IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Airman Basic (E-1), **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	4 August 2023

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 Assignment of Error (AOE) brief. Appellant requests an enlargement for a period of 60 days, which will end on **11 October 2023**. The record of trial was docketed with this Court on 13 June 2023. From the date of docketing to the present date, 52 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]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

GRANTED
7 AUG 2023

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 4 August 2023.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

4 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) RANDY B. GILES JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40482 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]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 4 August 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40482**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Randy B. GILES Jr.	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 8th day of August, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 3
Airman Basic (E-1), **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	2 October 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 his second enlargement of time to file an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **10 November 2023**. The record of trial was docketed with this Court on 13 June 2023. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 21 March 2023, at a general court-martial convened at Sheppard Air Force Base, Texas, a military judge, consistent with Appellant's pleas, found him guilty of one charge and one specification of aggravated arson in violation of Article 126, Uniform Code of Military Justice (UCMJ); one charge and one specification of willfully damaging miliary property in violation of Article 108, UCMJ; and one charge and two specifications in violation of Article 92, UCMJ—one specification of a violation of a general order and one specification of dereliction of duty. R. at 65. On 23 March 2023, a panel of officer and enlisted members sentenced Appellant to forfeit $1,917.00 of pay per month for one month, to be confined for 30 days, and to be discharged from with a bad-conduct discharge. R. at 780. The military judge awarded 81 days of rdered confinement credit and 36 days of pretrial confinement credit. R. at 379, 782.

GRANTED
5 Oct 2023

The military judge applied the confinement credits to Appellant's adjudged confinement and forfeitures, resulting in "zero days of confinement left to serve and zero forfeitures left to impose." R. at 782-83. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, *Convening Authority Decision on Action* – U.S. v. AB Randy B. Giles Jr., dated 5 April 2023.

The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Appellant is not currently confined.

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

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

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 2 October 2023.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

4 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) RANDY B. GILES JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40482 Panel No. 3

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 4 October 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 3
Airman Basic (E-1), **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	30 October 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 his third enlargement of time to file an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **10 December 2023**. The record of trial was docketed with this Court on 13 June 2023. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

On 21 March 2023, at a general court-martial convened at Sheppard Air Force Base, Texas, a military judge, consistent with Appellant's pleas, found him guilty of one charge and one specification of aggravated arson in violation of Article 126, Uniform Code of Military Justice (UCMJ); one charge and one specification of willfully damaging miliary property in violation of Article 108, UCMJ; and one charge and two specifications in violation of Article 92, UCMJ (one specification of a violation of a general order and one specification of dereliction of duty). R. at 65. On 23 March 2023, a panel of officer and enlisted members sentenced Appellant to forfeit [illegible] of pay per month for one month, to be confined for 30 days, and to be discharged from [illegible] with a bad-conduct discharge. R. at 780. The military judge awarded 81 days of judicially ordered confinement credit and 36 days of pretrial confinement credit. R. at 379, 782.

GRANTED
2 NOV 2023

The military judge applied the confinement credits to Appellant's adjudged confinement and forfeitures, resulting in "zero days of confinement left to serve and zero forfeitures left to impose." R. at 782-83. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, *Convening Authority Decision on Action* – U.S. v. AB Randy B. Giles Jr., dated 5 April 2023.

The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Appellant is not currently confined.

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

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

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 October 2023.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Email: samantha.castanien.1@us.af.mil

31 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) RANDY B. GILES JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40482 Panel No. 3

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 31 October 2023.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	
	)	Before Panel No. 3
Airman Basic (E-1), **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	27 November 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 his fourth enlargement of time to file an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **9 January 2024**. The record of trial was docketed with this Court on 13 June 2023. From the date of docketing to the present date, 167 days have elapsed. On the date requested, 210 days will have elapsed.

On 21 March 2023, at a general court-martial convened at Sheppard Air Force Base, Texas, a military judge, consistent with Appellant's pleas, found him guilty of one charge and one specification of aggravated arson in violation of Article 126, Uniform Code of Military Justice (UCMJ); one charge and one specification of willfully damaging miliary property in violation of Article 108, UCMJ; and one charge and two specifications in violation of Article 92, UCMJ (one specification of a violation of a general order and one specification of dereliction of duty). R. at 65. On 23 March 2023, a panel of officer and enlisted members sentenced Appellant to forfeit $1,[illegible]00 of pay per month for one month, to be confined for 30 days, and to be discharged from [illegible]with a bad-conduct discharge. R. at 780. The military judge awarded 81 days of [illegible]ordered confinement credit and 36 days of pretrial confinement credit. R. at 379, 782.

GRANTED
29 NOV 2023

The military judge applied the confinement credits to Appellant's adjudged confinement and forfeitures, resulting in "zero days of confinement left to serve and zero forfeitures left to impose." R. at 782-83. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, *Convening Authority Decision on Action* – U.S. v. AB Randy B. Giles Jr., dated 5 April 2023.

The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Appellant is not currently confined. Counsel has not yet completed her review of Appellant's record.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned fifteen cases; twelve cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, eight cases have priority over the present case:

1. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Counsel is currently writing the Grant Brief and compiling the Joint Appendix, due 15 December 2023.

2. *In re HVZ*, USCA Dkt. No 23-0250/AF – Oral argument is scheduled for 5 December 2023. While working on *United States v. Wells*, counsel will be preparing to argue on behalf of the real party in interest.

3. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – Oral argument is scheduled for 16 January 2023. While working on the cases listed below, counsel will be preparing for oral argument in this case.

4. *United States v. Bak*, ACM 40405 – The trial transcript is 95 pages long and the record of trial is comprised of four volumes containing seven Prosecution Exhibits, two Defense Exhibits, nine Appellate Exhibits, and two Court Exhibits. This appellant is currently confined. Counsel is preparing to write the AOE, which she intends to do while preparing for *United States v. Leipart.*

5. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. This appellant is currently confined. Counsel has completed her review of the transcript, but has not yet completed her review of the remaining parts of the record.

6. *United States v. Folts*, No. ACM 40322 – The trial transcript is 2,141 pages long and the record of trial contains eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. This appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

7. *United States v. Braum*, No. ACM 40434 – The trial transcript is 1,284 pages long and the record of trial contains 12 volumes consisting of eight Prosecution Exhibits, 19 Defense Exhibits, 58 Appellate Exhibits, and one Court Exhibit. This appellant is currently confined. Counsel has not yet completed her review of the record of trial.

8. *United States v. Clark*, No. ACM 40461 – The trial transcript is 1,060 pages long and the record of trial is 11 volumes consisting of 19 Prosecution Exhibits, 26 Defense Exhibits, 59 Appellate Exhibits, and one court exhibit. This appellant is currently confined. Counsel has not yet completed her review of the record of trial.

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

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

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

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 November 2023.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Email: samantha.castanien.1@us.af.mil

28 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) RANDY B. GILES JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40482 Panel No. 3

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 November 2023.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40482**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Randy B. GILES JR.	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 27 December 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 28th day of December, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **8 February 2024**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, continue to 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]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 3
Airman Basic (E-1), **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	27 December 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 his fifth enlargement of time to file an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **8 February 2024**. The record of trial was docketed with this Court on 13 June 2023. From the date of docketing to the present date, 197 days have elapsed. On the date requested, 240 days will have elapsed.

On 21 March 2023, at a general court-martial convened at Sheppard Air Force Base, Texas, a military judge, consistent with Appellant's pleas, found him guilty of one charge and one specification of aggravated arson in violation of Article 126, Uniform Code of Military Justice (UCMJ); one charge and one specification of willfully damaging miliary property in violation of Article 108, UCMJ; and one charge and two specifications in violation of Article 92, UCMJ (one specification of a violation of a general order and one specification of dereliction of duty). R. at 65. On 23 March 2023, a panel of officer and enlisted members sentenced Appellant to forfeit $1,917.00 of pay per month for one month, to be confined for 30 days, and to be discharged from the service with a bad-conduct discharge. R. at 780. The military judge awarded 81 days of judicially ordered confinement credit and 36 days of pretrial confinement credit. R. at 379, 782.

The military judge applied the confinement credits to Appellant's adjudged confinement and forfeitures, resulting in "zero days of confinement left to serve and zero forfeitures left to impose." R. at 782-83. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, *Convening Authority Decision on Action* – U.S. v. AB Randy B. Giles Jr., dated 5 April 2023.

The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Appellant is not currently confined. Counsel has not yet completed her review of Appellant's record.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned fifteen cases; twelve cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, six cases have priority over the present case:

1. *United States v. Leipart*, USCA Dkt. No. 23-0163/AF – Oral argument is scheduled for 16 January 2024. Counsel is currently preparing for oral argument while working on the cases listed below.

2. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Counsel filed the Grant Brief on 15 December 2023. The Government's Answer is currently expected no later than 15 January 2024, upon which undersigned counsel will begin working on the Reply Brief.

3. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Counsel

has completed her review of the transcript, and she outlined one issue for the appellate advocacy training she attended from 25-27 October 2023. Counsel has not yet completed her review of the remaining parts of the record.

4. *United States v. Braum*, No. ACM 40434 – This appellant has provided limited consent to disclose a confidential communication with counsel wherein he has conditionally waived military appellate counsel's review of the record so as to exercise his right to speedy appellate review. Based on this appellant's request, civilian appellate defense counsel intends to file this appellant's brief without undersigned counsel's review of the record. However, undersigned counsel remains detailed Article 70, UCMJ, counsel and will review the AOE (currently containing eight issues) prior to filing. Depending on when civilian appellate defense counsel completes the AOE, undersigned counsel's review of the brief may be prioritized over *United States v. Baumgartner*, No. ACM 40413.

5. *United States v. Folts*, No. ACM 40322 – The trial transcript is 2,141 pages long and the record of trial contains eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. Appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

6. *United States v. Clark*, No. ACM 40461 – The trial transcript is 1,060 pages long and the record of trial is 11 volumes consisting of 19 Prosecution Exhibits, 26 Defense Exhibits, 59 Appellate Exhibits, and one court exhibit. Appellant is currently confined. Counsel has not yet completed her review of 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.

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

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

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

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 December 2023.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

27 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) RANDY B. GILES JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40482 Panel No. 3

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

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

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

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 December 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	
	)	Before Panel No. 3
Airman Basic (E-1), **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	29 January 2024

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 his sixth enlargement of time to file an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **9 March 2024**. The record of trial was docketed with this Court on 13 June 2023. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 21 March 2023, at a general court-martial convened at Sheppard Air Force Base, Texas, a military judge, consistent with Appellant's pleas, found him guilty of one charge and one specification of aggravated arson in violation of Article 126, Uniform Code of Military Justice (UCMJ); one charge and one specification of willfully damaging military property in violation of Article 108, UCMJ; and one charge and two specifications in violation of Article 92, UCMJ (one specification of a violation of a general order and one specification of dereliction of duty). R. at 65. On 23 March 2023, a panel of officer and enlisted members sentenced Appellant to forfeit $1,917.00 of pay per month for one month, to be confined for 30 days, and to be discharged from with a bad-conduct discharge. R. at 780. The military judge awarded 81 days of ordered confinement credit and 36 days of pretrial confinement credit. R. at 379, 782.

GRANTED
30 JAN 2024

The military judge applied the confinement credits to Appellant's adjudged confinement and forfeitures, resulting in "zero days of confinement left to serve and zero forfeitures left to impose." R. at 782-83. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, *Convening Authority Decision on Action* – U.S. v. AB Randy B. Giles Jr., dated 5 April 2023.

The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Appellant is not currently confined. Counsel has not yet completed her review of Appellant's record.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned fifteen cases; twelve cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, five cases have priority over the present case:

1. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Counsel is drafting the Reply Brief, currently due 2 February 2024. However, counsel requested an extension until 9 February 2024, as she suddenly became ill with the flu on 25 January 2024. The requested extension is still pending as of this filing.

2. *United States v. Braum*, No. ACM 40434 – This appellant has provided limited consent to disclose a confidential communication with counsel wherein he has conditionally waived military appellate counsel's review of the record so as to exercise his right to speedy appellate review. Based on this appellant's request, civilian appellate defense counsel intends to file this appellant's brief without undersigned counsel's review of the record. However, undersigned counsel remains detailed Article 70, UCMJ, counsel and will review the AOE prior to filing.

Counsel is in receipt of the draft AOE and has begun her review, which has caused this case to become briefly prioritized over *United States v. Baumgartner*, No. ACM 40413.

3. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Counsel has completed her review of the transcript, and she outlined one issue for the appellate advocacy training she attended from 25-27 October 2023. Counsel has not yet completed her review of the remaining parts of the record.

4. *United States v. Folts*, No. ACM 40322 – The trial transcript is 2,141 pages long and the record of trial contains eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. Appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

5. *United States v. Clark*, No. ACM 40461 – The trial transcript is 1,060 pages long and the record of trial is 11 volumes consisting of 19 Prosecution Exhibits, 26 Defense Exhibits, 59 Appellate Exhibits, and one court exhibit. Appellant is currently confined. Counsel has not yet completed her review of 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.

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

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
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Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
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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 29 January 2024.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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29 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) RANDY B. GILES JR., USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40482 Panel No. 3

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

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

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

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 29 January 2024.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	
	)	Before Panel No. 3
Airman Basic (E-1), **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	26 February 2024

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 his seventh enlargement of time to file an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **8 April 2024**. The record of trial was docketed with this Court on 13 June 2023. From the date of docketing to the present date, 258 days have elapsed. On the date requested, 300 days will have elapsed.

On 21 March 2023, at a general court-martial convened at Sheppard Air Force Base, Texas, a military judge, consistent with Appellant's pleas, found him guilty of one charge and one specification of aggravated arson in violation of Article 126, Uniform Code of Military Justice (UCMJ); one charge and one specification of willfully damaging military property in violation of Article 108, UCMJ; and one charge and two specifications in violation of Article 92, UCMJ (one specification of a violation of a general order and one specification of dereliction of duty). R. at 65. On 23 March 2023, a panel of officer and enlisted members sentenced Appellant to forfeit $1,917.00 of pay per month for one month, to be confined for 30 days, and to be discharged from service with a bad-conduct discharge. R. at 780. The military judge awarded 81 days of ly ordered confinement credit and 36 days of pretrial confinement credit. R. at 379, 782.

GRANTED
27 Feb 2024

The military judge applied the confinement credits to Appellant's adjudged confinement and forfeitures, resulting in "zero days of confinement left to serve and zero forfeitures left to impose." R. at 782-83. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, *Convening Authority Decision on Action* – U.S. v. AB Randy B. Giles Jr., dated 5 April 2023.

The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Appellant is not currently confined. Counsel has not yet completed her review of Appellant's record.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned seventeen cases; fourteen cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, six cases have priority over the present case:

1. *United States v. Wells*, USCA Dkt. No. 23-0219/AF – On 20 October 2023, the CAAF granted review of one issue. Oral argument is scheduled for 6 March 2024, and undersigned counsel is currently preparing for argument while completing her review of the record in *United States v. Baumgartner*, No. ACM 40413.

2. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Counsel has reviewed the transcript, the sealed materials, the prosecution and defense exhibits, and the pre-trial and post-trial processing. She has started outlining several assignments of error as she

continues her review. Undersigned counsel is balancing her review of this appellant's record with her preparation for oral argument in *United States v. Wells,* USCA Dkt. No. 23-0219/AF.

3. *United States v. Folts*, No. ACM 40322 – The trial transcript is 2,141 pages long and the record of trial contains eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. Appellant is not currently confined. Civilian appellate defense counsel has begun drafting the AOE while undersigned counsel completes her pending priorities before reviewing the record.

4. *United States v. Braum,* No. ACM 40434 – Civilian appellate defense counsel filed this appellant's AOE on 10 February 2024. This appellant has provided limited consent to disclose a confidential communication with counsel wherein he has conditionally waived military appellate counsel's review of the record so as to exercise his right to speedy appellate review. Depending on this appellant's request, undersigned counsel may review any reply brief before it is filed.

5. *United States v. Dominguez-Garcia,* No. ACM S32694 (f rev) – The trial transcript is 362 pages long and the record of trial is four volumes consisting of nine Prosecution Exhibits, two Defense Exhibits, and six Appellate Exhibits. Appellant is not currently in confinement. Undersigned counsel has reviewed the rehearing-related documents, which has triggered the need to review the transcript for a new AOE. Undersigned counsel was not this appellant's original military appellate defense counsel.

6. *United States v. Clark*, No. ACM 40461 – The trial transcript is 1,060 pages long and the record of trial is 11 volumes consisting of 19 Prosecution Exhibits, 26 Defense Exhibits, 59 Appellate Exhibits, and one court exhibit. Appellant is not currently confined. Counsel has not yet completed her review of 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.

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

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
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Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 26 February 2024.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Email: samantha.castanien.1@us.af.mil

26 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) RANDY B. GILES JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40482 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case in this case will be 300 days in length. Appellant's nearly a year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed 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
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 February 2024.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40482**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Randy B. GILES JR.,	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 26 March 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) 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 27th day of March, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **8 May 2024**.

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]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 3
Airman Basic (E-1) **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	26 March 2024

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 his eighth enlargement of time to file an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **8 May 2024**. The record of trial was docketed with this Court on 13 June 2023. From the date of docketing to the present date, 287 days have elapsed. On the date requested, 330 days will have elapsed.

On 21 March 2023, at a general court-martial convened at Sheppard Air Force Base, Texas, a military judge, consistent with Appellant's pleas, found him guilty of one charge and one specification of aggravated arson in violation of Article 126, Uniform Code of Military Justice (UCMJ); one charge and one specification of willfully damaging military property in violation of Article 108, UCMJ; and one charge and two specifications in violation of Article 92, UCMJ (one specification of a violation of a general order and one specification of dereliction of duty). R. at 65. On 23 March 2023, a panel of officer and enlisted members sentenced Appellant to forfeit $1,917.00 of pay per month for one month, to be confined for 30 days, and to be discharged from the service with a bad-conduct discharge. R. at 780. The military judge awarded 81 days of judicially ordered confinement credit and 36 days of pretrial confinement credit. R. at 379, 782.

The military judge applied the confinement credits to Appellant's adjudged confinement and forfeitures, resulting in "zero days of confinement left to serve and zero forfeitures left to impose." R. at 782-83. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, *Convening Authority Decision on Action* – U.S. v. AB Randy B. Giles Jr., dated 5 April 2023.

The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Appellant is not currently confined. Counsel has not yet completed her review of Appellant's record.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned seventeen cases; fourteen cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, five cases have priority over the present case:

1. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Undersigned counsel has reviewed the record and begun drafting the AOE. She has identified several assignments of error, to include legal and factual sufficiency for both charges.

2. *United States v. Dominguez-Garcia*, No. ACM S32694 (f rev) – The trial transcript is 362 pages long and the record of trial is four volumes consisting of nine Prosecution Exhibits, two Defense Exhibits, and six Appellate Exhibits. Appellant is not currently in confinement. Undersigned counsel has reviewed the rehearing-related documents, which has triggered the need to review the transcript for a possible new AOE. Undersigned counsel was not this appellant's

original military appellate defense counsel. On 19 March 2024, this Court held as status conference discussing the procedural posture of this case and the issue noted in the rehearing documents. On 20 March 2024, the Court issued an order wherein any assignments of error would be filed by 24 April 2024, and, absent extraordinary circumstances, no further requests for an enlargement of time would be granted. As a result of this order, this appellant's case, docketed with the Court on 27 October 2023, has increased in priority.

3. *United States v. Folts*, No. ACM 40322 – The trial transcript is 2,141 pages long and the record of trial contains eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. Appellant is not currently confined. Civilian appellate defense counsel has begun drafting the AOE while undersigned counsel completes her pending priorities before reviewing the record independently to ensure this appellant's rights on appeal are protected.

4. *United States v. Braum*, No. ACM 40434 – Civilian appellate defense counsel filed this appellant's AOE on 10 February 2024. This appellant has provided limited consent to disclose a confidential communication with counsel wherein he has conditionally waived military appellate counsel's review of the record so as to exercise his right to speedy appellate review. Depending on timing and this appellant's request, undersigned counsel will likely review any reply brief before it is filed.

5. *United States v. Clark*, No. ACM 40461 – The trial transcript is 1,060 pages long and the record of trial is 11 volumes consisting of 19 Prosecution Exhibits, 26 Defense Exhibits, 59 Appellate Exhibits, and one court exhibit. Appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

Additionally, to alert the Court ahead of time, undersigned counsel has authorized overseas leave from 11-24 May 2024. She will be unable to work on Appellant's case, or any other case, during this time.

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.

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

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
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Air Force Appellate Defense Division
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Email: samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 26 March 2024.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

26 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) RANDY B. GILES JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40482 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case in this case will be 330 days in length. Appellant's nearly a year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed 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.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 March 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINETH)**
v.	)	
	)	Before Special Panel
Airman Basic (E-1) **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	26 April 2024

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 his nineth enlargement of time to file an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **7 June 2024**. The record of trial was docketed with this Court on 13 June 2023. From the date of docketing to the present date, 318 days have elapsed. On the date requested, 360 days will have elapsed.

On 21 March 2023, at a general court-martial convened at Sheppard Air Force Base, Texas, a military judge, consistent with Appellant's pleas, found him guilty of one charge and one specification of aggravated arson in violation of Article 126, Uniform Code of Military Justice (UCMJ); one charge and one specification of willfully damaging military property in violation of Article 108, UCMJ; and one charge and two specifications in violation of Article 92, UCMJ (one specification of a violation of a general order and one specification of dereliction of duty). R. at 65. On 23 March 2023, a panel of officer and enlisted members sentenced Appellant to forfeit $1,917.00 of pay per month for one month, to be confined for 30 days, and to be discharged from service with a bad-conduct discharge. R. at 780. The military judge awarded 81 days of [illegible]ally ordered confinement credit and 36 days of pretrial confinement credit. R. at 379, 782.

GRANTED
29 Apr 2024

The military judge applied the confinement credits to Appellant's adjudged confinement and forfeitures, resulting in "zero days of confinement left to serve and zero forfeitures left to impose." R. at 782-83. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, *Convening Authority Decision on Action* – U.S. v. AB Randy B. Giles Jr., dated 5 April 2023.

The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Appellant is not currently confined. Counsel has not yet completed her review of Appellant's record.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 21 cases; 18 cases are pending AOEs before this Court and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, four cases have priority over the present case:

1. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Undersigned counsel has written the draft AOE, which is pending civilian appellate defense counsel's addition of one potential issue relating to ineffective assistance of counsel. However, due to extraordinary circumstances, this appellant has requested an additional enlargement of time to address an issue with civilian appellate defense counsel's computer, which contained all the investigation related to the pending issue.

2. *United States v. Folts*, No. ACM 40322 – The trial transcript is 2,141 pages long and the record of trial contains eight volumes consisting of ten Prosecution Exhibits, 40 Defense Exhibits, 66 Appellate Exhibits, and one Court Exhibit. Appellant is not currently confined.

Civilian appellate defense counsel has begun drafting the AOE and undersigned counsel has begun her review of the record. Undersigned counsel's goal is to complete record review before her leave, starting 10 May 2024, so civilian appellate defense counsel can finalize the AOE.

3. *United States v. Dominguez-Garcia*, No. ACM S32694 (f rev) – This appellant's AOE was submitted on 24 April 2024. The Government's Answer is expected by 28 May 2024, upon which undersigned counsel will assess whether a reply is warranted.

4. *United States v. Clark*, No. ACM 40461 – The trial transcript is 1,060 pages long and the record of trial is 11 volumes consisting of 19 Prosecution Exhibits, 26 Defense Exhibits, 59 Appellate Exhibits, and one court exhibit. Appellant is not currently confined. Counsel has not yet completed her review of the record of trial.

In addition to the progress made on the various cases listed above, since Appellant's last enlargement of time request, undersigned counsel has also advised several new direct appeal clients, participated in moots for *United States v. Daughma*, No. ACM 40385, and *United States v. Arroyo*, No. 40321 (f rev), and prepared briefing materials for the Military Justice and Discipline Directorate's All-Call and the Military Justice Administration Course. She briefed the former on 17 April 2024 and is briefing the latter today, 26 April 2024. Additionally, to alert the Court ahead of time, undersigned counsel has authorized overseas leave from 11-24 May 2024. She will be out of the office from 10 to 28 May 2024. While out of the country, she will be unable to work on Appellant's case, or any other case, during this time.

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

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

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

Respectfully submitted,

[redacted]

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.castanien.1@us.af.mil

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 Air Force Government Trial and Appellate Operations Division on 26 April 2024.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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26 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) RANDY B. GILES JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40482 Panel No. 3

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case in this case will be 360 days in length. Appellant's nearly a year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed 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.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 April 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40482**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Randy B. GILES Jr.,	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 28 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, prior filings by the parties and orders of the court, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 31st day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **7 July 2024**.

Given the number of enlargements of time granted thus far, further requests by Appellant for enlargements 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,	)	**APPELLANT'S MOTION**
Appellee,	)	**FOR ENLARGEMENT**
	)	**OF TIME (TENTH)**
v.	)	
	)	Before Special Panel
Airman Basic (E-1)	)	
RANDY B. GILES JR.,	)	No. ACM 40482
United States Air Force,	)	
Appellant.	)	28 May 2024

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 his tenth enlargement of time to file an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **7 July 2024**. The record of trial was docketed with this Court on 13 June 2023. From the date of docketing to the present date, 350 days have elapsed. On the date requested, 390 days will have elapsed.

On 21 March 2023, at a general court-martial convened at Sheppard Air Force Base, Texas, a military judge, consistent with Appellant's pleas, found him guilty of one charge and one specification of aggravated arson in violation of Article 126, Uniform Code of Military Justice (UCMJ); one charge and one specification of willfully damaging military property in violation of Article 108, UCMJ; and one charge and two specifications in violation of Article 92, UCMJ (one specification of a violation of a general order and one specification of dereliction of duty). R. at 65. On 23 March 2023, a panel of officer and enlisted members sentenced Appellant to forfeit $1,917.00 of pay per month for one month, to be confined for 30 days, and to be discharged from the service with a bad-conduct discharge. R. at 780. The military judge awarded 81 days of judicially ordered confinement credit and 36 days of pretrial confinement credit. R. at 379, 782.

The military judge applied the confinement credits to Appellant's adjudged confinement and forfeitures, resulting in "zero days of confinement left to serve and zero forfeitures left to impose." R. at 782-83. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, *Convening Authority Decision on Action* – U.S. v. AB Randy B. Giles Jr., dated 5 April 2023.

The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Appellant is not currently confined. Counsel has not yet completed her review of Appellant's record.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 24 cases; 21 cases are pending before this Court (18 cases are pending AOEs) and three cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, four cases have priority over the present case:

1. *United States v. Baumgartner*, No. ACM 40413 – The trial transcript is 797 pages long and the record of trial contains seven volumes consisting of six Prosecution Exhibits, 17 Defense Exhibits, 44 Appellate Exhibits, and one Court Exhibit. Appellant is currently confined. Undersigned counsel has written the draft AOE, which is pending civilian appellate defense counsel's addition of one potential issue relating to ineffective assistance of counsel. This AOE will be submitted early June.

2. *United States v. Dominguez-Garcia*, No. ACM S32694 (f rev) – This appellant's AOE was submitted on 24 April 2024. The Government's filed its Answer Brief on 28 May 2024. Undersigned counsel is currently drafting a short reply brief, to be submitted within the next seven days.

3. *United States v. Clark*, No. ACM 40461 – The trial transcript is 1,060 pages long and the record of trial is 11 volumes consisting of 19 Prosecution Exhibits, 26 Defense Exhibits, 59 Appellate Exhibits, and one court exhibit. Appellant is not currently confined. Undersigned counsel has not yet completed her review of the record of trial.

4. *United States v. Folts*, No. ACM 40322 – Since Appellant's last request for an enlargement of time, undersigned counsel read the 2,141-page transcript for *United States v. Folts* and assisted civilian counsel with drafting and finalizing the AOE before going on two weeks of overseas leave. Civilian appellant defense counsel filed this appellant's AOE on 16 May 2024 (while undersigned counsel was on leave). The Government's Answer is expected on or near 15 June 2024 (a Saturday), upon which undersigned counsel will turn to drafting a reply brief. Any reply brief may impact undersigned counsel's processing and review of *United States v. Clark*, No. ACM 40461.

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

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

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
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Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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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 Air Force Government Trial and Appellate Operations Division on 28 May 2024.

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
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29 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) RANDY B. GILES JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40482 Special Panel

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

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

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

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 29 May 2024.

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	
	)	Before Special Panel
Airman Basic (E-1) **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	25 June 2024

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 his eleventh enlargement of time to file an Assignments of Error (AOE) brief. Appellant requests an enlargement for a period of 30 days, which will end on **6 August 2024**. The record of trial was docketed with this Court on 13 June 2023. From the date of docketing to the present date, 378 days have elapsed. On the date requested, 420 days will have elapsed.

On 21 March 2023, at a general court-martial convened at Sheppard Air Force Base, Texas, a military judge, consistent with Appellant's pleas, found him guilty of one charge and one specification of aggravated arson in violation of Article 126, Uniform Code of Military Justice (UCMJ); one charge and one specification of willfully damaging military property in violation of Article 108, UCMJ; and one charge and two specifications in violation of Article 92, UCMJ (one specification of a violation of a general order and one specification of dereliction of duty). R. at 65. On 23 March 2023, a panel of officer and enlisted members sentenced Appellant to forfeit $1,917.00 of pay per month for one month, to be confined for 30 days, and to be discharged from with a bad-conduct discharge. R. at 780. The military judge awarded 81 days of rdered confinement credit and 36 days of pretrial confinement credit. R. at 379, 782.

GRANTED
28 JUN 2024

The military judge applied the confinement credits to Appellant's adjudged confinement and forfeitures, resulting in "zero days of confinement left to serve and zero forfeitures left to impose." R. at 782-83. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, *Convening Authority Decision on Action* – U.S. v. AB Randy B. Giles Jr., dated 5 April 2023.

The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Appellant is not currently confined. Counsel has not yet completed her review of Appellant's record.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 27 cases; 22 cases are pending before this Court (19 cases are pending AOEs) and five cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). To date, three cases have priority over the present case:

1. *United States v. Folts*, No. ACM 40322 – Undersigned counsel is currently assisting with this appellant's Reply Brief, due 28 June 2024. A request for an enlargement of time was granted due to extraordinary circumstances surrounding this appellant's civilian counsel.

2. *United States v. Clark*, No. ACM 40461 – The trial transcript is 1,060 pages long and the record of trial is 11 volumes consisting of 19 Prosecution Exhibits, 26 Defense Exhibits, 59 Appellate Exhibits, and one court exhibit. Appellant is not currently confined. Undersigned counsel is working through completing her review of the record and identifying any assignments of error. She is working this case simultaneously with *United States v. Folts*, No. ACM 40322.

3. *United States v. Baumgartner*, No. ACM 40413 – Since Appellant's last request for an enlargement of time, undersigned counsel finalized and submitted this appellant's AOE on

3 June 2024. The Government's Answer is expected sometime in July, although pending motions in this case may affect the anticipated date.

Undersigned counsel was also recently assigned to take over a case from an appellate defense counsel who is changing assignments: *United States v. Casillas*, No. 24-0089/AF. This case was recently granted at the CAAF (14 June 2024), and undersigned counsel is assisting with the Grant Brief and will be handling the Reply Brief. It is possible the timing of this case interferes with Appellant's case, of which Appellant has been informed.

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

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

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

Respectfully submitted,

SAMANTHA M. CASTANIEN, Capt, USAF
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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 Air Force Government Trial and Appellate Operations Division on 25 June 2024.

Respectfully submitted,

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26 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) RANDY B. GILES JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40482 Special Panel

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case in this case will be 420 days in length. Appellant's more than a year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed more than two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 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.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 June 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40482**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Randy B. GILES, JR.	)	**CHANGE**
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 12th day of April, 2024,

ORDERED:

That the record of trial in the above-styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge

FOR THE COURT

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40482**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Randy B. GILES Jr.	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 19 July 2024, counsel for Appellant filed a Consent Motion to Examine Sealed Materials in the above-referenced case, requesting permission to examine sealed materials in the record of trial, specifically Defense Exhibits B through K which were viewed by the parties at trial and sealed by the military judge at the Defense's request. The Government consents to counsel for both parties reviewing this sealed material.

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." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2024 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 22d day of July, 2024,

ORDERED:

Appellant's Consent Motion to Examine Sealed Materials dated 19 July 2024 is **GRANTED**.

Counsel for Appellant and counsel for the Government may examine **Defense Exhibits B through K** 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]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	
	)	Before Special Panel
Airman Basic (E-1) **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	19 July 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 Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the sealed materials in Appellant's record of trial: **Defense Exhibits B-K** (contained in Vol. 2). These defense exhibits, "at defense request," were sealed by the military judge because they "contain sensitive mental health information from the accused." R. at 393. The members, military judge, trial counsel, and defense counsel at trial all reviewed these materials. R. at 658-59. The Government consents to both parties reviewing these sealed materials.

Pursuant to Rule for Court Martial (R.C.M.) 1113(b)(3)(B)(i), "materials presented or reviewed at trial and sealed . . . may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities[.]"

> 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 here must be reviewed in order for counsel to provide "competent appellate representation." *Id*. As these exhibits were presented to the members through trial defense counsel, viewing these exhibits is reasonably necessary to determine whether Appellant is entitled to relief due to errors concerning their substance during any portion of the proceedings—before, during, or after trial. Therefore, undersigned counsel's examination of the sealed materials is reasonably necessary to fulfill her responsibilities in this case as counsel cannot perform her duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, or fulfill her duty to provide effective assistance of counsel without first reviewing the complete record of trial.

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

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 19 July 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
	)	Before Panel Special Panel
Airman Basic (E-1) **RANDY B. GILES JR.,**, USAF *Appellant*.	)	No. ACM 40482
	)	7 October 2024

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Special Panel
Airman Basic (E-1) **RANDY B. GILES JR.,** United States Air Force *Appellant.*	)	No. ACM 40482
	)	7 October 2024

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

ISSUES PRESENTED

I.

WHETHER [APPELLANT] IS ENTITLED TO RELIEF FOR BEING INVOLUNTARILY RESTRICTED TO AN INPATIENT MENTAL HEALTH FACILITY AFTER HIS FAILED SUICIDE ATTEMPT.

II.

WHETHER [APPELLANT] WAS UNLAWFULLY KEPT IN PRETRIAL CONFINEMENT WHEN THE TRIGGER FOR HIS MISCONDUCT – A DESIRE TO COMMIT SUICIDE VIA SELF-IMMOLATION – WAS NO LONGER PRESENT.

III.

WHETHER THE GOVERNMENT VIOLATED [APPELLANT'S] RULE FOR COURTS-MARTIAL 707 SPEEDY TRIAL RIGHTS BY ARRAIGNING HIM 193 DAYS AFTER IMPOSITION OF RESTRAINT.

IV.

WHETHER THE ADJUDGED BAD-CONDUCT DISCHARGE FOR [APPELLANT'S] VICTIMLESS SUICIDE ATTEMPT IS INAPPROPRIATELY SEVERE.

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant's Actions Prior to Lighting his Dorm on Fire

Appellant was only on active duty for around four months before lighting his dorm on fire on 16 August 2023. (R. at 44, 524-523; *see* Pros. Ex. 1 (showing service entry date)). During his short time in the military, he made his fellow classmates uncomfortable with disturbing actions, remarks, and messages. (ROT Vol. 4, *Preliminary Hearing Officer's Report,* Ex. 3, pgs. 11-24). This included sending a violent video to his classmates' group chat of a man stabbing himself, pulling the legs off bugs and laughing because he "liked to see them suffer," saying it would be "cool" to see a tire explode and hit a classmate to "see her body parts get laid out across the ground," expressing a fascination with death, and saying he liked to watch living things die. Id.

Prior to 16 August, Appellant told J.M., one of his "closest peers," (R. at 548) that he was going to burn the dorm down on 29 August.[1] (ROT Vol. 4, *Preliminary Hearing Officer's Report,* pg. 5, 22; R. at 469). Appellant told J.M. that he would not have to worry because Appellant would not go to class and would instead stay in the dorm to light it on fire. (ROT Vol. 4, *Preliminary Hearing Officer's Report,* pg. 5).

On 16 August, Appellant received a Letter of Counseling (LOC) for the inappropriate actions reported by his classmates detailed above. (Pros. Ex. 6, *Stipulation of Fact*).

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[1] Appellant and witnesses referred to the dorm as the "squadron." For clarity, it is referred to as the dorm throughout this brief.

Immediately after receiving the LOC, he spoke to J.M. and was angry. Id. Appellant told J.M. that "It's going to happen that night." J.M. reported him. (R. at 482.)

As a result of J.M.'s report, Appellant was questioned by non-commissioned officers (NCOs) about whether he was suicidal. (R. at 482, 522.) He lied and told them no. (R. at 522.) Still, Appellant was taken to mental health. While at mental health, he was asked again whether he was suicidal and about the statements. He lied and told the mental health providers that he was just joking. (R. at 522-523.) Appellant testified that he lied to the NCOs and the mental health providers because he did not want them to prevent him from committing suicide. (R. at 522.)

Appellant Lighting the Fire

In the middle of the night on 16 August, Appellant executed his plan. He barricaded the door to his dorm room with a desk and tied a string from the door to the sink to make it even more difficult to open. (R. at 54, 446.) He taped over the smoke detector to keep it from going off. (R. at 58-59, 443, 447, 539.) He poured lighter fluid on the bed, struck a match, and lit the bed on fire. (R. at 44-45, 546.) He drank lighter fluid and laid down on the other bed in the room. (R. at 45, 431, 525.) There were 278 people assigned to the dorm that night. (ROT Vol. 4, *Preliminary Hearing Officer's Report,* Ex. 3, pg .25.)

Smoke escaped from Appellant's room and triggered the smoke detector in C.W.'s room across the hall. (R. at 414.) As C.W. and other Airmen came out of their rooms, C.W. saw smoke escaping into the hall from the other rooms. (R. at 416.) Someone pulled the fire alarm, and the building evacuated. (R. at 416-417.) C.W. testified that he was coughing quite a bit after evacuating the building. (R. at 418-419.) That cough lasted for a couple days. (R. at 419.) The base fire chief testified that the primary risk to those in the building is the spread of smoke

throughout the building. (R. at 555, 558, 559.) He testified that people sleeping in the building could inhale enough smoke while they are sleeping to die. (R. at 559.)

When the first responders identified that the fire was coming from Appellant's room, they attempted to make entry. (R. at 429.) The firefighters were barely able to get the door open because of the desk that was pushed up against the door and the string tied from the door to the sink. (R. at 429, 446.) Appellant was eventually rescued and taken to the hospital for treatment where he spent approximately 14 days under medical care. (R. at 528.)

In-Patient Mental Health Treatment

On 8 September, the commander ordered Appellant into pretrial confinement. (ROT. Vol. 4, *Confinement Order*). Appellant's commander became aware that Appellant was not receiving treatment while in pretrial confinement and coordinated for Appellant to be seen by the base mental health clinic once a week. (App. Ex. XV). The weekly mental health clinic visits while in pretrial confinement were to continue "unless his ADC gets him to volunteer for in-patient treatment." Id.

On 19 September, Appellant submitted a memorandum to the commander stating, "With your approval, I will voluntarily admit myself to a 30-day inpatient mental health treatment program." Id. Appellant's commander then ordered him to be released from pretrial confinement contingent on admission to the program. Id.

Appellant entered in-patient mental health treatment on 19 September. (R. at 529.) He stayed there for more than five months. Id. The program allowed for Appellant to leave the building to go on trips to an arcade or to an equestrian center as well as to go to the cafeteria across the street to get his own meals. (R. at 84, 85.) This privilege was taken away on 26 October after Appellant made a threat of suicide. (R. at 80-81, 85.) Appellant had threatened to

take a police officer's gun and shoot himself with it. (R. at 80, 534.) He lost the privilege to leave the building at that point. Id.

In ruling on trial defense counsel's motion for pretrial confinement credit, the military judge found Appellant was treated as a patient and not as a pretrial confinee. (R. at 347-348.) He received medication, individual counseling, group counseling, and art therapy. (R. at 530.) The facility offered religious services and medical services. (R. at 83.) He had phone privileges as long as he was going to group therapy. (R. at 83.) He had civilian clothes. (R. at 84.) He had a room with one roommate. (R. at 83.) He was able to go off on his own within the building for some privacy. (R. at 95.) Contrary to Appellant's assertion on appeal that there was "some evidence that there were 'armed guards'" at the facility (App. Br. at 12), Appellant testified that there were not armed guards escorting him around the facility. (R. at 82.) Appellant testified that his time in in-patient treatment was helpful (R. at 530-531), but after treatment, Appellant still experienced thoughts of suicide and negative thoughts every day. (R. at 531 534.)

Discharge from In-Patient Treatment

On 28 February 2023, 162 days after volunteering to go to in-patient treatment for 30 days, Appellant was discharged from the in-patient facility. (App. Ex. XV). Appellant's commander then ordered him back into pretrial confinement. Id. A pretrial confinement review hearing was held, and the pretrial confinement review officer (PCRO) determined continued pretrial confinement was necessary and less severe forms of restraint were inadequate. (ROT Vol. 4, *Pretrial Confinement of [Appellant],* dated 1 March 2023).

Trial defense counsel provided the PCRO with an affidavit from a clinical psychologist. Id. The psychologist stated that he was "somewhat limited on opinions that can be offered regarding suicidal risk." Id. at para. 13. The psychologist explained that following Appellant's

medical stabilization, "numerous mental health professionals continued to consider [Appellant] to be at a very high risk for suicide." Id. at para 14.

The PCRO noted that statements from Appellant's classmates revealed that he "frequently made offensive comments and exhibited behavior which made his fellow classmates uncomfortable." (ROT Vol. 4, *Pretrial Confinement of [Appellant],* dated 1 March 2023). This included pulling the legs off spiders, killing a mouse in class, taking photographs of dead animals, sending violent videos to the class group chat, stating that it would be 'cool' to see a fellow classmate get hit by an exploding tire so that he could see her body parts laid out on the ground, discussing suicide, and threatening to burn down the dorms." Id.

The PCRO found that Appellants commission of the serious offense of setting fire to the dorm, his history of making offensive comments to his classmates, including comments directed at specific classes of people, his affinity and demonstrations of violence while in the classroom, his repeated threats to burn down the dorms, and his suicidal ideation created a reason to believe Appellant posed a risk of engaging in serious criminal misconduct to harm himself and his classmates and that he would not appear at trial. Id. The PCRO found lesser forms of restraint inadequate because Appellant's alleged offense occurred in his room. Id. Trial defense counsel did not file a motion for Appellant to be released from pretrial confinement, and so Appellant remained in pretrial confinement until his trial.

ARGUMENT

I.

APPELLANT IS NOT ENTITLED TO MASON CREDIT OR ARTICLE 13, UCMJ, RELIEF.

Additional Facts

At trial, Appellant filed a motion for appropriate relief for confinement credit. (App. Ex. XV). He asserted that he should be awarded day-for-day credit in accordance with United States v. Mason, 19 M.J. 274 (C.M.A. 1985) for his time spent in in-patient mental health treatment because his admission to treatment was not voluntary and because the conditions were tantamount to confinement. (App. Ex. XV). During argument, the military judge raised the question as to whether Appellant was subjected to illegal pretrial punishment in violation of Article 13, UCMJ. (R. at 77.) The military judge focused on whether the fact that Appellant was offered the choice of remaining in pretrial confinement or receiving inpatient mental health treatment qualified as a violation of Article 13. (R. at 100.) When explaining his framework for analyzing Article 13, the military judge identified that one way of violating Article 13 is through an attempt to punish regardless of what the action is. (R. at 104.) He explained that circumstantial evidence of an intent to punish is permitted and noted that there is case law that a violation of a regulation could be circumstantial evidence of an attempt to punish. Id. He then stated, "That's a permissible inference if not a required inference." Id.

The military judge denied Appellant's motion for appropriate relief as to Mason[2] credit but granted it, in part, for Article 13 credit. In denying the Mason credit, the military judge found the time in inpatient treatment was not tantamount to confinement, but tantamount to restriction. (R. at 346, 354.) In granting the Article 13 credit, the military judge characterized it as "functioning as an abuse of discretion of command authority." Id.

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[2] The military judge mistakenly referred to the credit as Allen credit throughout the trial but applied the Mason credit standard as argued by both trial and defense counsel.

In his ruling, the military judge made the following findings of fact. Appellant was admitted to inpatient treatment on 19 September 2022. (R. at 347.) On or about 26 October 2022, 37 days after admittance, he made a suicidal ideation by stating that he wanted to get a police officer's weapon and shoot himself. Id. Because of his suicidal ideation, Appellant was placed on building restriction at the facility for 125 days from 26 October 2022 until 28 February 2023, at which point he was discharged from the facility. Id. This restriction was based solely on his suicidal ideation and not based on his status of someone awaiting trial as an accused. Id.

The military judge further found that Appellant was not treated as a pretrial confinee, but as a patient. (R. at 347-348.) He had access to religious and medical services. Members of his unit were allowed to visit, but members of his family were not. He had limited telephone privileges so long as he was participating in group therapy. He was assigned to a room with a roommate, not to a cell. There were no lockdown times at the facility. He had access to limited personal property, including paper, documents, arts and crafts, and access to the property that he brought with him to the facility. (R. at 347.)

When analyzing the command's motives, the military judge found that there was "no malicious intent by the command" in offering Appellant the choice to voluntarily place himself into inpatient treatment. (R. at 348.) But the military judge noted that Article 13 credit could be given "for trial punishment for abuse of command discretion with an intent to punish" and the amount of credit given was within the discretion of the court. (R. at 349.) The military judge found there was "an unauthorized command-directed or induced involuntary commitment that constitutes an abuse of discretion within the meaning of Article 13, UCMJ, insofar as it's a violation of Air Force and DoD regulations." (R. at 354.) The military judge provided

"meaningful relief" in the form of one day of confinement credit against every two days Appellant spent at the Red River facility against his will. (R. at 356.)

Standard of Review

The question whether appellant is entitled to credit for a violation of Article 13, UCMJ is a mixed question of law and fact. United States v. Mosby, 56 M.J. 309, 310 (C.A.A.F. 2002). A military judge's findings of fact, including a finding of no intent to punish, will not be overturned unless they are clearly erroneous. Id. The ultimate question of whether an appellant is entitled to credit for a violation of Article 13 is reviewed de novo. Id.

The Court reviews the legal question of whether certain pretrial restrictions are tantamount to confinement, and therefore warrant Mason credit, de novo. United States v. King, 58 M.J. 110, 113 (C.A.A.F. 2003).

Law and Analysis

Appellant is not entitled to additional pretrial confinement credit under United States v. Mason or Article 13, UCMJ.

1. Mason Credit

United States v. Mason, 19 M.J. 274 (C.M.A. 1985) established what is colloquially known as Mason credit by providing for day for day credit for pretrial restrictions tantamount to confinement.

Appellant contends that he is entitled to Mason credit for his entire time at inpatient treatment. This argument is unpersuasive for two reasons: (1) Appellant affirmatively waived the issue of whether the first month of his time in inpatient treatment was tantamount to confinement; (2) the remainder of Appellant's time in inpatient treatment was not tantamount to confinement.

Appellant's waiver of the first month of treatment

Appellant affirmatively waived the issue of whether the first month of his time in inpatient treatment was tantamount to confinement. (R. at 96-97.) R.C.M. 905(e) states that failure to raise motions before the court-martial is adjourned, other than those that must be made before pleas are entered, constitutes forfeiture, absent an affirmative waiver. "Affirmative waiver is an express relinquishment of a known right." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). There are no magic words to establish affirmative waiver. United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999). In making waiver determinations, the court looks to the record to see if the statements signify that there was a purposeful decision at play. Id. Our Superior Court has found affirmative waiver based on trial defense counsel's statement conceding an issue. *See* United States v. Elespuru, 73 M.J. 326 (C.A.A.F. 2014)((finding affirmative waiver where, when arguing motions, trial defense counsel conceded that the elements test for lesser included offenses was not met).

At Appellant's trial, trial defense counsel stated, "These conditions are tantamount to confinement at least for the period where he was on building restriction. In terms of that first month, the defense would concede solely for the restrictions tantamount to confinement that he would not be entitled to credit of that one month." This was affirmative waiver of whether Appellant would be entitled to any credit for restrictions tantamount to confinement for the 37 days before Appellant made a suicide threat and was restricted to the building. Just as in Elespuru, trial defense counsel made a purposeful decision to concede that issue and expressly relinquished a known right. This court cannot review waived issues because a valid waiver leaves no error to correct on appeal. United States v. Campos, 67 M.J. 330 (C.A.A.F. 2009).

This Court has said that even if its "waiver-piercing authority as to waived errors impacting sentencing survived after the [Fiscal Year 2021 National Defense Authorization Act] amendments to Article 66(d), UCMJ, waiver will only be ignored "in the most deserving cases." United States v. Cook, 2024 CCA LEXIS 276 (A.F. Ct. Crim. App. 3 July 2024)(citing United State v. Blanks, 2017 CCA LEXIS 186, at *22 n11, (A.F. Ct. Crim. App. 17 Mar 2017). Appellant's case does not meet that threshold. Therefore, this Court should decline to pierce Appellant's affirmative waiver for the first 37 days he was in inpatient treatment.

The remaining 125 days in inpatient treatment were not tantamount to confinement.

Appellant entered inpatient treatment on 19 September 2022. Appellant's restriction to the building began on 26 October 2022. As explained above, Appellant waived those 37 days leaving 125 days in inpatient treatment at issue. Appellant's remaining 125 days in inpatient treatment were not tantamount to confinement even though he was on building restriction.

This court reviews whether pretrial restrictions are tantamount to confinement de novo. United States v. King, 58 M.J. 110, 113 (C.A.A.F. 2003). Whether pretrial restrictions are tantamount to confinement is a matter of the totality of the conditions involved. United States v. Smith, 20 M.J. 528, 531 (A.C.M.R. 1985) (citing Mason, 19 M.J. 274). To be tantamount to confinement "the terms of the pretrial restraint must indeed be quite onerous." United States v. Gregory, 21 M.J. 952, 956 n.12 (A.C.M.R. 1986).

Appellant asserts that because he was "forced to make a choice between jail and inpatient treatment" that "his choice was not voluntary" and this Court should award him with Mason credit. In support of this proposition, Appellant claims that "involuntary restriction to an inpatient mental health facility results in conditions tantamount to confinement." (App. Br. at 15). This Court should definitively reject this assertion as it calls on this Court to inappropriately

expand the holdings of its prior decision in United States v. White, 2020 CCA LEXIS 235 (A.F. Ct. Crim. App. 15 July 2020), and our Superior Court in United States v. Regan, 32 M.J. 299 (C.A.A.F. 2006).

Appellant incorrectly cites White for the proposition that involuntary commitment to an inpatient treatment program entitled Appellant to Mason credit. (App. Br. at 15). That was not the findings, or even the question, of that case. The appellant in White was awarded Mason credit at the trial level when both parties and the military judge agreed "that the conditions at [the] facility were tantamount to confinement." 2020 CCA LEXIS at *10. This Court should not expand White by concluding that carte blanche involuntary commitment constitutes conditions tantamount to confinement as Appellant suggests.

Appellant goes on to cite Regan, as did trial defense counsel, for the proposition that being offered the choice of going to pretrial confinement or inpatient treatment results a lack of choice and therefore entitled him Mason credit based on involuntary commitment. (App. Br. at 15). He asks this court to "come to the same conclusions as in Regan*"* and award Appellant *Mason* credit. (App. Br. at 16)(Alterations in original). This Court should decline to do so because this would inappropriately expand the conclusions of our Superior Court in Regan.

As in his references to White, Appellant misstates the conclusions of Regan. In Regan, our Superior Court was analyzing whether inpatient treatment warrants credit pursuant to R.C.M. 305(k) (for failure to follow the provisions of R.C.M. 305) despite there not being physical restraint. Id. The Court, in describing the posture of the case like White, mentioned that the military judge found Mason credit was warranted because appellant was presented with an "impossible choice" and the "totality of [the] conditions" Id. at 301. The CAAF was not asked to analyze the military judge's grant of Mason, credit and the military judge's conclusion was not

dispositive to the decision. Appellant now asks this Court to apply Regan as if our Superior Court found that a single trial judge's conclusion that the choice between inpatient treatment and pretrial confinement is "no choice at all" entitles him to Mason credit. This Court should decline to do so and should clarify for the field that an offer for additional mental health care while in pretrial confinement is not involuntary commitment.

The facts support a finding that Appellant voluntarily entered mental health treatment and that the offer for inpatient treatment did not render his choice involuntary. Appellant was already set to receive mental health care weekly while in inpatient treatment. (App. Ex. XV, attachment 3). The commander was willing to allow him to receive more robust treatment if he wanted it. While it may have been an easy choice to decide to go to a less restrictive environment and receive mental health care rather than remain in confinement, it was still a choice. The negative implications should this court uphold the assertion that it is no choice at all and renders entry into care an "involuntary commitment" will be profound. Such a holding will chill commanders from offering help to suicidal Airmen awaiting trial. It will result in Airmen who could receive care beneficial to both their mental health and their rehabilitative potential not being offered greater resources than confinement facilities can offer. That is not the holding of White or Regan and this Court should reject Appellant's argument that such an offer renders inpatient treatment involuntary.

Instead, this Court should evaluate the factors set out in United States v. King, 58 M.J. 110 (C.A.A.F. 2003) in determining whether Appellant's time in inpatient treatment was tantamount to confinement. The four primary factors are:

(1)the nature of the restraint (physical or moral)

(2) the area or scope of the restraint (confined to post, barracks, room, etc.)

(3) the types of duties, if any, performed during the restraint (routine military duties, fatigue duties, etc.)

(4) the degree of privacy enjoyed within the area of restraint.

Id. at 113.

> Other important conditions which may significantly affect one or more of these factors are: whether the accused was required to sign in periodically with some supervising authority; whether a charge of quarters or other authority periodically checked to ensure the accused's presence; whether the accused was required to be under armed or unarmed escort; whether and to what degree [the] accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available for the accused's use; the location of the accused's sleeping accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing).

Id.

These factors weigh in favor of finding the remaining 125 days Appellant spent in inpatient treatment, after Appellant's suicidal ideation to shoot himself with an officer's gun, was not tantamount to confinement: (1) Appellant was not physically restrained; (2) Appellant was restricted to a building, not to a single room; (3) Appellant's duty was his mental health treatment; (4) Appellant held a good degree of privacy by having a room with only one roommate and by being able to go off and sit by himself in the facility (R. at 83, 95.)

As further evidence of the conditions not being tantamount to confinement there were not armed guards (R. at 82), he was allowed visitation with members of his unit (R. at 83) and telephone privileges (R. at 83), there were religious, medical, recreational, and educational support (R. at 83), and he was allowed to retain some personal property and wear civilian clothes. (R. at 84.) The only thing Appellant was not able to do was to leave the building to go to an arcade or to an equestrian center. (R. at 84-85.) This limitation was applied for Appellant's safety because he said that he wanted to take a police officer's gun and shoot

himself. Even with the higher restriction for the safety to himself and others, Appellant still enjoyed many freedoms. The four King factors, and additional considerations articulated in King support that Appellant's time in inpatient treatment was not so onerous as to rise to the level of restriction tantamount to confinement. Because of this, Appellant is not entitled to additional *Mason* credit for his stay in inpatient treatment.

2. Article 13, UCMJ

Article 13, UCMJ prohibits the intentional imposition of punishment on an accused before trial and pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial. United States v. Inong, 58 M.J. 460, 463 (C.A.A.F. 2003).

The military judge granted Appellant confinement credit based on his conclusion that Article 13, UCMJ was violated. Appellant asserts that the military judge erred in assessing the relief warranted for that violation. This court should decline to grant relief because, contrary to the military judge's conclusion, Article 13, UCMJ was not violated.

Trial defense counsel's decision to not request release from confinement or to raise the issue of Article 13 in their initial motion for sentencing credit (App. Ex. XV; R. at 97, 101) is some evidence that Appellant was not being punished in violation of Article 13. United States v. King, 61 M.J. 225, 228 (C.A.A.F. 2005).

The military judge sua sponte raised the issue, and while his findings of fact were correct, his conclusion that there was a violation of Article 13 was erroneous. This Court is not bound by his determination because the Court reviews de novo the ultimate question of whether an appellant is entitled to credit for a violation of Article 13. Mosby, 56 M.J. at 310.

The military judge correctly found that there was no intent to punish, but despite those findings concluded there was a violation of Article 13, UCMJ. This error occurred because the

military judge incorrectly concluded command abused their discretion in offering Appellant inpatient mental health treatment, and military judge misapplied the permissive inference of an intent to punish as a mandatory inference. These errors render the military judge's finding that Article 13 was violated clearly erroneous and this court should not adopt his findings.

The commander did not abuse his discretion and involuntarily commit Appellant.

Appellant asserts that the command "forced" him into inpatient mental health treatment in violation of Air Force and state involuntary commitment procedures, and therefore he should be entitled to credit under Article 13. (App. Br. at 19). He argues that this action was an abuse of discretion without "reasonable explanation for why involuntary commitment proceedings were circumvented." (App. Br. at 20). This argument is based on the military judge's finding of fact that command engaged in an unauthorized command directed or induced involuntary commitment that constituted an abuse of discretion. (R. at 354.) This finding is clearly erroneous, and this court should decline to adopt it.

There is no evidence to support that the command had the intention, or the obligation, to involuntary commit Appellant. The military judge's finding that offering inpatient mental health treatment is the equivalent of circumventing those procedures is a false equivalency. The command had ensured that Appellant was receiving mental health treatment while in pretrial confinement. (App. Ex. XV, attachment 3). The pretrial confinement review officer strongly recommended Appellant receive inpatient mental health treatment. (App. Ex. XV, attachment 2). The command then offered Appellant access to in mental health treatment if he voluntarily wanted to go. (App. EX. XV, attachment 3). This is not involuntary commitment. Appellant was given a choice. While it may have been an easy choice to have more freedoms than he would have in pretrial confinement, it was still a choice.

Concurring with the military judge's clearly erroneous finding that the offer was essentially involuntary commitment will have detrimental chilling effects on commanders offering help to Airmen awaiting trial. It will not only impact mental health care for such airmen, but it will deprive them of rehabilitative opportunities that they can then use to advocate for a lighter sentence at trial. . The command did not abuse their discretion or "force" appellant into mental health treatment, and so this issue should not be analyzed in terms of whether the command followed the appropriate procedures for *involuntary* commitment. This Court should therefore decline to find a violation of Article 13 on that basis.

The military judge misapplied the permissive inference as a mandatory inference.

The military judge misapplied the permissive inference as a mandatory inference when he found a violation of Article 13 for an abuse of discretion in failing to follow service regulations absent punitive intent. United States v. Star, 51 M.J. 528, 535 (A.F. Ct. Crim. App. 1999) found that a violation of service regulations permits an inference of punitive intent. Permissive inferences are circumstantial evidence, United States v. Ford, 23 M.J. 331, n2 (C.M.A. 1987). The military judge indicated that he believed the permissive inference may be mandatory when he stated it was a "permissible inference if not a required inference." (R. at 104.) This misunderstanding was revealed when the circumstantial evidence of punitive intent was repeatedly rebutted by the military judge's findings of fact. In his findings of fact and ruling, the military judge stated three times that the command had "no malicious intent" in offering Appellant inpatient mental health treatment. (R. at 348, 354.) He characterized the command's actions having a "humanitarian purposes" (R. at 354) as "the command trying to do the right thing." (R. at 351) and stated they had "benign and responsible command motives to try to get [Appellant] the help he needed." (R. at 354.) These findings of fact definitively rebutted any

inference of punitive intent. Despite this clear finding of lack of punitive intent, the military judge still found a violation of Article 13 based on the alleged abuse of discretion alone. (R. at 354.) He found that the court was "obligated to provide meaningful relief for the Article 13 violation, notwithstanding the absence of malicious intent by the command." (R. at 354.) This holding is clearly erroneous.

Appellant argues that United States v. Williams, 68 M.J. 252, 256-257 (C.A.A.F. 2010), stands for the proposition that a violation of a regulation designed to protect the liberty interest of servicemembers can constitute a violation of Article 13, UCMJ. (App. Br. at 19). This argument distorts the holding from Williams and is unpersuasive based on the distinguishing facts in this case. The Court in Williams was evaluating whether the Appellant was entitled to additional confinement credit under R.C.M. 305(k) when, in pretrial confinement, the confinement officials failed to follow regulations which required periodic re-evaluations of a person on suicide watch. Id. at 257. This re-evaluation was important because suicide watch resulted in the appellant being subjected to twenty-four-hour lighting, required to wear particular clothes, and denied books, radio, and a CD player. Id. These facts are what the Court was evaluating when it upheld the military judge's finding of a violation of Article 13 based on "the accused being subjected to more onerous conditions that were not related to a legitimate governmental objective." Id. at 255, 257. Here, Appellant was not subjected to more onerous confinement conditions than necessary. In fact, Appellant was subjected to *less* onerous conditions by being allowed to go to inpatient mental health treatment rather than stay in a confinement facility - that is why it was an easy choice. He wore civilian clothes, had access to personal items, phone privileges, and visitors. (R. at 347.) Even if the commander abused his discretion by offering inpatient

treatment, which as explained below he did not, Appellant received more personal liberties unlike the appellant in Williams, and there was no Article 13 violation.

Appellant's case is more akin to the portion of the Article 13 analysis in Williams were the Court concurred with the military judge's finding that there was no intent to punish in violating the service regulations. Williams, 68 M.J. at 258. Just as in Appellant's case, the conditions served a legitimate governmental objective. The Government had a legitimate objective in getting Appellant mental health care. By offering Appellant the opportunity to receive better care through inpatient treatment, the commander furthered that legitimate objective. This, along with the military judge's findings of fact that there was no intent to punish, demonstrate that Article 13, UCMJ was not violated. Therefore, this Court should decline to grant Appellant any more relief than what the military judge already granted.

3. This court should not set aside the findings and sentence or the bad-conduct discharge.

Even if this court finds a violation of Article 13 warranting additional relief or that Appellant's time in inpatient treatment was tantamount to confinement, any additional credit should be applied to his sentence of confinement, not his bad-conduct discharge or the findings of guilt.

The primary mechanism for addressing violations of Article 13, UCMJ, has been confinement credit. United States v. Zarbanty, 70 M.J. 169 (C.A.A.F. 2011). A punitive discharge is "so qualitatively different from the other punishments … the fact that an accused has served confinement which was technically illegal should not automatically affect a punitive discharge." Id. (internal quotation and citations omitted).

Where context warrants, courts must consider other relief for violations of Article, 13 UCMJ. Id. Whether meaningful relief has been granted and should be granted will depend on

factors such as the nature of the Article 13, UCMJ violations, the harm suffered by the appellant, and whether the relief sought is disproportionate to the harm suffered or in light of the offenses of which the appellant was convicted. Id. at 177.

Meaningful relief in Appellant's case does not involve setting aside the bad-conduct discharge and certainly does not involve setting aside the finding of guilt following his plea of guilty. Dismissal of charges is an extraordinary remedy. United States v. Fulton, 55 M.J. 88, 90 (C.A.A.F. 2001). Even where the court has found illegal pretrial confinement in a confinement facility it has declined to set aside a bad-conduct discharge. *See* United States v. Rosendahl, 53 M.J. 344 (C.A.A.F. 2000) (finding 120 days of confinement credit so different from a punitive discharge); Zarbatany, 2012 CCA LEXIS at 5-6 (A.F. Ct. Crim. App. 9 January 2012) (declining to disapprove a punitive discharge where application of the credit resulted in immediate release from confinement and disapproval of the total adjudge forfeitures provided meaningful relief); United States v. Hammond, 61 M.J. 676 (A. Ct. Crim. App. 2005) (declining to set aside or upgrade a dishonorable discharge for an appellant serving 30 days longer in confinement than he should have).

Should this court find that a violation of Article 13, UCMJ occurred, the nature of the violation is minor. It certainly does not rise to the level of "turn[ing] a blind eye toward an egregious situation" warranting dismissal of charges. (App. Br. at 21 citing Crawford, C.J. concurring in Fulton, 55 M.J. at 91.) Appellant's claim that he was "confined because it was essentially too challenging or burdensome to lawfully take care of him and his mental health" has no basis in fact. (App. Br. at 22). The command went out of their way to take care of Appellant. The same day NCOs received the report from J.M. that Appellant was making concerning statements, NCOs intervened and directly asked Appellant if he was suicidal. (R. at

522.) When Appellant lied and denied that he was suicidal, they continued to try to get him help by taking him to mental health for evaluation. Id. Appellant continued to lie to mental health providers. (R. at 522-523.) Appellant conveniently ignores that these efforts to help him were thwarted by his own lies to the NCOs and mental health providers. He instead claims that "his command turned a blind eye to him." (App. Br. at 23). These inaccurate characterizations of command "covering itself when it ignored all signs in [Appellant's] case" (App. Br. at 23), while in the same breath bemoaning the commander's offer for inpatient treatment as "unlawful commitment" belies his claim that his case rises to the level of requiring dismissal of charges.

Appellant admits that he suffered no harm as a result of attending inpatient treatment, and in fact, Appellant received crucial mental health care that ultimately helped him learn how to cope with recurring suicidal ideations and vital medications. (App. Br. at 29). If the command had not offered the mental health treatment, Appellant likely would not have gotten that help. (R. at 92.)

Appellant's further claim that there was a low interest in the administration of justice in Appellant's case is inaccurate. He repeatedly refers to his criminal action of setting his dorm on fire while more than 200 other Airmen slept as merely a suicide attempt not worthy of prosecution. (App. Br. at 24). That characterization greatly downplays Appellant's actions. He, at a minimum, recklessly disregarded the lives and safety of others. He knew people could die, and he did not care. (R. at 542.) The evidence indicates that that wanton abandonment of care occurred only after he was angry because he received an LOC based on allegations made by some of those airmen asleep that night. (Pros. Ex. 6, *Stipulation of Fact*, R. at 485, 486). This was more than a suicide attempt. This was a crime. The interests of justice and good order and

discipline are heavy, and overturning his conviction because he was offered inpatient mental health care is inappropriate.

Further, disapproving the bad conduct discharge is similarly inappropriate. A bad conduct discharge is "a severance of military status." United States v. Josey, 58 M.J. 105, 108 (C.A.A.F. 2003). It correctly characterizes Appellant's misconduct and is appropriate in this case. Appellant lit a dorm on fire with hundreds of his fellow classmates asleep inside. While it is tragic that he did so in an attempt to commit suicide, his disregard for the life of those around him makes the conviction and bad-conduct discharge appropriate. Setting aside his finding of guilt or the bad-conduct discharge because of his choice to go to inpatient treatment when it was offered by command is disproportionate relief. Therefore, this Court should deny Appellant's requested relief.

II.

APPELLANT'S RETURN TO PRETRIAL CONFINEMENT WAS APPROPRIATE.

Additional Facts

Appellant was released from inpatient mental health treatment on 28 February 2023. (App. Ex. XV). Upon his release, he was ordered into pretrial confinement. Id. The commander referenced Appellant's prior conduct. He explained that Appellant had received a LOC on 16 August 2022. Statements from Appellant's classmates indicated that Appellant would pull the legs off spiders, had killed a mouse in class, took photos of dead animals, sent violent videos to the class group chat, said it would be 'cool' to see a fellow classmate get hit by an exploding tire so he could see her body parts laid out on the ground, discussed suicide, and threatened to burn down the dorms. (ROT Vol. 4, *Preliminary Hearing Officer's Report,* Ex. 3, pgs. 11-24). After

receiving the LOC, Appellant went to J.M. and told him that he was moving his plan to set the dorms on fire up to that evening. (R. at 482.) That evening, Appellant lit his bed on fire.

The commander concluded that Appellant's commission of a serious offense of setting fire to the dormitories, his history of making offensive comments to his classmates, including comments directed at specific classes of people, his affinity and demonstrations of violence in the classroom, his repeated threats to burn down the dorms, and his suicidal ideation led the commander to believe he posed a risk of engaging in serious criminal misconduct to harm himself and his classmates and that he would not appear at trial.

On 2 March 2023, a pretrial confinement hearing was held to determine if Appellant was to remain in pretrial confinement. (ROT Vol. 4, *Preliminary Hearing Officer's Report*). At the hearing the PCRO found that pretrial confinement was necessary because it was foreseeable that Appellant would engage in serious criminal misconduct. He detailed that the inappropriate remarks and behavior observed by classmates interfered with the effectiveness, morale, and discipline of the squadron. He stated that Appellant demonstrated his dedication and resourcefulness by carrying out a suicidal act that posed a serious threat to the safety of those around him. Id.

Prior to Appellant setting the dorm on fire, he was taken to mental health for evaluation. While there, Appellant lied to the mental health provider when he stated he was not suicidal. (R. at 522-523.) He lied because he did not want anyone to interfere in his plan. (R. at 523.)

Standard of Review

Waiver leaves no error for Courts to correct on appeal. United States v. Campos, 67 M.J. 330 (C.A.A.F. 2009)(internal citation omitted).

Law and Analysis

Trial defense counsel waived the issue as to whether Appellant's return to pretrial confinement was proper under R.C.M. 305(k) or Article 13. (R. at 101, 106.) Appellant does not contest that the issue is waived. (R. at 31.)

This Court has affirmed that, assuming it still has the power to pierce waiver with regard to sentencing issues, it will "only ignore waiver in the most deserving cases." United States v. Cook, 2024 CCA LEXIS 276 (A.F. Ct. Crim. App. 3 July 2024)(citing United State v. Blanks, 2017 CCA LEXIS 186, at *22 n11, (A.F. Ct. Crim. App. 17 Mar 2017).

Appellant's case does not fall in the category of the most deserving cases, and this Court should decline to pierce the waiver. Appellant has not raised a claim that his trial defense counsel was ineffective. His counsel selectively raised and waived issues during the trial clearly and intentionally. Nothing in the record establishes Appellant's case as a particularly deserving case. This Court has declined to pierce waiver in more severe cases; for example, where trial defense counsel misunderstood the applicable law yet waived a known right after specific questions from the military judge, this Court still declined to pierce waiver. United States v. Daddario, 2023 CCA LEXIS 499, *9-10 (A.F. Ct. Crim. App. 1 December 2023) (unpub. op.). Similarly, Appellant's trial defense counsel made a tactical decision to not file a motion to seek release of Appellant from pretrial confinement and clearly waived the issue at trial. Moreover, the failure to raise this issue deprived the government of the opportunity to present evidence contradicting Appellant's claims. Therefore, this Court should decline to pierce the waiver and deny Appellant's requested relief.

Even if this Court pierces waiver, Appellant is not entitled to relief.

Should this court decide to pierce the waiver, Appellant's placement into pretrial confinement was not plain error. Failure to complain of such conditions before trial is "strong evidence" that the conditions did not constitute illegal punishment. United States v. McClean, 70 M.J. 573, 577 (A.F. Ct. Crim. App. 2011) (citing United States v. Palmiter, 20 M.J. 90, 97 (C.M.A. 1985)). Trial defense counsel made an express disclaimer that Appellant's return to pretrial confinement was not unlawful when questioned by the military judge. She affirmed to the military judge that the return to pretrial confinement was only being brought up as circumstantial evidence of the command's intent, not as a complaint of illegal pretrial confinement. (R. at 105-106.) As in McClean, the military judge had nothing to indicate that Appellant had been illegally punished by his return to pre-trial confinement. 70 M.J. at 577. He expressly clarified that trial defense counsel had not made a motion for his release from confinement or complained about his subsequent confinement. This strong indication that Appellant had not been subjected to illegal pretrial confinement. This, coupled with trial defense counsel's assurances gave the military judge every reason to believe that Appellant had not been illegally punished by being sent to pretrial confinement following his release from inpatient treatment. Therefore, there was no plain, clear, or obvious error.

In determining whether pretrial confinement is necessary the commander must have reasonable grounds to believe it is foreseeable that the confinee will not appear at trial or that the confinee will engage in serious criminal misconduct. R.C.M. 305(h)(2)(B). "Serious criminal misconduct" includes "serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command." R.C.M. 305(h)(2)(B). Apart from the strong evidence of Appellant's lack of

objection, the following evidence supports that the commander had an adequate basis for ordering Appellant into pretrial confinement following his release from inpatient treatment. Appellant made morbid statements to other students and then decided to act on one of those statements after receiving an LOC. While Appellant heavily relies on the claim that his conduct was the result of suicidal ideation, at trial, trial defense counsel was clear that suicidal ideation was *not* the only reason Appellant was placed in pretrial confinement. (R. at 101-102.) The rest of Appellant's conduct also established grounds for pretrial confinement. Appellant had already demonstrated a willingness to act on his morbid ideas and endanger others. This established reasonable grounds to believe that Appellant would commit additional serious misconduct if released.

Appellant's general denial of suicidal ideation following his release from inpatient treatment and the memorandum from the psychologist did not persuade the PCRO that there were not reasonable grounds to believe Appellant would commit serious misconduct. While suicide prevention is not an adequate basis for confinement, suicide prevention was not the basis for Appellant's confinement. Rather, Appellant's willingness to carry out deathly acts that implicate the safety of others formed the basis for confinement and was appropriately documented by the PCRO. Nothing was presented that Appellant no longer posed a risk to others, and the PCRO was unpersuaded by a denial of suicidality, especially where the trial defense team's own psychologist admitted he was "somewhat limited" on his ability to express an opinion on whether Appellant posed a continued suicide risk. (ROT Vol. 4, *Preliminary Hearing Officer's Report,* Ex. 4).

The PCRO's determination that lesser forms of restraint was supported by the facts and plain and obvious error. The PCRO stated that he "considered restricting [Appellant] to base or

to his room." (ROT Vol. 4, *Preliminary Hearing Officer's Report)*. He analyzed the fact that Appellant committed his crime in his dorm room and that restricting him anywhere on base would be inadequate to prevent further misconduct. Id. This rationale is reasonable. Appellant committed a serious offense that put the lives of others at risk when he was alone in his dorm room. Restricting him anywhere on base would be inadequate to prevent further misconduct. Pre-trial confinement was the best way to achieve the monitoring necessary to prevent further serious misconduct. Based on everything above, Appellant's return to pretrial confinement was not plain and obvious error. Appellant's return to pretrial confinement did not amount to a violation of Article 13, UCMJ, and this Court should deny his requested relief.

Appellant waived the issue of whether his pre-trial confinement following his release from mental health treatment was unlawful. Should this court choose to pierce that waiver, Appellant's return to pre-trial confinement was not plain error. Therefore, this Court should deny Appellant's requested relief.

III.

APPELLANT'S RCM 707 SPEEDY TRIAL RIGHTS WERE NOT VIOLATED.

Additional Facts

Appellant was ordered into pre-trial confinement on 8 September 2022. On 2 December 2022, trial defense counsel submitted a joint request to defer arraignment until 20 March 2023 and to exclude the 96 days between 14 December 20 and 20 March 2023. The military judge granted that request. (Government Motion to Attach, dated 7 October 2024). Appellant was arraigned on 21 March 2023.

Standard of Review

Speedy trial protections under R.C.M. 707 are forfeited upon a plea of guilty which results in a finding of guilty. RCM 707(e). When an issue is forfeited by failure to raise it during the trial, it is subject only to plain error review. United States v. Hacrow, 66 M.J. 154, 156 (C.A.A.F. 2008). Under a plain error analysis, the appellant must demonstrate that"(1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the [appellant]" United States v. Clifton, 71 M.J. 489, 491 (C.A.A.F. 2013). The appellant bears the burden of establishing plain error. United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007).

Law and Analysis

Appellant's right to a speedy trial under R.C.M. 707 was not violated. The Government does not concede that Appellant's time in mental health treatment applied against the speedy trial clock but even assuming it did, Appellant was still timely arraigned. Trial defense counsel's voluntary agreement to the exclusion of 96 days for the purpose of speedy trial under R.C.M. 707 resulted in Appellant being arraigned 75 days after his initial entry into pre-trial confinement on 8 September – well within the 120 day limit. Because Appellant's speedy trial right was not violated, there was no error, and this Court should deny Appellant's requested relief.

IV.

APPELLANT'S ADJUDGED BAD CONDUCT DISCHARGE IS NOT INAPPROPRIATELY SEVERE.

Standard of Review

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

Law and Analysis

"The numerous permutations and combinations of sentencing alternatives available to the sentencing authority are so broad that, normally, there will not be only one sentence that is appropriate for a particular appellant." United States v. Joyner, 39 M.J. 965, 966 (A.F.C.M.R. 1994). The proper test for sentence appropriateness is "whether, when viewed as a whole, the approved sentence is inappropriate for this appellant based on appellant's character and the circumstances surrounding the offense." Id. This Court assess sentence appropriateness 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. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (alteration in original) (citation omitted). Although the Courts of Criminal Appeals are empowered to "do justice" with reference to some legal standard, "we are not authorized to grant mercy." United States v. Guinn, 81 M.J. 195, 203 (C.A.A.F. 2021) (quoting United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)).

R.C.M. 1003(b)(8)(C) describes the purpose of a bad-conduct discharge as "punishment for bad conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offense and whose punitive separation appears to be necessary."

Circumstances surrounding Appellant's crime.

Appellant mischaracterizes the nature of his conviction. Contrary to his claim that the Government "prosecuted him for his failed [suicide] attempt," Appellant was neither charged nor convicted for attempting suicide. He was prosecuted mainly for committing arson by lighting his

dorm on fire. This prosecution was proper based on the criminality of setting fire to a residential building, and his sentence is appropriate.

Appellant asserts that the Government "missed or ignored all the warning signs about [Appellant's] suicidal ideations and when he tried to kill himself prosecuted him for his failed attempt." (App. Br. at 44). He goes on to claim that "No one bothered to question him or take him seriously." Id. Appellant uses these allegations to infer that the Government's prosecution of him was improper because the Government should have stopped Appellant from attempting suicide. This is unpersuasive because the assertions by Appellant are not true.

Appellant was only at Lackland AFB for two months. During those two months he made a number of inappropriate statements to his peers. Those statements were brought to command's attention around 10 August, and they began gathering statements. Command counseled Appellant on his inappropriate comments through the LOC they served on him 6 days later on 16 August.

After receiving his LOC, Appellant went to his friend, J.M. and told his friend that he was going to set a fire in the dorms and barricade his door. (R. at 522.) J.M. "reported him to a group of high-ranking NCOs." Id. Those noncommissioned officers [NCOs], having received information that Appellant made a threat of suicide that his friend believed, then questioned Appellant and asked him if he had a plan to commit suicide. Id. Appellant told them "No." Id. Despite his denial, the NCOs had him sent to Sheppard Mental Health. Id. At Sheppard Mental Health, Appellant was asked again whether he was suicidal. Id. Appellant again denied being suicidal and told them it was just a series of jokes. Id. He did this "because he didn't want them to prevent [him] from committing suicide." Id. That night, Appellant executed his plan.

Any assertion or inference by Appellant that a bad-conduct discharge was inappropriate because the prosecution shouldn't have occurred due to a lack of Government care for Appellant's wellbeing is unsupported by the record and without merit.

Nature and Seriousness of the Offense

Appellant's crime was more than "a failed suicide attempt." (App. Br. at 45). Appellant had been thinking about setting fire to himself in the dorms for at least a week prior. (R. at 483.) When he initially told his friend about his plan to light himself on fire in the dorms.

On 16 August, Appellant was served with a LOC for his disturbing remarks to his peers. Immediately after receiving the LOC, he was angry when speaking to his friend. (Pros. Ex. 6, *Stipulation of Fact*, R. at 485, 486). Appellant told him that he had moved up his plan and that "it's going to happen tonight." Appellant started the fire that night.

While Appellant's original plan for suicide by fire included consideration for others by lighting the fire when everyone was in class, after receiving the LOC, Appellant was angry. His perspective and care for those who had made allegations against him was no longer present. With disregard for their lives, Appellant started the fire in the middle of the night while his classmates were asleep. (R. at 536.) Appellant knew he was putting his classmates lives in danger. (R. at 536, 539, 546.) He testified that in the moment his desire to die overrode that concern (R. at 546) but that shift only occurred after his classmates were part of the reason he was getting in trouble. His action of lighting the fire was more than a suicide attempt. It was arson of a residential building, where more than 200 fellow Airmen were sleeping and supposed to feel safe. Appellant's indifference to his own life is tragic; indifference to the lives of 200 fellow Airmen is unacceptable and warrants a bad-conduct discharge.

Appellant asserts that because no one was injured but himself, his conduct does not warrant a bad-conduct discharge. Actual injury is not the measure of bad conduct. The act of starting the fire in a residential building creating an unnecessary risk to the lives of others is sufficient. It is fortunate that in this instance no one else was injured; that Appellant failed to fully barricade his door and the firefighters were able to gain entry and put out the fire despite Appellant's attempts to block them from doing so, and that Appellant's blocking of the smoke alarm despite knowing it was there to prevent loss of life by fire was thwarted because the alarm went off across the hall. (R at 58, 415.) That does not diminish his conduct. Appellant set fire to a residential building where more than 200 Airmen were sleeping, and he took active measures to prevent both detection and extinguishing of the fire. This conduct warrants a bad-conduct discharge.

Particular Appellant

While Appellant may have made progress on management of his mental health through in-patient treatment, it does not absolve him of his criminal conduct. The sentence Appellant received appropriately reflects his conduct and takes into consideration any mitigation from his mental state.

Appellant's sentence reflects that the members appropriately considered all factors in aggravation and mitigation. The maximum punishment Appellant could have received is 25 years of confinement, forfeiture of all pay and allowances and a dishonorable discharge. (R. at 690.) Government trial counsel argued for a sentence of 5 years confinement, a dishonorable discharge. (R. at 719.) Appellant was sentenced to only 30 days of confinement, forfeiture of $1,917.00 pay for one month, and a bad conduct discharge. This sentence was drastically lower

than both the maximum and the Government's argued sentence and further indicates that Appellant's sentence was not inappropriately severe.

CONCLUSION

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

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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 7 October 2024.

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Filed September 5, 2024

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Airman Basic (E-1)
RANDY B. GILES JR.,
United States Air Force,
Appellant.

Before Special Panel

No. ACM 40482

BRIEF ON BEHALF OF APPELLANT

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STATEMENT OF THE CASE

On March 21, 2023, at Sheppard Air Force Base (AFB), Texas, a military judge sitting as a general court-martial convicted Airman Basic (AB) Randy B. Giles Jr., consistent with his pleas, of one specification of aggravated arson in violation of Article 126, Uniform Code of Military Justice (UCMJ);[1] one specification of willfully damaging military property in violation of Article 108, UCMJ; and two specifications in violation of Article 92, UCMJ (one specification of violating a general order and one specification of dereliction of duty). R. at 9, 65; *Entry of Judgment*, Apr. 19, 2023. On March 23, 2023, a panel of officer and enlisted members sentenced AB Giles to

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

forfeit $1,917.00 of pay per month for one month, to be confined for 30 days, and to be discharged from the service with a bad-conduct discharge. R. at 779-80. The military judge awarded 81 days of judicially ordered confinement credit and 36 days of pretrial confinement credit. R. at 379, 782. The convening authority took no action on the findings or sentence. *Convening Authority Decision on Action – U.S. v. AB Randy B. Giles Jr*., Apr. 5, 2023.

Following the convening authority's lack of action, the military judge sua sponte corrected the convening authority's failure to apply the awarded confinement credit. *Entry of Judgment*, Apr. 19, 2023 (citing *United States v. Spaustat*, 57 M.J. 256, 263-64 (C.A.A.F. 2002)). The military judge applied the confinement credits to AB Giles's adjudged confinement and forfeitures, resulting in "zero days of confinement left to serve and zero forfeitures left to impose." R. at 782-83; *Entry of Judgment*, Apr. 19, 2023 at 3-4. The military judge declined to apply the remaining confinement credit against AB Giles's bad-conduct discharge. *Id*.

STATEMENT OF FACTS

"I have thought about suicide and ending my life [off and] on for most of my life. I did not see myself living beyond 30 with a plan to suicide by that date." *Red River Hospital Discharge Summary* at 1, Feb. 28, 2023 [hereinafter *Discharge Summary*].[2] "I originally planned on committing suicide on my 19th birthday, which is August 30, 2022, but I decided to move my suicide up to August 16th." R. at 44. AB Giles was three months and three weeks into his enlistment when he tried to self-immolate in his dormitory room. R. at 44, 524-26; *see* Pros. Ex. 1 (showing service entry date). Instead of providing AB Giles with the requisite mental health

[2] This unsealed document is part of the second pretrial confinement hearing and is the same as the sealed document admitted as Def. Ex. K at 1.

treatment or simply Entry Level Separating[3] him for the perceived misconduct associated with his suicide attempt, the Government court-martialed him. R. at 2; *Charge Sheet*, Sep. 30, 2022.

AB Giles arrived at Sheppard AFB for aircraft maintainer training on June 17, 2022. R. at 518; *Discharge Summary* at 1. About a month later, he began Googling about fire and death:

> July 20, 2022: "is non wood flammable"
>
> July 21, 2022: "death by overstuffing"
>
> July 28, 2022: "can a small fire kill you"
>
> July 31, 2022: "does burning your head kill you faster;" "what if you burn your skull"
>
> August 2, 2022: "can lighter fluid kill you;" "what does it take to start a fire;" "does fire kill you"

AFOSI Form 158, *AFOSI Investigative Communication*, at 2, Jan. 30, 2023 [hereinafter AFOSI Form 158]; R. at 453-54.

By August, AB Giles was making his classmates uncomfortable. Preliminary Hearing Officer (PHO) Ex. 3 at 9, 18, 20 (Sep. 30, 2022). He was fixated on death and suicide. Multiple times, he approached the same Airman Basic "about suicide and how to do it in detail." *Id*. at 16. "He randomly told [a different Airman Basic] that the quickest way to die by fire was to light [your] head on fire and that he watched some video of a guy burning to death and that he likes watching living things die." *Id*. at 20. He would also "casually mention[] that he's going to kill himself." *Id*. AB Giles told his former roommate he was "fascinated with death." *Id*. at 18. He apparently pulled the legs off spiders, killed a small rodent in class, and said it would be "cool" to

[3] Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*, para. 3.16 (Jun. 24, 2022) (incorporating change 1 on November 20, 2023) ("Members are in entry level status during the first 365 days of continuous active military service . . . ."); *see also id*. at 456 ("Entry Level Separation—Enlisted discharge from entry level status without service characterization. This is complete severance from all military status gained by the enlistment or induction concerned.").

see a tire explode and hit a fellow student so that their "body parts [got] laid out across the ground." *Id*. at 14, 16, 18, 20, 24. When AB Giles would talk, it would be about "race, sex, culture, suicide or death." *Id*. at 18. While discussing his own suicide by fire, AB Giles would also mentioned fires in the dormitory (dorms) or squadron. *Id*. at 22, 24. One of those individuals was AB JM.[4] *Id*. at 22. AB Giles told AB JM he would "burn the squadron" on the 29th of August. *Id*. He also asked him if the Base Exchange (BX) sold lighter fluid. *Id*. Initially, AB JM thought AB Giles would "talk about suicide, killing himself in a joking manner." *Id*. But AB JM came to realize that AB Giles's intention was truly suicide. R. at 476-77.

On top of these repeated comments about death and suicide, AB Giles sent a video to the class group chat of a "really bloody guy" stabbing himself. PHO Ex. 3 at 12, 14, 18. The Military Training Leader (MTL), "Sergeant Campbell," was informed of this video. *Id*. at 12. It prompted the MTL to move AB Giles's roommate to another room. *Id*. at 12, 18. However, it appears the MTL took no other action. AB Giles's squadron, the 362d Training Squadron, was aware of all the information listed above, at the latest, by August 10, 2022, the day the squadron took seven sworn statements from AB Giles's squadron-mates. *Id*. at 11-24.

On August 11, 2022, AB Giles Googled "DMT[5] after death," wondering if "our bodies make DMT," and do so "when we die." AFOSI Form 158 at 2. Three days later, he Googled "airman suicide." *Id*.; R. at 454.

On August 16, 2022, MSgt Charles Clark (the Flight Chief), having collected enough evidence to support a Letter of Counseling (LOC) through all the statements made by AB Giles's

[4] At the time of trial, JM was an Airman First Class (A1C). However, at the time he provided a statement about AB Giles on August 10, 2022, he was an Airman Basic like AB Giles.
[5] "N-dimethyltryptamine [DMT] is a hallucinogenic tryptamine drug that naturally occurs in many plant species." AFOSI Form 158 at 2.

classmates six days prior, offered AB Giles an LOC. *See* PHO Ex. 3 at 9-24 (suggesting all the statements dated August 10, 2022, were the evidentiary support for the LOC). AB Giles acknowledged receipt, but he never received a chance to respond. *Id*. at 10; R. at 493. Instead, he told AB JM he was moving his plan to "to set his bed on fire and jump on it" up to that night, August 16th. R. at 468, 488, 536-37. AB JM reported this statement, realizing AB Giles's intention was suicide. R. at 468, 476, 478, 482-84, 522. According to AB JM, "It was kind of like obvious that his plan was suicide in that conversation." R. at 484. Only then, on August 16, 2022, after (1) the MTL moved AB Giles's roommate away from him, (2) all the strange behavior was reported by his classmates, (3) all the repeated statements about death and suicide were collected, and (4) an *Airman Basic* realized AB Giles had an "obvious" plan of suicide, did AB Giles's chain of command finally become involved in AB Giles's mental health. R. at 482. AB Giles was seen by the 82d Medical Group (MDG), Mental Health Clinic at Sheppard AFB the morning of August 16, 2022. PHO Ex. 3 at 4. He was released the same day; after all, "it was a joke." *Id.*; R. at 522-23, 644.

But it was not a joke. R. at 523 ("I didn't want them to prevent me from committing suicide . . . ."). After being released from mental health after a concrete plan for suicide was expressed to other people multiple times, on the same day, AB Giles went to the BX and bought matches and lighter fluid. R. at 44; Pros. Ex. 4 at 15. He then went back to his room and played video games for a little while. R. at 523. Then, that night, he began Googling:

"flameproof building"

"can you cover a smoke detector"

"how do smoke detectors work"

"how long does it take to burn down a building"

"does heat resistance mean non flammable"

"flame retardant walls"

"how to start a continuous fire"

AFOSI Form 158 at 2; R. at 454, 527-28.

Sometime around this Google search, on the evening of August 16th, AB Giles was attempting to self-immolate. R. at 523-26. He had covered the smoke detector with tape to prevent emergency responders from interfering with his suicide attempt. R. at 58. "I knew that firefighters or some type of first responder would try to rescue me, and I wanted to buy myself time for my suicide attempt to be successful. I moved the desk in my room to block the door." R. at 54. He tied his pants to the door and the sink, in a further effort to prevent anyone from interfering with his plan to kill himself. R. at 429, 522, 524, 538; Pros. Ex. 4 at 1-4 (showing pants tied to the door). His roommate was gone, working swing shift. R. at 45. He knew people were sleeping in the dorms, but he had no intention of hurting anyone but himself. R. at 45. He only put lighter fluid on himself and the bed. R. at 527. He was not trying to "burn down the building;" based on his searches, he believed the risk of the fire spreading was minimal. R. at 526-28. He just wanted to die. R. at 45, 526.

"I started the fire because I intended to die in the fire." R. at 519. "I was inspired by a Vietnamese Buddhist protest involving Thich Quang Duc, who set himself on fire as a form of protest and his form of immolation." *Id.* "I was protesting the way that I have been treated throughout my life socially through negativity and bullying that was given to me by my peers . . . ." *Id.* The bullying AB Giles experienced was pre-Air Force. R. at 520. However, unbeknownst to AB Giles, at the time of his suicide, he was suffering from two severe mental diseases or defects: "Major Depressive Disorder, Single Episode, Severe without psychotic

features and Schizoid Personality Disorder." App. Ex. IV. Despite his severe mental health diagnoses, he knew what he was doing: "a metaphorical protest" to "gain hopefully a sense of peace and happiness." R. at 520-21. [redacted] "I believed that I would immolate myself in order to access a spiritual dream-like world where it would be more pleasant than the corporeal reality that we live in." R. at 520.

So, he began to light himself on fire, planning to "jump on top of the bed and burn." R. at 524. "But I changed my mind because I was worried that I might survive the attempt and be disfigured for life." R. at 524; [redacted] He decided to light his head on fire instead. R. at 431, 525. The fire burned his tongue and his lips, but his whole face would not light. R. at 525. It was not working. R. at 431. The Google searches changed:

"is lighter fluid dangerous"

"what happens if you drink lighter fluid"

"fire hazards"

"how long does it take fire fumes to kill"

"will charcoal lighter fluid kill yellow jackets"

"will charcoal lighter fluid kill *you*"

"will charcoal lighter fluid kill you if swallowed"

"how long does it take lighter fluid to kill"

"swallowed lighter fluid"

"can lead poisoning kill you"

"is odorless lighter fluid harmful"

"how is odorless lighter fluid made"

"isoprsaniffuc [sic] kerosene"

"can swallowing kerosene kill you"

"quick ways to commit suicide"

AFOSI Form 158 at 2 (emphasis added); R. at 454-56, 526-28.

Somewhere around these Google searches, AB Giles drank the lighter fluid he bought. R. at 431. "I decided to die from smoke inhalation instead, and I also drank lighter fluid to intoxicate myself." R. at 44-45, 525.

The last Google search AB Giles typed in before he laid down on his roommate's bed to die, black smoke filling his room and poison coursing through his body, was "common and lethal hazards." R. at 525-56; AFOSI Form 158 at 2. When he was eventually found by emergency responders, his phone was plugged in, unlocked, face up, fully displaying a Google image search photo: "B.E.S.A.F.E. Burns, Electrocution, Shock, Arc Flash/Blast, Fire, and Explosions." PHO Ex. 3 at 4; R. at 443. "The last thing I remember was laying on my roommate's bed listening to music and just hoping or trying to die . . . ." R. at 526.

While AB Giles was just hoping and trying to die, nearby in the same hallway, AB CW[6] woke up to his fire alarm around 11:00 PM. R. at 415. His smoke detector was going off and there was smoke in his room. R. at 415. There was not enough smoke that he could not see the other side of his room, but enough to realize this was not a drill. *Id*. He thought the smoke might be coming from his ceiling vent. *Id*. He got up, exited his room, and along with other airmen,

[6] At the time of trial, CW was an A1C. However, at the time of the incident, he was an Airman Basic like AB Giles.

started knocking on doors to tell others to evacuate since the main building fire alarm was not ringing, only the individual room alarms had gone off. *Id*. The smoke was "pretty contained" to that area. R. at 423. They all went down to the squadron CQ (Charge of Quarters) desk. R. at 415. The CQ desk told the on-call MTL there was a fire. R. at 416. The MTL told them to pull the fire alarm and the occupants evacuated. *Id*. There were about 400 people who evacuated. R. at 418. AB CW and the initial people who evacuated with him were "coughing quite a bit." R. at 418-19. No other injuries were reported. R. at 435.

When firefighters showed up, students were walking out of the building. R. at 428. A couple students told the firefighters as they were walking out that there was smoke on the second floor. *Id*. When firefighters got to the second floor, they noticed there was smoke in the hallway. *Id*. They did not need to mask up. R. at 432-33. They began trying to find the source of the fire. R. at 429. It was AB Giles's room. R. at 429. They attempted to open the door. *Id*. It would not open. *Id*. They found it was tied shut. *Id*. When they opened the door, they had to put on their equipment; there was smoke coming out from the room. *Id*. They entered the room looking for victims. R. at 429-30. They found AB Giles unconscious on a bed, while a fire burned in the other bed. R. at 430. At the time they found AB Giles, the fire was not hot enough or big enough to trigger the functioning heat detector above the bed. R. at 555-56. They had arrived at the dormitory in under seven minutes of the fire alarm being activated. R. at 560, 567.

Two firefighters pulled AB Giles out of the room. R. at 430. They resuscitated him, R. at 526, [redacted] "He had to be placed in a medically induced coma and

intubated for a week." R. at 607. [redacted] He was at the hospital for about two weeks for his physical injuries. R. at 529. [redacted]

As a result of AB Giles's unsuccessful attempt to kill himself, no one was injured other than AB Giles. R. at 435. AB Giles admitted he set the fire knowing other airmen *could* die, but no one was harmed, and he made every effort to contain the fire to his room. R. at 526-28, 542, 546. The door to AB Giles room was a one-hour-rated fire door, meaning the door could withstand a fire in the room for an hour before the door broke down. R. at 553. Same with the sheetrock walls; they would have prevented the fire from spreading for one hour before they broke down. R. at 554. Overall, "this particular fire had a low chance of spreading." R. at 554. The biggest risk was from smoke inhalation due to any carbon monoxide it may have contained. R. at 555, 559. However, each room had a smoke detector and heat detector to alert the occupant of that room to evacuate. R. at 555.

As a result of AB Giles unsuccessful attempt to kill himself, students "were given the day off from classes" the next day. R. at 419. The occupants on the same floor as AB Giles's room were placed in different dorms, which were directly next to the building. R. at 418-19. The Government repaired the damages caused at a cost of approximately $5,500. R. at 51; Pros. Ex. 3.

AB Giles never got the chance to respond to his LOC, the evidence of which foretold his suicide. R. at 493. Instead, after being released from the hospital following his suicide attempt, the commander ordered AB Giles directly into pretrial confinement on September 8, 2022. *See Pretrial Confinement Review – AB Randy B. Giles Jr., 362d Training Squadron,* Sep. 14, 2022.

He remained confined, between Archer County Jail and Red River Hospital (Red River), until his trial date, when he pled guilty to aggravated arson, taping his own smoke alarm, moving his desk in front of his door, and damaging government property by lighting his bed on fire. *See* R. at 40-59 (*Care*[7] Inquiry); *infra* Issues I-II (discussing restriction tantamount to confinement and unlawful pretrial confinement).

ARGUMENT

I.
AB Giles is entitled to *Mason*[8] credit and additional Article 13, UCMJ, relief for being involuntarily and unlawfully restricted to an inpatient mental health facility for his suicide attempt.

Additional Facts

On September 8, 2022, AB Giles was ordered into pretrial confinement at Archer County Jail in Wichita Falls, TX. DD Form 2707, *Confinement Order*, Sep. 8, 2022. On September 13, 2022, a pretrial confinement hearing was held, and the Pretrial Confinement Review Officer (PCRO) determined AB Giles should remain in confinement. App. Ex. XV at 12. However, while not recommending release, the PCRO did recommend AB Giles go into inpatient treatment. *Id*. AB Giles's squadron commander texted a group chat saying, "Giles will be seen by our [Mental Health] once a week unless his [defense counsel] gets him to volunteer for in-patient treatment." *Id*. at 10. On September 19, 2022, AB Giles agreed to admit himself into mental health treatment. *Id*. at 11. On the same day, AB Giles's commander released AB Giles from pretrial confinement "conditioned on [AB Giles's] voluntary admission" to Red River. *Id*. at 12. The military judge determined, "There was no malicious intent by the command in offering [AB Giles] . . . 'place

[7] *United States v. Care*, 18 C.M.A. 535 (C.M.A. 1969).
[8] *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (summary disposition). *Mason* credit is day-for-day confinement credit for restriction tantamount to confinement. *Id*.

himself into inpatient mental health care at the Red River . . . .'" R. at 348. Nevertheless, AB Giles had no intent or desire to enter himself into mental health treatment at the time of his entry to Red River on September 19, 2022, absent his command's inducement. R. at 92, 348.

About a month later while at Red River, on or about October 26, 2022, AB Giles "made a suicidal ideation with regards to desiring to end his own life by getting a guard's weapon and committing suicide." R. at 347. As a result of his ideation, AB Giles was placed on building restriction at Red River from October 26, 2022, until February 28, 2023. *Id.*

While at Red River, AB Giles

> had access to religious and medical services. Members of his unit were allowed to visit, although, members of his family were not. He had limited telephone privileges so long as he was participating in group therapy. He was assigned to a room with a roommate, not to a cell. . . . He had access to limited personal property, including paper, documents, arts and crafts, and access to the property that he brought with him to the Red River facility. His building restriction on 26 October was based solely upon his status as a suicide ideation and not upon his status as a pretrial -- as someone awaiting trial as an accused.

R. at 347. Although the military judge made a finding that "there were no lockdown times at the facility," there was no evidence or testimony presented on this point.[9] R. at 347. There was also some evidence there were "armed guards" at Red River, considering AB Giles "expressed a specific suicidal plan to shoot [himself] with a law enforcement officer's gun,"[10] but the military judge did not make this a finding of fact.

Based on AB Giles's "impossible choice" of either going to jail or to Red River inpatient, the defense filed a "Defense Motion for Appropriate Relief – Confinement Credit." App. Ex. XV. Therein, the defense asked for *Mason* credit, day-for-day confinement credit for restriction tantamount to confinement, as was done in *United States v. Regan*, 62 M.J. 299, 301 (C.A.A.F.

[9] The preceding paragraphs are all findings of fact the military judge made on this issue.
[10] R. at 80.

2006), which trial defense counsel cited. App. Ex. XV at 3. While initially waiving the right to be heard further on this motion, the military judge offered the defense the opportunity to augment and argue this motion. R. at 70. As such, at the motions hearing, the trial defense counsel argued that starting October 26, 2022, until February 28, 2023, the conditions at Red River were tantamount to confinement, requiring day for day credit. R. at 96-97 ("In terms of that first month, the defense would concede solely for the restrictions tantamount to confinement that he would not be entitled to credit for that one month."). This would have been 125 days of *Mason* credit, had the military judge agreed.

At the motions hearing, the trial defense counsel also argued there was an Article 13, UCMJ, violation. R. at 78, 97. The trial defense counsel then asked for "the entire period of Red River for day-for-day credit as a result of the impossible choice that Airman Giles was presented with." R. at 98. This would have been 162 days, from September 19, 2022, to February 28, 2023, and constituted credit under Article 13, UCMJ. In total, the defense asked for 125 days of *Mason* credit and 162 days of Article 13, UCMJ, credit, for a total of 287 days of credit. This is in addition to the *Allen*[11] credit trial defense counsel requested for AB Giles's confinement at Archer County Jail (33 days).[12, 13]

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[11] *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). *Allen* credit is distinct from *Mason* credit, although the military judge appears to conflate the two terms. *E.g.*, R. at 356. *Allen* credit is "day-for-day credit against confinement time an accused spends in *lawful* pretrial confinement." *United States v. King*, 58 M.J. 110, 112-113 (C.A.A.F. 2003) (emphasis added). *Mason* credit is for "situations involving pretrial restriction that is 'tantamount' or 'equivalent' to confinement, but that do not involve actual incarceration." *Id.*

[12] September 8-19, 2022 (11 days, counting the last day, not the first day); February 28 to March 23, 2023 (23 days, counting the last day, not the first day). This is 33 days *without* any additional consideration of the assignments of error. *See* Issues I and II (arguing meaningful relief is setting aside the findings and sentence or setting aside the bad-conduct discharge, *not* additional, or only, pretrial confinement credit).

[13] The military judge calculated 36 days *Allen* credit, but it is unclear where the three extra days came from. R. at 782.

The military judge found an Article 13, UCMJ, violation for illegal pretrial punishment when AB Giles was "induced" into an inpatient mental health facility against his will. R. at 354. The military judge found no "malicious intent" by the command in offering inpatient treatment versus incarceration but did find "the command was trying to do the right thing the wrong way." R. at 351. "[E]ssentially what occurred here was an unauthorized command-directed or induced involuntary commitment that constitutes an abuse of discretion within the meaning of Article 13, UCMJ, insofar as it's a violation of Air Force and DoD regulations." R. at 354. Despite finding a violation of Article 13, UCMJ, the military judge did not find AB Giles's "restriction tantamount to confinement," denying "Allen" credit. R. at 346, 356; *see supra* footnote 11 (explaining the term misuse). Because the restriction was not "tantamount to confinement," for "meaningful relief" under Article 13, UCMJ, the military judge determined AB Giles should not receive day-for-day credit, but rather what restriction is worth under R.C.M. 1003(b)(5): one day of credit for every two days of "restriction." R. at 355-56. AB Giles was awarded 81 days. R. at 379.

Standard of Review

Whether pretrial restriction is tantamount to confinement is reviewed de novo. *King*, 58 M.J. at 113. For Article 13, UCMJ, violations, this Court "defer[s] to the findings of fact by the military judge where those findings are not clearly erroneous," but "application of those facts to the constitutional and statutory considerations . . . involve independent de novo review." *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005) (citing *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000); *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002) ("Whether appellant is entitled to credit for a violation of Article 13 is a mixed question of fact and law.")).

The standard of review for pretrial confinement credit is also de novo. *United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F. 2011) (quoting *Spaustat*, 57 M.J. at 260).

Law and Analysis

1. AB Giles is entitled to *Mason* credit for his involuntary inpatient care tantamount to confinement.

An appellant is entitled to day-for-day confinement credit for time spent either in pretrial confinement, or in pretrial restriction equivalent to confinement. *Mason*, 19 M.J. 274. *Mason* credit "recognize[s] that the effect which restriction tantamount to confinement has upon an appellant is the practical equivalent of the effect which occurs from a similar period of actual pretrial confinement." *United States v. Gregory*, 21 M.J. 952, 955 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition). "Ultimately, the substantial impairment of the rights and privileges enjoyed by service members is the common thread in cases in which *Mason* credit is due." *United States v. Banegas*, ACM 38569, 2015 CCA LEXIS 329, *34 (A.F. Ct. Crim. App. Apr. 13, 2015) (cleaned up).

In *King*, the Court of Appeals for the Armed Forces (CAAF) provided a list of factors for when restriction conditions are tantamount to confinement. 58 M.J. at 113. Such factors include the nature and area or scope of the restraint; duties performed, if any; the degree of privacy enjoyed; any check-ins; any armed or unarmed escorts; any visitation and telephone privileges; any religious, medical, recreational, educational, or other support facilities available; location of sleeping accommodations; and retention and use of personal property (including civilian clothing). *Id*. Additionally, CAAF heavily considered the fact whether the issue was raised at trial or not. *Id*. at 113-114.

Involuntary restriction to an inpatient mental health facility results in conditions tantamount to confinement. *E.g.*, *Regan*, 62 M.J. at 301; *United States v. White*, No. ACM 39600, 2020 CCA LEXIS 235, *9-10 (A.F. Ct. Crim. App. Jul. 15, 2020) (awarding *Mason* credit where appellant involuntarily spent 17 days in inpatient mental health treatment program). In *Regan*, the

trial judge awarded day-for-day credit for inpatient treatment because appellant was "not given a choice" by command and the "totality of the conditions imposed" (being allowed to leave the facility with escorts, living behind secured doors at the facility, limited smoke breaks, limited breaks with other individuals, and supervised visits). *Regan*, 62 M.J. at 301; *cf. United States v. Rostmeyer*, NMCCA 201500095, 2015 CCA LEXIS 532, *9-11 (N.M. Ct. Crim. App. Nov. 30, 2015) (denying *Mason* credit where treatment was voluntary and member could physically leave treatment programs); *United States v. Piatti*, NMCCA 201300316, 2014 CCA LEXIS 21, *6-9 (N.M. Ct. Crim App. Jan. 23, 2014) (denying *Mason* credit because inpatient treatment was voluntary, not command driven). Even though the *King* factors are not cited in *Regan*, it is clear looking at the conditions and the member's inability to voluntarily leave, the restrictions were tantamount to confinement, consistent with *King.*

Here, upon de novo review, this Court should come to the same conclusion as in *Regan* and find the military judge erred in not awarding *Mason* credit to AB Giles. As in *Regan*, AB Giles was forced to make a choice between jail and inpatient treatment. R. at 92, 348. His choice was not voluntary. *Id.* He did not want to go, and he did not want treatment. *Id.* Additionally, the command unlawfully put AB Giles into involuntary treatment. R. at 351-54 (discussing involuntary commitment proceedings, both state and Air Force, neither of which were followed). This, too, is exactly like *Regan*. *Regan*, 62 M.J. at 301.

This impossible choice was coupled with similar restrictions on liberty as in *Regan*. AB Giles was restricted to a building, not just the treatment facility. R. at 347. He could not go on outings, even with escorts. R. at 88. He had limited telephone and visiting privileges, less than what the appellant in *Regan* had. *Compare Regan*, 62 M.J. at 301 ("breaks with individuals at the facility" and "supervised visits"), *with* R. at 347. His family also could not visit him. R. at 347.

He had minimal access to personal property, much like the appellant in *Regan* had limited access to the "gift shop" and "smoke breaks." *See* R. at 84. ("Were you allowed to keep any personal property? To an extent, sir. . . . Things like sheets of paper, documents, little—little arts and crafts . . . . documents and [civilian] clothing."). Based on a reasonable inference from his suicidal ideation, there were individuals with guns on the premises. R. at 80. Perhaps unsurprisingly, like the appellant in *Regan*, AB Giles had medical and mental health care. He was a patient, just like the appellant in *Regan*, but he was not free to leave. R. at 81. AB Giles believed, and was proven correct, that if he was discharged from Red River, he would go back into confinement. *Id*.; *infra* Issue II. In effect, he had no choice but to remain when his command hung confinement in Archer County Jail over his head indefinitely.

AB Giles was not treated as military member on minor liberty restriction. He was not performing military duties, he did not sleep in his own bed, he had no interaction with his unit, he could not leave the building, and he was required to attend therapy to have basic telephone privileges. AB Giles did not have personal property except for regular clothing (which is expected in a psychiatric facility) and things necessary for "arts and crafts" and letters. AB Giles's situation is not comparable to cases where restriction was found *not* tantamount to confinement, which typically deal with being restricted to a base or a military area and military work is still performed, there are some check-ins or escorts, and most privileges and support facilities are available. *See*, *e.g.*, *United States v. Guerrero*, 28 M.J. 223, 224 (C.M.A. 1989) (denying *Mason* credit where restricted to "place of duty as long as he was escorted by a noncommissioned officer," permitted to go to other places off-duty if still escorted, and required to sign in every 30 minutes with CQ); *King*, 58 M.J. at 111-12 (denying *Mason* credit where restricted to "places of duty" and required to check in twice a day); *Banegas*, 2015 CCA LEXIS 329, at *34 (denying *Mason* credit where

escorted and checked-in on frequently but "retained almost complete autonomy outside duty hours," "worked and lived among other members of his unit," and allowed to leave base for food); *United States v. Murray*, ACM 38663, 2015 CCA LEXIS 500, *9, 11 (A.F. Ct. Crim. App. Nov. 4, 2015) (denying *Mason* credit where restricted to base and visit requests had to be routed through chain of command).

As defense counsel argued, AB Giles's time in Red River was exactly like military confinement. R. at 96, 106; *see* Pros. Ex. 7 (noting comparable conditions). He may not have been "physically restrained," but his restriction was tantamount to confinement. *See Regan*, 62 M.J. at 301 (quoting *United States v. Rendon*, 58 M.J. 221, 224-25 (C.A.A.F. 2003)) (denying *R.C.M. 305 credit* because "that rule applies to 'restriction tantamount to confinement only when the conditions and constraints of that restriction constitute *physical restraint*'").[14]

Altogether, AB Giles is entitled to *Mason* credit for the *entire time* he was at Red River, to include the beginning when he was not restricted to the building, based on the "impossible choice" and "totality of conditions." *See Regan*, 62 M.J. at 301 (coming to the same conclusion). Consequently, AB Giles should be awarded 162 days of *Mason* credit. However, as this Court knows, AB Giles is no longer in confinement; so, this confinement credit should be applied towards the bad-conduct discharge to set it aside. As discussed in detail below in Issue I, section 3, setting aside the bad-conduct discharge is not disproportionate in light of the offenses for which AB Giles was convicted (or the harm he suffered). *Zarbatany*, 70 M.J. at 176-177.

[14] AB Giles is not asking for R.C.M. 305 credit for his time at Red River. He was not *physically* restrained, as in handcuffed to a bed, straight jacketed, or confined to a singular padded room for extended periods of time. The military judge seemed to be looking for this kind of restraint to find the conditions tantamount to confinement, hence the misuse of the word "Allen" credit when discussing *Mason* credit. However, those kinds of conditions are not necessary for *Mason* credit.

2. AB Giles is entitled to additional Article 13, UCMJ, relief for his unlawful and involuntary commitment to an inpatient mental health facility.

AB Giles is not challenging the military judge's finding that an Article 13, UCMJ, violation occurred; it did. "[E]ssentially what occurred here was an unauthorized command-directed or induced involuntary commitment that constitutes an abuse of discretion within the meaning of Article 13, UCMJ, insofar as it's a violation of Air Force and DoD regulations." R. at 354. By violating the law and various Department of Defense regulations to unlawfully and involuntarily commit AB Giles to Red River, the first prohibition of Article 13, UCMJ, was violated. *See* Article 13, UCMJ ("No person, while being held for trial, may be subjected to punishment . . . .").

"'[I]t is well-settled that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests.'" *United States v. Williams*, 68 M.J. 252, 256 (C.A.A.F. 2010) (quoting *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980)). A violation of a regulation designed to protect the liberty interest of servicemembers, like protecting against unlawful involutory commitment to a psychiatric facility, can constitute a violation of Article 13, UCMJ. *Williams*, 68 M.J. at 256-57 (finding "[w]hile R.C.M. 305(k) could have provided an alternative basis for relief, the factual basis for credit under . . . Article 13, UCMJ" was a violation of a regulation designed to protect personal liberties).

Here, the command forced AB Giles into Red River without due process, violating both Air Force and state involuntary commitment procedures. *See* R. at 351 (citing and summarizing applicable procedures). As in *Williams*, failure to follow proper procedures evidences an intent to punish. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) ("If a restriction or condition is not reasonably related to a legitimate goal -- if it is arbitrary or purposeless -- a court permissibly may infer that the purpose of the governmental action is punishment . . . ."). There is no reasonable explanation

for why involuntary commitment proceedings were circumvented. AB Giles was just sitting in jail; the Government had time to pursue that option. Instead of following the law, the Government coerced AB Giles into involuntary treatment, perpetually holding Archer County Jail over his head. In fact, upon his release from Red River, AB Giles was ordered back into county jail, further demonstrating the command's motivation was arbitrary. *See infra* Issue II (discussing how that decision was also unlawful). Thus, the command's blatant disregard for AB Giles's personal liberties constitutes an abuse of discretion amounting to punishment under Article 13, UCMJ. While the military judge also came to this conclusion, the military judge erred in assessing the meaningful relief warranted.

After excusing the Government's unlawful but "humanitarian purposes"[15] for violating AB Giles's constitutional[16] and statutory rights, the military judge failed to award meaningful relief. The military judge decided that because AB Giles unlawful inpatient treatment was "not tantamount to confinement," AB Giles should not get day-for-day credit (only half-day credit, a total of 81 days) and he later denied any other form of relief. R. at 354, 783. But this was a misunderstanding of how Article 13, UCMJ, relief works. Article 13, UCMJ, relief is for violations of Article 13, UCMJ, which "prohibits two things: (1) the imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial." *Zarbatany*, 70 M.J. at 174. *Separately*, *Mason* credit is day-for-day credit when restriction is tantamount to confinement, and an accused can receive *additional* Article 13, UCMJ, credit, if the purpose of the restriction tantamount to confinement was to punish or if the restriction conditions warrant. *See United States v. Chapa*, 57

[15] R. at 354.

[16] "[T]he Fifth Amendment includes freedom from punishment within the liberty of which no person may be deprived without due process of law." *Wolfish*, 441 U.S. at 535 n.17.

M.J. 140, 141 (C.A.A.F. 2002) (drawing a distinction between a request for relief for illegal pretrial punishment in violation of Article 13, UCMJ, and the assertion that restriction was tantamount to confinement and thus merited *Mason* credit).

By denying *Mason* credit in the first place (inpatient treatment was not tantamount to confinement), the military judge *lowered the value* of the *independent* Article 13, UCMJ, violation. In essence, the military judge merged the two independent bases for credit to erroneously find that the Article 13, UCMJ, violation was, in effect, "not that bad." This cheapened AB Giles's liberty rights and sanctioned the command's actions, denying AB Giles meaningful relief.

3. Meaningful relief is either the findings and sentence should be set aside or the bad-conduct discharge should be set aside.

> Whether meaningful relief has been granted and should be granted will depend on factors such as the nature of the Article 13, UCMJ, violations, the harm suffered by the appellant, and whether the relief sought is disproportionate to the harm suffered or in light of the offenses for which the appellant was convicted.

Zarbatany, 70 M.J. at 176-77. While the *primary* mechanism for addressing violations of Article 13, UCMJ, has been confinement credit, Article 13, UCMJ, relief is not *limited* to confinement credit. *Id*. at 170.

> Prior case law has recognized that "other relief" for Article 13, UCMJ, violations may range from disapproval of a bad-conduct discharge, *see United States v. Nelson*, 18 C.M.A. 177, 181 (C.M.A. 1969), to complete dismissal of the charges, depending on the circumstances. *See United States v. Fulton*, 55 M.J. 88, 89 (C.A.A.F. 2001).

Id. at 175. Whether at trial or on appeal, dismissal of charges or setting aside the findings and sentence is an extraordinary remedy. *Fulton*, 55 M.J. at 90. But extraordinary remedies should be employed in extraordinary cases. "If the command and staff offices have turned a blind eye toward an egregious situation, dismissal of court-martial charges would be warranted as an extraordinary measure." *Id.* at 91 (Crawford, C.J., concurring).

a. The findings and sentence should be set aside for the Government's extraordinary and unlawful act of confining AB Giles for his suicide attempt.

AB Giles was unlawfully confined because it was essentially too challenging or burdensome to lawfully take care of him and his mental health. There are legal ways to involuntarily commit someone, as the military judge here even noted. R. at 351-53; *see also United States v. Doane*, 54 M.J. 978, 982-983 (A.F. Ct. Crim. App. 2001) ("There is a fundamental difference between how we treat an accused who is a threat to himself and an accused who is a threat to commit other serious offenses. The former we refer to mental health practitioners and, if necessary, involuntary commitment.") (cleaned up). Instead of complying with the law, the Government, through its various agents, forced AB Giles into a mental health facility against his will and then ignored the progress made through his compelled treatment by putting him right back into confinement after he was released from treatment (*infra* Issue II). There is no windfall in dismissing all charges and specifications for an airman that was suicidal and whose command turned a blind eye to again and again (*see infra* Issue II).

It is apparent AB Giles had an intent to kill himself. The evidence throughout the entire record of trial—and before AB Giles's command—showed AB Giles talking about death, being fascinated by death, wanting to die, being interested in ways to die, and expressing suicidal ideation in various forms. PHO Ex. 3 at 9-24. He communicated that to almost everyone. *Id*. His command was aware but took no action to protect AB Giles from himself. *Id*. "AB Giles discussed suicidal 'jokes' and death with so many classmates more than a week before his suicide attempt, yet no one intervened until it was essentially too late and when they did intervene it certainly was not to let AB Giles know that someone cared about him and his wellbeing." *Attorney Memo – AB Randy Giles Chapter 6 Request* at 2-3, Oct. 19, 2022. Instead of lawfully getting him help, the command decided to unlawfully commit him, then lock him up in county jail, and then

prosecute him. Confining, committing, and prosecuting AB Giles served as a cover-up for the command's failure to take appropriate steps to provide mental health services to a clearly suffering airman.

It is common knowledge the military has a "sullied history" with suicide prevention and taking care of members with mental health concerns. *See Attorney Memo – AB Randy Giles Chapter 6 Request* at 1, Oct. 19, 2022.[17] In an effort to correct that history, the Air Force touts suicide prevention. *See id.* at 2 (citing Department of the Air Force Integrated Resilience, *Suicide Prevention*, https://www.resilience.af.mil/suicide-prevention-program/). Number one on the list of suicide warning signs is "[t]alk about death, wanting to die, and killing themselves." *Id*. AB Giles's record is full of these statements, yet his command turned a blind eye to him.

This entire process has been the chain of command covering itself when it ignored all the signs in AB Giles case. "In September 2022, Secretary of the Air Force Frank Kendall addressed the issue of pervasive suicide in the Air Force, saying, 'There are things we can do . . . recognize when somebody's having some problems, let them know that somebody cares and can reach out to them.'" *Attorney Memo – AB Randy Giles Chapter 6 Request* at 2, Oct. 19, 2022. AB Giles tried to commit suicide *one month* before that statement. The command failed to recognize AB Giles's problem, failed to show any care, and suffered the result—an airman's attempted suicide by self-immolation. Thereafter, instead of heeding "the things we can do," the command unlawfully committed AB Giles to keep him alive for a court-martial that should have never

[17] The memorandum cited the following for that proposition: Leo Shane III, *The military may be required to start tracking suicides by job assignments*, Military Times (Jul. 21, 2022), https://www.militarytimes.com/news/pentagon-congress/2022/07/21/the-military-may-be-required-to-start-tracking-suicides-by-job-assignments-in-hopes-of-more-answers/; David Roza, *Air Force fires commander who separated an airman recovering from a suicide attempt*, Task & Purpose (Dec. 8, 2021), https://taskandpurpose.com/news/air-force-toxic-leadership-maintenance/.

happened. Even after he showed substantial improvement from his coerced mental health treatment, the command again shoved him out of sight and out of mind in county jail. *Infra* Issue II. In the end, the Government's series of unlawful actions contravened the Secretary's direction and instead punished AB Giles—severely and repeatedly, without regard for appropriate process—in the wake of his failed attempt to end his own misery in isolation.

Setting aside the findings and sentence for this due process violation[18] is appropriate. The Supreme Court has "implicitly recognized the necessity for preserving society's interest in the administration of criminal justice [and] that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Fulton*, 55 M.J. at 89 (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)). In this case, there is a very low interest in the "administration of criminal justice" for AB Giles suicide attempt. The Government stacked the charge sheet, combining aggravated arson with damaging military property, and tacking on the petty offenses of moving around the dorm furniture and taping his own smoke alarm to increase the number of convictions. Yet all of this conduct amounts to one act: his suicide attempt. The overall harm suffered by AB Giles at the hands of the Government for his *suicide attempt* is disproportionate to the severity of the offenses he was convicted of and any consequences directly resulting therefrom. Consequently, when balancing competing interests here, it is appropriate and just to dismiss all charges and specifications.

[18] "A fundamental component of due process is the presumption of innocence accorded the criminal defendant. Pretrial release has long been recognized as a vital concomitant of that presumption. If a person may arbitrarily be confined before his trial, then in truth punishment precedes conviction and the presumption of innocence avails defendant little." *Courtney v. Williams*, 1 M.J. 267, 271 (C.M.A. 1976) (citation omitted) (citing *DeChamplain v. Lovelace,* 510 F.2d 419, 424 (8th Cir. 1975), *judgment vacated as moot*, 421 U.S. 996 (1975)).

b. In the alternative, the bad-conduct discharge should be set aside for AB Giles's unlawful confinement predicated on his suicide attempt.

If this Court does not dismiss the charges, the bad-conduct discharge should be set aside for the same reasons. Setting aside the bad-conduct discharge aligns with *Zarbatany* too. The relief sought is not disproportionate in light of the offenses for which AB Giles was convicted (or the harm he suffered). *Zarbatany*, 70 M.J. at 176-177.

First, as with a federal felony-level conviction, there is irreversible stigma associated with a bad-conduct discharge. R. at 698. There is no justification for depriving a formerly suicidal Airman Basic, who needs continued treatment,[19] of Veterans Benefits when it was the Government who turned its back on him in the first place. After realizing *that* error, the Government forced AB Giles into treatment unlawfully, and then continued to unlawfully confine him after they "fixed" their initial malfeasance (*infra* Issue II). This significant deprivation of liberty from the outset is serious harm suffered. This Court should decline to reward the Government by permitting them to toss-aside AB Giles. Instead, this Court should hold the Government responsible for failing to take care of an airman and set-aside the lucky[20] reward it received for violating a suicidal airman's rights repeatedly—the bad-conduct discharge.

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[19] R. at 611.

[20] Considering there were three panel members on the panel who thought suicide was morally wrong or a "sin," and one who thought suicide was murder, the sentence is hardly luck, but a product of bias. R. at 178, 200, 231, 304, 314. Trial defense counsel only challenged for cause one of these members and lost. R. at 365-69. Then, trial defense counsel failed to use the defense peremptory challenge on *any* member. R. at 374. The military judge—apparently incorrectly—advised AB Giles that because the defense did not exercise its peremptory challenge at all, the challenge for cause was preserved for appeal. R. at 375; R.C.M. 912(f)(4) (failing to use peremptory against *any* member constitutes waiver of challenge by challenging party); *United States v. Walker*, ACM 38645, 2015 CCA LEXIS 539, *13-14 (A.F. Ct. Crim. App. Dec. 2, 2015) (citing *United States v. Leonard*, 63 M.J. 398, 403 (C.A.A.F. 2006) (holding the appellant waived any error under R.C.M. 912(f)(4) and the court did not address merits of his claim of error)). To the extent any of these issues with the panel are prejudicial error, AB Giles affirmatively—and

Second, the *only* person injured in AB Giles's suicide attempt was AB Giles. There was a risk of injury to others, which AB Giles acknowledged and was why he elected to plead guilty. R. at 546. But what he did is not taking a gun and starting a firefight with police (or others) in an effort to die.[21] It was not driving head on into traffic with the intent to collide. He lit his bed on fire in a one-hour fireproof room that was linked via ventilation systems to rooms with working smoke detectors, drank lighter fluid, and laid down to die of smoke inhalation in that room—after trying to self-immolate. His roommate was not present. His dormmates were alerted to the smoke because he did not tamper with any other smoke alarms in the building. He did not prevent others from evacuating. He did not interfere with the fire alarm in the building. He did not want the building to burn down; he just wanted to die before firefighters reached him. AB Giles cannot be held responsible for a never-ending chain of hypotheticals. *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (citing *United States v. Witt*, 21 M.J. 637, 640 n. 3 (A.C.M.R. 1985), *pet. denied*, 22 M.J. 347 (1986)). In setting aside the bad-conduct discharge, AB Giles would *not* be getting a windfall, but recognition that the Government seriously erred when it chose to commit, confine, and prosecute a suicidal airman that it should have just discharged.

AB Giles requests that this Court set aside the findings and sentence. In the alternative, this Court should set aside the bad-conduct discharge.

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knowingly—**waives** them. AB Giles is intentionally pursuing only errors that result in this Court altering the sentence, not remanding for any new hearing.

[21] Notably, Trial Counsel elicited evidence and attempted to argue taking a gun and starting a firefight with police is exactly what AB Giles would do and what his conduct was like. R. at 615-16, 670. Eliciting and insinuating this in front of members is improper sentencing evidence, and the military judge allowed it to be considered for "rehabilitation potential" over defense objection. R. at 674. Additionally, Trial Counsel's sentencing argument heavily emphasized what amounted to a never-ending chain of hypotheticals and emotional pleas. R. at 710-20, 735-37. To the extent any of this is prejudicial error, AB Giles affirmatively and knowingly **waives** these issues. AB Giles limits his assignments of error and requests for relief to only those that would result in dismissal of all the charges and specifications or sentencing relief by this Court.

II.

AB Giles was unlawfully kept in pretrial confinement when the trigger for his misconduct—a desire to commit suicide via self-immolation—was no longer present.

Additional Facts

AB Giles was released from Red River on February 28, 2023, at 9:40 AM. App. Ex. XV at 15. By 10:44 AM, AB Giles was back in pretrial confinement at Archer County Jail. *Id.* On March 2, 2023, a pretrial confinement hearing was held to determine if AB Giles was to remain in Archer County Jail. *Id.* The next day, the PCRO determined AB Giles would remain in pretrial confinement until trial. *Id.* He was released March 23, 2023, the day he was sentenced. R. at 787.

At the start of AB Giles's second stint in Archer County Jail, his new commander, referring to the aggravated arson, simply stated without analysis: "[T]his alleged offense poses a serious threat to the safety of AB Giles and the student community." *Pretrial Confinement of AB Randy B. Giles* at 4, Mar. 1, 2023. He further concluded, "[T]here is probable cause to believe AB Giles would not appear at trial and would commit further serious misconduct." *Id.* This conclusive statement is different from the first PCRO's pretrial confinement review memorandum: "[T]he confinee clearly demonstrated unstable and erratic behavior and performed actions to his health, safety, and welfare, and the same to those around him;" "'[AB Giles's] safety is connected to his mental health condition.'" *Pretrial Confinement Review – AB Randy B. Giles Jr., 362d Training Squadron* at 2, Sep. 14, 2022. There is no such analysis by the new commander in his initial determination to put AB Giles back into county jail, just a summary of AB Giles's prior conduct. *Pretrial Confinement of AB Randy B. Giles* at 4, Mar. 1, 2023. The commander's conclusive memorandum was one of the documents the second PCRO reviewed. *Pretrial Confinement Review – AB Randy B. Giles, Jr., 362 Training Squadron* at 1, para. 5.3, Mar. 3, 2023 [hereinafter *Second PCRO Memo*].

The second PCRO reviewed several other documents, most of which were identical to the first pretrial confinement hearing in September. *Compare Pretrial Confinement Review – AB Randy B. Giles Jr., 362d Training Squadron*, September 14, 2022, *with Second PCRO Memo*. Some of the new documents included the "Defense Psychologist Affidavit," "Red River Hospital Discharge Summary," "Patient Weekly Progress Update," and an "AFOSI Form 158." *Second PRCO Memo* at 1.

The defense psychologist who testified at trial later, Dr. RD, provided an affidavit for the PCRO to consider. *Affidavit of Dr. [RD],* Mar. 1, 2023. For the affidavit, Dr. RD reviewed "numerous mental health records, including records from Sheppard AFB Mental Health Clinic, Parkland Hospital, Medical City McKinney and Red River Hospital." *Id*. at 2. Although Dr. RD did not discount that AB Giles needed continued treatment or that there was an "absolute guarantee" for his safety, he never stated AB Giles was still suicidal. *Id*. at 2-3. In fact, he opined based on his knowledge and experience that if AB Giles was kept in confinement, he would relapse into a suicidal state. *Id*. at 3. He also explained that if kept on base instead, AB Giles would be able to "continue to make therapeutic progress." *Id*.

The Discharge Summary from Red River showed AB Giles was no longer suicidal. *Discharge Summary.* He "denied current suicidality," "was introduced to behavioral interventions most suitable to [his] presenting problems and was emotionally stabilized," and denied "any suicidal or homicidal ideation, intent, or plan." *Discharge Summary* at 2-3.

The Patient Weekly Progress update, dated four days earlier, even more clearly shows a lack of suicidality:

> As of this writing, Randy denies [suicidal ideation], [homicidal ideation], or self-harm urges at this time. He shared that he wants people to remember that he survived his suicide attempt and that he worked very hard and made a conscious effort to make sure he would not want to attempt suicide again, as he initially said

> at admission that his worst fear was surviving a suicide attempt. Randy shared that learning about Radical Acceptance had the biggest impact on him and helped him challenge his negative ideologies that he had been struggling with, stating that he was serious about changing his mindset and doing better for himself.
>
> He states that his other goal is to "feel happy."

Military Resiliency Unit Patient Weekly Progress Update at 1-2, Feb. 24, 2023. Upon release, AB Giles was no longer suicidal, and he was receiving medication for his diagnoses. *See Discharge Summary* at 2 (showing discharge medication for "mood").

Finally, the AFOSI Form 158 revealed all the Google searches AB Giles made before his suicide attempt, such as "does burning your head kill you faster," "what if you burn your skull," "does fire kill you," "flameproof building," "flame retardant walls," "will charcoal lighter fluid kill you if swallowed," and "quick ways to commit suicide." *Supra* Statement of Facts.

The remaining information in front of the second PCRO was substantially similar to the evidence presented at the first pretrial confinement hearing. *Compare Pretrial Confinement Review – AB Randy B. Giles Jr., 362d Training Squadron*, Sep. 14, 2022, *with Second PCRO Memo*. His classmates' statements were included (*supra* Statement of Facts at 3-4), along with a fire report about how and where the fire started. *Second PCRO Memo* at 2. There was testimony presented about the state of the room. *See Witness Statement Summary*, Mar. 3, 2023 (Special Agent's testimony). All this information made it clear AB Giles committed aggravated arson, damaged military property, moved furniture to block the door, and taped over the smoke alarm. *Second PCRO Memo*. What was left at issue was whether AB Giles needed to be confined.

The PCRO determined AB Giles needed to be confined because "it is foreseeable AB Giles will engage in serious criminal conduct." *Second PCRO Memo* at 2. For this conclusion, the PCRO stated:

> AB Giles researched and identified multiple and specific means of suicide and attempted one which posed a serious threat to the safety of the dorm occupants. According to the psychologist affidavit, medical records showed he remained suicidal followed his medical stabilization. AB Giles remains a serious threat to the safety of the unit because he has demonstrated his interest in multiple methods of killing and his willingness to carry out deathly acts that impact more than just himself. Furthermore, the inappropriate remarks and behavior observed through classmate interviews interferes with the effectiveness, morale, and discipline of the squadron.

Id.

The PCRO also determined less severe forms of restraint were inadequate because AB Giles was "dedicate[ed] and resourceful[]" in carrying out his suicidal act. *Id.* "Arrest, restriction in lieu of arrest, and conditions on liberty would each provide opportunities to carry out follow-on acts that put others unnecessarily at risk." *Id.*

Standard of Review

The standard of review is abuse of discretion. *United States v. Gaither*, 41 M.J. 774, 778 (A.F. Ct. Crim. App. 1995), *aff'd*, 45 M.J. 349 (C.A.A.F. 1996). "An abuse of discretion occurs when the underlying reasoning is clearly untenable and amounts to a denial of justice." *United States v. Babian*, No. ACM S32593, 2021 CCA LEXIS 115, *10 (A.F. Ct. Crim. App. Mar. 19, 2021) (citing *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). To reverse a decision based on an abuse of discretion, the decision must be "arbitrary, fanciful, clearly unreasonable or clearly erroneous." *Id.* at 11. In determining the legality of pretrial confinement, appellate courts limit review to the facts before the PCRO. *Gaither*, 45 M.J. at 351.

Law and Analysis

Any military person charged with an offense under the UCMJ "shall be ordered into arrest or confinement, as circumstances may require." Article 10, UCMJ. However, "[n]o person may be ordered into pretrial confinement except for probable cause." R.C.M. 305(d). "Probable cause

to order pretrial confinement exists when there is a reasonable belief that: (1) An offense triable by court-martial has been committed; (2) The person confined committed it; and (3) Confinement is required by the circumstances." *Id.* Whether pretrial confinement is required by the circumstances involves two separate determinations: (1) whether there is an adequate basis for ordering the confinement; and (2) whether there is a need for the confinement as opposed to some lesser form of restraint. *United States v. Heard*, 3 M.J. 14, 20-21 (C.M.A. 1977).

Here, trial defense counsel waived this issue. R. at 101, 106. However, upon piercing waiver, it is clear there was not an adequate basis for ordering confinement, and confinement was not needed when lesser forms of restraint were available.

1. This Court should pierce waiver because this Court has an obligation to approve only the sentence that should be approved based on the entire record.

Trial defense counsel made it clear they were not challenging AB Giles's unlawful pretrial punishment and confinement apart from the Article 13, UCMJ, violation while at Red River inpatient facility. R. at 101, 106. This court has waiver-piercing authority as to waived errors impacting the sentence. *United States v. Cook*, No. ACM 40333, 2024 CCA LEXIS 276, *59 (A.F. Ct. Crim. App. Jul. 3, 2024). Under the applicable version of Article 66, UCMJ, this Court still "may affirm only 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)(A) (2021) (emphasis added); *see id.* at *59 n.28 (noting waiver piercing left intact for sentencing unless new Article 66, UCMJ, applies). The "should be approved" is the basis for this Court's waiver authority, *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016), and this Court should exercise that authority in this highly deserving case. This unlawful confinement is one of many reasons why AB Giles should not receive a bad-conduct discharge and demonstrates a continued attempt to punish AB Giles before he was tried. *Courtney*, 1 M.J.

at 271 ("If a person may arbitrarily be confined before his trial, then in truth punishment precedes conviction and the presumption of innocence avails defendant little.") (citing *DeChamplain*, 510 F.2d at 424).

2. There was not an adequate basis for ordering AB Giles into confinement after his release from Red River.

An adequate basis exists for pretrial confinement "'to assure the presence of an accused at his trial' and to avoid 'foreseeable future serious criminal misconduct of the accused, including any efforts at obstructing justice.'" *Doane*, 54 M.J. at (quoting *Heard*, 3 M.J. at 20). "Serious criminal misconduct" includes "serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command." R.C.M. 305(h)(2)(B).

Here, after AB Giles was released from inpatient care at Red River, he was placed back into pretrial confinement, even though his circumstances had radically changed. At the time of the second pretrial confinement order and hearing, there was no foreseeable risk of serious criminal misconduct. The pretrial confinement officer had minimal new information about the criminal conduct pending other than more information about AB Giles's Google searches. This new information did not substantially change the landscape to indicate AB Giles would reoffend or fail to show up for trial. Instead, the pretrial confinement was based on the same fear AB Giles was suicidal and his suicidal ideations were "dangerous" to others. That conclusion was an abuse of discretion when all the facts before the PCRO indicated AB Giles was no longer suicidal.

Based on the PRCO's limited analysis, he thought that because AB Giles tried to kill himself via fire once before, he would do so again. This conclusion is unfounded because AB Giles was no longer suicidal. AB Giles's *initial* pretrial confinement reveals a situation comparable to *United States v. Babian*, where an erratic, unstable mental health condition was

linked to serious future misconduct that put himself and others at risk. 2021 CCA LEXIS 115, at *10-11. However, AB Giles's situation was drastically different upon release from Red River. Unlike in *Babian* where that appellant continued to reoffend (DUIs, evading arrest, etc.), there was no evidence before the PCRO that AB Giles was a continued risk to himself or others. His previously erratic, unstable mental health condition was being treated, and he no longer expressed suicidal ideations. *Discharge Summary*. Yet, the PCRO stated "confinement is necessary because it is foreseeable that AB Giles will engage in serious criminal misconduct." This is a clearly erroneous conclusion for at least two reasons.

First, when analyzing what "serious criminal misconduct" was, the PCRO misunderstood the definition. It is not solely an "interference" with the "effectiveness, morale, and discipline of the squadron" but a "serious threat to" it. R.C.M. 305(h)(2)(B). As such, the "inappropriate remarks and behaviors" AB Giles was engaged in before his inpatient treatment are irrelevant. They do not qualify as a "serious threat to effectiveness, morale, and discipline of the squadron," especially given the passage of time and his improved condition. The PCRO's conclusion is an abuse of discretion because it was grounded in a fundamental misunderstanding of the law.

Second, the actual serious "misconduct" at hand, AB Giles's attempted suicide via self-immolation, was predicated on AB Giles *being suicidal.* The PCRO noted this: "AB Giles researched and identified multiple and specific means of suicide and attempted one which posed a serious threat to the safety of the dorm occupants." *Second PCRO Memo* at 2. The PCRO continued saying, "According to the psychologist affidavit, medical records showed he remained suicidal following his medical stabilization." *Id*. This is the only statement the PCRO makes about why a risk for foreseeable future serious misconduct remains. This statement, though, fails to capture AB Giles's state at the time of release from Red River. The PCRO seems to ignore the

other mental health documents and fundamentally misunderstands Dr. RD's affidavit to come to this erroneous conclusion.

To start, when Dr. RD indicated that AB Giles was still suicidal after stabilization, he was referring to AB Giles's stabilization from physical injuries incurred during the fire, not his mental state. *Affidavit of Dr. [RD]* at 2. The *mental health* records the PCRO had available to him reveal this distinction. In those documents, Red River mental health practitioners distinguish between *medical* health and *mental* health. *Discharge Summary* at 2. AB Giles was medically (i.e., physically) stabilized and was still suicidal for some of the time he was at Red River. *Affidavit of Dr. [RD]* at 2. However, at the time of his release, he was no longer suicidal. *Discharge Summary*; *Military Resilience Unit Patient Weekly Progress Update*. That is critical. There is no mention in the PRCO's analysis of AB Giles's improvement, despite the fact that his improvement obviates the concern for foreseeable future misconduct. The PCRO's failure to consider, address, and analyze this evidence constitutes an "arbitrary, fanciful, clearly unreasonable or clearly erroneous" decision. It was an abuse of discretion to keep AB Giles confined when the evidence before the PCRO showed he was no longer suicidal.

The PCRO kept AB Giles confined because the PCRO thought he was still suicidal with an "interest in multiple methods of killing" along with a "willingness to carry out deathly acts." *Second PCRO Memo* at 2. AB Giles's confinement was about his suicide attempt; nothing more. Suicide prevention is not an adequate basis for placing or maintaining an accused in pretrial confinement. *Doane*, 54 M.J. at 984.

> Although, an accused's mental condition is an appropriate consideration in deciding whether to place or maintain an accused in pretrial confinement, it must be relevant to the two basic criteria for pretrial confinement: (1) whether the accused will be present for trial; and, (2) whether the accused is a threat to commit other acts of serious misconduct.

Id. at 982. *Doane* makes it clear placing and keeping someone in pretrial confinement because they are suicidal is unlawful. All the facts before the PCRO related to AB Giles's attempted suicide and whether he would do it again. Therefore, even assuming AB Giles was still suicidal upon release, this is an unlawful basis for continued incarceration. This was an abuse of discretion.

3. <u>After AB Giles's release from Red River, there was no need for confinement as opposed to some lesser form of restraint.</u>

Based on the evidence, lesser forms of restraint were appropriate at the time of the hearing. Confinement was not appropriate to prevent AB Giles from reattempting suicide when other, lesser forms of restraint would have been adequate to keep AB Giles from killing himself—and by extension prevent him from putting "others unnecessarily at risk." However, the PCRO appears not to have engaged with the new evidence about AB Giles's mental health—that he was not suicidal. The PCRO also ignored Dr. RD's affidavit on less restrictive measures when Dr. RD opined that confinement would make the situation *worse. Affidavit of Dr. [RD]* at 3. Instead, as Dr. RD provided, restriction to base coupled with continued therapy would have been adequate to ensure AB Giles made it to trial—i.e., did not kill himself between now and then—and to avoid foreseeable future serious misconduct. *Id*.

There is no evidence from the hearing why the commander who testified thought less restrictive means were inadequate. *See Witness Statement Summary*, Mar. 3, 2023 (commander's testimony). In his memorandum, the commander said because the misconduct occurred in AB Giles's room, restriction was inadequate. *Pretrial Confinement of AB Randy B. Giles* at 4, Mar. 1, 2023. But that analysis is predicated on the assumption AB Giles remained suicidal. *Id*. at 3-4. The commander did not have the mental health documents showing AB Giles was no longer suicidal, but the PCRO did. *Compare Pretrial Confinement of AB Randy B. Giles* at 4, Mar. 1, 2023, *with Second PCRO Memo* at 1. Disregarding AB Giles's improvement and failing to

consider how that would impact lesser forms of restraint was an arbitrary decision, likely predicated on no one knowing how to properly—or legally—"deal" with an airman like AB Giles. Whatever the reason, it was an abuse of discretion to confine AB Giles on February 28, 2023 and keep him in local county jail until the day he was sentenced.

4. AB Giles is entitled to Article 13, UCMJ, relief because of the unlawful pretrial confinement.

The Government's arbitrary decision to unlawfully confine AB Giles then comes with significant consequences now. After finding a PCRO abused their discretion, this Court determines what relief is appropriate. *Zarbatany*, 70 M.J. at 176-177. "The issue of credit for pretrial confinement and/or punishment has a long history in military law. From its inception, Article 13, UCMJ, has forbidden pretrial punishment, as well as arrest or confinement more rigorous than necessary to assure the accused's presence at trial." *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999).

At the outset, AB Giles was unlawfully confined because his second time in Archer County Jail served as pre-trial punishment as it was not for a proper purpose and it was more rigorous than necessary to assure his presence at trial. This unlawful confinement is a violation of Article 13, UCMJ. *Zarbatany*, 70 M.J. at 174. As noted, relief for Article 13, UCMJ, violations are not limited to pretrial confinement credit, and "dismissal" of the charges or setting aside the punitive discharge are also options. *Zarbatany*, 70 M.J. at 170.

For the reasons provided earlier, *supra* Issue I.3., setting aside the findings and sentence is the appropriate remedy here. AB Giles tried to kill himself, and when he failed, the Government violated the law to confine him after forcing him into a psychiatric hospital against his will. The "benevolent" purposes of the command's actions in this case are overshadowed by (1) the blind eye they turned towards AB Giles for the two months he was at Sheppard AFB showing all the

signs of being suicidal and (2) their blatant violation of AB Giles's constitutional rights. He was ignored for months before committing suicide, he was ignored when he was unlawfully admitted into Red River (*supra* Issue I), and he was further ignored when he was put right back into pretrial confinement (unlawfully). Furthermore, in Archer County Jail, AB Giles was kept in isolation the entire time. R. at 657. Being in county jail "disrupted [his] access to therapy, as the jail [did] not offer or conduct mental health services." Def. Ex. N at 2. Overall, this is not a situation where AB Giles was unlawfully restricted to base or put in a military confinement facility on base with all its amenities. *See* R. at 626-27 (revealing how military confinement is more like basic training than jail). AB Giles was isolated in county jail after going through intensive mental health treatment and *against* expert medical advice that it would be better to keep AB Giles out of jail and in treatment at Sheppard AFB. All of these egregious command decisions, together, show that setting aside the findings and sentence is not disproportionate relief in light of the offenses and harm suffered.

In the alternative, for all the same reasons, the bad-conduct discharge should be set aside. *See also supra* Issue I.3.a.-b. Mere confinement credit is insufficient here, but even the basic amount of confinement credit the military judge awarded for the *other* Article 13, UCMJ, violation (*see* Issue I at 14, 20) indicates the bad-conduct discharge should be set aside for this additional violation.

There is no mathematical formulation for what a bad-conduct discharge is worth, and under *Zarbatany*, meaningful relief is case specific. The CAAF has found punitive discharges are "'qualitatively different' from confinement and other punishments such as forfeitures" and "there is 'no readily measurable equivalence' available to make meaningful conversions" of punitive separations and confinement. *United States v. Mitchell*, 58 M.J. 446, 448-49 (C.A.A.F. 2003)

(quoting *United States v. Rosendahl*, 53 M.J. 344, 348 (C.A.A.F. 2000)). A bad-conduct discharge has been deemed equal to as little as 30 days of confinement when other punishments are present. *United States v. Altier*, 71 M.J. 427, 428 (C.A.A.F. 2012) (per curiam) (affirming rehearing sentence to 30 days' confinement plus other components when bad-conduct discharge was original sentence). In another case, a bad-conduct discharge was equal to six months' confinement. *United States v. Turner*, 34 M.J. 1123, 1126-27 (A.F.C.M.R. 1992) (disapproving bad-conduct discharge and reduction to E-3 and affirming six months' confinement and reduction to E-4 instead).

Here, AB Giles was unlawfully confined for 23 days in Archer County Jail after his release from Red River. Considering the repeated violations of AB Giles's liberty rights, and under all the facts and circumstances of this case, the bad-conduct discharge should be set aside because that is meaningful relief, regardless of the number of confinement credit days AB Giles received at trial or may receive through this Court.

AB Giles requests that this Court set aside the findings and sentence. In the alternative, this Court should set aside the bad-conduct discharge.

III.
The Government violated AB Giles's R.C.M. 707 speedy trial rights by arraigning him 193 days after imposition of restraint.

Standard of Review

When an issue is forfeited by failure to raise it during trial, it is subject to plain error review. *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008). Under a plain error analysis, the appellant bears the burden of showing (1) there is error; (2) the error is plain and obvious; and (3) the error materially prejudices a substantial right of the appellant. *United States v. Clifton*, 71 M.J. 489, 491 (C.A.A.F. 2013).

Law and Analysis

An accused must "be brought to trial within 120 days after . . . [p]referral of charges; [or] the imposition of restraint under R.C.M. 304(a)(2)-(4)," whichever is earlier. R.C.M. 707(a). For purposes of R.C.M. 707, an "accused is brought to trial . . . at the time of arraignment." R.C.M. 707(b)(1). A violation of R.C.M. 707(a)(2) "will result in dismissal of the affected charges." R.C.M. 707(d). "Dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date." R.C.M. 707(d)(1).

No speedy trial issue was raised at AB Giles's court-martial. However, effective January 1, 2019, the President changed R.C.M. 905(e) to explicitly state that failure to object to an R.C.M. 707 violation is forfeiture, not waiver. Exec. Order 13,825, 83 Fed. Reg. 9,889, 9,984 (Mar. 1, 2018); R.C.M. 707(e) ("[A] plea of guilty which results in a finding of guilty forfeits any speedy trial issue to that offense, unless affirmatively waived); R.C.M. 905(e) (stating failure to raise a motion that "must be raised before the court-martial is adjourned . . . shall constitute forfeiture, absent an affirmative waiver").

Here, imposition of restraint as defined under R.C.M. 304(2)-(4) began on September 9, 2022, and lasted until arraignment on March 21, 2022. App. Ex. XV at 1-2, 15; *see also* Issues I-II. An arraignment date was ostensibly scheduled for December 14, 2022, the 96-day mark. App. Ex. I at 1; *see* App. Ex. XV at 2, para. 8 ("Motions were due early in anticipation of a bifurcated motions hearing in this case, which did not occur as planned."). Arraignment did not occur on December 14, 2022, but at the start of trial on the merits on March 21, 2023, day 193. R. at 1, 13. There is nothing in the record explaining why arraignment did not occur on December 14, 2022, or within 120 days. It is plain and obvious on the face of the record, that the Government violated

AB Giles's R.C.M. 707 speedy trial rights by not arraigning him within 120 days of imposition of pretrial restraint. If raised at trial, this would have resulted in the charges and specifications being dismissed, possibly with prejudice. R.C.M. 707(d).

Based on all the reasons articulated in Issues I-II above, AB Giles suffered material prejudice due to his unlawful restriction and incarceration for 193 days due to his suicide attempt. *See Barker v. Wingo*, 407 U.S. 514 (1972) ("The time spent in jail awaiting trial has detrimental impact on the individual."); *United States v. Guyton*, 82 M.J. 146, 154 (C.A.A.F. 2022) (R.C.M. 707 indicates the amount of pretrial delay that is "ordinarily tolerable" in the military). Additionally, based on all the reasons previously articulated in Issues I and II, which align with the R.C.M. 707(d) factors, the findings and sentence should be set-aside with prejudice.

AB Giles requests that this Court set aside the findings and sentence with prejudice.

IV.
The adjudged bad-conduct discharge for this victimless suicide attempt is inappropriately severe.

Additional Facts

The additional facts from Issues I-II are incorporated herein.

Dr. RD, the defense forensic psychologist, testified at the sentencing hearing. R. at 595. Dr. RD did not evaluate AB Giles but reviewed his medical and mental health records. R. at 601. After his suicide attempt, AB Giles was diagnosed with Major Depressive Disorder, which was "not a close call." R. at 603. He was also diagnosed with schizoid personality disorder, "a disorder characterized by a personality style where people are disconnected or disengaged from others."

> People with schizoid personality disorder have few close relationships. In fact, they may have no close relationships outside of immediate family. And the reason is that close relationships aren't important to them. They don't have confidants. They don't have close friends. They are indifferent to praise or criticism from others. They tend to be loners. They will prefer solitary activities. And other people find them very odd for those reasons.

R. at 604.

Dr. RD testified that AB Giles actions on August 16, 2022, were more than suicidal gestures (when someone does not intend to die), but a true suicide attempt; he was genuinely "trying to end his life." R. at 605-06.

AB Giles made a lot of progress at Red River. R. at 608. From Dr. RD's perspective, Red River had a very good rehabilitation program for AB Giles:

> He was prescribed psychiatric medications, specifically antidepressant medication. He was engaged in a variety of therapies, which he described during his testimony, including individual therapy twice a week. . . . He was also involved in group therapy on a daily basis. He was involved in what we call adjunct therapies, things like art therapy. And it's easy to kind of downplay those, but I think they're important. One, they provide structure; two, they provide the person with something meaningful to do with their time while they're not in a more mental health-focused therapy.

R. at 608-09. Dr. RD summarized AB Giles's progress well:

> AB Giles came into Red River not wanting any help, and it was a bumpy road. He remained at high suicidal risk early in his hospitalization there. And the records really describe the progress that they made as he started to reconsider some of his decisions and started to reconsider what he could make out of his life. And over time became less acutely suicidal and started to think about what his life might look like.

R. at 609-10.

[redacted]

Dr. DM opined that AB Giles will need continued mental health treatment and to see someone on a regular basis. R. at 611. Additionally, at 19 years old, AB Giles needs on-going medication management. *Id*. However, Dr. DM did not opine that AB Giles needed "further rehabilitation." R. at 647.

> [T]he behaviors that are the foundation of the criminal action here, the arson, were committed in the midst of a suicide attempt, and at this point he is not actively suicidal. So I struggle with how to think about whether or not he could be rehabilitated when, in my view, much of that has already taken place. This is not like a serial bank robber, and you have to figure out a way to convince him not to rob any more banks. This was, you know, a very serious incident, but I think that much of the progress that he made in therapy significantly diminishes the risk that he would do this again. And, therefore, again, I just struggle about thinking about what rehabilitation means in that context for somebody who's already markedly different than he was at the time of the offense.

Id. Instead, AB Giles needed (and needs) support to remain focused on the new goals he had (and has). R. at 611; *see* Def. Exs. L, N (showing his current goals and support structure).

In many ways, AB Giles "is a success story." R. at 610. In the midst of a court-martial, AB Giles grew from severely suicidal to seeing purpose in life. *Id*. That is evident from AB Giles's own testimony at trial where he discussed changing his viewpoint on life. R. at 530. He worked to break down his negative thoughts and world views. *Id*. He learned about radical acceptance: "I believe radical acceptance is the ability to look at aspects of life, even negative, even positive, and be able to live with them and deal with them no matter how harsh or how just negatively affected they may be." R. at 531. He still has negative thoughts, along with sporadic thoughts of suicide, but he is hoping to learn to control his diagnoses and channel them into something positive. R. at 531-32.

At trial, when asked, "What do you hope for the rest of your life? You're only 19. What are you thinking?" AB Giles answered, "I hope I can establish a career for myself. I want to pursue a successful but a simple life." R. at 532. His other goal? To "feel happy." *Military Resiliency*

Unit Patient Weekly Progress Update at 1-2, Feb. 24, 2023.[22] This is a far cry from the airman who thought it would be a pleasure to burn. *See* R. at 520-21 (discussing his search for peace and happiness through ritual burning); Def. Ex. N at 2 ("[I]f I could not feel pleasure, I could commit suicide and not feel pain either.").

Standard of Review

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). Sentence appropriateness review is independent from any evaluation of meaningful relief under Article 13, UCMJ. *Zarbatany*, 70 M.J. at 177.

Law and Analysis

This Court "may affirm only 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 (2021). Considerations include "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted). This Court's role in reviewing sentences under Article 66(d), UCMJ, is to "do justice," as distinguished from the discretionary power of the convening authority to grant mercy. *See United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998).

AB Giles requests that this Court find that his bad-conduct discharge is inappropriately severe considering his unlawful pretrial confinement and restraint, AB Giles's substantial (albeit initially forced) growth through mental health treatment, the seriousness of the offenses he was convicted of, and the circumstances surrounding his crime.

[22] This unsealed document is part of the pretrial confinement hearing and is the same as the sealed document admitted as Def. Ex. J.

It is apparent what happened in this case: the Government either missed or ignored all the warning signs about AB Giles's suicidal ideations and, when he tried to kill himself, prosecuted him for his failed attempt. AB Giles did not plan to "burn down the dorms." R. at 468, 488, 526-28; *see also* 536-37 (clarifying he told AB JM he wanted to set his bed on fire and jump on it). AB Giles planned to stop firefighters from rescuing him,[23] and he felt he had to die by fire based on his suicidal and schizophrenic beliefs. R. at 519-21. No one bothered to question him or take him seriously before he tried to kill himself, but when he attempted suicide by fire, the Government reacted by placing him in county jail and prosecuting him. This conduct, AB Giles's suicide attempt, is not serious enough to warrant a bad-conduct discharge when considering AB Giles and the circumstances as a whole.

The airman the panel sentenced was not the same airman who had to be in a medically induced coma for a week after his suicide attempt. AB Giles underwent significant mental health treatment, transforming from someone who could only think of killing himself to end his pain to one who believed he could, and wanted to, "feel happy." *Military Resiliency Unit Patient Weekly Progress Update*, Feb. 24, 2023; *see* Def. Exs. D-H, K. He took charge of his life and his mind and worked for five months to become a different person. *Id.* He is also an airman who needs lifelong care and treatment to continue to improve, and a bad-conduct discharge disproportionately affects him by taking that access to care and resources away.

AB Giles admitted he knew his classmates could get hurt when he lit his bed on fire. R. at 526-28, 542, 546. But he took steps *not* to hurt anyone else. R. at 45, 527. His Google searches reflect what he truly cared about: killing himself and now not to kill others in the process. R. at 454-56, 526-27; AFOSI Form 158 at 2. The Fire Chief confirmed that the fire was not the biggest

[23] R. at 54, 58.

concern, but rather the smoke. R. at 555, 559. AB Giles fully intended to die by smoke inhalation in his own room; that is why he taped his smoke detector, to stop someone from rescuing him in time. R. at 44-45, 58, 525. But the conclusion that the smoke would kill all 400 or so occupants in the building is not directly related to or arising from this particular "aggravated arson." Fire and smoke are dangerous, but to justify a bad-conduct discharge in *this* case, there needs to be more. There is not. Only AB Giles needed medical attention on the day he tried to kill himself. R. at 435. There was no victim impact at trial, only speculative hypotheticals for which AB Giles cannot be responsible. None of his suicidal conduct warrants a bad-conduct discharge. He was a suicidal airman who early into his treatment still wanted to commit suicide. R. at 615. But at sentencing, when he took responsibility for what he did, AB Giles was a different person. Def. Exs. D-H; *Discharge Summary*; *Military Resiliency Unit Patient Weekly Progress Update*, Feb. 24, 2023; *see* R. at 609-10, 647 (Dr. RD's testimony).

At the time of his sentencing, AB Giles admitted his conduct amounted to crimes under the UCMJ. *See* R. at 40-59 (*Care* Inquiry). After everything he had been through, taking responsibility for his conduct and acknowledging that he put people at some level of risk was the last step in his rehabilitation and it was an overwhelming mitigating factor to consider. *See* R.C.M. 1001(g) ("That a plea is a mitigating factor."). There is a difference between AB Giles being allowed to continue to serve and AB Giles receiving a punitive discharge. AB Giles may not be fit to serve, but that does not mean a bad-conduct discharge is appropriate. In pursuing four criminal convictions for a suicide attempt, there is a risk the punishment does not fit the crime. This risk became a reality for AB Giles. A bad-conduct discharge is for someone who deserves "severe punishment for *bad conduct*." R. at 698 (emphasis added). Classifying a failed suicide attempt where only the suicidal actor was harmed as "bad conduct" is disdainful. For all the

reasons articulated in Issues I-III and based on everything in his record, the bad-conduct discharge is inappropriately severe for AB Giles's failed suicide attempt.

AB Giles requests that this Court disapprove his bad-conduct discharge.

CONCLUSION

AB Giles is a convicted felon because he attempted to commit suicide. The Government unlawfully confined him for months, disregarded his liberty, and pursued convictions for offenses part and parcel to his suicide attempt, stacking the charge sheet against an airman it previously turned its back on. No one but AB Giles was hurt in his suicide attempt, yet, even after much growth, he continues to hurt today through the convictions and adjudged bad-conduct discharge. All AB Giles asks of this Court is to correct the unjustness in his case, whether by setting aside the findings and sentence or setting aside the bad-conduct discharge. Doing so is not an act of mercy, merely an act of justice.

Respectfully submitted,

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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 Air Force Government Trial and Appellate Operations Division on 5 September 2024.

Respectfully submitted,

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Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH)**
v.	)	
	)	Before Special Panel
Airman Basic (E-1) **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	26 July 2024

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) brief. Appellant requests an enlargement for a period of 30 days, which will end on **5 September 2024**. The record of trial was docketed with this Court on 13 June 2023. From the date of docketing to the present date, 409 days have elapsed. On the date requested, 450 days will have elapsed.

Undersigned counsel anticipates this EOT request will be the last, absent extraordinary circumstances. As detailed further below, undersigned counsel is in the middle of reviewing the Record of Trial (ROT) but needs additional time to advise Appellant and draft the AOE.

On 21 March 2023, at a general court-martial convened at Sheppard Air Force Base, Texas, a military judge, consistent with Appellant's pleas, found him guilty of one charge and one specification of aggravated arson in violation of Article 126, Uniform Code of Military Justice (UCMJ); one charge and one specification of willfully damaging military property in violation of , UCMJ; and one charge and two specifications in violation of Article 92, UCMJ (one n of a violation of a general order and one specification of dereliction of duty). R. at

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65. On 23 March 2023, a panel of officer and enlisted members sentenced Appellant to forfeit $1,917.00 of pay per month for one month, to be confined for 30 days, and to be discharged from the service with a bad-conduct discharge. R. at 780. The military judge awarded 81 days of judicially ordered confinement credit and 36 days of pretrial confinement credit. R. at 379, 782. The military judge applied the confinement credits to Appellant's adjudged confinement and forfeitures, resulting in "zero days of confinement left to serve and zero forfeitures left to impose." R. at 782-83. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, *Convening Authority Decision on Action* – U.S. v. AB Randy B. Giles Jr., dated 5 April 2023.

The trial transcript is 791 pages long and the record of trial is comprised of seven volumes containing seven Prosecution Exhibits, 14 Defense Exhibits, and 49 Appellate Exhibits. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information. Appellate defense counsel is currently assigned 41 cases;[1] 31 cases are pending before this Court (23 cases are pending AOEs) and nine cases are pending before the United States Court of Appeals for the Armed Forces (CAAF). **Appellant's case is undersigned counsel's first priority.**

Since the last EOT, undersigned counsel has reviewed Appellant's record, to include the sealed materials, for completeness, substantively reviewed the post- and pre-trial documents and processing, and is currently substantively reviewing the trial proceedings. Undersigned counsel intends to complete review of the 791-page transcript next week, 29 July – 2 August, and advise

[1] When two new military appellate defense counsel arrive in the office, this caseload will likely be reduced, but only as to the number of cases currently assigned to counsel pending before this Court.

Appellant on assignments of error. However, while writing Appellant's AOE, undersigned counsel anticipates working on two Reply Briefs. The first is for *United States v. Baumgartner*, No. ACM 40413, which undersigned counsel expects to start working on or about 6 August 2024. The second is for *United States v. Casillas*, No. 24-0089/AF, which undersigned counsel expects to start working on or about 19 August 2024. The requested 30 days factors in undersigned counsel's anticipated work on these two Reply Briefs.

Since Appellant's last request for an EOT, undersigned counsel reviewed *United States v. Clark*, No. ACM 40461 (an 11-volume and 1,060-page transcript case), and she conducted necessary research to advise appellant on a possible AOE brief. Undersigned counsel also assisted with the four-issue Grant Brief for *United States v. Casillas*, drafted and filed the Reply Brief for *United States v. Folts*, No. ACM 40322, and participated in oral argument preparation for *United States v. Braum*, No. ACM 40434.

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

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

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

Respectfully submitted,

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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 Air Force Government Trial and Appellate Operations Division on 26 July 2024.

Respectfully submitted,

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29 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) RANDY B. GILES JR., USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40482 Special Panel

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case in this case will be 450 days in length. Appellant's more than a year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed more than two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 3 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
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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 Air Force Appellate Defense Division on 29 July 2024.

[redacted]
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO FILE PAGES OF BRIEF ON BEHALF OF APPELLANT UNDER SEAL**
v.	)	Before Special Panel
Airman Basic (E-1) **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482 5 September 2024

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

Pursuant to Rules 17.2(b) and 23.3(o) of this Court's Rules of Practice and Procedure, undersigned counsel moves to file sealed material or information derived from such material in Appellant's brief under seal. Appellant asserts four assignments of error, of which rely on factual matters that were sealed by the military judge at trial, in particular Def. Exs. B-H, J, and K. As Appellant's brief requires discussion of these sealed materials, pages 7, 9, 10, and 41 of Appellant's brief referencing the sealed material have been prepared to be filed under seal. Undersigned counsel cannot properly fulfill her responsibilities and cannot explain Appellant's assignments of error without proper citation to these materials.

This Court should grant this motion to file unredacted sealed material under seal.

Respectfully submitted,

[redacted]

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GRANTED
16 SEP 2024

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 Air Force Government Trial and Appellate Operations Division on 5 September 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Special Panel
Airman Basic (E-1) **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	October 15, 2024

Appellant, Airman Basic (AB) Randy B. Giles, Jr., pursuant to Rule 18(d) of this Court's Rules of Practice and Procedure, files this Reply to the United States Answer to Assignments of Error (Ans.), dated October 7, 2024. AB Giles primarily rests on the argument in his initial brief (Appellant's Br.), filed on September 5, 2024. AB Giles submits the following additional arguments for the assignments of error listed below (Issues I, III, IV).

I.
AB Giles is entitled to relief for being involuntarily restricted to an inpatient mental health facility after his failed suicide attempt.

1. AB Giles is entitled to *Mason*[1] credit for his restriction tantamount to confinement at Red River Hospital.

Involuntary commitment to a mental health facility qualifies for *Mason* credit. *Cf. United States v. Regan*, 62 M.J. 299 (C.A.A.F. 2006) (reciting totality of conditions at facility and involuntary nature of admission as facts underpinning trial judge awarding *Mason* credit); *United States v. White*, No. ACM 39600, 2020 CCA LEXIS 235 (A.F. Ct. Crim. App. Jul. 15, 2020) (noting *Mason* credit was awarded at trial level for involuntary commitment). Trial findings concerning *Mason* credit for involuntary commitment have not been seriously questioned on appeal. *Regan*, 62 M.J. at 302. This is most evident in *United States v. Regan*, where the court

[1] *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985) (summary disposition). *Mason* credit is day-for-day confinement credit for restriction tantamount to confinement. *Id*.

noted the distinction between Rule for Court-Martial (R.C.M.) 305 and *Mason* credit when determining whether R.C.M. 305 credit was warranted when restriction tantamount to confinement was found. *Id*. For R.C.M. 305 credit, which AB Giles is not requesting, there must be a level of physical restraint. *Id*. at 301-302. That is not the case for *Mason* credit where physical restraint is only one factor to consider. *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003). And, while the Government argues there was no physical restraint on AB Giles, the remaining *King* factors weigh in AB Giles's favor, especially when considering the involuntary nature of his admission to Red River. Appellant's Br. at 16-17.

AB Giles avowed, under oath, that he did not want to go to Red River, and he did not want to receive care. R. at 92, 348. The Government claims AB Giles had a choice and his decision to be restricted to Red River for five months was voluntary, but this argument is contradicted by the record. Ans. at 13. AB Giles did not want to go to Red River. R. at 92. His command gave him a Hobson's choice:[2] stay in county jail or go to an inpatient mental health facility for unwanted medical care. App. Ex. XV at 10, 12. The commander in *Regan* gave a comparable choice to that appellant: "We wanted to give her the choice. We felt like, as you seem to indicate, it seemed like an obvious choice. I would rather choose a program to help myself than I would to go to confinement directly. We didn't force that choice on her." *Regan*, 62 M.J. 299, 300. *Compare id*., *with* App. Ex. XV at 10, 12, *and* Ans. at 13. No matter how "obvious" or "easy" the choice is, the decision between being involuntarily committed or confined is not a choice.

[2] *Cf. United States v. Gilmet*, 83 M.J. 398, 407 (C.A.A.F. 2023) (showing an example of another Hobson's choice); *Hobson's Choice*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Hobson%27s%20choice (last visited Oct. 15, 2024) ("1: an apparently free choice when there is no real alternative; 2: the necessity of accepting one of two or more equally objectionable alternatives").

This is best reflected by comparing to other cases, like *United States v. Rostmeyer*, NMCCA 201500095, 2015 CCA LEXIS 532, at *9-11 (N-M. Ct. Crim. App. Nov. 30, 2015), and *United States v. Piatti*, NMCCA 201300316, 2014 CCA LEXIS 21, at *6-9 (N-M. Ct. Crim App. Jan. 23, 2014), where *Mason* credit was not awarded for inpatient treatment programs. In both cases, doctors made the recommendation to attend inpatient programs, the appellants could leave the treatment programs at any time, there was no threat of confinement, and the decision to enter treatment was not command driven. *Rostmeyer*, 2015 CCA LEXIS 532, at *10-11; *Piatti*, 2014 CCA LEXIS 21, at *6-7. AB Giles's situation is the opposite: inpatient treatment was recommended by a commander,[3] AB Giles did not want to receive treatment and could not leave treatment without going back to confinement,[4] confinement was more than a threat, it was a reality,[5] and the decision to enter treatment was command driven.[6] The irony of this situation is that if AB Giles did not go to inpatient care, he would have received substantially more confinement credit (195 days, from September 9th to March 23rd) *and* weekly mental health treatment. App. Ex. XV at 1-2, 10. The "voluntary" nature of going to inpatient care was a sham, which this Court should not condone.

The Government cites no contrary authority, only criticizing *Regan* and *White* as not binding. Ans. at 12-13. However, the value of these cases is in their factual similarity. The cases where restriction was found *not* tantamount to confinement are incomparable, as they show admission to treatment was clearly voluntary or they analyze restrictions to base where an accused is still performing military duties even if under supervision or escort. *Rostmeyer*, 2015 CCA

[3] App. Ex. XV at 12; *see* Appointment as Pretrial Confinement Review Officer (Jul. 28, 2021) (indicating both selected officers were the "CD" of the unit, the joint force abbreviation for deputy commander).
[4] R. at 92, 348; App. Ex. XV at 15.
[5] App. Ex. XV at 7, 10, 15
[6] App. Ex. XV at 10, 12.

LEXIS 532, at *10-11; *Piatti*, 2014 CCA LEXIS 21, at *6-7; *see* Appellant's Br. at 17-18 (citing as examples a string of cases with distinguishable fact patterns). Even when analyzing the *King* factors, the Government cites no binding or persuasive authority to draw a comparison to AB Giles's situation. Ans. at 14-15. Instead, it only musters paternalistic policy arguments to argue against finding for AB Giles: "It will result in Airmen who could receive care beneficial to both their mental health and their rehabilitative potential not being offered greater resources than confinement facilities can offer." Ans. at 13. But this kind of policy argument ignores the mandate in *United States v. Doane*:

> There is a fundamental difference between how we treat an accused who is a threat to himself and an accused who is either a threat to flee the jurisdiction to avoid prosecution or to commit other serious offenses. The latter we put in pretrial confinement. The former we refer to mental health practitioners for evaluation and treatment and, if necessary, involuntary commitment in a mental health facility. We do not put an accused in pretrial confinement solely to protect against the risk that an accused might kill himself.

54 M.J. 978, 982-983 (A.F. Ct. Crim. App. 2001). The legal way to handle AB Giles's mental health concern was to involuntarily commit him, not unlawfully induce him into a mental health facility to circumvent the law for what the Government believed was best for AB Giles.

Contrary to the Government's belief, ensuring compliance with the law is not a "chilling" effect on the Government's ability to ensure access to mental health care. *Contra* Ans. at 13 (discussing "profound" negative implications). The Government could have simply kept AB Giles in county jail and given him access to health care as planned, but, instead, it inexplicably chose to circumvent involuntary commitment proceedings. *See* R. at 351-53 (explaining applicable involuntary commitment procedures). Involuntary commitment, as the military judge detailed, has very strict due process procedures. *Id*. The Government could have pursued those procedures if it believed AB Giles was a threat to himself. But it did not. Rather than "chilling" commanders, a ruling for AB Giles enforces the law.

AB Giles should be awarded at least 125 days of *Mason* credit. And, assuming trial defense counsel waived the first month of AB Giles's restriction tantamount to confinement, this Court should pierce waiver in this deserving case, and award 162 days of *Mason* credit. Any awarded credit should be applied to the bad-conduct discharge to set it aside.

2. AB Giles is entitled to meaningful relief for the Article 13, UCMJ, violation for his unlawful and involuntary commitment to Red River.

In securing AB Giles at Red River, his command circumvented the law, violating Article 13, UCMJ. Contrary to the Government's assertion, the command did *not* go "out of their way to take care of" AB Giles. Ans. at 20. Rather, AB Giles's command punished him repeatedly through unlawful restriction—and confinement[7]—while he awaited prosecution for his suicide attempt.

As it relates to the nature of the Article 13, UCMJ, violation, the military judge never concluded there was no intent to punish. Despite complimenting the command team for trying to help AB Giles and finding no "malicious" intent, the military judge had to find an intent to punish for the Article 13, UCMJ, violation. *See* Article 13, UCMJ ("No person, while being held for trial, may be subjected to punishment."). He did so, and that finding was correct. Appellant's Br. at 19-20.

In challenging the Article 13, UCMJ, violation itself (discussed further below on page 8), the Government discusses, at length, the permissive inference and the Government's "legitimate" objective in getting AB Giles mental health care. Ans. at 16-19. Both arguments are predicated on the "voluntariness" the Government believes AB Giles exercised in choosing unwanted medical care over county jail. But as discussed, AB Giles did not voluntarily elect medical care. R. at 92, 348. AB Giles was unlawfully coerced into receiving unwanted medical care. The Government

[7] Appellant's Br. at 27-38 (analyzing Issue II where AB Giles was unlawfully returned to pretrial confinement after his release from Red River).

had no legitimate reason to circumvent the law to mandate mental health treatment, which is what it did here. This is a significant violation and deprivation of personal liberty and autonomy, which, normally, is protected by procedural safeguards. *See* R. at 351-53 (explaining involuntary commitment procedures). The Government circumvented those procedures, revealing the insidious nature of its Article 13, UCMJ, violation. This kind of violation, including the harm suffered, compared to the offenses for which AB Giles was convicted, dictates setting aside the findings and sentence or, in the alternative, the bad-conduct discharge. Appellant's Br. at 21-26.

The Government argues, "Even where the court has found illegal pretrial confinement in a confinement facility it has declined to set aside a bad-conduct discharge." Ans. at 20 (citing *United States v. Rosendahl*, 53 M.J. 344 (C.A.A.F. 2000); *United States v. Zarbatany*, No. ACM 37488 (rem), 2012 CCA LEXIS 8, at *5-6 (A.F. Ct. Crim. App. Jan. 9, 2012); *United States v. Hammond*, 61 M.J. 676 (A. Ct. Crim. App. 2005)). But the cases the Government cites for this proposition are inapposite. *United States v. Rosendahl* is unpersuasive as it explicitly relied on a narrow interpretation of the law that was later abrogated by the CAAF's decision in *United States v. Zarbatany*. *Compare Rosendahl*, 53 M.J. at 347 ("R.C.M. 305(k) . . . does not authorize application of the credit against . . . [a] punitive separation."), *with United States v. Zarbatany*, 70 M.J. 169, 175 (C.A.A.F. 2011) ("Prior case law has recognized that 'other relief' . . . may [be] disapproval of a bad-conduct discharge.").[8]

United States v. Hammond is similarly outdated, as it also predated the CAAF's decision in *Zarbatany* and cited *Rosendahl*. 61 M.J. at 677 n.2. *Hammond* is also distinguishable on the

[8] In the CAAF's decision in *Zarbatany*, the CAAF remanded the case to this Court after clarifying setting aside a punitive discharge could constitute appropriate relief for an Article 13, UCMJ, violation. *Zarbatany*, 70 M.J. at 177. On remand, which is the case cited by the Government in its Answer, this Court did not set aside the bad-conduct discharge after applying the test from the CAAF. *Zarbatany*, 2012 CCA LEXIS 8, at *2, *5-6.

facts. *United States v. Hammond*, 60 M.J. 512, 514 (A. Ct. Crim. App. 2004) (describing how this appellant intentionally drove his car into his wife, causing grievous bodily harm, then fled the scene). In declining to change the character of the discharge, the Army Court of Criminal Appeals in *Hammond* noted, "[T]he facts and circumstances of the offenses clearly warrant a dishonorable discharge." 61 M.J. at 677. *Zarbatany*'s facts similarly warranted a punitive discharge, as the appellant was addicted to cocaine and marijuana and using these illegal substances consistently for at least half a year. *Zarbatany*, 2012 CCA LEXIS 8, at *3.

Unlike *Hammond* and *Zarbatany*, AB Giles's conduct does not "clearly warrant" a punitive discharge. Appellant's Br. at 22-26, 44-46 (detailing the facts and reasons why AB Giles's conduct does not warrant a punitive discharge). The specific facts and circumstances surrounding AB Giles's suicide attempt dictate the opposite: the bad-conduct discharge, at minimum, should be set aside. *Id*. In contesting this, the Government misconstrues the facts to argue (1) AB Giles is a liar and (2) he suffered no harm as a result of being involuntarily committed.

First, while AB Giles did lie to mental health care providers when asked if he was suicidal, he did so because he wanted to die and did not want anyone stopping him. R. at 522-23. His wish for death was the basis for his charged conduct. The Government presents a clean fact pattern where AB Giles was offered help and lied about his mental state, "thwarting" the righteous attempts to help him. Ans. at 21. However, there is much more to the story. The command had months to help AB Giles before he tried to commit suicide, facts the Government "conveniently ignores." *Compare* Appellant's Br. at 3-4 (outlining the lead up to the suicide attempt), *with* Ans. at 21 (focusing only on the day of the attempt, when it was far too late).

Second, AB Giles was harmed. To start, his liberty was harmed through a violation of due process. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972) ("The time spent in jail awaiting trial has detrimental impact on the individual."). On top of that, he was forced to receive medical care he

did not want in violation of the law. R. at 92, 351-54. The Government applauds itself for "offering" AB Giles "crucial mental health care" because otherwise he "would not have gotten help." Ans. at 21. However, the Government cannot wear the white hat when it went about its heroism unlawfully to the prejudice of AB Giles. As the military judge noted, this kind of attitude is not "malicious," but the Government cannot prevail "trying to do the right thing the wrong way." R. at 348, 357. The balance of factors from the CAAF's decision in *Zarbatany* indicates the findings and sentence should be set aside, or, in the alternative, the bad-conduct discharge should be set aside. Appellant's Br. at 21-26.

Finally, the Government argues no Article 13, UCMJ, violation occurred, and the military judge erred in awarding any Article 13, UCMJ, credit. But this argument falls outside of the cross-appeal doctrine and should not be considered. *United States v. Steen*, 81 M.J. 261, 271 (Maggs, J., dissenting) (clarifying the cross-appeal doctrine further, which the majority addressed briefly in a footnote). While the Government may defend the military judge's decision to only award 81 days, which it ultimately does, it would violate well-settled principles of cross-appeals and the construction of the military justice's system of review to question the Article 13, UCMJ, ruling at the request of the Government. While review of the issue is de novo and the basis for the violation is important in assessing meaningful relief, the issue presented is whether AB Giles is entitled to additional and meaningful Article 13, UCMJ, relief. Neither the law of the case doctrine nor the cross-appeal doctrine limit the Government from arguing how the military judge was correct. However,

> [A] party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.

United States v. American R. Express Co., 265 U.S. 425, 435 (1924). As such, the Government is limited to arguing why 81 days is appropriate relief. To argue more, the Government needed to properly cross-appeal through the mechanisms afforded in the UCMJ—assuming doing so is even possible in this situation. Article 56(d), UCMJ; Article 62, UCMJ; Article 66(b)(2), UCMJ. Since the Government did not, it cannot now obtain relief through AB Giles's appeal.

Due to the established Article 13, UCMJ, violation, the issue before this Court is whether AB Giles is entitled to additional meaningful relief. Additional relief is warranted, as both *Mason* credit and Article 13, UCMJ, relief, which results, at minimum, in the bad-conduct discharge being set aside. Yet, even the 57 days AB Giles has left over[9] dictates the same result: the bad-conduct discharge should be set aside because such relief is not disproportionate in the context of AB Giles's case, including the harm he suffered and the seriousness of the offenses of which he was convicted.

III.
The Government violated AB Giles's R.C.M. 707 speedy trial rights by arraigning him 193 days after imposition of restraint.

In response to the R.C.M. 707 issue, the Government moved to attach a ruling made by the military judge that excludes time for R.C.M. 707 purposes. This motion to attach raises two preliminary issues that must be resolved. First, whether this Court can consider the attachment, and second, if so, whether a motion to attach is the proper vehicle when this ruling should have been in the record. These two issues are not new assignments of error but are predicates to the resolution of the R.C.M. 707 issue raised in AB Giles's brief. *See United States v. Jessie*, 79 M.J. 437, 439-440 (C.A.A.F. 2020) (noting the issue of whether sentence appropriateness was

[9] *Entry of Judgment* at 4, Apr. 19, 2023.

conducted correctly required addressing whether the lower court could consider matters outside the record).

1. Attaching the ruling to the record contravenes *Jessie*.

As an initial matter, this Court cannot consider matters outside the "entire record." *Jessie*, 79 M.J. at 444. The "entire record" includes the record of trial and allied papers, the matters required by R.C.M. 1112(b) and listed in R.C.M. 1112(f). *See Jessie*, 79 M.J. at 440 (citing the applicable version of the rule at that time). There is an exception to this general rule where this Court can consider affidavits when doing so is necessary for resolving issues raised by materials in the record. *Jessie*, 79 M.J. at 444. The Government argues the R.C.M. 707 ruling should be attached to the record because "other materials in the record . . . make it seem as if [AB Giles] was not arraigned within 120 days of being put in pretrial confinement." United States' Motion to Attach at 2. The Government does not state what those "other materials" are, which reflects the problem. The issue facing the Government is that there are *no* "materials in the record." The complete omission of any mention of R.C.M. 707—by anyone—is the basis for the assignment of error.

This situation is no different than what occurred in *Jessie*. In *Jessie*, the appellant's affidavit and attachment were excluded because nothing in the record discussed the relevant policy. *Jessie*, 79 M.J. at 444. Much like in *Jessie* where "[n]either the record of trial nor the other matters attached to the record of trial mention the policy" at issue, here, nothing in the entire record mentions R.C.M. 707. *Id*. Since nothing in the record discusses R.C.M. 707, attaching the ruling to the record via *Jessie* is improper.

2. Due to the significance of the omitted ruling, the R.C.M. 707 issue becomes one of record completeness.

After referral, requests for excludable delay are submitted to the military judge for resolution. R.C.M. 707(c). Under Article 40, UCMJ, military judges may grant continuances. Here, the military judge considered the movement of the arraignment date to a later date a "joint request for a continuance" and a request for exclusion of time. United States' Motion to Attach, Appendix.

R.C.M. 801(f) dictates that all sessions involving rulings shall be made on the record. This is distinct from conferences under R.C.M. 802, which do not have to be included, and if they are not included, the issue of inclusion is waived. R.C.M. 802(b). However, a "sidebar" "'involving a ruling by the judge affecting rights of the accused at trial must be fully recorded if the transcript is to be verbatim.'" *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979) (quoting *United States v. Sturdivant*, 1 M.J. 256 (C.M.A. 1976)). While previous versions of the UCMJ and RCMs dealt with verbatim transcripts, the current version requires a "substantially verbatim recording." *Compare Sturdivant*, 1 M.J. at 257, *with* R.C.M. 1112(b)(1). Despite the switch from requiring a verbatim *transcript* to a verbatim *recording*, the logic behind including rulings in the record remains. "The omission of rulings . . . which affect an appellant's rights at trial render appellate review impossible and are substantial omissions." *United States v. Samuels*, No. ACM S32060, 2013 CCA LEXIS 824, at *6-7 (A.F. Ct. Crim. App. Sept. 20, 2023) (citing *United States v. Abrams*, 50 M.J. 361, 364 (C.A.A.F. 1999); *Gray*, 7 M.J. at 298). Consistent with the precedent related to the previous transcript requirement, under the current RCMs, a substantially verbatim recording of the proceeding does not exist if a ruling by the military judge affecting the rights of the accused is absent. A record of trial that does not include a substantially verbatim recording of the court-martial proceedings is incomplete and should be remanded for correction. *United States v. Valentin-Andino*, 83 M.J. 537, 540-41 (A.F. Ct. Crim. App. 2023).

Here, the R.C.M. 707 ruling affects AB Giles's substantial rights. Without the ruling, there appears to be a blatant violation of R.C.M. 707, which warrants relief. Appellant's Br. at 38-39. The lack of ruling also affects this Court's review, further supporting that the record is substantially incomplete. The military judge had to put on the record, verbally or as an appellate exhibit, that he ruled that time was properly excluded under R.C.M. 707 via a joint continuance. However, neither the trial judge nor Government did so. *See* R.C.M. 808 (putting the responsibility on trial counsel to ensure a record will meet the requirements of R.C.M. 1112). The record is devoid of any explanation for this omission. Therefore, AB Giles's record of trial is incomplete because it does not contain *any* reference to the military judge's continuance ruling and the exclusion of time under R.C.M. 707. The record should be sent back for correction under R.C.M. 1112(d)(2) because there is not a "substantially verbatim recording" when a ruling that affects AB Giles's substantial rights is omitted.

This Court should consider this issue more than just attaching a matter to the record but one of record completeness due to the significance of the ruling. As this Court has repeatedly held, attachments to the appellate record do not complete the record. *See United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. Jun. 9, 2022) ("[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete."); *United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2 (A.F. Ct. Crim. App. Oct. 26, 2022) ("We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the [record]."); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10, at *7 (A.F. Ct. Crim. App. Jan. 6, 2022) ("[W]e considered the attachments to trial counsel's declaration to determine whether the omission of the exhibits from the record of trial was substantial . . . we did not

consider the exhibits as a means to complete the record."). Attaching the materials in the Government's motion will not correct the substantial omission from AB Giles's record because attaching those materials does not incorporate them into the record. The record must be remanded. This ensures notice is given to all parties to "permit them to examine and respond to the proposed correction," in accordance with R.C.M. 1112(d)(2).

Without the missing ruling, on the face of the record, AB Giles's R.C.M. 707 rights were violated. In light of the Government's motion to expand the record, this Court should decline to attach the ruling pursuant to *Jessie* and instead remand the record for correction.

IV.

The adjudged bad-conduct discharge for this victimless suicide attempt is inappropriately severe.

The bad-conduct discharge is inappropriately severe. The Government reframes AB Giles's case to focus on the severity inherent in aggravated arson, AB Giles lying to "execute[] his plan," and his "anger" at his classmates. Ans. at 30-31. Aggravated arson, on its face, is a serious crime, with a maximum punishment of 25 years confinement, total forfeiture of all pay and allowances, and a dishonorable discharge. *Manual for Courts-Martial, United States* (2019 ed.), Appendix 12. But sentence severity is not a categorical assessment; it is individualized. *United States v. Mamaluy*, 27 C.M.R. 176, 180 (C.M.A. 1959) ("[A]ccused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment."). In this case, using the categorical severity of aggravated arson—evidenced by the maximum punishment—as a guide for whether the bad-conduct discharge is appropriate is as irrelevant as the Government's sentence request at trial. The complete record compels a different analysis, focused on this individual airman, committing this particular offense, in the specific way that he did.

AB Giles lit himself and a bed on fire to kill himself because he was suffering from extreme mental illness that his squadron and command ignored until it was too late. AB Giles had unique beliefs about self-immolation and a fascination with death. R. at 519-21; Preliminary Hearing Officer Ex. 3 at 18 (Sept. 30, 2022). He was not lying to mental health practitioners to harm his classmates, but to kill himself in the way he believed would provide ultimate spiritual relief. R. at 519; Appellant's Br. at 6-7. Contrary to the Government's argument, AB Giles did not express anger at his classmates. He appeared "mad" after "an appointment," but that is all. R. at 486 ("I believe he was mad about something."). As the testimony shows, such "anger" could be in response to anything, from the Letter of Counseling to his own depression and feelings of self-worth. Furthermore, other facts in the record indicate AB Giles was not out to harm his classmates, only himself. For example, his self-report to his friend saying his suicide was happening that night; his lie to mental health providers so he could kill himself; his attempt to contain the fire to his room; and the lack of interference with any other occupant's fire alarm system or the building's fire alarm. AB Giles wanted to commit suicide. He failed to kill himself. And the Government prosecuted him for it.

In light of all the matters in the record, to include the Government's unlawful treatment of AB Giles (*see* Appellant's Br. at Issues I-II) and AB Giles's growth and acceptance of responsibility, the bad-conduct discharge is inappropriately severe.

Respectfully submitted,

[redacted]

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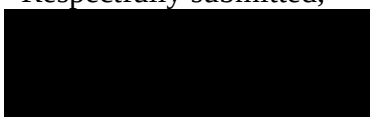
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 15 October 2024.

Respectfully submitted,



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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40482**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Randy B. GILES Jr.	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 7 October 2024, Appellee submitted a motion to attach a declaration from trial counsel, Captain MW, dated 2 October 2024 with an attached email exchange between the military judge, trial counsel, and trial defense counsel. Appellee contends this document addresses why Appellant was not arraigned on 14 December 2022, relevant to Appellant's contention that the Government violated his right to speedy trial under Rule for Courts-Martial 707. Appellee contends attaching the document is appropriate because "doing so is necessary for resolving issues raised by materials in the record," quoting *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020).

On 15 October 2024, Appellant opposed the motion "because the record is incomplete" and attaching the document "does not conform with" *Jessie*, "nor does it complete the record."

Having considered Appellee's motion, the Appellant's opposition, and the applicable law, we grant the motion to attach. However, we defer consideration of the applicability of *United States v. Jessie* and related case law to the attachment until we complete our Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's entire case.

Accordingly, it is by the court on this 17th day of October, 2024,

ORDERED:

Appellee's Motion to Attach dated 7 October 2024 is **GRANTED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO ATTACH
v.	)	Before Special Panel
Airman Basic (E-1) **RANDY B. GILES JR.** United States Air Force *Appellant.*	)	No. ACM 40482 7 October 2024

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 – Capt Marcus Walker Declaration with attachment, dated 2 October 2024 (7 pages)**

Appellant's third assignment of error alleges his right to a speedy trial under Rule for Courts-Martial 707 was violated based on the date of his arraignment. Appellant highlights that "There is nothing in the record explaining why arraignment did not occur on December 14, 2022 or within 120 days." (App. Br. at 39). The attachment to the appendix addresses why arraignment did not occur on 14 December 2022: specifically, the fact that trial defense counsel initiated a request for a continuance on arraignment and offered to waive the time for speedy trial purposes, which was granted by the military judge.

Capt Marcus Walker was trial counsel on the case. After reviewing his emails, Capt Walker located the email thread containing trial defense counsel's request and the military judge's ruling. Capt Walker provided the emails to Appellate Government Counsel and prepared the attached declaration explaining his role in the trial and location of the emails.

Capt Walker's declaration explains that he was trial counsel on Appellant's case. Bifurcated arraignment/motions were scheduled for 14 December 2022. Trial and defense counsel determined an Article 39(a), UCMJ, session for motions was no longer needed and that it would be more efficient to hold arraignment at the date of trial, 21 March 2023. With agreement from trial counsel, the trial defense counsel petitioned the court for a continuance of arraignment and to exclude the time under R.C.M. 707. The military judge granted the request, but the request, and ruling was never put on the record. Capt Walker, as trial counsel, was included on the email request for continuance and certifies, to the best of his knowledge, that the attached email correspondence is all the email correspondence with the military judge on the issue.

Our Superior Court 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 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)). The Appendix addresses the issue of whether Appellant was arraigned in accordance with R.C.M. 707, which is raised by other materials in the record which make it seem as if Appellant was not arraigned within 120 days of being put in pretrial confinement. It is necessary for resolving this issue because the ruling was never placed in the record which has caused question as to whether Appellant's right to a speedy trial was upheld and why no parties raised the issue during trial.

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 7 October 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**RESPONSE TO UNITED STATES' MOTION TO ATTACH**
v.	)	
	)	Before Special Panel
Airman Basic (E-1), **RANDY B. GILES JR.,** United States Air Force, *Appellant.*	)	No. ACM 40482
	)	October 15, 2024

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, Appellant, Airman Basic Randy B. Giles, responds to the United States' Motion to Attach, dated October 7, 2024 (Government Motion to Attach). Appellant opposes this motion. This Court should deny the motion because the record is incomplete and attaching the ruling to the record does not conform with *United States v. Jessie*, 79 M.J. 437, 439-440 (C.A.A.F. 2020) nor does it complete the record.

Facts

On September 5, 2024, Appellant filed his initial assignments of error with this Court. Br. on Behalf of Appellant at 4. One of the errors raised dealt with a violation of Rule for Court-Martial (R.C.M.) 707. *Id*. at 38-39. Specifically, nothing in the ROT indicated why Appellant was arraigned 193 days after imposition of restraint. *Id*.

On October 7, 2024, the Government filed its answer brief and moved to attach a ruling by the military judge, citing *Jessie*. United States Answer to Assignments of Error; Government Motion to Attach. The ruling the Government provided indicated the military judge continued the arraignment date to the previously established trial date and excluded time under R.C.M. 707. Government Motion to Attach, Appendix.

Law and Analysis

Article 54(c)(2), UCMJ, states that a "complete record of proceedings and testimony shall be prepared in any case" where the sentence includes a discharge, as is the case here where Appellant's sentence includes a bad-conduct discharge. 10 U.S.C. § 854; R. at 780. "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). The ROT for a general court-martial shall include "[a] substantially verbatim recording of the court-martial proceedings except sessions closed for deliberations and voting." R.C.M. 1112(b)(1). A ROT that does not include a substantially verbatim recording of the court-martial proceedings is incomplete and should be remanded for correction. *United States v. Valentin-Andino*, 83 M.J. 537, 540-41 (A.F. Ct. Crim. App. 2023).

A "sidebar" "'involving a ruling by the judge affecting rights of the accused at trial must be fully recorded if the transcript is to be verbatim.'" *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979) (quoting *United States v. Sturdivant*, 1 M.J. 256 (C.M.A. 1976)). While previous versions of the UCMJ and RCMs dealt with verbatim transcripts, the current version requires a verbatim recording. *Compare Sturdivant*, 1 M.J. at 257, *with* R.C.M. 1112(b)(1). Despite the switch from requiring a verbatim *transcript* to a verbatim *recording*, the logic behind including rulings in the record remains. "The omission of rulings . . . which affect an appellant's rights at trial render appellate review impossible and are substantial omissions." *United States v. Samuels*, No. ACM S32060, 2013 CCA LEXIS 824, at *6-7 (A.F. Ct. Crim. App. Sept. 20, 2023) (citing *United States v. Abrams*, 50 M.J. 361, 364 (C.A.A.F. 1999); *Gray*, 7 M.J. at 298). Consistent with the precedent covering the previous transcript requirement, under the current RCMs, a substantially verbatim recording of the proceeding does not exist if a ruling by the military judge

affecting the rights of the accused is absent. This is the case here because Appellant's record of trial does not include the R.C.M. 707 ruling that would otherwise obviate the need to review this issue. Because of the obvious nature of the R.C.M. 707 error, this Court would have likely specified the issue itself to obtain clarity, had AB Giles not raised it. In this regard, the lack of the ruling also affects this Court's review, further indicating the record is substantially incomplete.

As this Court has repeatedly held, attachments to the appellate record do not complete the record. *See United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. Jun. 9, 2022) ("[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete."); *United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2 (A.F. Ct. Crim. App. Oct. 26, 2022) ("We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the ROT."); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10, at *7 (A.F. Ct. Crim. App. Jan. 6, 2022) ("[W]e considered the attachments to trial counsel's declaration to determine whether the omission of the exhibits from the record of trial was substantial . . . we did not consider the exhibits as a means to complete the record."). Indeed, in both *Welsh* and *Mardis*, this Court remanded the ROTs for correction after the Government attached missing materials to the appellate records because those attachments did not cure the defects and incorporate the materials into the ROTs. 2022 CCA LEXIS 631, at *2–3; 2022 CCA LEXIS 10, at *4, 8–9. Nevertheless, the Government here attempts to cure what is ultimately a ROT omission by attaching missing materials to the appellate record. Government Motion to Attach. Attaching the materials in the Government's motion will

not correct the substantial omission from Appellant's ROT because attaching those materials does not incorporate them into the ROT. *Welsh*, 2022 CCA LEXIS 631, at *2. Rather, granting the Government's motion would leave the Court facing the same situation as in *Welsh* and *Mardis*: still needing to return the ROT to the military judge to properly correct it.

Furthermore, *Jessie* precludes reviewing matters outside the "entire record." *Jessie*, 79 M.J. at 444. There is an exception to this general rule where this Court can consider affidavits when doing so is necessary for resolving issues raised by materials in the record. *Id*. The Government argues the R.C.M. 707 ruling should be attached to the record because "other materials in the record . . . make it seem as if [AB Giles] was not arraigned within 120 days of being put in pretrial confinement." United States' Motion to Attach. The Government does not state what those "other materials" are, which reflects the problem. This issue facing the Government is that there are *no* "materials in the record." AB Giles raised this forfeited issue specifically because of the lack of R.C.M. 707 being mentioned in the record—by anyone. The complete omission of any mention of R.C.M. 707 is the basis for the assignment of error. Consequently, *Jessie* is not the proper vehicle for attaching this ruling to the record; remanding is.

The Rules for Courts-Martial contemplate only one method for correcting a ROT found to be incomplete after it has reached the appellate court: the incomplete ROT may be returned to the military judge for correction. R.C.M. 1112(d)(2); *see also, e.g., Welsh*, 2022 CCA LEXIS 631, at *2-3 (explaining R.C.M. 1112(d) provides for correction of a record of trial found to be incomplete or defective after authentication and returning the ROT for correction); *Mardis*, 2022 CCA LEXIS 10, at *9-10. R.C.M. 1112(d)(2) specifically states, "A superior competent authority may return a [ROT] to the military judge for correction under this rule." This rule says nothing about correcting a ROT by attaching materials to the appellate record. *Id.* Moreover, the rule

further states, "The military judge *shall* give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction." *Id.* (emphasis added). Attaching materials to the appellate record to correct it would neglect this required step in the correction process. Appellant's ROT should be corrected in accordance with the procedures set forth in R.C.M. 1112(d)(2), which necessitates remanding the ROT to the military judge to correct it.

This Court should deny the Government Motion to Attach because it attempts to improperly correct Appellant's ROT in a manner that is unknown to R.C.M. 1112 and that this Court has repeatedly found does not cure defects in ROTs. *Welsh*, 2022 CCA LEXIS 631, at *2; *Mardis*, 2022 CCA LEXIS 10, at *7. The Court should remand the ROT to the military judge to correct it in accordance with R.C.M. 1112(d)(2), properly curing the defect and allowing for full and fair consideration of the R.C.M. 707 issue raised by Appellant.

WHEREFORE, Appellant respectfully requests this Court deny the United States' Motion to Attach and remand Appellant's record of trial to the Chief Trial Judge, Air Force Trial Judiciary, for correction of the record of trial.

Respectfully submitted,

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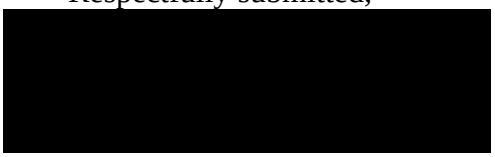
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 15 October 2024.

Respectfully submitted,



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