2022, and 16 May 2022, at a general court-martial convened at Wright-Patterson Air Force Base, Ohio, Appellant was found guilty, consistent with his pleas, of two specifications of possessing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), two specifications of violating a lawful order in violation of Article 92, UCMJ; and was found not guilty of two specifications of possessing child pornography in violation of Article 134, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 19 May 2022. The military judge sentenced Appellant to be dismissed and thirty months of confinement. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, *Convening Authority Decision on Action*, 22 April 2022. The convening authority

waived all of the automatic forfeitures for a period of six months to be paid to Mrs. Emerson for the benefit of herself and their dependent children in accordance with the plea agreement. *Id.*

The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits. Appellant is currently confined at Naval Consolidated Brig at Charleston, SC.

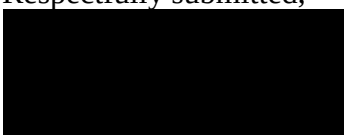
Undersigned counsel is currently assigned 16 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Three cases have priority over the present case:

1. *United States v. Edwards*, ACM 40349: The trial transcript is 1,505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit. Counsel is currently reviewing the record of trial and drafting the Assignment of Errors brief.
2. *United States v. Greene-Watson*, ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit.
3. *United States v. Flores*, ACM 40294: The petition for grant of review is due to the CAAF on 7 June 2023.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 27 April 2023.

Respectfully submitted,

[redacted]

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

1 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) EVERETT W. EMERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40297 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[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 1 May 2023.

[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 FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON,** United States Air Force *Appellant*	)	No. ACM 40297 25 May 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **3 July 2023**. The record of trial was docketed with this Court on 8 July 2022. From the date of docketing to the present date, 321 days have elapsed. On the date requested, 360 days will have elapsed.

On 24 August 2021, 6 April 2022, and 16 May 2022, at a general court-martial convened at Wright-Patterson Air Force Base, Ohio, Appellant was found guilty, consistent with his pleas, of two specifications of possessing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), two specifications of violating a lawful order in violation of Article 92, UCMJ; and was found not guilty of two specifications of possessing child pornography in violation of Article 134, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 19 May 2022. The military judge sentenced Appellant to be dismissed and thirty months of confinement. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, *Convening Authority Decision on Action*, 22 April 2022. The convening authority

waived all of the automatic forfeitures for a period of six months to be paid to Mrs. Emerson for the benefit of herself and their dependent children in accordance with the plea agreement. *Id.*

The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits. Appellant is currently confined.

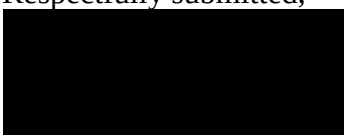
Undersigned counsel is currently assigned 17 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Undersigned counsel recently filed the Brief on Behalf of Appellant in *United States v. Edwards* (ACM 40349) and the Reply Brief in *United States v. Walker* (ACM S32737). There is then one case before this Court with priority over the present case:

1. *United States v. Greene-Watson*, ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit. Counsel has reviewed the record of trial and will return to drafting the Assignments of Error after finishing the draft of the Supplement to the Petition for Grant of Review in *United States v. Flores*, ACM 40294.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 25 May 2023.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

30 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) EVERETT W. EMERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40297 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[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 30 May 2023.

[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 40297**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Everett W. EMERSON	)	
Major (O-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 25 May 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) requesting an additional 30 days to submit Appellant's assignments of error. The Government 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 31st day of May, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **3 July 2023**.

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

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**CONSENT MOTION**
Appellee	)	**TO EXAMINE**
	)	**SEALED MATERIALS**
v.	)	
	)	Before Panel No. 2
Major (O-4)	)	
EVERETT W. EMERSON	)	No. ACM 40297
United States Air Force	)	
Appellant	)	30 May 2023

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

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3(B)(i), the Appellant moves for both parties to examine the following sealed materials:

1) Prosecution exhibit 6 which is a DVD containing 15 images and was ordered sealed by the military judge. R. at 221-22. The images are referenced in Prosecution Exhibit 1, the Stipulation of Fact, on pages 3-5 as the charged evidence of child pornography under Specifications 1 and 2 of Charge I. Both trial and defense counsel viewed the evidence. R. at 221.
2) Appellate Exhibit (App. Ex.) XXII which is a DVD containing two images and was ordered sealed by the military judge. R. at 199-200. These images were the subject matter of Appellate Exhibit IV, Defense Motion In Limine to exclude these images as not being child pornography. *Id.*; App. Ex. IV. Both images were reviewed by trial and defense counsel as well as the military judge. *Id.*

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a

complete review of the record of trial and be in a position to advocate competently on behalf of Appellant.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

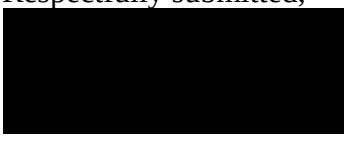
> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill her duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by the Appellant.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[redacted]

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 30 May 2023.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40297**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Everett W. EMERSON	)	
Major (O-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 30 May 2023, Appellant's counsel submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Prosecution Exhibit 6 and Appellate Exhibit XXII. Both images were reviewed by trial and defense counsel as well as the military judge.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." R.C.M. 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.).

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 9th day of June, 2023,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibit 6 and Appellate Exhibit XXII**, subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON** United States Air Force *Appellant*	)	No. ACM 40297 26 June 2023

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 an Assignments of Error (AOE). Appellant requests an enlargement for a period of 14 days, which will end on **17 July 2023**. The record of trial was docketed with this Court on 8 July 2022. From the date of docketing to the present date, 353 days have elapsed. On the date requested, 374 days will have elapsed.

On 24 August 2021, 6 April 2022, and 16 May 2022, at a general court-martial convened at Wright-Patterson Air Force Base, Ohio, Appellant was found guilty, consistent with his pleas, of two specifications of possessing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), two specifications of violating a lawful order in violation of Article 92, UCMJ; and was found not guilty of two specifications of possessing child pornography in violation of Article 134, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 19 May 2022. The military judge sentenced Appellant to be dismissed and thirty months of confinement. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, *Convening Authority Decision on Action*, 22 April 2022. The convening authority

waived all of the automatic forfeitures for a period of six months to be paid to Mrs. Emerson for the benefit of herself and their dependent children in accordance with the plea agreement. *Id.*

The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits. Appellant is currently confined.

Undersigned counsel is currently assigned 18 cases, with 9 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 9 in this case, undersigned counsel has filed a Motion to Withdraw from Appellate Review and Motion to Attach in *United States v. Milla* (ACM 40307); a Response to the Government's Motion to Dismiss in *United States v. Cooley* (ACM 40376); the Petition and Supplement to the Petition for Grant of Review in *United States v. Flores* (ACM 40294); a Motion for Leave to File a Responsive Pleading in *United States v. Cooley* (ACM 40376); and a Brief on Behalf of Appellant in *United States v. Greene-Watson* (ACM 40293). Undersigned counsel also had scheduled and approved leave starting late afternoon on Wednesday, 21 June 2023, through Sunday, 25 June 2023. Additionally, the Government filed an Answer in *United States v. Edwards* (40349) and undersigned counsel and her civilian co-counsel are currently coordinating to determine if a Reply Brief will be filed by the deadline of Friday, 30 June.

This is counsel's top priority case before this Court.

Counsel filed a Consent Motion to Examine Sealed Material on 30 May 2023, which was granted on 9 June 2023. Counsel subsequently reviewed the sealed material on 15 June 2023.

Counsel anticipates completing review of the record of trial tomorrow and will begin drafting the Assignments of Error.

The additional two weeks will allow undersigned counsel to finish reviewing Appellant's case, to conduct any necessary research, and advise him regarding potential errors. This additional time is also needed coordinate with Appellant, who is confined at Charleston Naval Brig. Appellant may file one or more *Grostefon* issues, and in counsel's experience it can take additional time to secure additional evidence and/or a declaration when appellants are confined. Additionally, counsel notes that Monday and Tuesday, 3-4 July 2023, are a Family Day and Holiday.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 26 June 2023.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

28 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) EVERETT W. EMERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40297 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 374 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.

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

[redacted]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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 28 June 2023.

[redacted]

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
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	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel No. 2
	)	
Major (O-4)	)	No. ACM 40297
EVERETT W. EMERSON	)	
United States Air Force	)	7 July 2023
Appellant	)	

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

Assignments of Error

I.

WHETHER THE FINDING OF GUILTY TO SPECIFICATION 2 OF CHARGE II SHOULD BE SET ASIDE AND DISMISSED BECAUSE IT IS UNREASONABLY MULTIPLIED WITH SPECIFICATION 1 OF CHARGE II?

II.

WHETHER THE SEGMENTED SENTENCES FOR SPECIFICATIONS 1 AND 2 OF CHARGE II ARE INAPPROPRIATELY SEVERE?

III.

WHETHER THE PORTION OF MAJ EMERSON'S PLEA AGREEMENT WHICH PROVIDES THAT DISMISSAL OF CERTAIN CHARGES AND SPECIFICATIONS WOULD ONLY RIPEN INTO DISMISSAL WITH PREJUDICE "UPON COMPLETION OF APPELLATE REVIEW UPHOLDING [MAJ EMERSON'S] CONVICTION OF THE OTHER SPECIFICATIONS" IS VOID OR OTHERWISE UNENFORCEABLE?

IV.[1]

WHETHER TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL?

[1] Issue IV is raised in Appendix A pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Statement of the Case

On 6 April 2022, Major (Maj) Emerson was convicted, consistent with his pleas, at a general court-martial comprised of a military judge alone at Wright-Patterson Air Force Base (AFB), Ohio, of one charge and two specifications of possessing child pornography,[2] in violation of Article 134, Uniform Code of Military Justice (UCMJ),[3] 10 U.S.C. § 934; and one charge and two specifications of violating a lawful order, in violation of Article 92, UCMJ, 10 U.S.C. § 892. Appellate Exhibit (App. Ex.) XXIII; Record (R.) at 216. Pursuant to the plea agreement, two specifications of possession of child pornography were withdrawn and dismissed, with prejudice to ripen "upon completion of appellate review upholding [the] conviction[s] of the other specifications." App. Ex. XXIII. The military judge sentenced Maj Emerson to 30 months' confinement and a dismissal. R. at 251. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 22 April 2022.

Statement of Facts

Background

Maj Emerson comes from two generations of men who served and retired honorably from the United States Air Force (USAF)—his father and grandfather. Defense Exhibit (Def. Ex.) B at 1. He followed their legacy by enlisting on 29 January 1997. Prosecution Exhibit (Pros. Ex.) 1 at

[2] Maj Emerson alleges that certain images described in Prosecution Exhibit 1 (*see* paras. 10.d., 10.f., 11.b., and 11.d.), as seen in Prosecution Exhibit 6 **SEALED**, do not satisfy the definitions of child pornography. He additionally notes that the image described in para. 11.e. of Prosecution Exhibit 1 is a duplicate of that described in 11.a. Despite these errors, Maj Emerson does not contest the providency of his pleas due to his possession of the remaining images.

[3] Unless otherwise noted, all references to the Uniform Code of Military Justice (UCMJ), the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

1. Maj Emerson later commissioned into the USAF on 12 June 2008. *Id.* He served for a combined nearly 26 years as Enlisted, Reserve, Guard, ROTC, and a commissioned Active Duty Officer. Def. Ex. B at 1. While at Airman Leadership School in 2001, he was nominated for the Scholarship for Outstanding Airman. Def. Ex. B at 2. Then in 2002, Maj Emerson was selected to attend the United States Air Force Academy (USAFA)'s AM-490 jump school where he earned his jump wings. *Id.* In 2003, he was selected as Airman of the Year for the 611th Civil Engineering Squadron (CES). *Id.*

Maj Emerson deployed five times including to locations such as Iraq, Kuwait, and Afghanistan. Def. Ex. B at 1. During his first deployment to Baghdad, Iraq, he was part of a 10 person electrical shop "responsible for pulling standby for any emergency power outages." Def. Ex. B at 3. After earning a promotion to Technical Sergeant, Maj Emerson deployed for the second time. *Id.* In 2008, he commissioned. *Id.* He won multiple Company Grade Officer (CGO) quarterly awards. Def. Ex. B at 4. Maj Emerson's third deployment was a combat tour in Kuwait. *Id.* He served as the lead Contracts Administrator "solidif[ying] the transition of the base operations support and security contract from the incumbent contractor to the new contractor." *Id.* Once home, he was selected for a competitive career broadening program. *Id.* While serving in a Major's billet as a Captain, Maj Emerson was coined by the PACAF/A4. Def. Ex. B at 5. He then deployed for the fourth time, this time to Afghanistan, receiving CGO of the month and serving as Action Officer for numerous maintenance events. *Id.* In 2019, Maj Emerson led his team in winning the David Packard Excellence team award and General Larry O. Spencer team award. Def. Ex. B at 6. In 2020, Maj Emerson left on his fifth deployment after only nine days' notice. *Id.*

Maj Emerson struggled with his mental health from the time he first enlisted yet resisted seeking health due to the stigma surrounding mental health treatment. R. at 227. In 2016, he was able to recognize he had a problem and needed mental health assistance. Def. Ex. B at 7. He self-reported to the Wright Patterson AFB Behavioral Health Clinic for porn addiction. *Id.* Maj Emerson was told mental health could not assist him and was refused a referral. *Id.* In 2018, he realized his porn addiction had escalated and he sought help again, no longer believing he could handle it on his own. R. at 227. However, he was "slow to find the right help." *Id.* Maj Emerson was "flat-out scared, felt trapped due to the context of [his] struggles and did not know where [he] could turn." *Id.* Once Maj Emerson returned from his last deployment on 7 October 2020, he was apprehended by Homeland Security Investigations (HSI) agents based on the suspicion that he possessed child pornography. Pros. Ex. 1 at 2. Maj Emerson was interviewed by the Office of Special Investigations (OSI) and admitted to viewing child pornography. *Id.* In October 2020, Maj Emerson was finally referred off base to a provider with specialized experience in the mental health issues he faced. Def. Ex. B at 7. He was able to find help working with Dr. F.P. through individual and group therapy. *Id.*

Charge II—Article 92

In Specification 1 of Charge II, Maj Emerson was charged with "at or near Ali Al Salem Air Base, Kuwait, between on or about 1 March 2020 and on or about 25 June 2020, violat[ing] a lawful general order, which was his duty to obey, to wit: paragraph 2.i., United States Central Command's General Order Number 1C, dated 21 May 2013, by wrongfully possessing and transferring sexually explicit photographs." DD Form 458, referred on 25 May 2021 (Charge Sheet). In Specification 2 of Charge II, Maj Emerson was charge with "at or near Ali Al Salem Air Base, Kuwait, between on or about 26 June 2020 and on or about 7 October 2020, violat[ing]

a lawful general order, which was his duty to obey, to wit: paragraph 2.i., United States Central Command's General Order Number 1D, dated 26 June 2020, by wrongfully possessing and transferring sexually explicit photographs." Charge Sheet. The Stipulation of Fact references the same images of child pornography under Specification 2 of Charge I as evidence under both specifications of Charge II, as well as sexually explicit photographs of adults. Pros. Ex. 1 at 6-7.

Trial defense counsel filed a motion to dismiss Specification 2 of Charge II for unreasonable multiplication of charges before the parties entered into the plea agreement. App. Ex. XII. During the motions hearing, the military judge stated that he suspected that if there had not been a change in the general order, Charge II would have only been one specification. R. at 156. He stated the maximum punishment would have then been two years—for just the one specification. *Id.* Then the military judge asked the Government why, given that unreasonable multiplication of charges is aimed at equity, would the Court not merge both specifications for sentencing at least. *Id.* Trial counsel responded that given there are two separate orders, it was impossible to merge the specifications for findings. R. at 156-57. However, trial counsel conceded that the specifications should be merged for sentencing if Maj Emerson were convicted of both. R. at 157.

Plea Agreement

The plea agreement included a waive all waivable motions provision. App. Ex. XXIII at 1. The plea agreement also stipulated minimum and maximum confinement terms. App. Ex. XXIII at 2. The minimum confinement for Specifications 1 and 2 of Charge I was no less than four months and the maximum confinement was no more than 15 months for each specification. *Id.* The minimum confinement for Specifications 1 and 2 of Charge II was no less than two months and the maximum confinement was no more than nine months for each specification. *Id.* All

periods of confinement were to run consecutively. *Id.* The convening authority agreed to withdraw and dismiss Specifications 3 and 4 of Charge I upon the military judge's acceptance of Maj Emerson's guilty plea, with prejudice attaching "upon completion of appellate review upholding [the] conviction[s] of the other specifications."[4] *Id.*

The military judge sentenced Maj Emerson to confinement for 12 months each for Specifications 1 and 2 of Charge I and confinement for three months each for Specifications 1 and 2 of Charge II with all confinement terms running consecutively. R. at 251.

CARE Inquiry

When asked to explain why he was guilty of Specification 1 of Charge II, Maj Emerson told the military judge that between the end of May and early June 2020, he had been experiencing significant challenges with isolation stemming from challenges in his marriage as well as COVID-19 restrictions. R. at 189. This led Maj Emerson to interact in chat rooms resulting in his possession and transfer of sexually explicit photographs. *Id.* The images included that of adult pornography and the same child pornography images he received on 21 June 2020, which were the basis of Specification 2 of Charge I (*see* R. at 183). R. at 189. Maj Emerson acknowledged possession of adult pornography was a violation of United States Central command General Order number 1C, which later became number 1D on 26 June 2020. *Id.*

The military judge then asked Maj Emerson to tell him what happened under Specification 2 of Charge II. R. at 195. Maj Emerson essentially repeated the same facts as under Specification 1 of Charge II, but added that the General Order became number 1D on 26 June 2020. *Id.*

[4] The original Statement of Trial Results (STR) stated "Withdrawn and Dismissed with prejudice," but after a post-trial Article 39(a), UCMJ, hearing the STR was corrected to state "Withdrawn and Dismissed; prejudice to attach after appellate review." App. Ex. XXVII; R. at 252-55; ROT, Vol. 1, Corrected Copy – Statement of Trial Results, dated 2 May 2022.

Argument

I.

THE FINDING OF GUILTY TO SPECIFICATION 2 OF CHARGE II SHOULD BE SET ASIDE AND DISMISSED BECAUSE IT IS UNREASONABLY MULTIPLIED WITH SPECIFICATION 1 OF CHARGE II.

Standard of Review

Claims of unreasonable multiplication of charges are reviewed for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012). A "waive all waivable motions" provision in a plea agreement waives a claim of unreasonable multiplication of charges such that the claim is extinguished and cannot be raised on appeal. *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009). However, this Court is "not bound to apply waiver" when exercising its powers under Article 66(d), UCMJ6. *United States v. Butcher*, 53 M.J. 711 (A.F. Ct. Crim. App. 2000) (citing *United States v. Evans*, 28 M.J. 74, 76 (C.M.A. 1989)). "[F]ailure to raise the issue does not preclude the Court of Military Review in the exercise of its powers from granting relief." *United States v.* Britton, 26 M.J. 24, 27 (C.M.A. 1988). If this Court "in the interest of justice, determines that a certain finding or sentence should not be approved . . . the court need not approve such finding or sentence." *United States v. Claxton*, 32 M.J. 159 (C.A.A.F. 1991).

Law

Unreasonable multiplication of charges (UMC) is an equitable doctrine based on R.C.M. 307(c)(4). It provides, in part, that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4), Discussion.

The factors for a trial court to consider when evaluating UMC are as follows:

> 1. Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?;
>
> 2. Is each charge and specification aimed at distinctly separate criminal acts?;
>
> 3. Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
>
> 4. Does the number of charges and specifications unfairly increase the appellant's punitive exposure?; and
>
> 5. Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001). These factors are not all-inclusive, nor is any one or more factors a prerequisite. Likewise, one or more factors may be sufficiently compelling, without more, to warrant relief for UMC. *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012).

"In applying this rule, it first should be determined whether the charged offenses are based on '[o]ne transaction or what is substantially one transaction.'" *United States v. Baker*, 14 M.J. 361, 366 (C.M.A. 1983). "A 'transaction' generally means 'a series of occurrences or an aggregate of acts which are logically related to a single course of criminal conduct.'" *United States v. Grubb*, 34 M.J. 532, 535 (A.F.C.M.R. 1991) (citations omitted).

This Court recently granted relief for an unreasonable multiplication of charges in *United States v. Massey*, No. ACM 40017, 2023 CCA LEXIS 46 (A.F. Ct. Crim. App. 30 Jan. 2023) (unpub. op.), *rev. denied*, 2023 CAAF LEXIS 238 (C.A.A.F. 2023). In *Massey*, the appellant was convicted of three separate solicitations for sending one text message. *Id*. at *33. In its discussion of the unreasonable multiplication of charges, this Court was "not persuaded . . . that allowing Appellant to stand convicted of three separate offenses is a just outcome." *Id*. at *38. As a result,

this Court consolidated the three specifications into one and dismissed the other two specifications with prejudice under its Article 66(d), UCMJ, authority. *Id*. at *40-41, *63.

On appeal, the issue of unreasonable multiplication of charges involves the duty of the Courts of Criminal Appeals to 'affirm only such findings of guilty, and the sentence . . . as it . . . determines, on the basis of the entire record, should be approved.'" *United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001). This power is "highly discretionary" and includes the ability to determine that an unreasonable multiplication of charges claim "has been waived or forfeited when not raised at trial." *Id.* A service court should not apply waiver "when the 'piling on' of charges is so extreme or unreasonable as to necessitate the invocation of our Article 66(c), UCMJ, equitable power to prevent material prejudice to the substantial rights of the accused and ensure a fair result, which is the objective and justification of the military justice system." *United States v. Quiroz*, 52 M.J. 510, 513 (N.M. Ct. Crim. App. 1999) (citations omitted). This Court has exercised its Article 66 power to overcome waiver in cases where the unreasonable multiplication of charges are "plainly presented." *See e.g. United States v. Jeffers*, 2016 CCA LEXIS 52, at *10 (A.F. Ct. Crim. App. 28 Jan. 2016) (unpub. op.); *United States v. Chin*, 2015 CCA LEXIS 241, at *12 (A.F. Ct. Crim. App. 12 Jun. 2015) (unpub. op.). This Court confirmed that "we retain the authority to address errors raised for the first time on appeal despite waiver of those errors at trial." *United States v. Andersen*, 82 M.J. 543, 547 (A.F. Ct. Crim. App. 19 Apr. 2022) (citing *United States v. Hardy*, 77 M.J. 438, 442-43 (C.A.A.F. 2018).

Analysis

To the extent the waive all waivable motions provision in the plea agreement waived the unreasonable multiplication of charges issue, this Court should pierce waiver under its Article 66(d), UCMJ, authority. *See United States v. Chin*, No. ACM 38452, 2015 CCA LEXIS 140 at

*10 (A.F. Ct. Crim. App. 7 Apr. 2015 (unpub. op.) (exercising "plenary, de novo power of review" to rectify a waived UMC issue in a guilty plea context) *affirmed by United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016). This is especially true given Maj Emerson initially preserved the issue by filing a Motion to Dismiss or Merge UMC. App. Ex. XII. It is unjust for Maj Emerson to be weighed down by two convictions[5] for one bad act or a continuing course of conduct amounting to "substantially one transaction." R.C.M. 307(c)(4), Discussion; *see also Massey*, unpub. op. at *38 (invoking justice as an appropriate Article 66(d), UCMJ, consideration in the UMC context).

Maj Emerson possessed and transferred sexually explicit photographs from late May to the end of September 2020. R. at 195. He was charged with two separate specifications simply because the general order was rescinded and reordered 26 June 2020. R. at 156-57. Had the order not been rescinded, there would have been only one specification as this was a continuing course of conduct. *See* R. at 156-57. Further, the images of child pornography that were included as evidence under both Specifications of Charge II, were retrieved by Maj Emerson on 21 June 2020—just five days before the general order was reissued—and were the very same images he was convicted of possessing under Specification 2 of Charge I. R. at 183, 189, 195; Pros. Ex. 1 at 6-7. If this Court pierces waiver and dismisses or merges Specification 2 of Charge II, Maj Emerson will not receive a windfall; he would more appropriately no longer have two convictions on his record for one course of conduct.

Consideration of the *Quiroz* factors demonstrate Specifications 1 and 2 of Charge II were unreasonably multiplied. Maj Emerson did initially object to UMC. App. Ex. XII. Next, both specifications were aimed at the same criminal act: possessing and transferring sexually explicit

[5] Maj Emerson is in fact weighed down by three convictions for one act when this Court considers that both Specifications under Charge II encompass the same conduct Maj Emerson was convicted and sentenced for under Specification 2 of Charge I.

photographs. Third, two convictions misrepresents and exaggerates Maj Emerson's criminality--to any outside observer or future employer, it looks like he violated two lawful general orders while deployed when, in fact, it was the same order, which had been rescinded and reordered. The Court of Military Appeals (CMA) has explained that separate from any sentence adjudged, each additional criminal conviction has other consequences as well, which include "formal judgment by the community," and additional stigma and damage to the defendant's reputation. *United States v. Doss*, 15 M.J. 409, 411-12 (C.M.A. 1983) (quoting *Missouri v. Hunter*, 459 U.S. 359, 372-73 (1983) (Marshall, J., dissenting)).[6] However, the punitive exposure was doubled as well. Maj Emerson faced a potential maximum of 18 months rather than nine months' confinement, and he received double confinement because the confinement did not run concurrently. Of note, during the motions hearing, trial counsel conceded both specifications of Charge II should have been merged for sentencing. R. at 157. Finally, the fact that Maj Emerson was not just charged with Specification 2 of Charge I for possessing child pornography while deployed, but also charged with two additional specifications of violating a general order for the same conduct is evidence of prosecutorial overreach. Pros. Ex. 1 at 4-7. While the two specifications were also for possessing and transferring sexually explicit photographs of adults, the stipulation of fact clearly also included the same conduct from Specification 2 of Charge I as well. *Id.* Trial counsel even argued it as such in his sentencing argument. R. at 240.

The Government obtained two separate convictions for the same conduct simply because the general order was reissued. The prejudice flowing from Specification 2 of Charge II is rather

[6] *See also Ball v. United States*, 470 U.S. 856 (1985); *United States v. Savage*, 50 M.J. 244, 245 (C.A.A.F. 1999) (holding an unauthorized multiplicious conviction alone constitutes punishment and carries potential adverse collateral consequences); *United States v. Neblock*, 45 M.J. 191, 200 (C.A.A.F. 1996) (stating the danger of multiplicious charging is "that prolix recitation may falsely suggest to a jury that a defendant has committed not one but several crimes").

simple: Maj Emerson has two federal conviction for one continuous course of conduct. The appropriate thing to do in this circumstance is to set aside and dismiss Specification 2 of Charge II because Maj Emerson ought not maintain an additional, cumulative conviction on his record. Article 66(d)(1), UCMJ, provides this Court ample authority to remedy the concern. The same course of action this Court took in *Massey* is appropriate here; this Court could consolidate two specifications into one and dismiss, with prejudice, Specification 2 of Charge II.

WHEREFORE, Maj Emerson respectfully requests this Honorable Court set aside and dismiss, with prejudice, Specification 2 of Charge II, and the sentence.

II.

THE SEGMENTED SENTENCES FOR SPECIFICATIONS 1 AND 2 OF CHARGE II ARE INAPPROPRIATELY SEVERE.

Standard of Review

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

Law

Under Article 66(d), UCMJ, this Court may only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "It follows that a sentence should be approved only to the extent it is found appropriate based on a [Court of Criminal Appeals (]CCA[)]'s review of the entire record." *United States v. Varone*, No. ACM S32685, 2022 CCA LEXIS 426, at *7 (A.F. Ct. Crim. App. 21 Jul. 2022) (unpub. op). This Court's broad power to ensure a just sentence is distinct from the convening authority's clemency power to grant mercy. *See United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted).

In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (alteration in original) (citation omitted). Matters in extenuation of an offense serve to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse. R.C.M. 1001(d)(1)(A).

Prior to the Military Justice Act of 2016 (MJA 2016), all sentences, whether adjudged by members or a military judge, were unitary. *See* R.C.M. 1002(b) (2016). MJA 2016 altered this system by requiring military judges, when they act as sentencing authority, to determine the appropriate confinement and fine for each specification. R.C.M. 1002(d)(2)(A) (2019).

In *United States v. Alkazahg*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) addressed the impact of MJA 2016 on sentence appropriateness review. 81 M.J. 764, 785–86 (N.M. Ct. Crim. App. 2021). The NMCCA set aside one specification for failure to state an offense, and thus addressed whether the sentence was appropriate for the remaining segmented sentences. *Id.* The NMCCA found that the segmented sentence was inappropriate for multiple specifications and reassessed the sentence accordingly. *Id.* at 786–91.

Analysis

MJA 2016 changed the dynamic for military judge sentencing. This Court's statutorily-mandated sentence appropriateness review in light of this new structure should take that into consideration and adapt as well. Of the cases shedding light on this issue, most involve sentence reassessment by a CCA. In such situations, the CCA must gauge whether it "can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain

severity"; if so, that sentence "will be free of the prejudicial effects of error." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). While *Sales* was decided long before MJA 2016 was instituted, its guiding principles would appear to still be applicable and of value when examining the appropriateness of a sentence issued using the segmented sentencing scheme.

Since MJA 2016, many CCAs have understandably looked to a segmented sentence to answer the question asked in *Sales*. Where the military judge issued a certain segmented term of confinement or fine on a certain specification, the CCAs have targeted the segmented sentence from the offending specification and reassessed the sentence accordingly. *See United States v. McCameron*, No. ACM 40089, 2022 CCA LEXIS 663, at *15–16 (A.F. Ct. Crim. App. Nov. 17, 2022) (unpub. op.) (noting that "we also have the benefit of the military judge's segmented sentence in this case" and reassessing the sentence by removing the $100.00 fine that corresponded to the set-aside specification), *rev. granted*, 2023 CAAF LEXIS 198 (C.A.A.F. 2023); *United States v. Injerd*, No. ACM 40111, 2022 CCA LEXIS 727, at *29 (A.F. Ct. Crim. App. Dec. 20, 2022) (unpub. op.) (considering "the fact that the military judge imposed a segmented sentence of three months' confinement for Appellant's conviction" that was set aside, and thus reassessing by the same three months); *United States v. Figuereo*, No. 202100048, 2023 CCA LEXIS 153, at *7 (N.M. Ct. Crim. App. Mar. 31, 2023) (unpub. op.) (reassessing the sentence to set aside the exact amount of confinement from the military judge's segmented sentence after setting aside that specification).

This practice makes sense: when the task is to reassess to what the sentencing authority would have adjudged but for the error, knowing that amount answers the question. Maj Emerson respectfully asks this Court to apply this practice in conducting its sentence appropriateness review and in analyzing whether the segmented sentences for Specifications 1 and 2 of Charge II are

inappropriately severe. While this Court has said in *United States v. Souders* that it is "unaware of any authority that would require this court to use a segmented term of confinement identified by an appellant as a benchmark to evaluate 'the sentence or such part or amount of the sentence' that 'should be approved' under Article 66, UCMJ," such analysis would fall in line with the NMCCA's action in *Alkazahg. United States v. Souders*, No. ACM 40145, 2023 CCA LEXIS 126, at *23 (A.F. Ct. Crim. App. Mar. 9, 2023) (unpub. op.), *rev. denied*, 2023 CAAF LEXIS 425 (C.A.A.F. 2023). In *Alkazahg*, though the NMCCA was reassessing the sentence, it did so while also reviewing the appropriateness of each segmented sentence. 81 M.J. at 785. With that level of granularity, the NMCCA determined that several sentences were inappropriate and reduced them accordingly. *Id.* at 786–91.

Turning to the sentence appropriateness assessment, this particular appellant followed in his family's footsteps to voluntarily serve. Def. Ex. B at 1. He himself served a combined nearly 26 years after enlisting in 1997 and commissioning in 2008. *Id.*; Pros. Ex. 1 at 1. His military record is extensive.[7] Going back to his beginnings, he was nominated for the Scholarships for Outstanding Airman back in Airman Leadership School in 2001, selected to attend the USAFA AM-490 jump school in 2002, and selected as Airman of the Year for the 611 CES Squadron in 2003. Def. Ex. B at 2. Not only that, but he deployed five times over the course of his career. Def. Ex. B at 1. During Maj Emerson's deployment career, he was awarded scholarships, won numerous awards and received other accolades. Def. Ex. B at 3-6.

While the crimes alleged in Charge I are serious and Specification 2 of Charge I occurred during Maj Emerson's fifth deployment, he admitted to his actions as soon as he was detained. He

[7] The Government did not locate Maj Emerson's EPRs, but the military judge inferred that they were positive. R. at 159-61.

took responsibility and followed through with steps to address his porn addiction at that point. Further mitigating his offenses, Maj Emerson did identify he had a porn addiction back in at least 2016 and tried to get treatment, but was turned away. This was before the charged timeframe. He was refused a referral and not given help. Given his deep seated concern over the stigma of mental health stemming back to even his initial enlistment in 1997, Maj Emerson had concerns of losing his career if he pushed too hard to receive mental health treatment. Regretably, he was slow to find the right help after being turned away over and over again. This is not an excuse, but it is mitigating (*see* Issue IV *infra*). Maj Emerson was scared and felt trapped especially given the context of his porn addiciton that led to the crimes he pleaded guilty to. Importantly, after he was apprehended and admitted to viewing child pornography, Maj Emerson was finally referred off-base to a provider with specialized experience in the mental health issues he faced. Def. Ex. B at 7. He continued that treatment as well.

On the basis of the entire record, three months confinement each for two specifications of violating a lawful general order is inappropriately severe when Maj Emerson was also sentenced for possessing child pornography while deployed in Specification 2 of Charge I. The confinement sentence is also inappropriately severe in light of the fact that both specifications address a single continuing course of conduct, as explained in Issue I above.

WHEREFORE, Maj Emerson respectfully requests this Honorable Court approve only three months' confinement for Charge II if this Court does not merge the specifications as requested above.

III.

THE PORTION OF MAJ EMERSON'S PLEA AGREEMENT WHICH PROVIDES THAT DISMISSAL OF CERTAIN CHARGES AND SPECIFICATIONS WOULD ONLY RIPEN INTO DISMISSAL WITH PREJUDICE "UPON COMPLETION OF APPELLATE REVIEW UPHOLDING [MAJ EMERSON'S] CONVICTION OF THE OTHER SPECIFICATIONS" IS VOID OR OTHERWISE UNENFORCEABLE.

Standard of Review

Whether a condition of a plea agreement impermissibly deprives an accused of the complete and effective exercise of post-trial and appellate rights in violation of R.C.M. 705(c)(1)(B) is a question of law reviewed de novo. *See United States v. Tate*, 64 M.J. 269, 271 (C.A.A.F. 2007).

Law

Article 66(d), UCMJ, provides that in any case in which a Court of CCA has jurisdiction to consider an accused's timely appeal of his court-martial conviction, "[t]he Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d)(1). "Thus, the Uniform Code provides for an automatic review which is unparalleled elsewhere." *United States v. Mills*, 12 M.J. 1, 4 (C.M.A. 1981). "A complete Article 66, UCMJ, review is a 'substantial right' of an accused, and a CCA may not rely on only selected portions of a record or allegations of error alone." *Chin*, 75 M.J. at 222 (internal citation omitted). This scope of review is significantly different "from direct review in the civilian federal appellate courts." *Id*. at 222-23 (internal quotations omitted).

Thus, while an appellant may be prevented from raising an issue on appeal by operation of a "waive all waivable motions" provision in his plea agreement, he *cannot* "waive a CCA's statutory mandate unless . . . [he] waives the right to appellate review altogether—and that election

cannot be made until after the trial and sentencing." *Id*. at 223. "If an appellant elects to proceed with Article 66, UCMJ, review, as in this case, then the CCA is commanded *by statute* to review the entire record and approve only that which 'should be approved.'" *Id*. (emphasis in original). To that end, and as both the United States Supreme Court and the CMA have recognized, even if an appellant has no *constitutional* right to an appeal in the first instance, once that right is conferred upon him by *statute*, then this statutory right of appeal must still conform to the demands of due process and equal protection. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985).

R.C.M. 1115(c) provides that "[n]o person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw from appellate review." As both the CMA and the Navy-Marine Corps Court of Military Review recognized, "[t]he rules of the marketplace . . . are not permitted to operate unregulated in the military justice system. Despite the mutual assent of the parties, the propriety of a particular pretrial agreement provision and its operation in the case must be assessed in view of the basic tenets of the military justice system." *United States v. Cassity*, 36 M.J. 759, 762 (N.M. C.M.R. 1992) (citing *United States v. Dawson*, 10 M.J. 142, 144-45 (C.M.A. 1981)).

The presence of an impermissible term in a plea agreement is not necessarily fatal to the result of the court-martial. *See Tate*, 64 M.J. at 272. Where a term or condition of a plea agreement is impermissible and thus unenforceable, courts may determine whether the presence of the unenforceable term renders the entire plea agreement void. *See United States v. Holland*, 1 M.J. 58, 60 (C.M.A. 1975) (concluding the presence of an unenforceable term in a plea agreement required the voiding of the agreement and the authorization of a rehearing); *United States v. McLaughlin*, 50 M.J. 217, 218-19 (C.A.A.F. 1999) (concluding an impermissible term may be

treated as null without vitiating the remainder of the agreement) *and Tate*, 64 M.J. at 272 (concluding that impermissible terms may be stricken from a pretrial agreement without impairing the balance of the agreement and the accused's plea).

Analysis

A plea agreement term that conditions prejudice attaching to the withdrawn and dismissed specifications only if the other convictions are upheld on appellate review is unenforceable. The clause in Maj Emerson's plea agreement specifically states that the convening authority agrees to, through trial counsel, withdraw and dismiss Specifications 3 and 4 of Charge I in exchange for Maj Emerson pleading guilty to the other specifications and to Charge II and its specifications. App. Ex. XXIII at 2. However, the clause goes on to caveat that term with prejudice attaching "upon completion of appellate review upholding [Maj Emerson's] conviction of the other specifications." *Id.* Ergo, should any appellate court find any of the other specifications improvident and set one aside, the other specifications could breathe new life. Such a condition violates R.C.M. 705(c)(1)(B) and implicates R.C.M. 1115(c). To find otherwise leaves Maj Emerson with the choice of raising issues such as Issues I and II above and risking the Government re-preferring Specifications 3 and 4 of Charge I or not raising any issues.

However, Article 66, UCMJ, affords Appellant a "substantial right" he could not waive—even if he *wanted to*—prior to being sentenced. *Chin*, 75 M.J. at 222-23. No one is permitted to "compel, coerce, or induce an accused by force, promises of clemency, *or otherwise* to waive or withdraw from" this substantial right. *See* R.C.M. 1115(c) (emphasis added). The *MCM* likewise provides that a term or condition in a plea agreement which deprives the accused of the right to "the complete *and effective* exercise of post-trial and appellate rights" shall not be enforced. R.C.M. 705(c)(1)(B) (emphasis added). This Court's unique statutory charge compels it to review

Maj Emerson's case for legal and factual error and only uphold so much of the findings and sentence as are correct in both law and fact, *regardless* of whether Maj Emerson brings such errors to the Court's attention personally or through counsel. *Cf. United States v. Martinez*, No. ACM 39903 (f rev), 2022 CCA LEXIS 324, at *3-4 (A.F. Ct. Crim. App. 31 May 2022) (providing relief on a basis not articulated by the appellant on appeal). Under our unique appellate system, this Court conducts its own review of his case and will grant review when relief is warranted. Therefore, absent withdrawing his case from appellate review, Maj Emerson cannot stop this Court from abiding by its congressionally-mandated duties under Article 66, UCMJ.

While not controlling precedent, this Court addressed this issue in its unpublished opinion *United States v. Goldsmith*.[8] This Court's analysis was heavily premised on the position that *United States v. Partin*[9] did not "carr[y] as much legal force as [a]ppellant claims" due to the panel's perspective that the CMA had "seemingly distanced itself from the language [in *Partin*] just two years later in *United States v. Mills*"[10] and "the *Partin* [C]ourt upheld the agreement." *Goldsmith*, unpub. op. at *8, *10. However, the *Mills* case is distinguishable from both the military judge's misinterpretation of the pretrial agreement and the legal effect of the actual pretrial agreement in *Partin*. In *Mills*, the CMA set aside the sentence and authorized a rehearing in appellant's case due to improper comments by trial counsel in presentencing. *Mills*, 12 M.J. at 2. While waiting for his rehearing, the appellant, through counsel, presented an "Offer to Stipulate" to the convening authority, essentially agreeing to "waive[] his right to call certain witnesses in extenuation and mitigation" and agreeing to "stipulate to their expected testimony." *Id.* The convening authority would, in exchange, remit any confinement beyond 15 months, effectively

[8] No. ACM 40148, 2023 CCA LEXIS 8 (A.F. Ct. Crim. App. 11 Jan. 2023) (unpub. op.).
[9] 7 M.J. 409 (C.M.A. 1979).
[10] 12 M.J. 1 (C.M.A. 1981).

meaning the appellant would not have to serve any more confinement than he already had. *Id.* One condition of the agreement was that if a rehearing was again directed, the agreement would be void. *Id.*

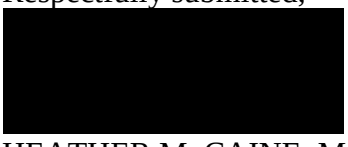
While noting Congress's care and concern for full appellate review of courts-martial convictions, the CMA stated it "cannot approve an agreement between an accused and the convening authority which would tend to inhibit the exercise of appellate rights." *Mills*, 12 M.J. at 4. The CMA, using a "restrictive interpretation" of the pretrial agreement found its "clear purpose" was "to assure that, in the event of a further rehearing, Mills would not be free to demand the personal attendance of witnesses in extenuation and mitigation and yet have the benefit of a 15-month ceiling on his sentence to confinement." *Mills*, 12 M.J. at 5. The CMA rationalized that even if a rehearing was directed a second time, appellant would still have the option of the benefit of his agreement as long as he saved the Government time and money by stipulating to testimony (as he had previously stipulated) instead of calling live witnesses. *Id.* Only then did the CMA find the agreement enforceable since it did not have the tendency to deter appellant from asserting his appellate rights. *Id.*

Here, the term in Maj Emerson's case has a tendency to deter the assertion of Maj Emerson's own appellate rights as explained above. In *Mills*, the appellant still held the power to maintain the benefit of his bargain. That is true because that appellant could still exercise his appellate rights in raising issues that may have a tendency to result in a rehearing, and could still agree to stipulated testimony. While the term did not prevent Maj Emerson from raising Issues I and II above, he should not have to incur such a severe risk to avail himself of his statutory right to an appeal.

Further, in *Partin*, the military judge misapprehended the term in the pretrial agreement which said that if the plea of guilty to the lesser included offense (LIO) was changed by anyone, the original charge may be reinstituted by the convening authority (*Partin*, 7 M.J. at 411), and incorrectly advised the appellant that if the finding of guilt on the LIO was overturned on appeal that the appellant could be tried on the original charge. *Partin*, 7 M.J. at 412. It was that misinterpretation which led the *Partin* Court to dictate that if the actual term in the pretrial agreement was as the military judge believed, the term very may well have imposed an impermissible burden on the appellant's appellate rights. *Id.* The pretrial agreement was upheld because the *Partin* Court held that interpretation of the term by the military judge had no legal effect since it was not part of the actual agreement—as in, the term the *Partin* Court would not have condoned was not actually part of the agreement they upheld. *Id.* Here, there is no allegation the military judge misapprehended the term. Instead, this case at its core involves an agreement between an accused and the convening authority that has a "tend[ency] to inhibit the exercise of appellate rights" and should not be approved especially in light of Congress's concern that courts-martial convictions receive full appellate review. *Mills*, 12 M.J. at 4. As such, Maj Emerson respectfully asks this Court to sever the problematic term—the language "upholding my conviction of the other specifications." *See McLaughlin*, 50 M.J. at 218-19; *Tate*, 64 M.J. at 272.

WHEREFORE, Maj Emerson respectfully requests that this Honorable Court provide the above-described relief.

Respectfully submitted,

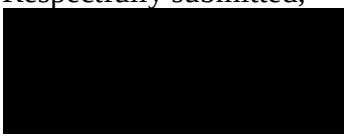


HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 July 2023.

Respectfully submitted,



HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

APPENDIX A

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

IV.

TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

Additional Facts

Maj Emerson told his trial defense counsel that he had attempted to get treatment for porn addiction since at least early 2016. Motion to Attach, at Appendix B, *Declaration of Maj Emerson* [Declaration], dated 7 July 2023. After looking at his mental health records, Maj Emerson saw his first appointment was actually 9 November 2015. *Id.* Maj Emerson attempted to get treatment for porn addiction prior to first viewing child pornography. *Id.* When Maj Emerson sought treatment, he was informed "there was no treatment available to him, because porn addiction was not listed in the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM-5)." *Id.* He was also "refused a referral for off-base treatment with a professional who did have the capability of treating" him for porn addiction. *Id.* Maj Emerson also tried calling TRICARE to see if he could get a referral through them directly, but was also denied treatment. *Id.*

Maj Emerson asked his trial defense counsel if information regarding him seeking treatment for porn addiction would be helpful. *Id.* He offered to retrieve the mental health records documenting his requests for treatment and having been denied a referral. *Id.* Maj Emerson's trial defense counsel kept telling him "to wait and that [they] would discuss it again later." *Id.* Maj Emerson started seeing Dr. R.D. since 2021 for treatment. *Id.* Maj Emerson's trial defense counsel was aware of this fact and had even spoken with Dr. R.D. prior to Maj Emerson's trail. *Id.*

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021).

Law

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend VI. The Supreme Court has held that this "right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted). An attorney can "deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance." *Id*. To prevail on a claim of ineffective assistance of counsel, an appellant must show two things: (1) that the performance of defense counsel was deficient and (2) that the appellant was prejudiced by the error. *Id*. at 698–99.

To establish deficient performance, an accused must show "that counsel's representation fell below an objective standard of reasonableness." *Id*. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id*. at 690. Reviewing courts must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance, and thus, an accused must overcome a presumption that the challenged action, "might be considered sound trial strategy." *Id*. at 689.

However, "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (citing *Strickland*, 466 U.S. at 690–

91). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citation omitted). The Supreme Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)). "At the sentencing phase, ineffective assistance may occur if trial defense counsel either 'fails to investigate adequately the possibility of evidence that would be of value to the accused in presenting a case in extenuation and mitigation or, having discovered such evidence, neglects to introduce that evidence before the court-martial.'" *Scott*, 81 M.J. at 84 (citing *United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F. 1998)).

To establish prejudice, an accused must demonstrate "a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). "Prejudice may occur at the sentencing phase, even when trial defense counsel presents several character witnesses, if there is a reasonable probability that there would have been a different result if all available mitigating evidence had been exploited by the defense." *Scott*, 81 M.J. at 84–85 (internal citation omitted).

"In the guilty plea context, the first part of the *Strickland* test remains the same—whether counsel's performance fell below a standard of objective reasonableness expected of all attorneys." *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012) (citing *Hill v. Lockhart*, 474 U.S. 52, 56-58 (1985). The second prong—prejudice—"is modified to focus on whether the 'ineffective performance affected the outcome of the plea process." *Id.*

Analysis

Maj Emerson's trial defense counsel were ineffective for failing to adequately investigate evidence of Maj Emerson seeking mental health treatment for his porn addiction back in 2016 and yet being turned away by the military and refused a referral off-base. This evidence could have been offered in presentencing as mitigation evidence and argued by trial defense counsel during the sentencing argument. This deficiency denied Maj Emerson effective assistance of counsel and merits setting aside his sentence.

Trial defense counsel was aware of Maj Emerson's attempts to receive treatment for his porn addiction from early 2016 on. Def. Ex. B at 7. Trial defense counsel was also aware of Maj Emerson being turned away and refused a referral only to receive treatment after being detained on the suspicion of possession of child pornography, evidenced by the fact that Maj Emerson referenced such in his unsworn statement. Def. Ex. B. However, trial defense counsel made no effort to retrieve or present any documentary or testimonial evidence of Maj Emerson's attempts to receive treatment to the convening authority or the military judge.

Trial defense counsel had a duty to investigate whether Maj Emerson's attempts to get treatment for the porn addiction that led to his later possessing child pornography, but being refused treatment—or even a referral to someone off-base who could provide such treatment no less—mitigated the charged offenses. One reasonable step to conduct such an investigation would have been to ask Maj Emerson for copies of his medical and mental health records. At a minimum, one reasonable step would have been to accept the records from Maj Emerson who was readily willing to retrieve them and even asked his trial defense counsel about it more than once. Declaration. They would have learned that Maj Emerson actually sought treatment as early as 9

November 2015. *Id.* There is no reasonable explanation why trial defense counsel could not have performed this simple investigative step.

Additionally, trial defense counsel was aware that Maj Emerson had been seeing Dr. F.P. since October 2020. Trial defense counsel also knew Maj Emerson had started seeing Dr. R.D. since 2021 given that trial defense counsel had even spoken to Dr. R.D. prior to trial. The fact that trial defense counsel did not present testimony from Dr. F.P. or Dr. R.D. or attempt to get a written statement from either of them falls well below the objective standard of reasonableness. The only account of these mitigating circumstances came from Maj Emerson's unsworn statements. *See* Def. Ex. B; R. at 227-31.

This lack of investigation prejudiced Maj Emerson. Investigation into Maj Emerson's attempts to receive treatment would have shown that he was suffering mentally from his addiction to porn well before the charged timeframe and the timeframe which he admitted to first accessing child pornography, mitigating his conduct under both charges. Had this mitigating evidence been presented to the convening authority during the negotiation of the plea agreement, Maj Emerson may have avoided a plea agreement requiring him to plead guilty to an additional charge and two specifications of violating a lawful general order for the very same conduct underlying Specification 2 of Charge I and other conduct for which he had attempted to get treatment for. There is a reasonable probability that had this information been investigated and presented to the convening authority and the military judge, Maj Emerson may have received a lower sentence. Because trial defense counsel did not exploit this mitigating evidence, Maj Emerson suffered prejudice.

WHEREFORE, Maj Emerson respectfully requests that this Honorable Court set aside his sentence.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON** United States Air Force *Appellant*	)	No. ACM 40297 7 July 2023

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

Pursuant to Rule 23(b) of this Honorable Court's Rules of Practice and Procedure, Appellant, Maj Everett W. Emerson, hereby moves to attach the following document to the Record of Trial:

1. Declaration of Maj Everett W. Emerson, dated 7 July 2023, 1 page (Appendix)

The attached document is the sworn declaration of Maj Everett W. Emerson. He provides this declaration in support of his argument relating to Assignment of Error IV. Specifically, Maj Emerson's declaration is relevant to this Court's consideration of Assignment of Error IV because Maj Emerson's declaration provides additional support for his assertion that he was not provided effective assistance of counsel. It is also necessary because it provides an essential factual predicate for determining Maj Emerson did, in fact, inform his trial defense counsel of his attempt to receive treatment for his porn addiction prior to viewing child pornography. Maj Emerson's declaration expounds upon the steps he took in attempt to receive treatment and his offer to retrieve mental health records to provide to his trial defense counsel in an attempt to assist in his case. Therefore, his declaration is relevant and necessary to this Court's consideration of whether he was provided effective assistance of counsel concerning Issue IV.

In *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020), the Court of Appeals for the Armed Forces continued the practice of allowing consideration of matters outside the record to resolve issues reasonably raised by materials in the record but not fully resolvable by those materials. Ineffective assistance of counsel is explicitly recognized in *Jessie* as an exception to the general rule prohibiting extra-judicial declarations on appeal. 79 M.J. at 442. The failure of trial defense counsel to adequately investigate and provide evidence of Maj Emerson's attempt to receive treatment for his porn addiction prior to the charged timeframe is reasonably raised by materials in Maj Emerson's record, but not fully resolvable from the materials in the record.

WHEREFORE, Maj Emerson respectfully requests this motion be granted.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[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 7 July 2023.

Respectfully submitted,

[redacted]
HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON** United States Air Force *Appellant.*	)	No. ACM 40297 21 July 2023

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests that it be given 14 days after this Court's receipt of a declaration or affidavit from trial defense counsel to submit its answer so that it may incorporate statements provided by Appellant's trial defense counsel in response to the specified ineffective assistance of counsel issue. This case was docketed with the Court on 8 July 2022 and Appellant filed his brief on 7 July 2023. Since docketing, Appellant has been granted ten enlargements of time. This is the United States' first request for an enlargement of time, and it is for the purpose of being able to appropriately respond to Appellant's claim of error. As of the date of this request, 378 days have elapsed.

There is good cause for the enlargement of time in this case. Appellant has raised an assignment of error in which he claims his trial defense counsel were ineffective. The United States cannot prepare its answer to the allegations of ineffective assistance of counsel without a statement from trial defense counsel. An enlargement of time is necessary to ensure trial defense counsel have time to review the allegations before they draft and submit their statements to the Court, and to give the United States sufficient time to incorporate trial defense counsels'

statements into its answer. The additional time will permit counsel to incorporate the changes and accommodate for the drafting and supervisory review before the United States files its answer. Furthermore, undersigned counsel is a Reservist whose annual tour ends today. This case will be reassigned, likely to a new counsel arriving into the JAJG office. This enlargement of time will allow new counsel time to thoroughly review the case and prepare a responsive brief.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

[redacted]F
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 21 July 2023.

JOSHUA M. AUSTIN, Maj, USAF
Appellate Government Counsel
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,*	)	**UNITED STATES' MOTION TO COMPEL DECLARATIONS**
v.	)	Before Panel No. 2
Major (O-4) **EVERETT W. EMERSON** United States Air Force *Appellant.*	)	No. ACM 40297 21 July 2023

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court compel each of Appellant's trial defense counsel, Maj Matthew Snell and Maj Alexander Perkins, to provide an affidavit or declaration in response to Appellant's allegations of ineffective assistance of counsel (IAC). In his fourth assignment of error filed under United States v. Grostefon, 12 M.J. 431 (C.M.A.1982), Appellant claims, "trial defense counsel were ineffective for failing to adequately investigate evidence of [Appellant] seeking mental health treatment for his porn addiction back in 2016 and yet being turned away by the military and refused a referral off base. This evidence could have been offered in presentencing as mitigation evidence and argued by trial defense counsel during the sentencing argument." (App. Br. at 27.)

On 17 July 2023, Appellant's trial defense counsel responded to undersigned counsel stating that they would only provide an affidavit or declaration pursuant to an order from this Court. To prepare an answer under the test set out in United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991), the United States requests that this Court compel trial defense counsel to provide an affidavit or declaration. Appellant is alleging his trial defense counsel failed to adequately

investigate evidence of Appellant seeking mental health treatment for his pornography addiction, but no strategic inputs about this decision was provided. Only trial defense counsel can explain the context of this decision.

A statement from Appellant's counsel is necessary because the record is insufficient to determine the strategy trial defense counsel used in presenting mitigation. Thus, the United States requires statements from both trial defense counsel to adequately respond to Appellant's brief. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from both trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

Accordingly, the United States respectfully requests this Court order each trial defense counsel to provide a declaration, containing specific and factual responses to Appellant's allegations of ineffective assistance of counsel, within 30 days of this Court's order.

[redacted]

JOSHUA M. AUSTIN, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 21 July 2023.

JOSHUA M. AUSTIN, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40297**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Everett W. EMERSON	)	
Major (O-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 7 July 2023, Appellant personally raised an issue in which he claims his "trial defense counsel were ineffective for failing to adequately investigate evidence of [Appellant] seeking mental health treatment for his porn addiction back in 2016 and yet being turned away by the military and refused a referral off-base." Appellant further argues "[t]his evidence could have been offered in presentencing as mitigation evidence and argued by trial defense counsel during the sentencing argument."

On 21 July 2023, the Government filed a Motion to Compel Declarations and contemporaneously filed a Motion for Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel, Major (Maj) Matthew Snell and Maj Alexander Perk, to provide an affidavit or declaration in response to the claimed ineffective assistance of counsel. According to the Government, Appellant's trial defense counsel indicated they would only provide an affidavit or declaration upon order by this court. In the Motion for Enlargement of Time, the Government requests 14 days to submit its answer after the court's receipt of a declaration or affidavit from trial defense counsel. Appellant did not respond to either motion.

The court has examined the claimed deficiencies and finds good cause to compel a response from Appellant's trial defense counsel with regards to Appellant's claims. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and trial defense counsel. Moreover, in light of the court's order granting the Government's Motion to Compel Declarations, it finds good cause to grant the Government's requested enlargement.

Accordingly, it is by the court on this 2d day of August, 2023,

ORDERED:

The Government's Motion to Compel Declarations is **GRANTED**. Maj Matthew Snell and Maj Alexander Perk are ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claim that trial defense counsel were ineffective.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **30 August 2023**. The Government shall also deliver a copy of the responsive affidavits or declarations to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **13 September 2023**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40297**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Everett W. EMERSON	)	
Major (O-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 24th day of August, 2023,

ORDERED:

The Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
BREEN, DANIEL J., Lieutenant Colonel, Appellate Military Judge
DOUGLAS, KRISTINE M., 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*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Special Panel
Major (O-4) **EVERETT W. EMERSON** United States Air Force *Appellant*	)	No. ACM 40297 30 August 2023

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to this motion:

- Appendix A – Declaration of Maj Matthew Snell, dated 29 August 2023 (48 pages total)
- Appendix B – Declaration of Maj Alexander Perkins, dated 25 August 2023 (2 pages total)

The attached declarations are responsive to this Court's order directing Maj Matthew Snell and Maj Alexander Perkins to provide declarations responsive to Appellant's Assignment of Error concerning whether he received ineffective assistance of counsel. (Court Order, dated 2 August 2023.)

Our Superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Accordingly, the attached documents are relevant and necessary to address this Court's order and Appellant's Assignment of Error.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Documents.

[redacted]
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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 30 August 2023.

[redacted]

TYLER L. WASHBURN, Capt, USAF
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13 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) **EVERETT W. EMERSON**, USAF, *Appellant.*	))))))))	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR No. ACM 40297 Special Panel

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

ISSUES PRESENTED

I.

WHETHER THE FINDING OF GUILTY TO SPECIFICATION 2 OF CHARGE II SHOULD BE SET ASIDE AND DISMISSED BECAUSE IT IS UNREASONABLY MULTIPLIED WITH SPECIFICATION 1 OF CHARGE II?

II.

WHETHER THE SEGMENTED SENTENCES FOR SPECIFICATION 1 AND 2 OF CHARGE II ARE INAPPROPRIATELY SEVERE?

III.

WHETHER THE PORTION OF [APPELLANT'S] PLEA AGREEMENT WHICH PROVIDES THAT DISMISSAL OF CERTAIN CHARGES AND SPECIFICATIONS WOULD ONLY RIPEN INTO DISMISSAL WITH PREJUDICE "UPON COMPLETION OF APPELLATE REVIEW UPHOLDING [MAJ EMERSON'S] CONVICTION OF THE OTHER SPECIFICATIONS" IS VOID OR OTHERWISE UNENFORCEABLE?

IV.

WHETHER TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL?[1]

[1] Issue is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF THE CASE

On 25 May 2021, the convening authority referred the following charges and specifications against Appellant: one charge and four specifications of wrongful possession/distribution of child pornography, in violation of Article 134, UCMJ, and one charge and two specifications of violation of a lawful general order, in violation of Article 92, UCMJ. (*Charge Sheet*, 25 May 2021, ROT, Vol. 1.)

STATEMENT OF FACTS

Pursuant to a plea agreement, Appellant pleaded guilty to two specifications of possession of child pornography, in violation of Article 134, UCMJ, and two specifications of violation of a lawful general order, in violation of Article 92, UCMJ. (*Entry of Judgment*, 19 May 2022, ROT, Vol. 1.) Specifications 3 and 4 of Charge I were withdrawn and dismissed without prejudice consistent with his plea agreement. (*Charge Sheet*, 25 May 2021, ROT, Vol. 1.) The withdrawal without prejudice would ripen into prejudice, consistent with the plea agreement upon completion of appellate review, upholding Appellant's conviction to the other specifications. (App. Ex. XXIII at 2.) Appellant was sentenced to a dismissal and 30 total months confinement. (*Charge Sheet*, 25 May 2021, ROT, Vol. 1.)) The plea agreement included a waive all waivable motions provision and contained an election to be tried and sentenced by military judge alone. (App. Ex. XXIII at 1.) In exchange for his plea of guilty, the convening authority agreed to the following limitations on sentencing: for each specification of possession of child pornography under Charge I, no less than four months confinement and no more than 15 months confinement for each respective specification; for each violation of a lawful general order under Charge II, no less than two months confinement, but no more than nine months confinement; the periods of confinement

were required to run consecutively; and the military judge could not impose forfeitures of pay. (Id. at 2).

Appellant admitted that both in the United States and while he was deployed at Ali Al Salem Air Base, Kuwait, he possessed multiple images of child pornography. (Pros. Ex. 1) Appellant's possession of child pornography ranged from on or about January 2017 to October 2020. (Id. at 7-8.) Appellant also admitted that he violated two separate general orders by possessing child pornography while deployed to Ali Al Salem Air Base, Kuwait. (Id.) Specifically, Appellant violated United States Central Command's General Order Numbers 1C and 1D. (*Charge Sheet*, 25 May 2021, ROT, Vol. 1.) General Order Number 1C was issued 21 May 2013 and signed by General Lloyd J. Austin, U.S. Army. (Pros. Ex. 1 at 10-18). General Order Number 1D superseded General Order Number 1C on 26 June 2020 and was signed by General Kenneth F. McKenzie, U.S. Marines. (Pros. Ex. 1 at 19-30). Both orders, pertaining to the expectations in the deployed environment, specifically prohibit the possession of pornography generally, as well as possession of any photographic or video image which, under the circumstances, are prejudicial to good order and discipline or service discrediting. (Pros. Ex. 1 at 10-30.)

Prior to his plea agreement, Appellant faced a potential of 54 years in confinement. MCM, pt IV, 93.d.(1,3) (2019 ed.); MCM, pt IV, 18.d.(1).

Relevant additional facts will be addressed within each response to Appellant's assignments of error.

ARGUMENT

I.

APPELLANT AFFIRMATIVELY WAIVED ANY MOTION FOR UNREASONABLE MULTIPLICATION OF CHARGES.

Additional Facts

Trial defense counsel filed a motion to dismiss Specification 2 of Charge II or merge Specification 1 and 2 of Charge II due to unreasonable multiplication of charges. (App. Ex. XII). Trial defense counsel and trial government counsel argued the motion before the military judge. (R. at 153-157.) The military judge never issued a written ruling for the motion. (R. at 159.)

Appellant entered into a voluntary plea agreement with the government. (R. at 212-213.) Paragraph 4(a) of Appellant's plea agreement provided that in exchange for his guilty plea and other matters elsewhere in the agreement, the convening authority would withdraw and dismiss, without prejudice, Charge I, Specifications 3 and 4. (App. Ex. XXIII. at 2). The agreement stated prejudice would attach to the dismissed charges "upon completion of appellate review upholding [Appellant's] conviction of the other specifications. (Id.)

Paragraph 2(c) of Appellant's plea agreement was a "waive all waivable motions" provision. (Id. at 1). Appellant's plea agreement also stated that he offered "to plead guilty because it will be in my best interest in accordance with the conditions stated herein," and that "[n]o person or person made any attempt to force or coerce me into making this offer or to plead guilty." (Id. at 3).

At trial, the military judge discussed the meaning and effect of Appellant's plea agreement with him. (R. at 202-214). The military judge confirmed that Appellant understood his plea agreement and that no one forced him to enter it in any way. (R. at 214). The military judge also confirmed Appellant had time to discuss his plea agreement with his defense counsel

and that their advice concerning the plea agreement was in his best interest. (R. at 213). The military judge then discussed the convening authority's obligation to dismiss a charge and specification with prejudice upon completion of appellate review upholding Appellant's conviction of the offenses to which he pled guilty:

> MJ: Now your plea agreement also states that the convening authority has directed trial counsel to move to withdraw and dismiss Specifications 3 and 4 of Charge I after I accept your plea of guilty. The plea agreement indicates that the prejudice will attach upon successful completion of the appellate review in your case. So in other words, if I accept your plea of guilty, the government will move to withdraw [sic] dismiss, and then once he [sic] appellate review is complete ad the conviction is upheld, prejudice will attach, and so the government will not prosecute those two specifications which you pled not guilty. Do you understand?
>
> Appellant: Yes I do, Your Honor.
>
> MJ: However, if for some reason your plea of guilty at any time becomes unacceptable, trial counsel would be free to proceed on the specifications. Do you understand that?
>
> Appellant: Yes, Your Honor.

(R. at 208).

Trial defense counsel stated the waive all waivable motions provision originated from them. (R. at 204). But there was no further discussion on the record about which party originated any other terms of the plea agreement.

The military judge confirmed with Appellant he understood the nature of the waive all waivable motions provision of his plea agreement prior to accepting the guilty plea:

> MJ: Your plea agreement states that you waive, or give up, the right to all waivable motions. I advise you that certain motions are waived, or given up, if your defense counsel does not make the motion prior to entering plea. Some motions, however, such as motions to dismiss for a lack of jurisdiction, for example, can never be given up. Do you understand this term of your plea agreement means that you give up the right to make any motion which by law is given up when you plead guilty?

> ACC: Yes, Your Honor.
>
> MJ: In particular, do you understand that this term of your agreement may preclude this court or any appellate court from having the opportunity to determine if you are entitled to any relief based upon these motion? [sic]
>
> ACC: Yes, Your Honor.
>
> MJ: When you elected to give up the right to litigate these motion [sic], did your defense counsel explain this term of your agreement and the consequences to you?
>
> ACC: Yes they did, Your Honor.

(R. at 203-204.)

During the plea inquiry, the military judge specifically addressed the implications of Appellant waiving the previously filed motion to dismiss for unreasonable multiplication of charges:

> MJ: Another motion that was made was a motion to dismiss for unreasonable multiplication of charges. This related to the Specifications in Charge II. So what your counsel initially sought to do was dismiss Specification 2 of Charge II, or emerging [sic] with Specification 1 of Charge II. So in this case that could have been dismissed, and that specification maybe would have reversed and kind of combined the two into one specification; or even if I didn't find [sic] to be an unreasonable multiplication of charges for purposes of findings, maybe in sentencing I would have, you know, however I would have posed a sentence I could have made those sentences run concurrently as opposed to consecutively. So those are just some possibilities that existed there. Do you understand that?
>
> ACC: Yes, Your Honor.

(R. at 206.)

Standard of Review

"Whether an appellant has waived an objection is a legal question that this Court reviews *de novo*." United States v. Gudmundson, 57 M.J. 493, 495 (C.A.A.F. 2002). Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020) (citation

and internal quotation marks omitted). The standard of review for forfeiture is plain error. United States v. Rich, 79 M.J. 472, 475-76 (C.A.A.F. 2020). "The plain error standard is met when (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008).

Law

"Waiver can occur either by a party's intentional relinquishment or abandonment of a known right or by operation of law." United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018) (internal citations omitted). An accused may intentionally abandon a waivable objection in a plea agreement by including a clause waiving all waivable motions. *See* United States v. Danylo, 73 M.J. 183, 188 (C.A.A.F. 2014) (holding that such a waive all waivable motions clause in a pretrial agreement waived a claim for sentencing credit.). An affirmative statement that an accused at trial has "no objection" generally "constitutes an affirmative waiver of the right or admission at issue." United States v. Swift, 76 M.J. 210, 217 (C.A.A.F. 2017) (citation omitted).

Analysis

A. Appellant's unequivocally waived any motion to dismiss for unreasonable multiplication of charges with his affirmative statements and per the terms of his plea agreement.

Appellant waived his motion for unreasonable multiplication of charges three times on the record. (App. Ex. XXII at 1, R. at 203-204, 207.)

Appellant agreed to waive all waivable motions in his plea agreement. (App. Ex. XXIII at 1.) Unreasonable multiplication of charges is a waivable motion. R.C.M. 905(e)(1); R.C. M. 906(b)(12). Appellant intentionally abandoned a waivable objection—a motion for unreasonable multiplication of charges—in his plea agreement by including a clause waiving all waivable motions. (App. Ex. XXIII at 1.) *See* Danylo, 73 M.J. at 188 (holding that such a waive all waivable motions clause in a

pretrial agreement waived a claim for sentencing credit.).

The second waiver occurred during the plea agreement inquiry, when the military judge discussed the factual basis of any waived motions with Appellant. (R. at 203-204). The military judge then discussed the motion to dismiss for unreasonable multiplication of charges that had previously been filed and argued, and the relief Appellant was giving up by agreeing to waive all waivable motions as a term of the plea agreement. (R. at 206.) Appellant affirmatively waived the issue for the third time when the military judge asked whether the Appellant still wished to give up making the motion in order to derive the benefit of the plea deal. (R. at 207.)

Appellant argues that the Court should pierce waiver because the two offenses constitute one transaction. (App. Br. at 9-10). The government disagrees. As explained below, the Quiroz, factors are not met, and Appellant does not point to any evidence that merits piercing waiver. Appellant unequivocally waived the motion three times, and he received the benefit of his plea agreement. Appellant should not be allowed to reap the significant benefits of his plea deal and now get additional relief on appeal. The issue has been sufficiently waived, and Appellant is not entitled to relief.

B. Even if this Court chooses to pierce waiver, the two specifications of Charge I do not constitute unreasonable multiplication of charges.

Rule for Court-Martial 307(c)(4) provides that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Unreasonable multiplication of charges concerns "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." United States v. Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001). A five-part test determines whether the prosecution has unreasonably multiplied charges:

> (1) Did the Accused object at trial to an unreasonable multiplication of charges or specifications?

> (2) Does each charge and specification address distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the Appellant's criminality?
>
> (4) Does the number of charges and specifications unfairly increase the appellant's punitive exposure?
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Id. at 338.

Appellant argues, "consideration of the Quiroz factors demonstrates Specification 1 and 2 of Charge II were unreasonably multiplied. It does not. Appellant's argument for unreasonable multiplication of charges does not prevail under the Quiroz test.

First, while Appellant did file a motion to dismiss for unreasonable multiplication of charges, Appellant subsequently waived that motion pursuant to the waive all waivable motions provision of his plea agreement. (App. Ex. XXIII at 1.) Further, when the military judge discussed in significant detail the implications of waiving Appellant's Motion to Dismiss for unreasonable multiplication of charges, Appellant acknowledged he understood and once again knowingly and voluntarily abandoned the issue. (R. at 206.)

Second, each charge and specification addressed distinctly separate criminal acts. Specification 1 of Charge II, pertains to the violation of United States Central Command's General Order Number 1C, dated 21 May 2013. (*Charge Sheet*, 25 May 2021, ROT, Vol. 1.) The applicable charged time frame for Specification 1 of Charge II was between on or about 1 March 2020 and on or about 25 June 2020. (Id.) General Order Number 1C was subsequently superseded by United States Central Command's General Order Number 1D, dated 26 June 2020. (Id.) The charged time frame for Specification 2 of Charge II was between on or about 26 June 2020 and on or about 7 October 2020. (*Charge Sheet*, 25 May 2021, ROT, Vol. 1.) As

indicated in the Stipulation of Fact entered into by Appellant, the Appellant maintained possession of child pornography during each of the respective timeframes, thereby violating both General Order Numbers 1C and 1D, respectively. (Pros. Ex. 1.) Appellant violated two separate and distinct General Orders, and each violation was a distinctly separate criminal act.

Appellant claims identical facts were used to prove both specifications. (App. Br. at 11.) However, the court in Quiroz found that "offenses are separate if each offense requires proof of an element not required to prove the other." 55 M.J. at 334 (citing Blockburger v. United States, 284 U.S. 299 (1932)). The offenses in question required proof of separate facts not required to prove the other. Specifically, the government had to prove General Order Number 1C and 1D existed and were lawful, and had to prove their respective dates of issue, and their respective dates of applicability matched with the charged time period for each specification. Therefore, the government prevails on this factor.

Third, the number of charges and specifications do not misrepresent or exaggerate Appellant's criminality as Appellant claims. (App. Br. at 11.) Appellant's criminal exposure was exactly proportional to the crimes that he committed without exaggeration or misrepresentation. He violated two separate orders, which were effective at different periods of time and were issued by different authorities. (Pros. Ex. 1 at 11-30.) The government prevails on this factor.

Fourth, the number of charges and specifications do not unfairly increase Appellant's punitive exposure. Under his plea, Appellant agreed to a maximum of nine months of confinement for both Specification 1 and Specification 2 of Charge II, to run consecutively. (App. Ex. XXIII at 2.) The military judge sentenced Appellant to three months confinement for each specification, respectively, and the confinement ran consecutively for these two

specifications in accordance with the plea agreement. (*Entry of Judgment*, ROT, Vol. 1., Id.) For one specification of failure to obey a lawful general order, the maximum authorized punishment at a general court-martial was two years. MCM, pt IV, 18.d.(1) (2019 ed.) Even if Appellant had been charged with only one specification of failure to obey a lawful general order, the maximum punishment he would have faced would have been two years, which is substantially more than the 18 months he faced based on sentencing limitations within his plea agreement. The limitations under the plea agreement ensured that Appellant's punitive exposure was not unfairly increased. Appellant only received a total of six months confinement for his two offenses, again, substantially less than the two years he would have faced for just one of those specifications alone had there not been a sentencing limitation in place. Appellant presents no argument or evidence to show the sentence he received was *per se* unreasonable, or that an increased maximum punishment actually increased his punitive exposure *unfairly*. Appellant's punitive exposure was fair. The Appellant committed two separate crimes and received an appropriate sentence for each violation of the law. Thus, the fourth Quiroz factor favors the government.

Fifth, there is no evidence of prosecutorial overreach or abuse in the drafting of the charges. The government charged separate and distinct offenses based on two different orders, which required different proof for each offense. The government did not have any other choice if it wanted to charge Appellant for the full timeline of his misconduct. This factor favors the government.

Appellant unequivocally waived any unreasonable multiplication of charges claim by virtue of the waive all waivable motions provision in his plea agreement, as well as his affirmative waivers during the plea proceedings themselves. Even if this Court pierces waiver,

the Quiroz factors favor the government, and the charges were not unreasonably multiplied. This Court should deny this assignment of error.

II.

THE SEGMENTED SENTENCES FOR SPECIFICATION 1 AND 2 OF CHARGE II ARE NOT INAPPROPRIATELY SEVERE.

Standard of Review

This Court reviews sentence appropriateness *de novo*. United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (citation omitted). The Court may only affirm the sentence if it finds the sentence to be "correct in law and fact and determines, on the basis of the entire record, [it] should be approved." Article 66(d)(1), UCMJ.

Law and Analysis

Sentence appropriateness is assessed "by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although this Court has great discretion to determine whether a sentence is appropriate, the Court lacks any authority grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, CCAs are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment she deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

Appellant's sentence should be affirmed as entered on the Entry of Judgment because Appellant received the punishment he deserved. This Court should find the reasons Appellant advanced as to why his sentence is inappropriate unpersuasive, distinctly and in the aggregate. Appellant advances three reasons why he should receive leniency: (1) his overall military

record, (2) he admitted his crimes after being caught, (3) Appellant had previously sought help for his porn addiction, (4) Specifications 1 and 2 of Charge II address a single continuing course of conduct[2], and (5) Appellant was also sentenced for possessing child pornography while deployed in Specification 2 of Charge I. (App. Br. at 15-16).

Appellant argues three months confinement for each of the two specifications of violating a lawful general order is inappropriately severe. However, Appellant agreed to accept a potential maximum period of confinement of nine months for each of the two specifications as part of his plea agreement. (App. Ex. XXIII at 2.) "Absent evidence to the contrary, [an] accused's own sentence proposal is a reasonable indication of its probable fairness to him." United States v. Mathis, 2022 CCA LEXIS 90, *21-22 (A.F. Ct. Crim. App. 2022) (citing 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)) (alteration in the original). "Thus, when considering the appropriateness of a sentence, courts may consider that a pretrial agreement or plea agreement—to which an appellant agreed—placed limits on the sentence that could be imposed." Mathis, 2022 CCA LEXIS 90, *21-22. Appellant agreed nine months was a possible sentence; this significantly indicates the "probable fairness" of the substantially lower three months he received. Moreover, Appellant agreed the sentences for the Article 92 violations should run consecutively (and consecutive to any sentence stemming from the possession of child pornography offenses) further indicating the "probable fairness" of the total of six months confinement he received from the Article 92 offenses, substantially lower than the 18 months Appellant agreed would have been reasonable, as reflected in the plea agreement. (App. Ex. XXIII at 2.)

[2] The government does not address this claim as the claim was thoroughly addressed in the government's analysis of Issue I above.

Appellant argues his 26-year service record should serve as a mitigating factor for his misconduct. (App. Br. at 15.) Appellant also cites to his five deployments as grounds for mitigation. (Id.). As an officer in the United States Air Force, Appellant was entrusted with the privilege of leadership. A significant part of leadership is embodying the values and standards of the armed forces and enforcing them when the situation calls for it. Appellant failed to embody the values and standards of the armed forces when he possessed, downloaded, and accessed multiple images of child pornography. (Pros. Ex. 1 at 5-7.) Appellant failed to embody the values and standards of the armed forces when he failed to obey General Order Number 1C and General Order Number 1D by possessing multiple images of child pornography, in direct violation of two separate lawful orders from General Officers of sister services. Most significantly, while Appellant cites his deployments as grounds for mitigation, it was on one such deployment that rather than executing the mission he was assigned and doing his duty to reflect the standards expected of an officer, he downloaded, accessed, and possessed multiple images of child pornography.

Third, Appellant argues the fact he previously sought help for his pornography addiction should act as mitigation. However, that fact was before the military judge when he sentenced Appellant. (Def. Ex. B at 7.) Appellant did not receive the maximum amount of confinement under the plea agreement. In fact, he received substantially less than the maximum for the two offenses under Charge II. Appellant does not indicate or show how this factor should have mitigated his sentence any more than it appears to have already.

Lastly, Appellant argues because he was already charged with possessing child pornography while deployed in Specification 2 of Charge I, he should not also be punished for the two specifications of Charge II. What Appellant fails to recognize is the punishment for

Charge I is for the act of possessing the child pornography itself, the punishments for Charge II are for violating two separate and distinct orders, by possessing child pornography. More importantly, possessing child pornography while in a deployed environment in a foreign country in direct violation of specific orders to the contrary adds an additional level of aggravating factors to the misconduct. This is especially true in Appellant's case given that he is an officer entrusted with enforcement and maintenance of the standards expected of members of the armed forces, such as following orders. His failure to follow an order is particularly aggravating because someone responsible for giving orders to others, should also be able to follow orders and exemplify the standards expected of an officer in the armed forces. There are two very different offenses at issue and the Appellant was appropriately punished for each and every separate and distinct violation of the law.

The military judge considered Appellant's mitigating evidence and demonstrated his discretion as the sentencing authority by adjudging only three months of confinement for each specification of Charge II, instead of the maximum under the plea agreement of nine months for each specification. Appellant's sentence was not inappropriately severe, and this Court should deny this assignment of error.

III.

APPELLANT'S PLEA AGREEMENT DID NOT VIOLATE THE LAW OR PUBLIC POLICY WHEN IT CONDITIONED DISMISSAL OF CERTAIN CHARGES WITH PREJUDICE UPON COMPLETION OF APPELLATE REVIEW UPHOLDING HIS CONVICTION OF THE OTHER SPECIFICATIONS.

Additional Facts

The government incorporates the additional facts from Issue I here.

Appellant's Participation in Sentencing, Post-trial, and Appellate Review

Throughout Appellant's sentencing proceeding, trial defense counsel made many evidentiary

objections. (*See*, e.g., R. at 232, 234, 238, 239.) Appellant was advised of his Post-trial and Appellate rights in writing and acknowledged his understanding of those rights prior to sentencing. (App. Ex. XXV, R. at 248-249). After sentencing, Appellant did not request appellate defense counsel to represent him, but two months later, submitted a request for Appellate representation. (Post-sentencing, ROT, Vol. 3.) Appellant submitted a clemency request. (Id.) In his clemency request, Appellant asked the convening authority to waive automatic forfeitures for the benefit of his family, in accordance with his plea agreement. (Id.)

Standard of Review

This Court reviews questions of interpretation of plea agreements de novo. *See* United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F. 2006) (applying de novo review to pretrial agreements). The standard is the same in our assessment of whether a plea agreement's terms violate the Rules for Courts-Martial. *See* United States v. Hunter, 65 M.J. 399, 401 (C.A.A.F. 2008) (applying de novo review in the case of pretrial agreements).

Law

Generally, in a plea agreement an accused is free "to waive [his] constitutional rights in exchange for a benefit." United States v. Cron, 73 M.J. 718, 729 (A.F. Ct. Crim. App. 2014) (citation omitted). But a plea agreement condition is invalid "if the accused did not freely and voluntarily agree to it." R.C.M. 705(c)(1)(A). Moreover, even when an accused freely agrees, a plea agreement condition "shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights." R.C.M. 705(c)(1)(B).

In a court-martial, either party can propose "any term or condition not prohibited by law

or public policy." United States v. McFadyen, 51 M.J. 289, 290 (C.A.A.F. 1999) (quotation omitted); R.C.M. 705(e)(1). "What provisions violate appellate case law is determined by reference to precedent." United States v. Cassity, 36 M.J. 759, 761 (N.M.C.M.R. 1992). And the terms in a plea agreement are contrary to public policy if they either "interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity and fairness of the disciplinary process." United States v. Raynor, 66 M.J. 693, 697 (A.F. Ct. Crim. App. 2008) (quoting Cassity, 36 M.J. at 762). "Appellate case law, its sources, and R.C.M. 705 are, themselves, statements of public policy." Cassity, 36 M.J. at 760–62.

Analysis

The challenged plea agreement term is permissible because it does not violate the law or public policy. The challenged term does not violate R.C.M. 705 or R.C.M. 1115(b)(6)(c), no court has disallowed it, and it has passed Article 66, UCMJ review in this Court and in a sister court of appeals. Further, the challenged term did not interfere with court-martial fact-finding, sentencing, or review functions, or undermine public confidence in the integrity and fairness of the disciplinary process. Finally, it has not deprived Appellant of his appellate rights as he has raised multiple assignments of error seeking various forms of relief.

In his brief, Appellant claims the prejudice attaching after appellate review upholding his other convictions term of his plea agreement is "unenforceable" because it violates R.C.M. 705(c)(1)(b) and R.C.M. 1115(c), as well as Article 66, UCMJ. (App. Br. at 19).

Appellant is incorrect. Earlier this year, this Court addressed arguments similar to Appellant's in United States v. Goldsmith, No. ACM 40148, 2023 CCA LEXIS 8 (A.F. Ct. Crim. App. 11 January 2023). There, the appellant entered into a plea agreement that stated dismissal of charges pursuant to a plea agreement would be without prejudice initially and would "ripen into

prejudice upon completion of appellate review where the findings and sentence have been upheld." Id., unpub. op. at *5. Appellant here entered into a similar agreement, though Appellant's agreement only required the findings of his case to be upheld, not *both* the findings and sentence as in Goldsmith. On appeal, just as here, the appellant argued the provision was "void or otherwise unenforceable," because the term served "as a disincentive from raising meritorious issues that could entitle [him] to relief." Id.

Goldsmith squashed each of Appellant's current claims. In Goldsmith, this Court first explained why it was "not convinced the language in United States v. Partin,7 M.J. 409 (C.M.A. 1979), carries much legal force" to that appellant's claims, which again mirror Appellant's current claims. Id., unpub. op. at *8-9. The Court first noted that our superior Court "seemingly distanced itself from the [Partin] language just two years later in United States v. Mills, 12 M.J. 1 (C.M.A. 1981)," before concluding that "[r]eading Partin and Mills together, what is prohibited is prosecutorial vindictiveness after a successful appeal or—arguably—an agreement provision which would subject an accused to a higher sentence based solely on an appellate court's decision to order a rehearing." Id., unpub. op. at *10. This Court found neither of these situations were present in the Goldsmith case. They are likewise not present in this case.

This Court next recognized a plea agreement provision that deprived an appellant of "the complete and effective exercise of post-trial appellate rights" would be invalid. Id., unpub. op. at *10, *citing* R.C.M. 705(c)(1)(B). However, this Court also recognized that convening authorities may withdraw and dismiss specifications, and that, pursuant to R.C.M. 705(b)(2)(C), such "does not bar later reinstitution of the charges" so long as jeopardy has not attached. Id., unpub. op. at *10. This Court stated the following:

> Because a convening authority may withdraw a specification before jeopardy attaches and then re-refer it at some point in the future –

> regardless of the existence of a plea agreement, the accused's pleas, or an appellant's success on appeal – we see no obvious reason why a convening authority may not agree to dismiss specifications with prejudice so long as the remaining specifications are upheld during appellate review. If anything, such an agreement operates to an appellant's benefit, as it creates the opportunity for that appellant to see withdrawn specifications dismissed with prejudice. In the absence of such an agreement, a convening authority would be free to simply dismiss specifications without prejudice and allow them to be revived at some later date – the same position Appellant faces should the findings in his case be disturbed on appeal.

Id., unpub. op. at *10-11.

Next, this Court highlighted that an accused is entitled to "waive a broad swath of rights, and doing so has the plain potential to negatively impact his or her ability to mount an appeal." Id., unpub. op. *11. This Court further noted that in the "context of plea negotiations, an accused may agree to waive all waivable motions, at least so long as the accused understands what he or she is doing." Id., unpub. op. at *12, *citing* United States v. Gladue, 67 M.J. 311, 314 (C.A.A.F. 2009). This Court noted that in Goldsmith, the military judge explained the term to the appellant, twice asked the appellant if he understood, and the appellant answered both times that he did. Further, this Court noted that appellant had not asserted on appeal that he did not understand the term or was misled about its legal effect. Id.

Here just as in Goldsmith, Appellant willfully and knowingly included this provision in his plea agreement. Moreover, just as in Goldsmith, the military judge discussed the meaning and effect of Appellant's plea agreement with him, confirmed on multiple occasions Appellant understood his plea agreement with him, confirmed on multiple occasions Appellant understood his plea agreement and no one forced him to enter it in any way, explained the concept of the prejudice attaching after appellate review upholding his other convictions term of his plea agreement to Appellant, and also confirmed Appellant had time to discuss his plea agreement with his defense counsel and that their concerning the plea agreement was in his best interest. (R. at

202-214, 214, 208, 213.)

Next, this Court quoted United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F. 2006), for the proposition that plea agreements involve the "accused fore[going certain] constitutional rights… in exchange for a reduction in sentence or other benefit," before stating the following:

> Here, Appellant essentially accepted the risk of being tried by court-martial on the two dismissed specifications should his findings and sentence not remain intact during appellate review. On the other hand, he secured the convening authority's promise to dismiss those specifications with prejudice if the findings and sentence are upheld. While we understand such a scenario might lead Appellant to question whether or not to raise certain issues on appeal, it was Appellant who agreed to this particular provision, and he does not claim he was coerced into doing so.

Goldsmith, unpub. op. at *13.

Likewise in this case, Appellant accepted the risk of multiple specifications of Charge I not being dismissed if his findings did not survive appellate review, but also secured the convening authority's promise that those charges would be dismissed with prejudice if his findings were upheld. Further, just as in Goldsmith, Appellant agreed to this particular provision in his plea agreement and does not currently claim he was coerced into doing so or misled as to the legal effect of the term. Appellant entered into a binding agreement with the convening authority, derived the benefit of that agreement, and is now attempting to revise the terms of that agreement after already deriving the benefits to him.

This Court next noted the Supreme Court "has determined that the possibility of receiving a higher sentence during a retrial following a successful appeal 'does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction' so long as the second sentence is not 'a product of vindictiveness.'" Goldsmith, unpub. op. at *13-14, *quoting* Chaffin v. Stynchcombe, 412 U.S. 17 (11973). This Court found this "analogous to the situation faced by Appellant," adding that the Supreme Court has noted, "[t]he criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to

follow." Goldsmith, unpub. op. at *13-14, *quoting* Chaffin, 412 U.S. at 32. Appellant in this case faces the same situation as the appellant in Goldsmith—his claims should meet the same fate.

Ultimately, based on its analysis, this Court denied Appellant's claims, stating as follows:

> Considering the foregoing, we cannot conclude the provision operated to deprive Appellant of his ability to completely and effectively exercise his appellate rights. Appellant would surely be in a better position had the convening authority agreed to dismiss the specifications with prejudice during Appellant's court-martial and without waiting to see the outcome of the appellate process, but Appellant is not entitled to the most advantageous plea agreement Rather, Appellant is owed the benefit of the bargain he negotiated with the convening authority.

Id., unpub. op. at *14. Considering his plea agreement contains essentially the same provision, Appellant's case should be treated no different.

Finally, this Court highlighted in Goldsmith that the appellant in that case was not deprived of "his ability to completely and effectively exercise his appellate rights," and highlighted there was "no evidence the plea agreement provision impacted those rights at all." Id. Specifically, this Court noted the appellant raised six issues on appeal and asked for various forms of relief, including setting aside of both the findings and his sentence. This Court concluded:

> Thus, whatever pressure Appellant may have felt by virtue of the plea agreement provision, it has not stopped him from asking for the very sort of relief which would relieve the convening authority of the obligation to dismiss the two specifications with prejudice. In other words, even if the plea agreement provision was legally unenforceable, and in light of our conclusions in this case, Appellant has failed to demonstrate any prejudice. We decline Appellant's invitation to modify his plea agreement or grant other relief for this alleged error.

Id., unpub. op. at *15. Similarly, Appellant in this case has raised four issues, including one personally raised by Appellant pursuant to Grostefon, in which he has asked this Court to set aside and dismiss a specification, and modify his overall sentence. None of these issues is meritorious. Just as the appellant in Goldsmith, Appellant has failed to show any prejudice in this case. This assignment of error warrants no relief.

IV.

TRIAL DEFENSE COUNSEL WERE EFFECTIVE.[3]

Additional Facts

Dr. R.D. started treating Appellant for his pornography addiction in October 2020. (Capt Alexander A. Perkins Declaration, dated 25 August 2023.) During a pretrial interview with trial defense counsel, "Dr. R.D. indicated that the pornography addiction [Appellant] battled had been an ongoing struggle long before the charged conduct. (Id.) Trial defense counsel "were made aware of the fact that [Appellant] had been struggling with a pornography addiction for years before, even attempting to seek treatment as early as around November 2015." (Id.) "Dr. R.D. was also aware of misconduct that predated [Appellant]'s charges." (Id.)

Trial defense counsel explained that the trial defense team:

> discussed the pros and cons of such testimony and evidence and ultimately decided that since this was a sentencing case, the goal was to minimize the severity of [Appellant]'s prior inability to overcome his addiction (and the resulting escalation into child pornography) as much as possible.

(Id.) Trial defense counsel determined the risk of providing information about uncharged misconduct and the fact that his conduct occurred long before being caught, outweighed the potential mitigation the evidence provided.

Trial defense counsel specifically requested an expert in forensic psychology for "sex related crimes, related diagnoses, sex related offense treatment, and [] offender evaluations for purposes of sentencing relevant to similar cases [to U.S. v. Emerson.]" (Major Matthew J. Snell Declaration, dated 29 August 2023, Attach. 1 at 2.) Appellant "failed to provide his complete mental health records." (Major Snell Declaration at 2.) Despite repeated conversations, it was

[3] Appellant raised Issue IV under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

not until 8 March 2022, that [Appellant] provided the contact information for his current mental health provided, Dr. R.D." (Id.) The trial defense counsel and their expert consultant interviewed Dr. R.D. and determined Dr. R.D. was "hesitant to testify and included that he was aware of potential misconduct that predated the charged misconduct." (Id.).

Trial defense counsel "determined strategically it would be best to raise the issue [of his history of seeking mental health treatment] through the member's unsworn statement." (Id.). Trial defense counsel "feared that presenting his medical records would open mandatory discovery obligations or potential argument that [Appellant]'s failure to address the issues and he knew about the issue going before the charged misconduct, that it would increase his criminal liability." (Id.).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. United States v. Scott, No. 81 M.J. 79, 84 (C.A.A.F. 2021).

Law

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, courts apply the standard from Strickland v. Washington, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in United States v. Cronic, 466 U.S. 648, 658 (1984).

"In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency

resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). The Strickland standard is "stringent." United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012).

The Court can decide an ineffective assistance claim on either of these two elements without consideration of the other. Strickland, 466 U.S. at 697. So, this Court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [appellant] as a result of the alleged deficiencies." Id.

To establish the element of deficiency, the appellant must first overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. In cases involving attacks on defense counsel's trial tactics, an appellant must show specific defects in counsel's performance that were "unreasonable under prevailing professional norms." United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009).

Military courts apply the following three-part test in assessing whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions"; (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance…[ordinarily expected] of fallible lawyers"; and (3) if defense counsel were ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result? United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alteration and omission in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

Analysis

Appellant alleges his trial defense counsel were deficient in their performance when they failed to "adequately investigate evidence of [Appellant] seeking mental health treatment for his porn addiction back in 2016 and yet being turned away by the military and refused a referral off-base." (App. Br. Appx. at 4.) Appellant goes on to claim that his trial defense counsel never requested Appellant's mental health records from him. (Id.) This is not the case.

The burden is on Appellant to prove both deficient performance and prejudice. Datavs, 71 M.J. at 424. He does not meet that burden. Trial defense counsel thoroughly investigated the issue and made a strategic decision not to admit the evidence. They were effective in their representation, and Appellant likely benefited from the strategic choice.

C. Appellant's allegations are not true; trial defense counsel investigated potential mental health information to determine its use as mitigation evidence, and trial defense counsel provided a reasonable explanation for their actions.

"Disaffected clients seeking to assign blame for their predicament often blame their lawyers for their predicament rather than themselves. For this reason, the law presumes that counsel is effective, and places upon an appellant the burden of establishing ineffectiveness." United States v. Thompson, ACM 32630, 1998 CCA LEXIS 163, at *7 (A.F. Ct. Crim. App. 5 February 1998) (unpub. op.). Trial defense counsel were effective because they investigated the issue. (Maj Snell Declaration at 2; Maj Perkins Declaration at 1.) They requested Appellant provide them his mental health records – which he did not do early on and when he did he provided only some of them. (Maj Snell Declaration at 2.) Trial defense counsel requested an expert confidential consultant to assist them in understanding Appellant's addiction. (Id.) And then they interviewed Appellant's mental health provider with their expert to ensure they understood the limits and pitfalls of having Dr. RD testify for Appellant. (Id.)

Ultimately trial defense counsel determined that having Dr. RD testify was too risky because the testimony could open the door to testimony about the actual length of time Appellant had been viewing pornography and about additional misconduct Appellant committed. (Major Snell Declaration at 2.) Trial defense counsel's "goal was to minimize the severity of [Appellant]'s prior inability to overcome his addiction (and the resulting escalation into child pornography) as much as possible." (Maj Perkins Declaration at 1.)

The decision not to introduce mental health records or call Dr. RD as a witness was a "[s]trategic choice[] made after thorough investigation of law and facts relevant to plausible options," and the decision is "virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690). Trial defense counsel made an objectively reasonable decision to avoid a high level of culpability for their client and exposure to additional charges. Thompson, 1998 CCA LEXIS at *7-8.

D. Even if this Court finds the allegations are true, trial defense counsel's level of advocacy fell within the rank of performance ordinarily expected of fallible lawyers.

Trial defense counsel's level of advocacy did not "fall measurably below the performance…[ordinarily expected] of fallible lawyers." Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011). They investigated the issue and made a strategic choice. Reasonable attorneys may differ on trial defense strategy. A different attorney may have accepted the risk and admitted a portion of the mental health records or attempted to limit the scope of the testimony in a way to avoid testimony about additional misconduct.

Trial defense counsel "feared that presenting his medical records would open mandatory discovery obligations or potential argument that [Appellant]'s failure to address the issues and [the fact] he knew about the issue going before the charged misconduct, that it would increase his criminal liability." (Maj Snell Declaration at 2.)

Trial defense counsel's decisions show that they thought through the ramifications of whether to admit the evidence. By doing so, they ensured their level of advocacy met the standards expected of fallible lawyers and fell within the wide range of reasonable professional assistance.

E. Appellant failed to show a reasonable probability that, absent trial defense counsel's errors there would have been a different result.

To show prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 698; Loving v. United States, 68 M.J. 1, 6-7 (C.A.A.F. 2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Appellant alleges that he was prejudiced by trial defense counsel's decision not to investigate and present evidence of porn addiction treatment. (App. Br. Appx at 5.) He claims, that "[t]here is a reasonable probability that had this information been investigated and presented to the convening authority and the military judge, [Appellant] may have received a lower sentence." (Id.) This argument is extremely speculative and does not meet the "reasonable probability" standard necessary for relief. More likely, the mental health records and testimony from Dr. RD would have been harmful to Appellant's mitigation efforts. Trial defense counsel determined the risk of providing information about uncharged misconduct and the fact that his conduct occurred long before being caught, outweighed the potential mitigation the evidence provided.

But the record is not void of information about Appellant's mental health struggles. (R. at 227-231.) Appellant addressed the issue in his unsworn statement to the Court. "In 2018 I realized I had an escalating pornography addiction and sought help for it." (R. at 236.)

Appellant goes on to explain his treatment and various coping mechanisms he has developed as a result of treatment. (R. at 227-231.) Thus, the information was provided to the sentencing authority without the danger of damaging testimony from Dr. R.D. or the risk of evidence of additional offenses being brought to the government's attention. Although the evidence was not provided to the Court in the manner Appellant preferred, trial defense counsel still assisted Appellant in explaining his mental health concerns without additional exposure and risk – a safer way of presenting the same mitigation evidence. Because Appellant was still able to present the evidence for the court's consideration, Appellant suffered no prejudice. There is no reasonable probability that if Appellant had presented the information about seeking help for his pornography addiction in the form of documents or testimony that his sentence would have been any different—especially if doing so would have opened the door to the government presenting more damaging information.

An appellant who claims ineffective assistance of counsel "must surmount a very high hurdle." United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000) (citations and quotation marks omitted). Appellant's claim of ineffective of counsel does not meet this high burden, and this Court should deny this assignment of error.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division

Military Justice and Discipline Directorate
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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 13 September 2023 via electronic filing.

[redacted]

TYLER L. WASHBURN, Capt, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40297**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Everett W. EMERSON	)	
Major (O-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 6 April 2022, Appellant was convicted at a general court-martial of two specifications of violation of a lawful general order and two specifications of child pornography, in violation of Articles 92 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 934. On 19 May 2022, a military judge entered a sentence consisting of 30 months' confinement and a dismissal. Appellant's case was docketed with this court on 8 July 2022.

Upon review of Appellant's record of trial, we note there were three separate sessions held: (1) open proceedings on 24 August 2021; (2) open proceedings to include announcement of sentence on 6 April 2022; and (3) a post-trial, Article 39(a), UCMJ, 10 U.S.C. § 839(a), hearing on 16 May 2022. There are two discs that contain audio recordings of the open proceedings on 6 April 2022 and 16 May 2022, however, it appears a recording of the open proceedings from 24 August 2021 is not included.

Rule for Courts-Martial 1112(b) provides that "[t]he record of trial in every general and special court-martial shall include . . . [a] substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting . . . ."

Accordingly, it is by the court on this 15th day of September, 2023,

ORDERED:

Not later than **27 September 2023**, counsel for the Government shall

SHOW GOOD CAUSE as to why this court should not return the record of trial for remand for correction of the record in accordance with Rule for Courts-Martial 1112(d).

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Major (O-4) **EVERETT W. EMERSON**, USAF) *Appellant*	)))))))))	UNITED STATES' ANSWER TO SHOW CAUSE Before Special Panel No. ACM 40297 27 September 2023

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

On 6 April 2022, Appellant, was convicted, at a general court-martial of one charge and two specifications of violation of a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of possession of child pornography, in violation of Article 134, UCMJ. (*Entry of Judgment, 19 May 2022, ROT, Vol. 1.*)

On 15 September 2023, this Court *sua sponte* directed the following: "Not later than 27 September 2023, counsel for the Government shall **SHOW GOOD CAUSE** as to why this court should not return the record of trial for remand for correction of the record in accordance with Rule for Courts-Martial 1112(d)." (*Order*, dated 15 September 2023.) This Court's order stemmed from the identification that the audio recording of the proceedings held on 24 August 2021, was missing from the record of trial.

Supplemental Statement of the Facts

On 20 September 2023, undersigned counsel contacted the Wright-Patterson legal office and notified them of this Court's Show Cause order. Undersigned counsel requested the legal office to verify whether the missing audio was in their original record of trial or otherwise

retained within their office. On that same day, undersigned counsel received acknowledgment from the legal office that they would conduct the requested search. On 25 September 2023, undersigned counsel followed up with the legal office via email. On that same day, the legal office responded they did not have a copy of the missing recording in either their original ROT or their office electronic shared drive. On 26 September 2023, undersigned counsel identified an enlisted court reporter had served on the date of the missing audio and identified the court reporter as TSgt Christian Wells who is currently stationed at Joint Base Pearl Harbor-Hickam. Undersigned counsel attempted to contact TSgt Wells via telephone, but was unable to make contact. On 27 September 2023, undersigned counsel made contact with TSgt Wells via Microsoft Teams chat. TSgt Wells indicated he believes he still has the audio recording on a hard drive located at his personal residence located off installation. TSgt Wells stated due to mission requirements, he was unable to leave the office to retrieve the hard drive, but confirmed that he would confirm the missing audio's status after he returns home at the end of the duty day. The government anticipates being able to provide an additional update to this Court on 28 September 2023. The government also intends to request leave to file a supplemental answer to the show cause order at that time.

WHEREFORE, the United States respectfully requests this Court decline to remand the record for correction or take any additional corrective action until it can be confirmed whether the missing audio exists.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division

Military Justice and Discipline Directorate
United States Air Force
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MARY ELLEN PAYNE
Associate Chief
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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 27 September 2023.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel 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. Major (O-4) **EVERETT W. EMERSON**, USAF) *Appellant*	)))))))))	UNITED STATES' SUPPLEMENTAL ANSWER TO SHOW CAUSE Before Special Panel No. ACM 40297 28 September 2023

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

On 6 April 2022, Appellant, was convicted, at a general court-martial of one charge and two specifications of violation of a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ), and one charge and two specifications of possession of child pornography, in violation of Article 134, UCMJ. (*Entry of Judgment, 19 May 2022, ROT, Vol. 1.*)

On 15 September 2023, this Court *sua sponte* directed the following: "Not later than 27 September 2023, counsel for the Government shall **SHOW GOOD CAUSE** as to why this court should not return the record of trial for remand for correction of the record in accordance with Rule for Courts-Martial 1112(d)." (*Order*, dated 15 September 2023.) This Court's order stemmed from the identification that the audio recording of the proceedings held on 24 August 2021, was missing from the record of trial.

Supplemental Statement of the Facts

The Government incorporates the facts from the initial answer to show cause filed on 27 September 2023.

On 28 September 2023, TSgt Wells, the court reporter for the 24 August 2021 hearing, confirmed to undersigned counsel he had located the hard drive he believed contained the missing audio. TSgt Wells used a standalone computer at the Joint Base Pearl Harbor-Hickam legal office to search the hard drive for the missing audio. TSgt Wells was unable to locate the missing audio on the hard drive or his email correspondence from the above-styled case.

Standard of Review

Whether a record of trial is complete is a question of law that courts review *de novo*. United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law and Argument

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general or special court-martial where a sentence of "death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months" is adjudged. Article 54(c)(2), UCMJ. Appellate courts understand that inevitably records will be imperfect, and therefore review for substantial omissions. United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982). A substantial omission renders a record incomplete and raises a presumption of prejudice that the government must rebut. United States v. Henry, 53 M.J. 108, 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 can conduct an informed review. *See* 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 that despite the omission from the record of an Article 39(a) session containing the military judge's findings and conclusions related to an R.C.M. 917

motion, the record, as it was, was "adequate to permit informed review by this court and any other reviewing authorities"). R.C.M. 1112(b) states that a record of trial shall include "[a] substantially verbatim recording of the court-martial proceedings." In United States v. Mobley, this Court remanded proceedings when the audio of an arraignment was missing from the record of trial. ACM 40088, 2022 CCA LEXIS 79, *3 (A.F. Ct. Crim. App. 4 February 2022) (unpub. op). This Court noted that the court reporter erred by failing to attach the transcript to the record. Id.

The lack of audio amounts to an insubstantial omission. If this Court were to find that the lack of audio is a substantial omission, the Government has rebutted the presumption of prejudice because there is no prejudice to Appellant. The verbatim transcript of the court-martial proceedings is part of the record. The appellate courts can conduct a meaningful and informed appellate review. *See* United States v. Credit, 4 M.J. 118, 119 (C.M.A. 1977) (explaining that "a trial transcript is, indeed, the very heart of the criminal proceedings and the single element essential to our meaningful appellate review…).

1. Omission of the audio is not a substantial omission warranting relief.

The court-martial proceedings audio from 24 August 2021 does not exist in this case. Both the legal office and court reporter affirmed that the audio of these proceedings is unretrievable. Still, the lack of audio is not a substantial omission. In United States v. Matthew, ACM 39796, CCA LEXIS 425, *11-12 (A.F. Ct. Crim App. 21 July 2022) (unpub. op), this Court held that the omission of audio of arraignment was a substantial omission. In Matthew, the omission of arraignment meant this Court "could not review the sufficiency of Appellant's advisement of his right to counsel and forum selection. Id. at *12. Here, we do not have this concern. While the audio no longer exists, the certified verbatim transcript transcribed the entire

court-martial proceedings, from arraignment to the announced sentence. The transcript was reviewed by both trial counsel and trial defense counsel. If the transcript was inaccurate, Appellant's own counsel was given the opportunity to make corrections. Since Appellant's counsel reviewed the transcript and raised no objections, Appellant should not be able to complain now that the transcript is inadequate for this Court to conduct its appellate review. In Mobley, this Court decided that the lack of audio was a substantial omission because the audio and written transcript of the arraignment proceeding were not inserted in the record. Mobley, unpub. op. at *3. Here, a verbatim transcript of the entire court-martial proceedings exists and is part of the record of trial. This Court should find that the lack of audio is not a substantial omission.

2. Appellant is not prejudiced and is afforded meaningful appellate review.

Even if this Court finds that it is a substantial omission, Appellant is not prejudiced. The lack of audio is not prejudicial because this Court can conduct a meaningful and informed review. See Credit, 4 M.J. at 119 (explaining that "a trial transcript is, indeed, the very heart of the criminal proceedings and the single element essential to our meaningful appellate review…).

Appellant has exercised his appellate rights. Appellant cited the verbatim transcript. The verbatim transcript inserted in the record of trial provides the opportunity for Appellant to receive meaningful appellate review. In fact, Appellant filed his assignments of error brief without raising the lack of audio as an issue. Appellant is not prejudiced because of the lack of audio recording. Moreover, remanding the record for correction would be futile, because the United States has already confirmed that the original audio recording cannot be located. Thus, this Court should not grant a remedy and should affirm the dishonorable discharge — the service characterization that Appellant agreed to in his plea agreement.

CONCLUSION

WHEREFORE, the United States respectfully requests this Court decline to remand the record for correction or take any additional corrective action.

[redacted]
TYLER L. WASHBURN, Capt, USAF
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[redacted]

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 28 September 2023.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
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[redacted]

28 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Major (O-4) **EVERETT W. EMERSON**, USAF, *Appellant.*	))))))))	MOTION FOR LEAVE TO FILE SUPPLEMENTAL ANSWER TO SHOW CAUSE No. ACM 40297 Before Special Panel

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

Pursuant to Rules 18.4 and 23(d) of this Honorable Court's Rules of Practice and Procedure, the government hereby moves for leave to file a Supplemental Answer to Show Cause Order. The original Answer to Show Cause Order was timely filed on 28 September 2023. At that time, the Government was awaiting additional information from the court reporter to ensure an accurate response was provided to this Court. Additional briefing is necessary because since the original answer was filed, the government received additional information from the court reporter indicating the missing audio noted in this Court's Show Cause Order no longer exists. The Supplemental Answer to Show Cause incorporates the new facts and provides appropriate legal argument based on these new facts for this Court's consideration. The government asserts the additional submission is vital to the Court's performing its duties and making the appropriate decision regarding whether to remand this case.

WHEREFORE, the government respectfully requests this Honorable Court grant its motion for leave to file a Supplemental Answer to Show Cause Order.

Respectfully submitted,

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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 28 September 2023 via electronic filing.

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