

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	<b>MOTION FOR ENLARGEMENT OF</b>
<i>Appellee</i>	)	<b>TIME (FIRST)</b>
	)	
v.	)	Before Panel No. 2
	)	
Airman First Class (E-3)	)	No. ACM 40306
<b>BRANDEN C. HAYNES</b>	)	
United States Air Force	)	29 August 2022
<i>Appellant</i>	)	

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **11 November 2022**. The record of trial was docketed with this Court on 14 July 2022. From the date of docketing to the present date, 46 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[Redacted Signature]

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

[Redacted Address]

**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 August 2022.

Respectfully submitted,

[REDACTED]

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

[REDACTED]

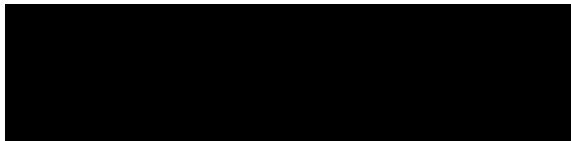
**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
	)	
Airman First Class (E-3)	)	ACM 40306
BRANDEN C. HAYNES, USAF,	)	
<i>Appellant.</i>	)	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.

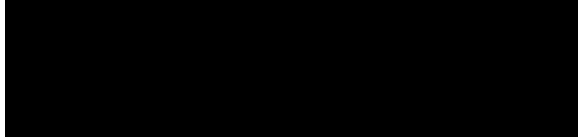


MARY ELLEN PAYNE  
Associate Chief, Government Trial and  
Appellate Operations Division  
Military Justice and Discipline  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 August 2022.



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



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

<b>UNITED STATES</b>	)	<b>MOTION FOR ENLARGEMENT OF</b>
<i>Appellee</i>	)	<b>TIME (SECOND)</b>
	)	
v.	)	Before Panel No. 2
	)	
Airman First Class (E-3)	)	No. ACM 40306
<b>BRANDEN C. HAYNES</b>	)	
United States Air Force	)	2 November 2022
<i>Appellant</i>	)	

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **11 December 2022**. The record of trial was docketed with this Court on 14 July 2022. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 31 March 2022 at Nellis Air Force Base, Nevada, Appellant was convicted and sentenced in accordance with his pleas, of one charge and two specifications of dereliction of duty, in violation of Article 92, Uniform Code of Military Justice (UCMJ).<sup>1</sup> Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. AIC Branden C. Haynes*, dated 8 June 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to four months of confinement, reduction to E-1, forfeiture of all pay and allowances, and bad conduct discharge. *Id.*

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<sup>1</sup> One charge and two specifications of sexual assault, in violation of Article 120, UCMJ; one charge and specification of stalking, in violation of Article 130, UCMJ; one charge and specification of indecent conduct, in violation of Article 134, UCMJ; and an additional charge of assault in violation of Article 128, UMCJ were withdrawn and dismissed with prejudice in accordance with Appellant’s plea agreement. EOJ.

On 28 April 2022, the convening authority took no action on the findings or sentence in the case, noting Appellant did not request any deferments of confinement, forfeitures, or reduction in grade. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Airman First Class Branden C. Haynes*, dated 28 April 2022.

The record of trial consists of four prosecution exhibits; 11 defense exhibits; 18 appellate exhibits; and two court exhibits; the transcript is 216 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

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

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

Respectfully submitted,



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



**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 2 November 2022.

Respectfully submitted,

[REDACTED]

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

[REDACTED]

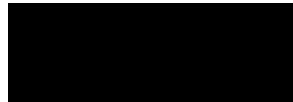
**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
	)	
Airman First Class (E-3)	)	ACM 40306
BRANDEN C. HAYNES, USAF,	)	
<i>Appellant.</i>	)	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.



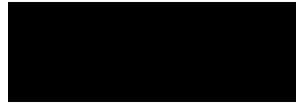
OLIVIA B. HOFF, Capt, USAF  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
Military Justice and Discipline Directorate  
United States Air Force





**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 November 2022.



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



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

<b>UNITED STATES</b>	)	<b>MOTION FOR ENLARGEMENT OF</b>
<i>Appellee</i>	)	<b>TIME (THIRD)</b>
	)	
v.	)	Before Panel No. 2
	)	
Airman First Class (E-3)	)	No. ACM 40306
<b>BRANDEN C. HAYNES</b>	)	
United States Air Force	)	7 November 2022
<i>Appellant</i>	)	

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 January 2023**. The record of trial was docketed with this Court on 14 July 2022. From the date of docketing to the present date, 116 days have elapsed. On the date requested, 180 days will have elapsed.

On 31 March 2022 at Nellis Air Force Base, Nevada, Appellant was convicted and sentenced in accordance with his pleas, of one charge and two specifications of dereliction of duty, in violation of Article 92, Uniform Code of Military Justice (UCMJ).<sup>1</sup> Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. AIC Branden C. Haynes*, dated 8 June 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to four months of confinement, reduction to E-1, forfeiture of all pay and allowances, and bad conduct discharge. *Id.*

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<sup>1</sup> One charge and two specifications of sexual assault, in violation of Article 120, UCMJ; one charge and specification of stalking, in violation of Article 130, UCMJ; one charge and specification of indecent conduct, in violation of Article 134, UCMJ; and an additional charge of assault in violation of Article 128, UMCJ were withdrawn and dismissed with prejudice in accordance with Appellant’s plea agreement. EOJ.

On 28 April 2022, the convening authority took no action on the findings or sentence in the case, noting Appellant did not request any deferments of confinement, forfeitures, or reduction in grade. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Airman First Class Branden C. Haynes*, dated 28 April 2022.

The record of trial consists of four prosecution exhibits; 11 defense exhibits; 18 appellate exhibits; and two court exhibits; the transcript is 216 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Undersigned counsel recognizes this request for enlargement of time could be considered early, as there are more than four weeks remaining in the current time period for submission of Appellant's AOE. However, counsel currently anticipates undergoing surgery within the next month for a recent unanticipated health diagnosis. Counsel anticipates losing several days of review and drafting time both for medical appointments related to the surgery as well as for recovery time. The recovery time following the surgery is currently unknown, as it will depend on the type and success of the surgery; however, counsel anticipates losing a week of review and drafting time at minimum. Counsel is therefore requesting an enlargement of time in an abundance of caution in considering the foregoing information. Should additional requests for enlargement of time become necessary prior to return from convalescent leave, undersigned counsel will ensure completion through assignment of co-counsel.

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

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

Respectfully submitted,





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



**CERTIFICATE OF FILING AND SERVICE**

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

Respectfully submitted,

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


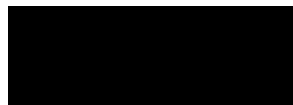
**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' RESPONSE
<i>Appellee,</i>	)	TO APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.	)	
	)	
Airman First Class (E-3)	)	ACM 40306
BRANDEN C. HAYNES, USAF,	)	
<i>Appellant.</i>	)	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 does not oppose Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case. Due to Appellant's counsel's unexpected upcoming surgery, the United States does not oppose this one-time request for an enlargement of time. However, the United States will likely oppose future enlargements of time when counsel or co-counsel becomes available to work on this brief.

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



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



**CERTIFICATE OF FILING AND SERVICE**

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



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



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

<b>UNITED STATES</b>	)	<b>MOTION FOR ENLARGEMENT OF</b>
<i>Appellee</i>	)	<b>TIME (FOURTH)</b>
	)	
v.	)	Before Panel No. 2
	)	
Airman First Class (E-3)	)	No. ACM 40306
<b>BRANDEN C. HAYNES</b>	)	
United States Air Force	)	7 December 2022
<i>Appellant</i>	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 February 2023**. The record of trial was docketed with this Court on 14 July 2022. From the date of docketing to the present date, 146 days have elapsed. On the date requested, 210 days will have elapsed.

On 31 March 2022 at Nellis Air Force Base, Nevada, Appellant was convicted and sentenced in accordance with his pleas, of one charge and two specifications of dereliction of duty, in violation of Article 92, Uniform Code of Military Justice (UCMJ).<sup>1</sup> Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. AIC Branden C. Haynes*, dated 8 June 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to four months of confinement, reduction to E-1, forfeiture of all pay and allowances, and bad conduct discharge. *Id.*

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<sup>1</sup> One charge and two specifications of sexual assault, in violation of Article 120, UCMJ; one charge and specification of stalking, in violation of Article 130, UCMJ; one charge and specification of indecent conduct, in violation of Article 134, UCMJ; and an additional charge of assault in violation of Article 128, UMCJ were withdrawn and dismissed with prejudice in accordance with Appellant’s plea agreement. EOJ.



On 28 April 2022, the convening authority took no action on the findings or sentence in the case, noting Appellant did not request any deferments of confinement, forfeitures, or reduction in grade. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Airman First Class Branden C. Haynes*, dated 28 April 2022.

The record of trial consists of four prosecution exhibits; 11 defense exhibits; 18 appellate exhibits; and two court exhibits; the transcript is 216 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Since filing the last EOT in this case, counsel completed drafting a petition for certiorari to the United States Supreme Court in *United States v. Bench*, ACM 39797, which was filed with the Court on 6 December 2022. Approximately five days of review time were lost for medical appointments and procedures. Counsel is currently assigned 18 cases, nine of which are pending initial AOE's before this Court. Four cases currently have priority for submission of the initial AOE to this Court:

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

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

3. *United States v. Dunleavy*, ACM No. S32724 – The record of trial consists of three prosecution exhibits, three defense exhibits; and five appellate exhibits; the transcript is 90 pages. Counsel has not yet begun review of this case.

4. *United States v. Pelletier*, ACM No. 40277 – The record of trial consists of three prosecution exhibits; 21 defense exhibits; and five appellate exhibits; the transcript is 83 pages. Counsel has not yet begun review of this case.

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

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

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

Respectfully submitted,




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



**CERTIFICATE OF FILING AND SERVICE**

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

Respectfully submitted,

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



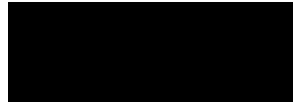
**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' RESPONSE
<i>Appellee,</i>	)	TO APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
v.	)	
	)	
Airman First Class (E-3)	)	ACM 40306
BRANDEN C. HAYNES, USAF,	)	
<i>Appellant.</i>	)	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 does not oppose Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case. Due to Appellant's counsel's unexpected upcoming surgery, the United States does not oppose this request for an enlargement of time. However, the United States will likely oppose future enlargements of time when counsel or co-counsel becomes available to work on this brief.

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



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



**CERTIFICATE OF FILING AND SERVICE**

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



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



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

<b>UNITED STATES</b>	)	<b>MOTION FOR ENLARGEMENT OF</b>
	)	<b>TIME (FIFTH)</b>
	)	
v.	)	Before Panel No. 2
	)	
Airman First Class (E-3)	)	No. ACM 40306
<b>BRANDEN C. HAYNES</b>	)	
United States Air Force	)	30 January 2023
<i>Appellant</i>	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on 11 **March 2023**. The record of trial was docketed with this Court on 14 July 2022. From the date of docketing to the present date, 200 days have elapsed. On the date requested, 240 days will have elapsed.

On 31 March 2022 at Nellis Air Force Base, Nevada, Appellant was convicted and sentenced in accordance with his pleas, of one charge and two specifications of dereliction of duty, in violation of Article 92, Uniform Code of Military Justice (UCMJ).<sup>1</sup> Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. AIC Branden C. Haynes*, dated 8 June 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to four months of confinement, reduction to E-1, forfeiture of all pay and allowances, and bad conduct discharge. *Id.*

---

<sup>1</sup> One charge and two specifications of sexual assault, in violation of Article 120, UCMJ; one charge and specification of stalking, in violation of Article 130, UCMJ; one charge and specification of indecent conduct, in violation of Article 134, UCMJ; and an additional charge of assault in violation of Article 128, UMCJ were withdrawn and dismissed with prejudice in accordance with Appellant’s plea agreement. EOJ.

On 28 April 2022, the convening authority took no action on the findings or sentence in the case, noting Appellant did not request any deferments of confinement, forfeitures, or reduction in grade. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Airman First Class Branden C. Haynes*, dated 28 April 2022.

The record of trial consists of four prosecution exhibits; 11 defense exhibits; 18 appellate exhibits; and two court exhibits; the transcript is 216 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Through no fault of Appellant’s, undersigned counsel has been working on other assigned matters and has not yet started her review of Appellant’s case. Since filing the last EOT in this case, counsel reviewed and submitted an AOE in *United States v. Dunleavy*, ACM No. S32724, completed review of the record in *United States v. Stradtmann*, ACM No. 40237, and submitted a Petition for Grant of Review and Supplement to the Petition before the Court of Appeals for the Armed Forces in *United States v. Tarnowski*, ACM No. 40110. Approximately one day of review time since returning from convalescent leave on 9 January was lost for recent medical appointments. Undersigned counsel is currently assigned 20 cases, 11 of which are pending initial AOE before this Court.

Three cases currently have priority for submission of the initial AOE to this Court:

1. *United States v. Stradtmann*, ACM No. 40237 – The record of trial consists of 35 prosecution exhibits, 12 defense exhibits, 116 appellate exhibits, and 3 court exhibits; the transcript is 871 pages. Counsel has completed review of this case and begun drafting this Appellant’s AOE, including potential issues being raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Counsel has identified 18 potential issues, including failures to state an offense, improper denial of character evidence, improper admission of character and sentencing evidence,



factual and legal sufficiency, unconstitutional vagueness, and fatal variance. Counsel is in the process of researching and drafting these issues, with the Statement of the Case, Statement of Facts, and two issues currently fully drafted.

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

3. *United States v. Pelletier*, ACM No. 40277 – The record of trial consists of three prosecution exhibits; 21 defense exhibits; and five appellate exhibits; the transcript is 83 pages. Counsel has not yet begun review of this case.

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

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

Respectfully submitted,

[REDACTED]



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

[REDACTED]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 January 2023.

Respectfully submitted,

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


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

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
	)	OF TIME
v.	)	
	)	
Airman First Class (E-3)	)	ACM 40306
BRANDEN C. HAYNES, USAF,	)	
<i>Appellant.</i>	)	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.

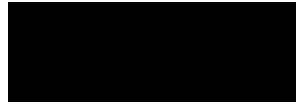


OLIVIA B. HOFF, Capt, USAF  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
Military Justice and Discipline Directorate  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

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



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



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

UNITED STATES	)	No. ACM 40306
<i>Appellee</i>	)	
	)	
v.	)	
	)	<b>ORDER</b>
Branden C. HAYNES	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	<b>Panel 2</b>

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

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

**ORDERED:**

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **11 March 2023**.

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



FOR THE COURT



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

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

<b>UNITED STATES</b>	)	<b>MOTION FOR ENLARGEMENT OF</b>
	)	<b>TIME (SIXTH)</b>
	)	
v.	)	Before Panel No. 2
	)	
Airman First Class (E-3)	)	No. ACM 40306
<b>BRANDEN C. HAYNES</b>	)	
United States Air Force	)	1 March 2023
<i>Appellant</i>	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 April 2023**. The record of trial was docketed with this Court on 14 July 2022. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 31 March 2022 at Nellis Air Force Base, Nevada, Appellant was convicted and sentenced in accordance with his pleas, of one charge and two specifications of dereliction of duty, in violation of Article 92, Uniform Code of Military Justice (UCMJ).<sup>1</sup> Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. AIC Branden C. Haynes*, dated 8 June 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to four months of confinement, reduction to E-1, forfeiture of all pay and allowances, and bad conduct discharge. *Id.*

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<sup>1</sup> One charge and two specifications of sexual assault, in violation of Article 120, UCMJ; one charge and specification of stalking, in violation of Article 130, UCMJ; one charge and specification of indecent conduct, in violation of Article 134, UCMJ; and an additional charge of assault in violation of Article 128, UMCJ were withdrawn and dismissed with prejudice in accordance with Appellant’s plea agreement. EOJ.

On 28 April 2022, the convening authority took no action on the findings or sentence in the case, noting Appellant did not request any deferments of confinement, forfeitures, or reduction in grade. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Airman First Class Branden C. Haynes*, dated 28 April 2022.

The record of trial consists of four prosecution exhibits; 11 defense exhibits; 18 appellate exhibits; and two court exhibits; the transcript is 216 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started her review of Appellant's case. Since filing the last EOT in this case, counsel submitted an AOE before this Court in *United States v. Stradtman*, ACM No. 40237, and submitted a Petition for Grant of Review and Supplement to the Petition before the Court of Appeals for the Armed Forces in *United States v. Todd*, ACM S32701, Dkt. No 23-0093. Counsel will be submitting an AOE to this Court in *United States v. Thompson*, ACM No. 40019 prior to 7 March 2023, and has begun review in *United States v. Pelletier*, ACM No. 40277.

Undersigned counsel is currently assigned 21 cases, 12 of which are pending initial AOE before this Court. Three cases currently have priority for filing an AOE ahead of Appellant's:

1. *United States v. Thompson*, ACM No. 40019 – The record of trial consists of 20 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits; the transcript is 440 pages. Counsel has completed review of this case and is nearing completion of this Appellant's AOE. Counsel anticipates filing this AOE prior to 7 March 2023.

2. *United States v. Pelletier*, ACM No. 40277 – The record of trial consists of three prosecution exhibits; 21 defense exhibits; and five appellate exhibits; the transcript is 83 pages.

Counsel has begun review of Appellant's case, identified at least one potential error, and begun drafting the AOE. Counsel anticipates filing a motion to examine sealed materials within the next week. Counsel anticipates filing this AOE no later than 30 March 2023.

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

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

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

Respectfully submitted,



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







**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 March 2023.

Respectfully submitted,

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


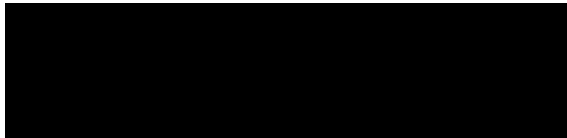
**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
	)	OF TIME
v.	)	
	)	
Airman First Class (E-3)	)	ACM 40306
BRANDEN C. HAYNES, USAF,	)	
<i>Appellant.</i>	)	Panel No. 2
	)	

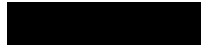
**TO THE HONORABLE, THE JUDGES OF  
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

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.

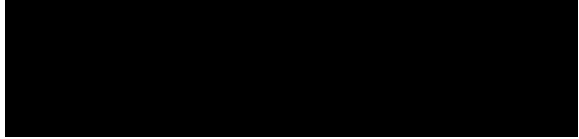


MARY ELLEN PAYNE  
Associate Chief, Government Trial and  
Appellate Operations Division  
Military Justice and Discipline  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force  
Appellate Defense Division on 2 March 2023.



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



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

<b>UNITED STATES</b>	)	<b>MOTION FOR ENLARGEMENT OF TIME (SEVENTH)</b>
<i>Appellee</i>	)	
	)	
v.	)	Before Panel No. 2
	)	
Airman First Class (E-3)	)	No. ACM 40306
<b>BRANDEN C. HAYNES</b>	)	
United States Air Force	)	22 March 2023
<i>Appellant</i>	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 May 2023**. The record of trial was docketed with this Court on 14 July 2022. From the date of docketing to the present date, 251 days have elapsed. On the date requested, 300 days will have elapsed.

On 31 March 2022 at Nellis Air Force Base, Nevada, Appellant was convicted and sentenced in accordance with his pleas, of one charge and two specifications of dereliction of duty, in violation of Article 92, Uniform Code of Military Justice (UCMJ).<sup>1</sup> Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. AIC Branden C. Haynes*, dated 8 June 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to four months of confinement, reduction to E-1, forfeiture of all pay and allowances, and bad conduct discharge. *Id.*

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<sup>1</sup> One charge and two specifications of sexual assault, in violation of Article 120, UCMJ; one charge and specification of stalking, in violation of Article 130, UCMJ; one charge and specification of indecent conduct, in violation of Article 134, UCMJ; and an additional charge of assault in violation of Article 128, UMCJ were withdrawn and dismissed with prejudice in accordance with Appellant’s plea agreement. EOJ.

On 28 April 2022, the convening authority took no action on the findings or sentence in the case, noting Appellant did not request any deferments of confinement, forfeitures, or reduction in grade. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Airman First Class Branden C. Haynes*, dated 28 April 2022.

The record of trial consists of four prosecution exhibits; 11 defense exhibits; 18 appellate exhibits; and two court exhibits; the transcript is 216 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started her review of Appellant's case. Since filing the last EOT in this case, counsel submitted two AOE's before this Court, in *United States v. Thompson*, ACM No. 40019 and *United States v. Pelletier*, ACM No. 40277.

Undersigned counsel is currently assigned 22 cases, 12 of which are pending initial AOE before this Court. One case currently has priority for filing an AOE ahead of Appellant's:

1. *United States v. Lee*, ACM No. 40258 – The record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Counsel has completed her review of this appellant's case with the exception of sealed materials, and is currently researching identified potential errors and drafting the AOE.

Additionally, Counsel anticipates filing Replies to the Government's Answers in *United States v. Stradtman*, ACM No. 40237 and *United States v. United States v. Thompson*, ACM No. 40019, prior to submission of Appellant's AOE.

Further, undersigned counsel is currently scheduled for surgery on 30 March 2023 that will require in-patient care through 31 March, followed by 30 days' convalescent leave. Though Counsel anticipates being able to work during convalescent leave, significant review and drafting


time will be lost during surgery, in-patient recovery, and follow-up treatment during the period of convalescent leave. There is some risk that depending on the outcome of the surgery, alternative counsel may need to be assigned. Counsel is requesting this enlargement of time both because the current deadline falls within the period of convalescent leave and to ensure there is sufficient time for the Appellate Defense Division to assign new counsel, should this be required.

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

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

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

Respectfully submitted,





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



**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 22 March 2023.

Respectfully submitted,

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


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

UNITED STATES,	)	UNITED STATES' RESPONSE TO
<i>Appellee,</i>	)	APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
	)	
v.	)	
	)	
Airman First Class (E-3)	)	ACM 40306
BRANDEN C. HAYNES, USAF,	)	
<i>Appellant.</i>	)	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 does not oppose Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case. Due to Appellant's counsel's unexpected upcoming surgery, the United States does not oppose this request for an enlargement of time. However, the United States will likely oppose future enlargements of time when counsel or co-counsel becomes available to work on this brief.

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



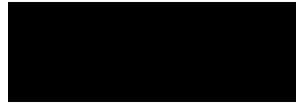
OLIVIA B. HOFF, Capt, USAF  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
Military Justice and Discipline Directorate  
United States Air Force





**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 March 2023.



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



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

<b>UNITED STATES</b>	)	<b>MOTION FOR ENLARGEMENT OF</b>
<i>Appellee</i>	)	<b>TIME (EIGHTH)</b>
	)	
v.	)	Before Panel No. 2
	)	
Airman First Class (E-3)	)	No. ACM 40306
<b>BRANDEN C. HAYNES</b>	)	
United States Air Force	)	1 May 2023
<i>Appellant</i>	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 June 2023**. The record of trial was docketed with this Court on 14 July 2022. From the date of docketing to the present date, 291 days have elapsed. On the date requested, 330 days will have elapsed.

On 31 March 2022 at Nellis Air Force Base, Nevada, Appellant was convicted and sentenced in accordance with his pleas, of one charge and two specifications of dereliction of duty, in violation of Article 92, Uniform Code of Military Justice (UCMJ).<sup>1</sup> Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. AIC Branden C. Haynes*, dated 8 June 2022 (hereinafter “EOJ”). The military judge sentenced Appellant to four months of confinement, reduction to E-1, forfeiture of all pay and allowances, and bad conduct discharge. *Id.*

---

<sup>1</sup> One charge and two specifications of sexual assault, in violation of Article 120, UCMJ; one charge and specification of stalking, in violation of Article 130, UCMJ; one charge and specification of indecent conduct, in violation of Article 134, UCMJ; and an additional charge of assault in violation of Article 128, UMCJ were withdrawn and dismissed with prejudice in accordance with Appellant’s plea agreement. EOJ.

On 28 April 2022, the convening authority took no action on the findings or sentence in the case, noting Appellant did not request any deferments of confinement, forfeitures, or reduction in grade. R. at Vol. 1, Convening Authority Decision on Action – *United States v. Airman First Class Branden C. Haynes*, dated 28 April 2022.

The record of trial consists of four prosecution exhibits; 11 defense exhibits; 18 appellate exhibits; and two court exhibits; the transcript is 216 pages. Appellant is not confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Through no fault of Appellant’s, undersigned counsel has been working on other assigned matters and has not yet started her review of Appellant’s case. Since filing the last EOT in this case, counsel submitted an AOE before this Court in *United States v. Lee*, ACM No. 40258 and a Reply to the Government’s Answer in *United States v. Thompson*, ACM No. 40019 and *United States v. Stradtman*, ACM No. 40237.

Undersigned counsel is currently assigned 19 cases, 11 of which are pending initial AOE before this Court. One case currently has priority for filing an AOE ahead of Appellant’s:

1. *United States v. Porterie*, ACM No. S32735 – The record of trial consists of seven prosecution exhibits; five appellate exhibits; and one court exhibit. The transcript is 87 pages. Undersigned counsel has reviewed the entirety of this record with the exception of sealed materials, and anticipates filing an AOE in this case no later than 9 May 2023.

Additionally, undersigned counsel anticipates filing the following prior to submission of Appellant’s AOE: a Reply to the Government’s Answer in *United States v. Lee*, ACM No. 40258 before this Court by 29 May 2023; and two Supplements to Petitions for Review in *United States v. Dunleavy*, ACM No. S32724 (due 11 May 2023) and *United States v. Rodriguez*, ACM No. 40218 (due 23 May 2023) before the Court of Appeals for the Armed Forces.

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

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

Respectfully submitted,

[REDACTED]

aj, USAF



Appellate Defense Counsel  
Air Force Appellate Defense Division

[REDACTED]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 May 2023.

Respectfully submitted,

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


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

UNITED STATES,	)	UNITED STATES' OPPOSITION TO
<i>Appellee,</i>	)	APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
	)	
v.	)	
	)	
Airman First Class (E-3)	)	ACM 40306
BRANDEN C. HAYNES, USAF,	)	
<i>Appellant.</i>	)	Panel No. 2
	)	

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not started 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.

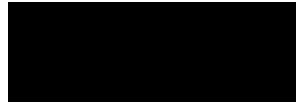


OLIVIA B. HOFF, Capt, USAF  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
Military Justice and Discipline Directorate  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 May 2023.



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





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

UNITED STATES	)	No. ACM 40306
<i>Appellee</i>	)	
	)	
v.	)	
	)	<b>ORDER</b>
Branden C. HAYNES	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	<b>Panel 2</b>

On 1 May 2023, 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 2d day of May, 2023,

**ORDERED:**

Appellant’s Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **9 June 2023**.

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



FOR THE COURT



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

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

UNITED STATES,

*Appellee*

v.

Airman First Class (E-3)  
BRANDEN C. HAYNES  
United States Air Force,

*Appellant*

**NOTICE OF APPEARANCE OF  
COUNSEL**

Case No. ACM 40306

Before Panel No. 2

23 May 2023

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

COMES NOW, Maj. Nicole Herbers, pursuant to rule 12(a) of this Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. Maj Herbers is assigned to the Appellate Defense Division and her contact information is in the signature block below.

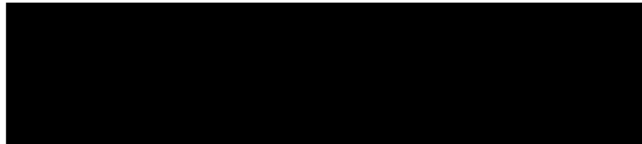
Respectfully submitted,

NICOLE J. HERBERS, Maj, USAF  
Appellate Defense Counsel  
Air Force Appellate Defense Division

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Air Force Government Trial and Appellate Operations Division on 23 May 2023.

Respectfully submitted,

A large black rectangular redaction box covering the signature area.

NICOLE J. HERBERS, Maj, USAF  
Appellate Defense Counsel  
Air Force Appellate Defense Division

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

<b>UNITED STATES</b>	)	<b>MOTION FOR WITHDRAWAL</b>
<i>Appellee,</i>	)	<b>OF APPELLATE DEFENSE</b>
	)	<b>COUNSEL</b>
v.	)	
	)	Before Panel No. 2
Airman First Class (E-3)	)	
<b>BRANDEN C. HAYNES</b>	)	No. ACM 40306
United States Air Force	)	
<i>Appellant</i>	)	23 May 2023

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Maj Nicole J. Herbers has been detailed substitute counsel in undersigned counsel's stead. A thorough turnover of the record between counsel has been completed and Maj Herbers is able to make this case her first priority before this Court.

Undersigned counsel will be separating from Active Duty with the United States Air Force effective 21 August 2023. Undersigned counsel's terminal leave begins on 1 June 2023. Undersigned counsel has accepted a position as an attorney with the United States Department of Justice which begins 20 June 2023.

If undersigned counsel were to remain as counsel on the case, it would be her third priority. Her first priority is a Supplement to the Petition for Grant of Review before the Court of Appeals for the Armed Forces in *United States v. Rodriguez*, ACM No. 40218, with a record consisting of four volumes, seven motions, three

prosecution exhibits, one defense exhibit, and a 70-page transcript. Her second priority is a Reply to the Government's Answer in *United States v. Lee*, ACM No. 40258, with the Government's Answer due on 26 May 2023 and the Reply due on 2 June 2023. In this case, the record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started her review of Appellant's case. The record of trial consists of four prosecution exhibits; 11 defense exhibits; 18 appellate exhibits; and two court exhibits; the transcript is 216 pages.

Though undersigned counsel is in the process of transferring to the United States Air Force Reserves, her scroll currently remains pending. In any event, she would be unable to begin her Reserve service until 22 August 2023. Given the size of Appellant's case, undersigned counsel's impending separation from the Active Duty Air Force, and her existing caseload, it is in Appellant's best interest that undersigned counsel be permitted to withdraw and be represented by Maj Nicole J. Herbers. Maj Herbers is able to make Appellant's case her first priority before this Court, and expects her assignment with the Appellate Defense Division to continue through Summer 2024. She will continue to represent Appellant and file all motions and briefs as necessary.

Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

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

Respectfully submitted,

A solid black rectangular redaction box covering the signature of the undersigned counsel.

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

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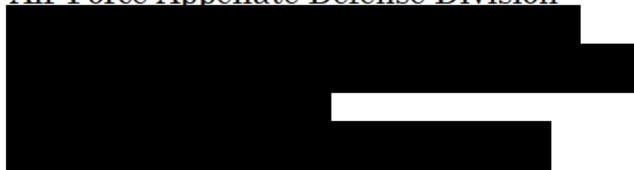
**CERTIFICATE OF FILING AND SERVICE**

I certify that the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 May 2023.

Respectfully submitted,

A solid black rectangular redaction box covering the signature of the sender.

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

A large black rectangular redaction box covering the contact information, including phone and email addresses.

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

**UNITED STATES**

*Appellee,*

*v.*

Airman First Class (E-3)  
**BRANDEN C. HAYNES,**  
United States Air Force,  
*Appellant.*

**MOTION FOR ENLARGEMENT OF  
TIME (NINTH)**

Before Panel No. 2

Case No. ACM 40306

Filed on: 1 June 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 9 July 2023. The case was docketed on 14 July 2022. From the date of docketing to the date of this filing, 322 days have elapsed. On the date requested, 360 days will have elapsed from the date this case was received by the Court.

On 31 March 2022, Appellant was tried by a general court-martial composed of a military judge alone at Nellis Air Force Base, Nevada. Consistent with his plea, Appellant was convicted of one charge and two specifications in violation of Article 92, Uniform Code of Military Justice (UCMJ).<sup>1</sup> R. at Vol 1, EOJ, dated 8 June 2022.

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<sup>1</sup> One charge and two specifications of sexual assault, in violation of Article 120, UCMJ; one charge and specification of stalking, in violation of Article 130, UCMJ; one charge and specification of indecent conduct, in violation of Article 134, UCMJ; and an additional charge of assault in violation of Article 128, UCMJ were withdrawn



The military judge sentenced Appellant to a bad conduct discharge, 4 months confinement, a reduction to E1 and forfeitures of all pay and allowances. *Id.* The convening authority took no action on the findings or the sentence. ROT, Vol. 1, Convening Authority Decision on Action dated 28 April 2022.

The record of trial consists of 4 prosecution exhibits, 11 defense exhibits, 18 appellate exhibits; and 2 court exhibits. The transcript is 216 pages. Appellant is no longer confined. Appellant understands his right to speedy appellate review and consents to this enlargement of time.

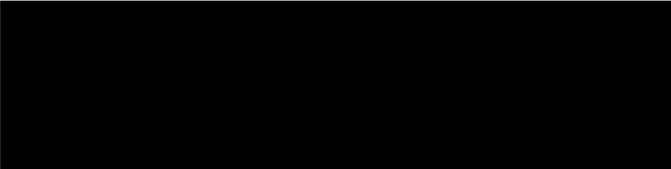
Through no fault of Appellant, the undersigned's review of the record was not able to be completed until 1 June 2023. Two digital files in the undersigned counsel's copy of the record of trial are not readable (Pros. Ex. 1, Attachment 2, files IMG-0274 and IMG\_0275). Additionally, two exhibits from the Article 32 preliminary hearing are not included in the undersigned's copy of the Record of Trial (Exhibit 8 and 12). Thus, the undersigned had not been able to finalize the review of the record of trial on her own despite multiple attempts to view the attachments to Prosecution Exhibit 1. Local counsel was able to verify if the official record is complete on the date of this filing. Additionally, the undersigned counsel has been diligently working on the review of the record and the Assignment of Errors since she filed her notice of appearance on 23 May 2023. While this is the 9<sup>th</sup> requested enlargement, this is counsel's first request and counsel does not expect to need any additional delay. The

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and dismissed with prejudice in accordance with the plea agreement. R. at Vol 1, EOJ, dated 8 June 2022.

undersigned counsel has been assigned to this case since 5 May 2023, receiving the digital transcript that day. The Record of Trial was received by the undersigned on 12 May 2023, and she was able to speak with Appellant on 15 May 2023. Prior to 5 May 2023, the undersigned had no knowledge of nor access to this case. This is the undersigned counsel's highest priority case and the only one with pending Assignments of Error. An enlargement of time is necessary to allow undersigned counsel to fully brief Appellant's case and advise Appellant regarding potential errors since the review of the complete record of trial was not able to be completed until 1 June 2023.

**WHEREFORE**, Appellant respectfully requests that this Honorable Court grant the requested enlargement based on the good cause shown.

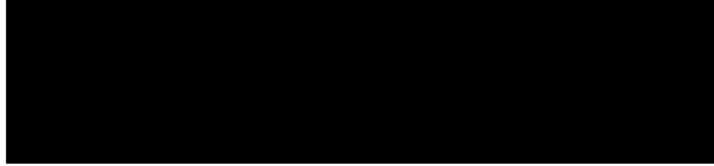


NICOLE J. HERBERS  
Appellate Defense Counsel  
Air Force Appellate Defense Division



**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 1 June 2023.



NICOLE J. HERBERS  
Appellate Defense Counsel  
Air Force Appellate Defense Division



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

UNITED STATES,	)	UNITED STATES' OPPOSITION TO
<i>Appellee,</i>	)	APPELLANT'S MOTION FOR
	)	ENLARGEMENT OF TIME
	)	
v.	)	
	)	
Airman First Class (E-3)	)	ACM 40306
BRANDEN C. HAYNES, USAF,	)	
<i>Appellant.</i>	)	Panel No. 2
	)	

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

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

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

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

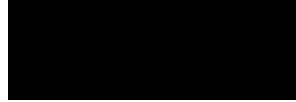


OLIVIA B. HOFF, Capt, USAF  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
Military Justice and Discipline Directorate  
United States Air Force

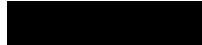


**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 June 2023.



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



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

**UNITED STATES,** ) **BRIEF ON BEHALF OF**  
*Appellee,* ) **APPELLANT**  
)  
v. ) Before Panel No. 2  
)  
Airman First Class (E-3) ) No. ACM 40306  
**BRANDEN C. HAYNES,** )  
United States Air Force ) 28 June 2023  
*Appellant* )

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

**ASSIGNMENTS OF ERROR<sup>1</sup>**

**I.**

**WHETHER AB HAYNES' SENTENCE IS INAPPROPRIATELY SEVERE?**

**II.**

**R.C.M. 1106(d)(3) PROVIDES AN ACCUSED FIVE DAYS TO RESPOND TO A VICTIM'S POST-TRIAL SUBMISSION OF MATTERS. DID THE CONVENING AUTHORITY VIOLATE BASIC DUE PROCESS RIGHTS WHEN HE ACTED WITHOUT**

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<sup>1</sup> Undersigned Counsel notes there are two other errors within the Record of Trial (ROT) but asserts no prejudice and requests no relief related to these two omissions in the Record. AB Haynes is aware of these errors and does not assert prejudice nor request relief. While the Article 32 Preliminary Hearing Report is included in the ROT as required under RCM 1112(f), that report is not complete as PHO Exhibits 8 and 12 are not included. Preliminary Hearing, Disc containing "US v. Haynes PHO Report and Attach" ROT Vol. 2. The Article 32 preliminary hearing and report relates only to charges and specifications that were ultimately withdrawn and dismissed with prejudice. See Disc containing "US v. Haynes PHO Report and Attach" ROT Vol. 2 and Entry of Judgement (EOJ) ROT Vol. 1, dated 8 June 2022. Additionally, while the Pretrial Advice on the Second Additional Charge was completed, there is no record of receipt by the Accused or Trial Defense of this advice as required IAW DAFI 51-201, *Administration of Military Justice* (14 Apr 2022, para 13.1.4) and previously under AFI 51-201, para 13.20. See Pretrial Advice, ROT Vol. 2, dated 25 March 2022. The Pretrial Advice is otherwise in proper form. *Id.*

## **GIVING AB HAYNES AN OPPORTUNITY TO RESPOND TO THE 1106A POST-TRIAL SUBMISSIONS?**

### **STATEMENT OF THE CASE**

On 31 March 2022, at Nellis Air Force Base (AFB), Nevada, a general court-martial composed of a military judge alone found Airman First Class (A1C) Branden C. Haynes guilty, consistent with his pleas, of the following: one charge with two specifications of willful dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 92.<sup>2</sup> R. at 167; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, dated 8 Jun 2022. The military judge sentenced A1C Haynes to a reduction to E-1, total forfeitures, 4 months confinement, and a bad conduct discharge.<sup>3</sup> R. at 215. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, ROT Vol. 1, 28 April 2022.

### **STATEMENT OF FACTS**

#### *Sentence Severity*

AB Haynes arrived at Nellis Air Force Base, NV in March 2019, and met K.A., the individual in Specification 2 of the Second Additional Charge at the First Term Airman's Course. Defense Exhibit (Def. Ex.) K; Prosecution Exhibit (Pros. Ex.) 1, page

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<sup>2</sup> All references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Mil. R. Evid. are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 MCM).

<sup>3</sup> The military judge sentenced AB Haynes to 2-months confinement for Specification 1 of the Second Additional Charge, and 4-months confinement for Specification 2 of the Second Additional Charge, with confinement running concurrently. R. at 215.



3. The charged timeframe for the harassment against K.A. is from 6 June 2019 through 30 August 2020. EOJ, ROT Vol. 1, dated 8 June 2022. Between April 14, 2019, and June 6, 2019, AB Haynes and K.A. were friends, went out to dinner, engaged in sexual intercourse on multiple occasions, and remained on good terms. Pros. Ex. 1, page 3. During this time, K.A. advised AB Haynes she did not want an exclusive relationship, because she was going through a divorce. *Id.* K.A. then advised AB Haynes she did not want to date him at all, sometime in May 2019 when she went on leave. *Id.* On June 6, 2019, AB Haynes went to K.A.'s apartment and was invited into her apartment. *Id.* The two engaged in sexual intercourse, although AB Haynes and K.A. disagree whether the encounter was consensual. *Id.* AB Haynes has not been convicted of any sexual assault or rape charge. EOJ, ROT Vol. 1, dated 8 June 2022. The sexual harassment is that AB Haynes left K.A. voicemails, went to her home uninvited and left her a gift, engaged her in conversation at various places on base, and asked coworkers and friends for information about her. EOJ, ROT Vol. 1, dated 8 June 2022. The stipulation of fact and the record of trial does not document that K.A. contacted her command, AB Haynes' command, law enforcement, nor any other authority to stop any unwanted behavior towards her by AB Haynes. Pros. Ex. 1. The Stipulation does reflect K.A. communicated her desire to have AB Haynes stop contacting her and showing up at her apartment, given she told him as much, and ultimately she blocked him from making further electronic communications with him. Pros. Ex. 1, page 3, R. at 136. The record only reflects direct contact between AB

Haynes and K.A. between 6 June 2019 and August 2019. Pros. Ex. 1, Attachment 2; Pros. Ex. 1; R. at 112-20.

Specification 1 of the Second Additional Charge occurred on 9 September 2020. EOJ, ROT Vol. 1, dated 8 June 2022. This specification involves S.M., a coworker whom AB Haynes was working with on that day R. at 88; Pros. Ex. 1. S.M. and AB Haynes were in an open work center with people freely walking in and out. Pros. Ex. 1 and Attachment 1. AB Haynes and S.M. continued to work together throughout the day, after AB Haynes harassed S.M. Pros. Ex. 1, Attachment 1. The record does not document any further contact between AB Haynes and S.M. There is no indication in the record that S.M. continued to work with or interact with AB Haynes after 9 September 2020.

The Government offered no evidence in aggravation at sentencing. R. at 171-78. Trial Defense offered 8 character letters in support of AB Haynes. Def. Ex. A. Individuals described AB Haynes as hardworking and trustworthy. Def. Exs. B, F, and G. R.K., the Programs Section Chief, with over 22 years of service, and after working with AB Haynes for approximately 16 months, found him to have “high rehabilitation potential.” Def. Ex. C; R. at 187. Others describe AB Haynes as dependable, generous, and outgoing. Def. Ex. D and I. A family friend who has known AB Haynes for 10 years opined AB Haynes has “high rehabilitative potential.” Def. Ex. H.

K.A. provided an unsworn statement at trial. Court Exhibit (Ct. Ex.) A. She noted impact, in part, from conversations others were having about the sexual

harassment, “hearing so many things” that eventually she stopped being able to trust. *Id.* S.M. also provided a statement at trial. Ct. Ex. B. She expressed, in part, difficulty with the timeline of and coordination required by the court-martial process, which is not attributable to AB Haynes. *Id.*

The maximum punishment for willful dereliction of duty is 6 months confinement, reduction to E-1, total forfeitures, and a Bad Conduct Discharge.<sup>4</sup> Article 92, UCMJ d.(3)(C), 10 U.S.C. § 892.

#### *Post-trial Processing*

The Government did not offer any evidence at sentencing to rebut AB Haynes’ rehabilitative potential, nor produce anything related to AB Haynes’ “lack of good moral character.” *See* R. at 171-78, 193; Ct. Ex. A and B. AB Haynes was sentenced on 31 March 2022, and his matters in clemency were due on 10 April 2022. Submission of Matters to the Convening Authority, ROT Vol. 2, undated. On 9 April 2022, Trial Defense submitted clemency matters on behalf of Appellant. Request for Clemency, ROT Vol. 2, dated 9 April 2022. AB Haynes, through counsel, requested to reduce his time in confinement to 2 months. *Id.* Although he did not ask for clemency related to his reduction in rank or total adjudged forfeitures, he did express the difficulty in not being able to provide support to his single mother, who has chronic health conditions and a fixed income. *Id.*

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<sup>4</sup> AB Haynes faced 12 months confinement given he was charged with two specifications in violation of Article 92 for willful dereliction of duty. R. at 140.

On 8 April 2022, Trial Defense receipted for a Victim Submission of Matters dated 4 April 2022. Receipt, ROT Vol. 2, dated 8 Apr 2022. On 18 April 2022, Trial Defense receipted for another Victim Submission of Matters dated 8 April 2022. Receipt, ROT Vol. 2, dated 18 April 2022.

In a memorandum dated 4 April 2022, K.A. asserted the following: “[D]ue to Airman Haynes’ *lack of good moral character*, I am now unable to feel safe in every environment that I am supposed to feel safe in.” Victim Submission of Matters, ROT Vol. 2, dated 4 April 2022 (emphasis added). She expressly asked the Convening Authority to consider the impact these actions, which she described to include AB Haynes’ “lack of good moral character” when making his decision on the sentence in this case, and requested the sentence be upheld. *Id.*

S.M. also provided post-trial matters for the Convening Authority to consider. Submission of Matters from S.M., ROT Vol. 2, dated 8 April 2022. She thought four months of confinement “sufficed” and that a bad conduct discharge, BCD, would be ‘highly effective.’ *Id.* She asked for the sentence to be upheld as adjudged. *Id.*

On 28 April 2022, the Convening Authority issued a decision on Action via memorandum, considering matters submitted under Rules for Court-Martial (RCM) 1106 and 1106A. Convening Authority Decision on Action, ROT Vol. 1, dated 28 April 2022. The Convening Authority took no action on the findings or the sentence. *Id.* There is no record the Government ever provided copies of these matters submitted under 1106A to AB Haynes.

RCM 1101A(c)(2)(A) limits submissions under the rule; they may not include matters that related to the character of the accused unless such matters were admitted as evidence at trial. AB Haynes did not file a post-trial motion in accordance with R.C.M. 1104(b)(2)(B) within five days of receiving the Convening Authority's action to address an asserted error in the action.

Had AB Haynes been given the opportunity to respond, he would have. Declaration of Branden Haynes, dated 28 June 2023, Appendix A, Motion to Attach dated 28 June 2023 (hereinafter, Appendix A). He would have provided additional evidence in rebuttal related to his character, would have offered the statements of high rehabilitative potential, and would have asked for additional relief. *Id.*

## **ARGUMENT**

### **I.**

#### **THE ADJUDGED SENTENCE IS INAPPROPRIATELY SEVERE.**

##### **Standard of Review**

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

##### **Law**

This Court “may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [it] finds correct in law and fact and determines, on the basis of the entire record, should be approved.” Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). Considerations include “the particular appellant, the nature and

seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted). "The breadth of the power granted to the Courts of Criminal Appeals to review a case for sentence appropriateness is one of the unique and longstanding features of the [UCMJ]." *United States v. Hutchison*, 57 M.J. 231, 233 (C.A.A.F. 2002) (citations omitted). This Court's role in reviewing sentences under Article 66(d) is to "do justice," as distinguished from the discretionary power of the convening authority to grant mercy. *See United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998).

### **Analysis**

AB Haynes' sentence is inappropriately severe for at least two reasons: (1) the sentence does not adequately reflect AB Haynes' rehabilitative potential and (2) the sentence is too severe in light of the nature of the offenses of which he was convicted.

First, AB Haynes offered un rebutted evidence of his rehabilitative potential, yet he was sentenced to confinement just two months' shy of the maximum punishment of confinement for specification 2 and he was otherwise given the maximum punishment, including total forfeitures, reduction to E-1, and a bad conduct discharge. R. at 215, 187, 193; Def. Ex. C, H. Rehabilitative potential, as defined under RCM 1001(b)(5), refers to "the accused's potential to be *restored*, through vocational, correction, or therapeutic training or other corrective measures to a *useful and constructive* place in society." (emphasis added). While a sentence to 4 months confinement vice 6 months can indicate some consideration of AB Haynes'

rehabilitative potential, adding on the total forfeitures, reduction to E-1 and a bad conduct discharge, that sentence places roadblocks in front of AB Haynes, limiting his ability to be restored to that useful and constructive place in society. These financial burdens, on top of the stigma of a punitive discharge, saddle AB Haynes with every possible roadblock to a successful entry into society. This, despite the evidence before the Trial Court and this Court—that AB Haynes will be able to function as a contributing and successful member of society given his unrebutted “high rehabilitative potential.”

Secondly, AB Haynes was convicted of willful dereliction of duty for sexually harassing a woman he dated in the immediate period following the end of their relationship, and for harassing a coworker on one day, without any record of ongoing personal contact with K.A. after August 2019 and none with S.M. after the charged timeframe, 9 September 2020. While AB Haynes acknowledges his conduct meets the definition of sexual harassment and takes responsibility for his conduct through his plea of guilty, he should be sentenced based solely on the evidence presented at trial.

In this case, the Government provided no evidence in aggravation at sentencing. While there is evidence in the record of trial “that K.A. told AFOSI she was sexually assaulted by AB Haynes on 6 June 2019,” the military judge correctly stated he was not going to consider this evidence in determining an appropriate sentence. R. at 171-78, 206. However, it does not appear based on the punishment adjudged, that the Court was able to disregard this inflammatory and irrelevant

evidence. While AB Haynes pled to sexual harassment that consisted in part of leaving K.A. voicemails in June and August 2019, stopping by her place in June 2019, and on one occasion leaving her food that she liked unsolicited, the context of this behavior is central to crafting an appropriate sentence. R. at 111-13, 118-20; Pros. Ex. 1.

The conduct between AB Haynes and K.A. was based on a prior dating and sexual relationship and the sexual harassment should be evaluated, not in a vacuum, but with those facts in mind. The context of this behavior is that this was in the immediate period at the end of their short-lived dating relationship after both of them had arrived to their first duty station, having met at First Term Airman's Course. Def. Ex. K; Pros. Ex. 1. AB Haynes and K.A.'s relationship was ever-changing, starting with a dinner and a sexual relationship, to then being told by K.A. that she did not want to be exclusive due to pending divorce, to K.A. breaking things off altogether within a matter of months. Pros. Ex. 1. Then, in June 2019 after this break up, when AB Haynes went to K.A.'s home to speak with her, K.A. invited him into her apartment. *Id.* He also left her voicemails between June and August 2019. Pros. Ex. 1, Attachment 2. However, in reviewing those voicemails, the tone/tenor of them is also important, in the context of a break-up. The contact on base, as admitted to by AB Haynes at trial, was happenstance, in that he was not following her or seeking her out, but he did not avoid her when he saw her at the Shoppette or base gym when he was otherwise there even after K.A. had told AB Haynes she did not want to be with him or speak to him. R. at 119. This conduct with direct contact by



AB Haynes with K.A. was over a matter of *three months* not over the span of a year or more. Pros. Ex. 1 and Attachment 2, R. at 112-20.

Understanding why Appellant found himself unable or unwilling – based on this prior relationship with K.A. – to walk away from K.A. is integral to sentencing him appropriately for his sexual harassment of K.A. This is no way is a shift of blame to K.A. – she was clear in her intentions and AB Haynes fully acknowledged he sexually harassed K.A., but AB Haynes’ conduct was done in the course of the end of a tumultuous romantic relationship. Additionally, in part, K.A. attributed impact from this and her “inability to trust” to other people talking about the sexual harassment, which is not attributable to AB Haynes. Given the context of their prior dating relationship, the record reflecting a shorter timespan of direct contact with K.A., and AB Haynes’ rehabilitative potential, and some of the impact reported as a result of this court-martial that is not attributable to AB Haynes, this sentence is too severe as adjudged.

The nature of the offense involving S.M., while meeting the definition of sexual harassment, should be considered in light of the facts of that conduct. At trial AB Haynes pled to, and the Government did not rebut, AB Haynes’ conduct with S.M. was limited to only such conduct described on one day with no ongoing contact between AB Haynes and S.M. after that date. Similar to K.A., there is no evidence that any authority had to step in to stop AB Haynes’ conduct with S.M. While the conduct between AB Haynes and S.M. was wrongful, this was an isolated incident with S.M. The record does not show AB Haynes required a third-party to intervene

to stop this behavior, nor did he return to continue such behavior past 9 September 2020 with S.M. As such, while this meets the definition of sexual harassment, it was isolated to one day, without recurrence, and AB Haynes took the first step to accepting responsibility by pleading guilty. Given these mitigating factors, his rehabilitative potential, and the combined effects of receiving the maximum punishment in nearly all available modes of punishment, sentence relief is warranted.

Reassessing the sentence will not negate the seriousness of the offenses he committed – nor the impacts thereof on K.A. and S.M., but it will ensure the sentence is no more severe than warranted by the entire record of trial and consistent with justice.

WHEREFORE, AB Haynes respectfully requests this Honorable Court reassess the sentence.

## II.

### **THE CONVENING AUTHORITY VIOLATED BASIC DUE PROCESS RIGHTS WHEN HE ACTED WITHOUT GIVING AB HAYNES OPPORTUNITY TO RESPOND TO THE CRIME VICTIMS POST-TRIAL SUBMISSION OF MATTERS.**

#### **Standard of Review**

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

*States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)).

### Law

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

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

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

This Court recently addressed this issue in *United States v. Valentin-Andino*, 83 M.J. 537 (A.F. Ct. Crim. App. 2023). In *Valentin-Andino*, the victim submitted matters to the convening authority, but there was no record Appellant ever received the victim’s post-trial matters. *Id.* at 540. This Court held that the convening authority abused his discretion and that new post-trial processing was warranted to provide Appellant what he is entitled: “the right to be served with K.G.’s submission of matters and the opportunity to submit rebuttal matters for the convening authority’s consideration, before the convening authority decides whether to grant [Appellant’s requested relief].” *Id.* at 544.

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

(citation omitted). “If the appellant makes such a showing, the Court of Criminal Appeals must either provide meaningful relief or return the case to the Judge Advocate General concerned for a remand to a convening authority” for new post-trial action. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

### **Analysis**

The Government introduced no evidence in aggravation nor victim impact during presentencing. R. at 171-78. While both K.A. and S.M. provided statements at presentencing, found in Court Exhibits A and B, at no point was evidence offered of Appellant’s “lack of good moral character.” Thus, when K.A. disparaged AB Haynes’ character to the Convening Authority, AB Haynes had an absolute right to respond under R.C.M. 1106(d)(3). Victim Submission of Matters, ROT Vol. 2, dated 4 April 2022. While the Convening Authority considered both the statements provided by K.A. and S.M. offered under 1106A and did not grant relief as they both requested, AB Haynes never signed receipt for either submission. Convening Authority Decision on Action dated 28 April 2022, ROT Vol. 1. AB Haynes does not recall ever getting the matters submitted S.M. post-sentencing and while he may have had a discussion with his trial defense counsel about the memorandum submitted by K.A., he does not recall getting either memo served on him by the Government. Appendix A, Motion to Attach dated 28 June 2023. Under R.C.M. 1106(d)(3), Appellant had five days to provide a response. As this Court recognized in *Valentin-Andino*, making a decision on action without allowing an opportunity to respond was an abuse of discretion. *See Valentin-Andino* at 543.

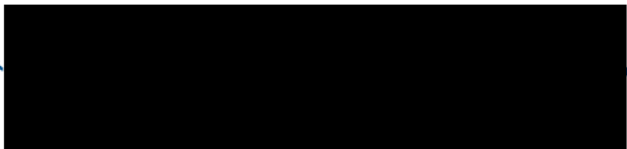
At the time of the decision on action, the Convening Authority would not have the transcript to validate or invalidate any claims related to AB Haynes' character. The court-reporter did not finish transcribing the record until 28 April 2022. Court Reporter Chronology, ROT Vol. 2, undated. Nor is it realistic that the Convening Authority would have reviewed all of the exhibits entered in presentencing. Both K.A. and S.M. asked the Convening Authority to take no action on the findings or sentence. Victim Submission of Matters, ROT Vol. 2, dated 4 April 2022 and S.M. Submission of Matters, ROT Vol. 2, dated 8 April 2022. Given the opportunity to respond, AB Haynes could have highlighted to the Convening Authority the improper nature of such a statement related to his character, and could have offered evidence to rebut it that was contained within the record already. Appendix A, Motion to Attach dated 28 June 2023. Additionally, AB Haynes could have asked for alternate relief in terms of remission of the adjudged forfeiture or reduction in rank. *Id.* Most importantly, AB Haynes explained that he would have taken the opportunity to respond. *Id.* But the Convening Authority acted without ensuring AB Haynes received a copy of these post-sentencing submissions and therefore without giving him an opportunity to respond.

The Convening Authority indicated that he considered AB Haynes' initial submission under R.C.M. 1106 and the crime victims' statements under RCM 1106A. Convening Authority Decision on Action, ROT Vol. 1, dated 28 Apr. 2022. This raises the broader question of whether the Convening Authority was advised against

considering matters related to AB Haynes' character that were improper. This only strengthens the case to remand for post-trial processing.

AB Haynes has demonstrated some colorable showing of possible prejudice. The low threshold for material prejudice is "designed to avoid undue speculation as to how certain information might impact the convening authority's exercise of such broad discretion." *Scalo*, 60 M.J. at 437. The Convening Authority could have granted some relief. Consequently, this Court should either remand for new post-trial processing or, in light of the sentence's inappropriate severity, reassess his sentence.

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

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NICOLE J. HERBERS, Maj, USAF  
Appellate Defense Counsel  
Appellate Defense Division (AF/JAJA)

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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 Appellate Government Division on 28 June 2023.

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Appellate Defense Counsel  
Appellate Defense Division (AF/JAJA)

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

UNITED STATES,	)	<b>UNITED STATES' ANSWER</b>
<i>Appellee</i>	)	<b>TO ASSIGNMENTS OF ERROR</b>
	)	
	)	
v.	)	
	)	Before Panel No. 2
Airman First Class (E-3)	)	
<b>BRANDEN C. HAYNES, USAF</b>	)	No. ACM 40306
<i>Appellant.</i>	)	

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

**ISSUES PRESENTED**

**I.**

**WHETHER [APPELLANT'S] SENTENCE IS  
INAPPROPRIATELY SEVERE?**

**II.**

**R.C.M. 1106(d)(3) PROVIDES AN ACCUSED FIVE DAYS TO  
RESPOND TO A VICTIM'S POST-TRIAL SUBMISSION OF  
MATTERS. DID THE CONVENING AUTHORITY  
VIOLATE BASIC DUE PROCESS RIGHTS WHEN HE  
ACTED WITHOUT GIVING AB HAYNES AN  
OPPORTUNITY TO RESPOND TO THE 1106A POST-  
TRIAL SUBMISSIONS?**

**STATEMENT OF THE CASE**

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

**STATEMENT OF FACTS**

At a general court-martial, the military judge sitting alone found Appellant guilty, consistent with his pleas, of Specifications 1 and 2 of the Second Additional Charge for willful dereliction of duty in violation of Article 92, UCMJ, for sexually harassing SM and KA. (*Entry of Judgment*, dated 8 June 2022, ROT Vol. 1). The remainder of the charges and specifications

were dismissed with prejudice in accordance with Appellant's offer of plea agreement. (Id; App. Ex. XVII). The military judge sentenced Appellant to four (4) months confinement, a bad-conduct discharge, forfeiture of all pay and allowance, and reduction in grade to E-1. (Id.)

**a. Sexual Harassment Involving SM.**

While on duty in the 57th Aircraft Maintenance Squadron, Appellant began a sexually-charged conversation with SM, whom he had only known professionally for a short time and not at all personally. (Pros. Ex. 1). He asked her about her sexual preferences, whether she wanted to have sex with women, and if he could have sex with her and her husband. (Id.)

Appellant opened his phone in SM's presence and began to scroll through sexually explicit photos and videos, some of which were of himself engaging in sexual acts. (Id.) Without any prompting or request, Appellant displayed a video of himself having sex with a woman to SM and told her to look at it. (Id.) SM looked at the video as directed by Appellant, which was captured on security cameras, and turned her attention away after a few seconds. (Id.)

On another occasion, Appellant directed SM to unlock his phone and to look at it. (Id.) When SM did as Appellant instructed, the phone showed explicit pictures and videos of Appellant's exposed erect penis as well as him engaging in sexual acts with women. (Id.) At no point did SM ask to be shown or consent to being shown the images or videos. (Id.)

**b. Sexual Harassment Involving KA.**

After meeting KA at the First Term Airman Course at Nellis AFB, Nevada, Appellant and KA had dinner together followed by their first sexual encounter on 14 April 2019. (Id.) While they were at dinner, KA informed Appellant she did not want an exclusive relationship due to her ongoing divorce. (Id.) However, Appellant became more interested in a serious and

exclusive dating relationship, told his family and friends about KA, and talked about a future with her. (Id.)

KA and Appellant continued to spend time together and have consensual sexual encounters over the next two months. (Id.) In May 2019, KA went on leave and around that time she broke off the relationship with Appellant and asked him to take his things from her apartment. (Id.)

KA said after she ended the relationship with Appellant he showed up at her apartment without invitation, including one time when he knocked on her door for an extended period (possibly an hour) and asked to be let in. (Id.) KA did not let him in. (Id.) On another occasion, she opened the door to tell him the relationship was over and to stop coming to her apartment. (Id.) He came knocking at her door another time while intoxicated begging her to let him in, and the only way to make him leave was to threaten to call the police. (Id.)

On 6 June 2019, Appellant again went to KA's apartment to renew the relationship, and she let him in. (Id.) They eventually engaged in sexual intercourse. (Id.) Appellant told KA, among other things, he needed her, he would miss her, they could have a good life together, and if they were going to break up, they need to have sex one last time. (Id.) KA told him she was not interested in having sex that night, but Appellant continued to talk about having sex with her and kissed her on the face and neck as she turned her face away. (Id.) As he continued to touch her, KA moved his hands away. (Id.)

Appellant then grabbed KA, picked her up bear hug style, and took her to her bedroom, and he had an erection at the time. (Id.) Over KA's protests, including saying no several times, Appellant started trying to take off KA's clothes. (Id.) She tried to get away from Appellant by rolling toward the wall. (Id.) Appellant then took his own pants off. (Id.) KA told him no again

and tried to push his hand away from her body. (Id.) Appellant then held her down by her hands and penetrated her vagina with his penis until he ejaculated. (Id.) Afterwards, Appellant left. (Id.) KA told Appellant either while he was at her apartment or within 24-hours that she was no longer interested in a sexual or dating relationship with Appellant. (Id.)

After the sexual encounter, KA started to fear Appellant and it compounded the impact of subsequent interactions with Appellant. (Id.) Appellant thought the sexual encounter was consensual, while KA thought it was not consensual. (Id.) The parties agreed to the following term in the plea agreement:

I agree that the details of the sexual encounter between [KA] and myself on or about 6 June 2019, as well as any victim impact stemming from that encounter as defined under R.C.M. 1001(c)(2)B), are directly related to Specification 2 of the Second Additional charge and are appropriate matters to be included in any victim impact statement she may offer under R.C.M. 1001(c), so long as such statement comports with the other requirements of R.C.M. 1001(c)(5)(A).

(App. Ex. XVII). The military judge interpreted this to mean the parties agreed to not object to any mentions of the sexual encounter if referenced in KA's victim impact statement. (Id.) The parties agreed the military judge could consider the sexual encounter entered into evidence in the stipulation of fact for any and all purposes as it relates to the charge Appellant pled guilty to; however, the military judge stated he understood that he was only to sentence Appellant for the offenses for which he pled guilty. (R. at 74). He also *sua sponte* analyzed Prosecution Exhibit 4 and stated he would not consider the letter of reprimand issued to Appellant the week before trial that covered the Article 120, UCMJ, offenses Appellant had otherwise been charged with before the plea agreement terms and excluded it as evidence. (R. at 181).

After the sexual encounter, Appellant called KA repeatedly and left a series of at least seven, to a number possibly in the teens, voicemails over an almost two-month period. (Pros.

Ex. 1; R. at 111). In the voicemails, Appellant acknowledged that KA told him “no,” told KA good luck trying to find a guy who cares as much about her as him, asked her to meet up with him or go on a date with him, told her he left food outside her door, told her he was sorry, told her he didn’t care she was dating other people, told her he saw her car in the parking lot when he drove by, asked to hear from her, told her he saw something that reminded him of her, told her sorry for texting her and asking her how she has been, asked her if she was with someone or just going on random dates, and told her he was getting help because she really hurt him. (Id.)

Appellant also ran into KA at various locations around Nellis AFB where he approached her and engaged her in small talk. (Id.) On one of the occasions, he told KA that he considered moving into her apartment complex, and she could get a referral bonus if he put her down as the one who referred him. (Id.) KA did not initiate the encounters and was curt with Appellant. (Id.) KA stated the encounters caused her to be uncomfortable and fearful. (Id.)

Appellant sought information about KA’s personal and professional life on several occasions from her friends and coworkers. (Id.) When KA learned of these inquiries, it made her fearful and uneasy, especially while she was on base, because she knew Appellant was likely also on base. (Id.)

### **c. Victims’ Impact Statements**

At trial, KA submitted a two-paragraph victim impact statement that detailed the emotional and social impact Appellant’s sexually harassing behavior had on her. (Court Ex. A). Appellant’s actions caused her to stop trusting others and destroyed her ability to feel safe at work, home, and in her car. (Id.) His behavior stopped KA from going out with her friends and sharing information about herself and made her afraid of strangers. (Id.)

SM also submitted a victim impact statement, dated 28 March 2022, regarding Appellant's conduct and how it had affected her for the year and a half since it occurred. (Court Ex. B). She described how Appellant saw her as a "target for his own enjoyment." (Id.) Appellant's actions caused continuous impacts to SM's day-to-day life and made her feel she had to second guess her vocabulary when she talked to anyone at work "to prevent unprovoked sexual conversations[.]" (Id.) She now harbors doubts about the way her peers perceive her and that they see her in a degrading manner. (Id.) She told the military judge that she felt Appellant needed to be punished for what he did, because he would not learn proper boundaries or respect for others without it. (Id.)

**d. Post-trial**

On 8 April 2022, Appellant's trial defense counsel acknowledged receipt of a Victim Submission of Matters, dated 4 April 2022. (Receipt of Victim Post Sentencing Matters, 8 April 2022). On 18 April 2022, trial defense counsel acknowledged receipt of a Victim Submission of Matters, dated 8 April 2022. (Receipt of Victim Post Sentencing Matters, 18 April 2022). On 28 April 2022, the convening authority filed his decision on action in Appellant's case. (*Convening Authority Decision on Action*, dated 28 April 2023, ROT Vol. 1). The convening authority took no action on the sentence as adjudged and stated he considered the matters timely submitted by the Appellant and the victims under R.C.M. 1106 and 1106A. (Id.) The military judge completed the Entry of Judgment on 8 June 2022. (*Entry of Judgment*, dated 8 June 2022, ROT Vol. 1).

SM submitted a statement to the convening authority describing how relieved she felt when she heard the verdict in Appellant's case, because she could not have asked for a "better sentence to reflect the severity of the crimes he committed." (Submission of Matters from [SM]

– U.S. v. Haynes, 8 April 2022). She felt he would realize his actions have consequences with the amount of confinement he received. (Id.) She stated what Appellant did was “abhorrent and he deserves to be held accountable.” (Id.) She asked that the convening authority uphold the sentence exactly as adjudged. (Id.)

KA again submitted a two-paragraph victim submission of matters to the convening authority describing how Appellant’s actions had a “significant and lasting impact” on her life. (Victim Submission of Matters, dated 4 April 2022.) She stated specifically, “Due to Airman Haynes’ lack of good moral character, I am now unable to feel safe in every environment that I am supposed to feel safe in.” (Id.) She included her home, personal vehicle, Nellis AFB, and work in the places she no longer feels safe. (Id.) She told the convening authority she is “terrified of the potential fact that he might just show up at any point in time and [she] would not be able to protect [herself] from him.” She requested the convening authority uphold the sentence as adjudged. (Id.)

## **ARGUMENT**

### **I.**

#### **APPELLANT’S SENTENCE IS APPROPRIATE.**

##### *Standard of Review*

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

### *Law and Analysis*

The appropriateness of a sentence is assessed “by considering the particular appellant, the nature and seriousness of the offenses, the appellant’s record of service, and all matters contained in the record of trial.” United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006).

Unlike the act of bestowing mercy through clemency, which was delegated to other hands by Congress, Courts of Criminal Appeals are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

Appellant agreed to plead guilty to both specifications of the Second Additional Charge and enter into a reasonable stipulation of fact, and, in exchange, the convening authority agreed to dismiss Charge I and its two specifications for sexual assault in violation of Article 120, UCMJ; Charge II and its specification for stalking in violation of Article 130, UCMJ; Charge III and its specification for indecent conduct in violation of Article 134, UCMJ; and the Additional Charge and its specification for assault consummated by battery in violation of Article 128, UCMJ. (App. Ex. XVII). Appellant’s trial defense counsel specifically crafted the Second Additional Charge and specifications for the plea agreement. (R. at 116). Appellant agreed that he would receive no less than fourteen (14) days of confinement for each specification of the Second Additional Charge that would run concurrently. (Id.) Appellant agreed there were no other sentence limitations. (Id).

A plea agreement with the convening authority is “some indication of the fairness and appropriateness of [an appellant’s] sentence.” United States v. Perez, No. ACM S32637 (f rev), 2021 CCA LEXIS 501, at \*7 (A.F. Ct. Crim. App. 28 September 2021) (unpub. op.); *see also* United States v. Casuso, No. 202000114, 2021 CCA LEXIS 328, at \*8 (N-M. Ct. Crim. App. 30



June 2021) (unpub. op.) (questioning an appellant’s “claim of inappropriate severity when the sentence he received was within the range of punishment he was expressly willing to accept in exchange for his pleas of guilty.”). In total, Appellant received the benefit of the convening authority dismissing, with prejudice, four charges and their specifications, which limited his punitive exposure from a dishonorable discharge and 68 years and 6 months confinement to only one (1) year of confinement and a bad conduct discharge. Manual for Courts-Martial (2019 ed.), Appendix 12. Appellant’s plea agreement did not preclude the military judge from adjudging him the bad conduct discharge or four months confinement that he did adjudge. Here, Appellant received the sentence he agreed to and indeed deserved based on his conduct, and his agreement is a strong indication of its appropriateness.

Through his misconduct, Appellant victimized two fellow Air Force members. He failed to understand the most basic concept of “no” meaning “no.” In victimizing SM through sexual harassment, Appellant made the decision to degrade SM by showing her multiple sexually explicit images and videos of himself. By doing so, he created a hostile and offensive environment in the Air Force for SM who should have been able to feel safe and professional in her workplaces. Instead, she felt targeted for Appellant’s own amusement and left doubting whether she was respected by her peers. (Court Ex. B.) Since Appellant’s conduct, SM has had to watch everything that she says in the workplace for fear someone would sexualize it the way Appellant sexualized their encounters. (Id.) His conduct should most certainly be considered in the context of their relationship – during a non-existent relationship outside of knowing each other for a short period of time as coworkers, he chose to show her sexually explicit images and asked to engage in sex with her and her husband. (Pros. Ex. 1.)

Furthermore, Appellant argues that his *sexual harassment* of KA should be evaluated with respect to his prior dating and sexual relationship with KA. (App. Br. at 10.) He makes these arguments as if he should get a pass on sexually harassing someone simply because he previously dated her – that he should be able to disregard her own autonomy because of his own feelings. (Id.) Appellant has been unable to accept “no” since the day KA told him she did not want an exclusive relationship with him on their very first date. He continued to follow her, call her, leave her sexually charged voicemails, ask her friends and coworkers about her, and seek to invade every aspect of her life with total disregard for her known wishes. His actions show he needed a solid punishment to ingrain in him that he could not simply do what he wanted to without any regard for another human being’s autonomy.

The military judge crafted an appropriate punishment for Appellant within the terms Appellant’s agreement with the convening authority. Appellant deserved the bad-conduct discharge and four months confinement he received at trial for his conduct. (*Entry of Judgment*, 8 June 2022, ROT Vol. 1). He placed another Airman in fear of him and then continued to hold power over her by continually insinuating that he was everywhere she was, from her apartment to shopping to her workplace. He then degraded his fellow airman by showing her sexually explicit images of himself engaging in sexual activities. Rather than placing roadblocks on Appellant’s ability to be restored to a useful and constructive place in society, his sentence provides the necessary punishment to correct his actions. Obviously, Appellant’s duties, the military environment, his victims’ status as fellow military members, and his own inner compass were insufficient to keep Appellant from repeatedly violating the law and the autonomy of his victims. His sentence is appropriate for this Appellant and the circumstances of this case.

Ultimately, this Court should find, as the military judge did, that Appellant's agreed to sentence represents justice in this case considering this particular Appellant and his misconduct. Appellant willfully disregarded Air Force regulation and sexually harassed two fellow Airmen to the point they felt their workplaces in the Air Force were hostile and offensive. No Airman should have to feel this way due to Appellant's disregard for their lives.

The United States respectfully requests this Court deny Appellant's assignment of error and find Appellant's sentence is appropriate.

## II.

**R.C.M. 1106(d)(3) PROVIDES AN ACCUSED FIVE DAYS TO RESPOND TO A VICTIM'S POST-TRIAL SUBMISSION OF MATTERS. THE CONVENING AUTHORITY DID NOT VIOLATE BASIC DUE PROCESS RIGHTS WHEN HE ACTED ON APPELLANT'S SENTENCE.**

### *Standard of Review*

Proper completion of post-trial processing is a question of law, which this Court reviews *de novo*. United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000)). When an appellant alleges error in an action and the appellant does not object in a post-trial motion, this Court reviews the alleged error for plain error. United States v. Brubaker-Escobar, 81 M.J. 471, 473 (C.A.A.F. 2021) (per curiam).

An Appellant claiming to have been denied a right to comment on post-trial matters "has the burden of making a colorable showing of possible prejudice" to be entitled to relief. United States v. Brown, 54 M.J. 289, 292 (C.A.A.F. 2000). A colorable showing of possible prejudice does not include sheer speculation about factual matters that are within the normal investigative capabilities of counsel. Id. at 293. CAAF requires an appellant to demonstrate prejudice by stating what, if anything, would have been submitted to deny, counter, or explain the new matter.

United States v. Chapman, 46 M.J. 321, 323 (C.A.A.F. 1997) (internal quotation marks and citations omitted). If an appellant can make that colorable showing of possible prejudice, the appellant is given the benefit of the doubt and the court will not speculate on what the convening authority might have done if defense counsel had been given an opportunity to comment. Id. at 323-34 (internal quotation marks and citations omitted).

### ***Law and Analysis***

In a case where a crime victim has submitted matters under R.C.M. 1106A, the accused shall have five days from receipt of those matters to submit any matters in rebuttal, which is limited to addressing matters raised in the crime victim's submissions. Rule for Courts-Martial (R.C.M.) 1106. Under R.C.M. 1106A, a crime victim may submit matters to the convening authority for consideration that may reasonably tend to inform the convening authority's exercise of discretion under R.C.M. 1109 or 1110, but the submission may not include matters related to the character of the of accused unless admitted as evidence at trial. *See* R.C.M. 1106A. The convening authority has the duty to ensure any matters submitted by the crime victims are provided to the accused as soon as practicable and the accused shall have five days from receipt to submit matters in rebuttal. R.C.M. 1106A(c)(3); R.C.M. 1106(d)(3). Under Air Force regulation, if a victim submits post-sentencing matters under R.C.M. 1106A, trial counsel shall serve those matters on defense counsel within two-duty days to allow the accused an opportunity to provide a written rebuttal. Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 14 April 2022.

After conclusion of his court-martial, Appellant did not raise a motion under Rule for Courts-Martial (R.C.M.) 1104(b)(1)(E)-(F) to allege an error in the post-trial processing of the court-martial nor did he raise an error in the convening authority's action under R.C.M. 1109 or

1110. United States v. Behunin, 2022 CCA LEXIS 412, \*37 (A.F. Ct. Crim. App. 18 July 2022); *see also* R.C.M. 1104(b)(1)(F) (allowing post-trial motion to address “[an] allegation of error in the convening authority’s action”). Rather, Appellant alleges error for the first time in this appeal. Therefore, this assignment of error is reviewed for plain error.

**a. The convening authority did not err because he served the victims’ submission of matters on Appellant’s trial defense counsel and did not decide on action until five days had passed.**

The convening authority did not err because he served the victims’ submission of matters on Appellant’s counsel, which provided Appellant’s counsel ample opportunity to submit matters on his behalf to the convening authority and to gather any evidence to rebut statements in the victims’ submission of matters. However, Appellant and Appellant’s counsel chose not to include any reference to KA’s submission of matters in Appellant’s initial clemency request. (*Request for Clemency*, 9 April 2022, ROT Vol. 2.) Appellant’s clemency request solely focused on Appellant rather than his impact on the victims and only requested that the convening authority reduce his sentence by two (2) months confinement. (*Request for Clemency*, dated 9 April 2022). Furthermore, even after SM’s submission of matters, which Appellant’s trial defense counsel received and acknowledged in writing on 18 April 2022, Appellant’s trial defense counsel made no further submission of matters to the convening authority. Therefore, the Court does not need to speculate on what the convening authority might have done if trial defense counsel had been given the opportunity to comment, because trial defense counsel was given the opportunity to comment and made the decision not to do so. This is so because the convening authority did not err but served the victims’ submission of matters on Appellant through his trial defense counsel.

This case differs from United States v. Baker, 2022 CCA LEXIS 523 (A.F. Ct. Crim. App. 6 September 2022). In Baker, like the present case, the appellant did not sign a receipt for the victim's submission of matters while his trial defense counsel did. Baker, 2022 CCA LEXIS 523, \*3-4. However, in Baker, the appellant submitted his clemency matters four days before the victim submitted matters and the convening authority made his decision on action only two days after the victim submitted matters and only one day after trial defense counsel was provided a copy of the victim's submission rather than providing the Appellant with the five days required by R.C.M. 1106. Id. Therefore, this case differs from Baker in that in the present case, the convening authority provided matters to Appellant through his counsel and provided the appropriate amount of time for Appellant to rebut those submissions before making his decision on action. (*Convening Authority Decision on Action*, dated 28 April 2023, ROT Vol. 1.) This case also stands in contrast to United States v. Valentin-Andino, which is cited by Appellant, where the government in that case could not demonstrate that either the appellant's trial defense counsel or the appellant received the victim's submission of matters prior to the convening authority's decision on action. 83 M.J. 537, 539-540 (A.F. Ct. Crim. App. 30 January 2023). But, even if this Court finds that the convening authority committed plain error, Appellant was not prejudiced.

**b. Appellant has failed to make some colorable showing of possible prejudice.**

Appellant has failed to make some colorable showing of possible prejudice for three reasons. First, unlike Baker, the convening authority here made his decision on action well after--10 days after--Appellant's trial defense counsel received SM's submission of matters, as argued above. Appellant and Appellant's trial defense counsel had ample opportunity after learning of the memorandum submitted by KA prior to submission of clemency matters, and they had the

option to submit additional matters in response to her statement about his moral character.

Second, Appellant has failed to provide more than mere speculation about what he *could* have submitted to the convening authority—he argues he “could have offered evidence to rebut it that was contained in the record already” – without indicating specifically information that would rebut any of the victims’ statements. (App. Br. at 16). Third, KA and SM’s submission of matters are largely the same as Court Exhibits A and B outside of the victims’ requests for the convening authority to uphold Appellant’s sentence.

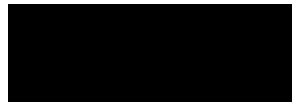
To the second point, Appellant indicates no specific evidence that he would have submitted to the convening authority to rebut KA’s assertion about his “lack of good moral character,” especially as it concerns materials not already in the record, nor any other assertions by KA and SM. (*Cf.* App. Br. at 16). He has failed to demonstrate prejudice by failing to state what, if anything, would have been submitted to “deny, counter or explain” the new matter. *See United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). Appellant merely states he could have highlighted portions of the record to rebut the victim’s submissions but highlights none for this Court to consider. Nor has Appellant provided any rebuttal evidence along with this assignment of error that he would have raised to the convening authority--especially any evidence not already contained in the record. There is simply no basis for Appellant’s argument that it was unrealistic that the convening authority would have reviewed all of the exhibits entered in presentencing. There were only 11 defense exhibits submitted at trial, which totaled no more than 22 pages in all. Therefore, Appellant has failed to meet his burden to reveal any information he would have put before the convening authority in rebuttal to the victims’ submission of matters.

Finally, KA's statement about Appellant's "lack of good moral character" was made in conjunction with the same sentiment she expressed in her victim impact statement, which was that she was unable to feel safe in the environments she was supposed to feel safe in. (*Victim Submission of Matters*, dated 4 April 2022). She stated in her victim impact statement that her ability "to feel safe at work, home, even in [her] own vehicle was destroyed." (Court Ex. A). KA referring to Appellant's actions against her as a "lack of good moral character" is nothing more than a description on KA's part rather than actual character evidence and she provided no further evidence than what was already contained in the record. SM's statement is largely a request for the convening authority to uphold the sentence Appellant received as she felt it was appropriate, and she provided no new matters that Appellant could rebut other than her sentiment. (*Victim Submission of Matters*, dated 8 April 2022). In sum, Appellant does not show how he would have rebutted anything SM raised in her statement to establish prejudice here.

Since the convening authority did not err when he made his decision on action and Appellant has failed to make any colorable showing of prejudice, this Court should deny Appellant's assignment of error.

### CONCLUSION

**WHEREFORE**, the United States respectfully requests this Court deny Appellant's claims and affirm the findings and sentence in this case.



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[REDACTED]

[REDACTED]

FOR

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

[REDACTED]

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court, and to the Air Force Appellate Defense Division on 27 July 2023 via electronic filing.



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



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

<b>UNITED STATES</b>	)	<b>No. ACM 40306</b>
<i>Appellee</i>	)	
	)	
v.	)	
	)	<b>NOTICE OF PANEL CHANGE</b>
<b>Branden C. HAYNES</b>	)	
<b>Airman First Class (E-3)</b>	)	
<b>U.S. Air Force</b>	)	
<i>Appellant</i>	)	

It is by the court on this 28th day of July, 2023,

**ORDERED:**

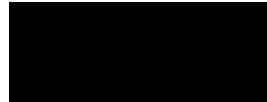
The Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge  
ANNEXSTAD, WILLIAM J., Colonel, Appellate Military Judge  
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.



**FOR THE COURT**



TANICA S. BAGMON  
Appellate Court Paralegal

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

<b>UNITED STATES</b>	)	<b>APPELLANT’S REPLY BRIEF</b>
<i>Appellee,</i>	)	
	)	Before Special Panel
v.	)	
	)	No. ACM 40306
Airman First Class (E-3)	)	
<b>BRANDEN C. HAYNES,</b>	)	2 August 2023
United States Air Force	)	
<i>Appellant</i>	)	

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

Airman First Class Branden C. Haynes (Appellant), by and through his undersigned counsel and pursuant to Rule 31(c) of this Honorable Court’s Rules of Practice and Procedure, files this reply to the Appellee’s Answer filed 27 July 2023 [hereinafter Answer]. Appellant stands on the arguments in his initial brief, filed on 28 June 2023 [hereinafter AOE], and in reply to the Answer, submits additional arguments for the issues listed below.

**STATEMENT OF FACTS**

Appellant relies on the facts laid out in his AOE, but will offer the following additional facts for this Court to consider. The sexually-charged facts recited in the Government’s Answer regarding the allegations of non-consensual sex between the Appellant and K.A. were not considered by the military judge in formulating a sentence. Record (R.) at 74. The term of the plea agreement related to the content of K.A.’s victim impact statement was specifically addressed by the Military Judge,

who stated that he would not consider evidence outside of the parameters of the requirements of the Rules for Courts-Martial (R.C.M.) related to sentencing. R. at 156-57, 206.

Trial Defense Counsel receipted for K.A.'s post-trial submission on 8 April 2022. Receipt, Record of Trial (ROT), Vol. 2, dated 8 Apr 2022. Trial Defense Counsel signed as receipted for S.M.'s post-trial submissions on 6 June 2022, although the receipt was dated 18 April 2022. Receipt, ROT, Vol. 2, dated 18 April 2022. Trial Defense Counsel was assigned to Joint Base Elmendorf-Richardson in Alaska at the time of this trial. ROT, Vol. 2, Request for Clemency Header, dated 9 April 2022. Appellant was confined at Nellis Air Force Base, NV. ROT Vol. 2, Confinement Order dated 31 March 2022. There is no receipt showing the Government provided either K.A. or S.M.'s respective post-trial statements to Appellant. (ROT), Vol. 1-3. There is no indication in the record that the Appellant ever received or reviewed either memo. *Id.* In the Submission of Matters to the Convening Authority memo, signed by Appellant on March 31, 2022, the Government asserted, "Any matters submitted by a victim will be forwarded to *you* so that you may rebut them, if you so choose." ROT, Vol. 2, Submission of Matters memorandum, 2 pages (emphasis added).

## **ARGUMENT**

### **APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE**

The Government attempts to sidestep the inappropriately severe nature of Appellant's sentence by pointing to the fact that the Appellant agreed to a term of a

minimum of 14 days confinement with no other limitations on the sentence. While a plea agreement is “some indication of the fairness and appropriateness of [an appellant’s] sentence,” that is not dispositive here. *United States v. Perez*, No. ACM S32637 (f rev), 2021 CCA LEXIS 501, at \*7 (A.F. Ct. Crim. App. 28 September 2021) (unpub. op.). In this case, the only indication of what Appellant thought was an appropriate sentence was a minimum term of 14 days confinement, with any sentence to confinement running concurrently. App. Ex. XVII. Appellant did not agree to a sentence that would include nearly all possible punishments, including the near maximum term of confinement, reduction to E-1, forfeitures of all pay and allowances, and a Bad Conduct Discharge.

The Government also incorrectly points to alleged sexually-charged statements made by K.A. to AFOSI to attempt to justify the inappropriately severe sentence, but those statements are not relevant to an assessment of sentence severity, as those are not crimes for which Appellant was convicted. Entry of Judgment (EOJ), ROT, Vol. 1, dated 8 Jun 2022. Similarly, any assertion that the allegation made by K.A. was included in any evaluation of victim impact is not properly before this Court as victim impact must be directly related to or arising from the offense of which the accused has been found guilty. *See* R.C.M. 1001(c)(2)(B). As such, the allegation of sexual assault by K.A. highlighted by the Government in the Answer should only be considered, consistent with the military judge’s application of the rules, that is, for its tendency to support the providence of the plea. R. at 206. That is not an error assigned by Appellant. AOE, dated 28 June 2023. Therefore, those facts asserted by

the Government in the Answer should be disregarded by this Court in resolving the issue of sentence severity.

Similarly, the Government mischaracterizes Appellant's conduct as it relates to S.M. The assertion by the Government that Appellant was sentenced for not understanding 'no meaning no' is nowhere in the facts related to the conduct with S.M. Answer at 9. There is no evidence S.M. ever made a statement to Appellant regarding the video/photographs shown on his phone, nor in response to the questions he posed, but rather he engaged in the conduct constituting the sexual harassment with S.M. uninvited (not over protest). *See* Pros. Ex. 1, R. at 93; Answer at 9.

Moreover, the Government's assertion that Appellant argued he should "get a pass on sexually harassing someone simply because he previously dated her," misstates Appellant's argument related to his relationship with K.A. that provided the context to the circumstances surrounding the charged conduct. Answer at 10; AOE, 10-11. Contrary to the Government's assertions, the rapidly evolving and changing nature of their relationship is relevant to a proper review of Appellant's sentence. Critical here, Appellant and K.A.'s relationship went from meeting at First Term Airman Course (FTAC) to a sexual/dating relationship after one dinner, with ongoing sexual contact, conversations about dating versus not wanting to be exclusive due to K.A.'s pending divorce, and then to a break-up after a few months where they continued to talk and where she invited him into her home. *See* AOE, 10-11. This evolving, volatile relationship dynamic provided the context for Appellant's conduct. At no point during trial did Appellant advance the proposition that he was not in fact

guilty of sexual harassment by the voicemails he left, by showing up at her house uninvited, by talking to her when he saw her on base, or by asking coworkers and friends about her. But his conduct with K.A. does not exist in a vacuum. They had a back and forth relationship, with changing terms and conditions – which informed Appellant’s behavior that ultimately constituted sexual harassment. Previously, when he pursued K.A., he was successful in continuing this relationship with K.A. despite her assertions she did not want a relationship. It is that context of the relationship between K.A. and Appellant that is a necessary part of assessing the nature and seriousness of the offense that should be considered in determining whether this sentence is inappropriately severe. *See United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted).

When this Court considers the relevant and admissible evidence regarding the nature and seriousness of the offenses, the appellant’s record of service, and all matters contained in the record of trial, justice requires sentence reassessment. *See Anderson*, 67 M.J. at 705 (A.F. Ct. Crim. App. 2009) (citations omitted) and *United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998).

## II.

**THE CONVENING AUTHORITY VIOLATED BASIC DUE PROCESS RIGHTS WHEN HE ACTED WITHOUT GIVING AIRMAN FIRST CLASS HAYNES THE OPPORTUNITY TO RESPOND TO THE CRIME VICTIMS’ POST-TRIAL SUBMISSION OF MATTERS.**



The Record of Trial shows that the Government failed to personally serve Appellant with the victims' post-trial submissions. Instead, the Government attempts to justify this failure by noting that Trial Defense Counsel was served with the post-trial submissions on Appellant's behalf. Answer at 13. But the right to receive matters submitted by a crime victim under R.C.M. 1106A belongs to the Accused based on the plain reading of the R.C.M. 1106A<sup>1</sup>.

Neither *United States v. Valentin-Adino*, 83 M.J. 537 (A.F. Ct. Crim. App. 2023), nor *United States v. Baker*, 2022 CCA LEXIS 523 (A.F. Ct. Crim. App., 6 September 2022) (unpub. op.) address the issue of whether service of the post-trial submissions on Trial Defense Counsel is sufficient under the Rules. Indeed this Court in *Baker* did not reach a decision on that specific issue. *Baker*, 2022 CCA LEXIS 523, \*8 fn 6. To be sure, in *Baker*, this Court did not find that receipt by a trial defense counsel versus an Accused was dispositive in determining that the Convening Authority in that case abused her discretion in taking Action. Rather, *Baker* turned on whether the appellant in that case was afforded five days to submit matters in rebuttal. *Id.* at 8. However, this Court noted that relief was warranted to provide the appellant with what he is entitled: "*the right to be served with Mrs. JA's submission of matters*, and the opportunity to submit rebuttal matters for the convening authority's consideration before deciding whether to grant Appellant

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<sup>1</sup> R.C.M. 1106A(c)(3) provides: "the convening authority shall ensure any matters submitted by a crime victim under this subsection be provided to *the accused* as soon as practicable." (emphasis added).

sentence relief.” *Id.* at 9 (emphasis added). Notably, this Court made this finding despite the fact that Trial Defense Counsel in that case did in fact receive post-trial submission of matters. *Id.* at 3.

Similar to *Baker*, in Appellant’s case, Trial Defense Counsel alone receipted for the post-trial submission of matters on 8 April 2022 for K.A.’s matters and for S.M.’s matters on 3 June 2022, respectively. Receipt, ROT, Vol. 2, dated 8 April 2022, and Receipt, ROT, Vol. 2, dated 18 April 2022. In its answer, the Government cites a Department of the Air Force Instruction (DAFI) in an attempt to argue that service on Trial Defense Counsel was sufficient, but that Instruction was not effective until 14 April 2022, which post-dates both dated submissions by K.A. and S.M. (4 April and 8 April, respectively). As such, any reference to that version of DAFI 51-201 dated 14 April 2022 does not apply in this case, as it was not in effect as of the date of the submissions at issue.

Moreover, this cited provision in DAFI 51-201 conflicts with other language within the Rules for Courts-Martial, which demonstrate that requirement to serve any victim post-trial submissions is a right that belongs to the individual accused. “The convening authority shall ensure any matters submitted by a crime victim under this subsection be provided *to the accused* as soon as practicable.” R.C.M. 1106A(c)(3) (emphasis added).

This is consistent with the Government’s assertions in the 31 March 2022, Submission of Matters memorandum. That memorandum states that Appellant himself would be served by the Government. “Any matters submitted by a victim

will be forwarded to *you* so that you may rebut them, if you so choose.” ROT, Vol. 2, Submission of Matters Memo, 2 pages (emphasis added).

This distinction appears significant, as in this case, when an Accused is confined separate from his Trial Defense Counsel’s assigned base. Here, Appellant was confined at Nellis Air Force Base, NV, and Trial Defense Counsel was assigned to Joint-Base Elmendorf-Richardson, AK, without in-person access to the Accused to provide copies of any post-trial submissions. *See* ROT, Vol. 2, Confinement Order dated 31 March 2022 and ROT, Vol. 2, Request for Clemency Header, dated 9 April 2022. Additionally, if the Government has this obligation, as the Government itself noted in the post-trial submission of matters memo, consistent with the reading of RCM 1106A(c)(3), there is no basis to rely on anything other than the plain reading of the rule in determining Appellant must be served with a copy of the post-trial submissions. *See United States v. Lowe*, 58 M.J. 261, 262 (C.A.A.F., 5 June 2023).

As to the issue of prejudice, for such post-trial errors related to ability to respond to post-trial submissions, “[t]he threshold should be low, and if an appellant makes some colorable showing of possible prejudice, we will give that appellant the benefit of the doubt and ‘we will not speculate on what the convening authority might have done’ if defense counsel had been given an opportunity to comment.” *United States v. Chatman*, 46 M.J. 321, 323–34 (C.A.A.F. 1997) (quoting *United States v. Jones*, 44 M.J. 242, 244 (C.A.A.F. 1996)). The low threshold for material prejudice “reflects the convening authority’s vast power in granting clemency and is designed to avoid undue speculation as to how certain information might impact the

convening authority's exercise of such broad discretion." *United States v. Scalo*, 60 M.J. 435, 437 (C.A.A.F. 2005).

Appellant has indicated that there was evidence he could have submitted to the Convening Authority had he been given an opportunity to respond. That is, he pointed to evidence already in the Record of Trial. That includes the presentencing evidence offered and admitted by the Defense at trial and the transcript and the presentencing matters submitted by the Government that were admitted at trial. This evidence could have rebutted the assertion there was any evidence of his "poor moral character," shown his evidence of high rehabilitative potential, and would have shown the Convening Authority the Government did not provide any evidence in aggravation at presentencing, nor any evidence of his character. Appendix A, Motion to Attach dated 28 June 2023.

The Record of Trial supports the conclusion that the Convening Authority did not review any evidence offered at trial based not only on the chronology of the court reporter's actions in this case that showed that the transcription was not complete until the day the Convening Authority took action, but also based on the fact that the document the Convening Authority signed showed that no other evidence or matters were considered other than those listed. Convening Authority Decision on Action dated 28 April 2022, ROT Vol. 1. and Court Reporter Chronology, undated, ROT Vol. 2.

This threshold is low for showing prejudice in part because this "post-trial conduct must consist of fair play, specifically giving the appellant 'notice and an

opportunity to respond.” *United States v. Hunter*, No. 20170036, 2017 CCA LEXIS 527, at \*4 (N.M. Ct. Crim. App. 8 Aug 2017) (unpub. op.) (quoting *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996). In this case, Appellant received no notice. While his geographically separated Trial Defense Counsel received post-trial matters submitted by K.A. and S.M., Appellant did not. If Appellant had been given an opportunity to respond, he would have. In another recent case, this Court has determined “some colorable showing of possible prejudice” was demonstrated when in that case the R.C.M. 1106A submission contained new information, the appellant articulated how he would have responded to the victim’s submission had he been given the required opportunity, that his response would have been different from his initial clemency submission, and the convening authority could have granted some clemency relief.” *Baker*, 2022 CCA LEXIS 523, \*9.

Similar here, new information was contained with the post-trial submissions of K.A. and S.M. These submissions made assertions about Appellant’s character, about upholding a sentence, and made further exposition as to the impact of the sentence and personal thoughts about the sentence as adjudged by both K.A. and S.M, which were not in Court Exs. A and B.

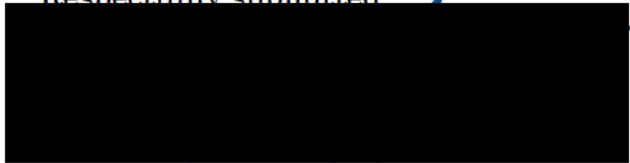
Appellant offered how he would have responded if he was given the opportunity. Appendix A, Motion to Attach dated 28 June 2023. The rebuttal of character evidence provided by K.A. in her post-trial submission would have been different from the original clemency submission, which did not address any evidence

of that nature as it was not part of the original record. And finally, the Convening Authority would have had power to grant clemency with this sentence as adjudged.

Basic due process has not been met in the post-trial processing of this case – and this case should be remanded for new post-trial processing. Appellant did not receive notice of 1106A matters submitted in this case, and as a result, was not given opportunity to respond to those matters prior to the Convening Authority taking Action. Further, the low threshold for establishing some possibility of prejudice has been met. Appellant could have and would have responded to the memorandums submitted by K.A. and S.M., these memorandums contained new information, his response would have been different than his clemency matters, and the Convening Authority would have had power to grant clemency.

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

Respectfully submitted,

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NICOLE J. HERBERS, Maj, USAF  
Appellate Defense Counsel  
Air Force Appellate Defense Division

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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 Appellate Government Division on 2 August 2023.

Respectfully submitted,

[Redacted signature block]

Appellate Defense Counsel  
Air Force Appellate Defense Division

[Redacted contact information]