IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
MICHAEL E. HERNANDEZ, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40287 25 July 2022

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 an enlargement of time (EOT) to file an Assignment of Errors. Appellant requests an enlargement for a period of 60 days, which will end on **6 October 2022.** The record of trial was docketed with this Court on 8 June 2022. From the date of docketing to the present date, 47 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 25 July 2022.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

26 July 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL E. HERNANDEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40287 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **MICHAEL E. HERNANDEZ,** Senior Airman (E-4) United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 No. ACM 40287 28 September 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time (EOT) to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on **5 November 2022.** The record of trial was docketed with this Court on 8 June 2022. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

Appellant was tried by a general court-martial composed of a military judge alone at Hill Air Force Base, Utah. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 21 March 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of three specifications and two charges of aggravated assault with a dangerous weapon, in violation of Article 128 of the Uniform Code of Military Justice (UCMJ). (*Id*.) On 21 March 2022, the military judge sentenced appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 5 years, and a dishonorable discharge. (ROT, Vol. 1, Statement of Trial Results at 3.) On 18 April 2022, the military judge entered the same findings and judgment after the convening authority took no action on the findings or sentence. (ROT, Vol. 1, EOJ at 1.)

The record consists of 7 prosecution exhibits, 27 defense exhibits, and 10 appellate exhibits. The transcript is 226 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete review of Appellant's case. This enlargement is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Undersigned counsel is presently assigned 11 cases pending brief before this Court and two cases pending brief before this Court currently have priority over the present case: *United States v. Lopez*, ACM 40161, and *United States v. Ross*, ACM 40289. In addition, undersigned counsel has two cases pending petition before the Court of Appeals for the Armed Forces: *United States v. Wermuth* and *United States v. Baird*.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 28 September 2022.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

29 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL E. HERNANDEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40287 Panel No. 2

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

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

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[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 29 September 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
MICHAEL E. HERNANDEZ, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40287 24 October 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **5 December 2022.** The record of trial was docketed with this Court on 8 June 2022. From the date of docketing to the present date, 138 days have elapsed. On the date requested, 180 days will have elapsed. Appellant has been advised of his right to a timely appeal and this request for an enlargement of time, and concurs with this request for an enlargement of time.

Appellant was tried by a general court-martial composed of a military judge alone at Hill Air Force Base, Utah. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 21 March 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of three specifications and two charges of aggravated assault with a dangerous weapon, in violation of Article 128 of the Uniform Code of Military Justice (UCMJ). (*Id*.) On 21 March 2022, the military judge sentenced appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 5 years, and a dishonorable discharge. (ROT, Vol. 1, Statement of Trial Results at 3.) On 18 April 2022, the military judge entered the same findings and judgment

after the convening authority took no action on the findings or sentence. (ROT, Vol. 1, EOJ at 1.) The record consists of 7 prosecution exhibits, 27 defense exhibits, and 10 appellate exhibits. The transcript is 226 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete review of Appellant's case. This enlargement is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Undersigned counsel is presently assigned 12 cases pending brief before this Court and three cases pending brief before this Court currently have priority over the present case: *United States v. Lopez*, ACM 40161, *United States v. Johnson*, ACM 40291, and *United States v. Ross*, ACM 40289. In addition, undersigned counsel has three cases pending petition before the Court of Appeals for the Armed Forces: *United States v. Wermuth*, *United States v. Baird*, and *United States v. Zapata*.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 24 October 2022.

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

26 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL E. HERNANDEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40287 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **MICHAEL E. HERNANDEZ,** Senior Airman (E-4) United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 2 No. ACM 40287 28 November 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **4 January 2023.** The record of trial was docketed with this Court on 8 June 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

Appellant was tried by a general court-martial composed of a military judge alone at Hill Air Force Base, Utah. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 21 March 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of three specifications and two charges of aggravated assault with a dangerous weapon, in violation of Article 128 of the Uniform Code of Military Justice (UCMJ). (*Id*.) On 21 March 2022, the military judge sentenced appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 5 years, and a dishonorable discharge. (ROT, Vol. 1, Statement of Trial Results at 3.) On 18 April 2022, the military judge entered the same findings and judgment after the convening authority took no action on the findings or sentence. (ROT, Vol. 1, EOJ at 1.)

The record consists of seven prosecution exhibits, 27 defense exhibits, and 10 appellate exhibits. The transcript is 226 pages. Appellant is currently in confinement.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information:

(1) Undersigned counsel currently represents 18 clients and is presently assigned 12 cases pending brief before this Court. Two cases pending brief before this Court currently have priority over the present case:

a. *United States v. Johnson*, ACM No. 40291 – The record of trial consists of 23 appellate exhibits, 28 prosecution exhibits, and 4 defense exhibits. The transcript is 395 pages. Appellant is confined. Counsel has begun review of this record of trial.

b. *United States v. Ross*, ACM No. 40289 – The record of trial consists of 11 prosecution exhibits, 1 defense exhibit, 2 court exhibits, and 4 appellate exhibits. The transcript is 130 pages. Appellant is not confined. Counsel has begun review of this record of trial.

In addition, undersigned counsel has one case pending petition and supplement before the Court of Appeals for the Armed Forces: *United States v. Zapata*, ACM No. 40048. Since requesting the third EOT in this case, undersigned counsel attended a three-day appellate training in North Carolina; filed a response brief on behalf of the Real Party in Interest in *In Re AL*, Misc, Dkt. No. 2022-12; filed Assignments of Error in *United States v. Lopez*, ACM No. 40161; filed a Supplement to a Petition for Grant of Review in both *United States v. Wermuth*, ACM No. 39856, and *United States v. Baird*, ACM No. 40050; and co-authored an Amicus Brief to the Court of the Appeals for the Armed Forces in *United States v. Gilmet*, USCA Dkt. No. 23-0010/NA.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete review of Appellant's case. This enlargement is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant has been advised of his right to a timely appeal and this request for an enlargement of time, and concurs with this request for an enlargement of time.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 28 November 2022.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

29 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL E. HERNANDEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40287 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
MICHAEL E. HERNANDEZ, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40287 28 December 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **3 February 2023**. The record of trial was docketed with this Court on 8 June 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

Appellant was tried by a general court-martial composed of a military judge alone at Hill Air Force Base, Utah. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 21 March 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of three specifications and two charges of aggravated assault with a dangerous weapon, in violation of Article 128 of the Uniform Code of Military Justice (UCMJ). (*Id*.) On 21 March 2022, the military judge sentenced appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 5 years, and a dishonorable discharge. (ROT, Vol. 1, Statement of Trial Results at 3.) On 18 April 2022, the military judge entered the same findings and judgment after the convening authority took no action on the findings or sentence. (ROT, Vol. 1, EOJ at 1.)

The record consists of seven prosecution exhibits, 27 defense exhibits, and 10 appellate exhibits. The transcript is 226 pages. Appellant is currently in confinement.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information:

(1) Undersigned counsel currently represents 18 clients and is presently assigned 11 cases pending brief before this Court. Two cases pending brief before this Court currently have priority over the present case:

a. *United States v. Johnson*, ACM No. 40291 – The record of trial consists of 23 appellate exhibits, 28 prosecution exhibits, and 4 defense exhibits. The transcript is 395 pages. Appellant is confined. Counsel has begun review of this record of trial.

b. *United States v. Ross*, ACM No. 40289 – The record of trial consists of 11 prosecution exhibits, 1 defense exhibit, 2 court exhibits, and 4 appellate exhibits. The transcript is 130 pages. Appellant is not confined. Counsel has begun review of this record of trial.

In addition, undersigned counsel has one case pending an answer before the United States Court of Appeals for the Armed Forces (U.S.C.A.A.F.), *A.L.*, USCA Dkt. No. 23-0073/AF, Crim App. No. 2022-12; and one case pending petition and supplement before the U.S.C.A.A.F., *United States v. Brown*, No. ACM 40066.

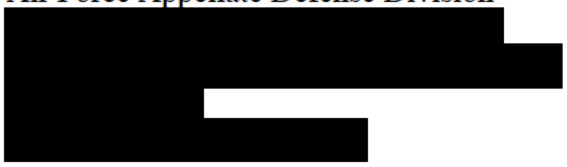
Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete review of Appellant's case. This enlargement is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential

errors. Appellant has been advised of his right to a timely appeal, was consulted with regard to an enlargement of time, and agrees with this request for an enlargement of time.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, 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 was sent via email to the Court and served on the Appellate Government Division on 28 December 2022.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

29 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL E. HERNANDEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40287 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40287**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Michael E. HERNANDEZ	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 28 December 2022, 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 3d 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 **3 February 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 his right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
MICHAEL E. HERNANDEZ, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM 40287 18 January 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **5 March 2023**. The record of trial was docketed with this Court on 8 June 2022. From the date of docketing to the present date, 224 days have elapsed. On the date requested, 270 days will have elapsed.

Appellant was tried by a general court-martial composed of a military judge alone at Hill Air Force Base, Utah. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 21 March 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of three specifications and two charges of aggravated assault with a dangerous weapon, in violation of Article 128 of the Uniform Code of Military Justice (UCMJ). (*Id*.) On 21 March 2022, the military judge sentenced appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 5 years, and a dishonorable discharge. (ROT, Vol. 1, Statement of Trial Results at 3.) On 18 April 2022, the military judge entered the same findings and judgment after the convening authority took no action on the findings or sentence. (ROT, Vol. 1, EOJ at 1.)

The record consists of seven prosecution exhibits, 27 defense exhibits, and 10 appellate exhibits. The transcript is 226 pages. Appellant is currently in confinement.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information:

(1) Undersigned counsel currently represents 17 clients and is presently assigned 12 cases pending brief before this Court. Two cases pending brief before this Court currently have priority over the present case:

a. *United States v. Johnson*, ACM No. 40291 – The record of trial consists of 23 appellate exhibits, 28 prosecution exhibits, and 4 defense exhibits. The transcript is 395 pages. Appellant is confined. Counsel has begun review of this record of trial.

b. *United States v. Ross*, ACM No. 40289 – The record of trial consists of 11 prosecution exhibits, 1 defense exhibit, 2 court exhibits, and 4 appellate exhibits. The transcript is 130 pages. Appellant is not confined. Counsel has begun review of this record of trial.

In addition, undersigned counsel has one case pending petition and supplement before the United States Court of Appeals for the Armed Forces, *United States v. Brown*, ACM No. 40066. Since requesting the fifth EOT in this case, undersigned counsel has begun drafting the petition and supplement for *United States v. Brown*, ACM No. 40066, and filed an answer before the United States Court of Appeals for the Armed Forces in *A.L.*, USCA Dkt. No. 23-0073/AF, Crim App. No. 2022-12. Additionally, undersigned counsel will be out of the office on pre-authorized leave from 21-30 January 2023.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete review of Appellant's case. This enlargement is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant has been advised of his right to a timely appeal and of this request for an enlargement of time. Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 18 January 2023.

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

19 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL E. HERNANDEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40287 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 19 January 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **MICHAEL E. HERNANDEZ,** Senior Airman (E-4) United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 2 No. ACM 40287 24 February 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a seventh enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **4 April 2023**. The record of trial was docketed with this Court on 8 June 2022. From the date of docketing to the present date, 261 days have elapsed. On the date requested, 300 days will have elapsed.

Appellant was tried by a general court-martial composed of a military judge alone at Hill Air Force Base, Utah. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 21 March 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of three specifications and two charges of aggravated assault with a dangerous weapon, in violation of Article 128 of the Uniform Code of Military Justice (UCMJ). (*Id*.) On 21 March 2022, the military judge sentenced appellant to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 5 years, and a dishonorable discharge. (ROT, Vol. 1, Statement of Trial Results at 3.) On 18 April 2022, the military judge entered the same findings and judgment after the convening authority took no action on the findings or sentence. (ROT, Vol. 1, EOJ at 1.)

The record consists of seven prosecution exhibits, 27 defense exhibits, and 10 appellate exhibits. The transcript is 226 pages. Appellant is currently in confinement.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), counsel provides the following information:

(1) Capt Golseth currently represents 17 clients and is presently assigned 12 cases pending brief before this Court. Two cases pending brief before this Court currently have priority over the present case:

a. *United States v. Johnson*, ACM No. 40291 – The record of trial consists of 28 prosecution exhibits, 4 defense exhibits, and 23 appellate exhibits. The transcript is 395 pages. Appellant is confined. Counsel has reviewed approximately half of this record of trial.

b. *United States v. Ross*, ACM No. 40289 – The record of trial consists of 11 prosecution exhibits, 1 defense exhibit, 2 court exhibits, and 4 appellate exhibits. The transcript is 130 pages. Appellant is not confined. Counsel has begun review of this record of trial.

(2) Maj Bosner has recently been detailed to the case as well. He currently represents 18 clients and is presently assigned 7 cases pending brief before this Court. Appellant's case is his top priority.

Through no fault of Appellant, undersigned counsel have been working on other assigned matters and have yet to complete review of Appellant's case. This enlargement is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant has been advised of his right to a timely appeal and of this request for an enlargement of time. Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 24 February 2023.

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

27 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) MICHAEL E. HERNANDEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40287 Panel No. 2

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

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 February 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

MICHAEL E. HERNANDEZ
Senior Airman (E-4),
United States Air Force,
Appellant.

No. ACM 40287

BRIEF ON BEHALF OF APPELLANT

DAVID L. BOSNER, Maj, USAF
Air Force Appellate Defense Division
[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Senior Airman (E-4), **MICHAEL E. HERNANDEZ,** United States Air Force, *Appellant*.	)	No. ACM 40287
	)	Filed on: 23 March 2023

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

Assignments of Error

I.

WHETHER THE FINDINGS OF GUILTY TO THE ADDITIONAL CHARGE AND ITS SPECIFICATIONS SHOULD BE SET ASIDE AND DISMISSED BECAUSE THEY ARE UNREASONABLY MULTIPLIED WITH THE SPECIFICATION OF CHARGE I?

II.

WHETHER THE SENTENCE IS INAPPROPRIATELY SEVERE?

Statement of the Case

On 13 September 2021, 15 November 2021, and 21 March 2022, Senior Airman (SrA) Michael E. Hernandez (Appellant) was tried by a general court-martial composed of a military judge alone at Hill Air Force Base, Utah. He was arraigned on the following offenses: two charges and three specifications[1] of attempted unpremeditated murder, in violation of Article 80, Uniform Code of Military Justice (UCMJ); one charge and one specification of firearm discharge endangering human life, in violation of Article 114, UCMJ; and one charge and one specification

[1] The Specification of Charge I; Specifications 1 and 2 of the Additional Charge.

of obstruction of justice, in violation of Article 131b, UCMJ.[2] Record (R.) at 10-12.

By plea agreement, Appellant pleaded guilty to one charge and three specifications of aggravated assault with a dangerous weapon, in violation of Article 128, UCMJ. *See* Appellate Exhibit (App. Ex.) VIII at 1-2; R. at 91-92.[3] He pleaded not guilty to everything else. *Id*. The military judge granted a Government request to withdraw and dismiss, with prejudice, Charge II and its Specification and Charge IV and its Specification. R. at 175, 226. The military judge then found Appellant guilty consistent with his pleas. R. at 175-76. The military judge sentenced Appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for a total of five years, and a dishonorable discharge. R. at 226. She awarded 372 days of pretrial confinement credit. *Id*.

The convening authority took no action on the findings or sentence. Record of Trial (ROT) Vol. 1, Convening Authority Decision on Action – *United States v. Senior Airman Michael Hernandez*, dated 7 April 2022. He denied Appellant's various requests for deferments of forfeitures and reduction in grade. *Id*. The military judge entered judgment accordingly. *See* ROT Vol. 1, *Entry of Judgment in the case of Senior Airman Michael Hernandez*, dated 18 April 2022.

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

[3] Although the plea agreement designated the Article 128, UCMJ, offenses as "lesser included offenses" (LIOs), the military judge made clear on the record they were not, in fact, LIOs. Nevertheless, she confirmed this was a permissible course of action and ascertained waivers from Appellant regarding major changes to the charge sheet, defective preferrals and referrals, and an insufficient Article 32, UCMJ, hearing. *See* R. at 92-102; *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012); *United States v. Wilkins*, 29 M.J. 421 (C.M.A. 1990). Appellant was on sufficient notice of the new offenses. R. at 96. Appellant raises no issues on appeal arising from this rare procedure.

Statement of Facts

On the night of 13 March 2021, Appellant was at his home in Clearfield, Utah. R. at 120. He and his roommates hosted a birthday party for a friend that evening. *Id*. After some amount of time, uninvited guests showed up. *Id*. Three of those individuals were JR, KN, and KF; all were civilians. *Id*. A man known only as "Brian" began to make a disturbance. *Id*. This caused another guest to ask Appellant and the other owner of the house to remove Brian because he had "laid hands on her." *Id*. Brian was standing next to JR and KN in the kitchen.

Appellant approached the men with his roommate, the homeowner. *Id*. They asked the men to leave; the men did not. *Id*. Instead, JR and KN assaulted Appellant by striking him in the face on multiple occasions. *Id*. The punches damaged Appellant's nose, chipped his teeth, and blurred his vision. *Id*. at 120-21. Appellant was disoriented and confused. R. at 121; Defense Exhibit (Def. Ex.) X at 2. A forensic psychologist, Dr. MH, later concluded this assault on Appellant "was the direct and proximate cause [of Appellant] experiencing a traumatic brain injury (TBI) or concussion." Def. Ex. X at 2. A "TBI, by definition, involves impairment in the person's ability to engage in higher order cognition. This would include perception of information, information processing and judgement and problem solving." *Id*. Dr. MH opined Appellant's "cognitive capabilities immediately following the TBI would have been compromised to some degree." *Id*. He also concluded Appellant's "ability to engage in complex motor behavior immediately following the event would not negate the cognitive impact of the TBI on his cognitive functioning." *Id*. Appellant was also later seen at the Tanner Eye Clinic for recurring problems resulting from the assault. Def. Ex. Y. He had cataract spots in each lens, a piticual hemorrhage in his right eye, and vitreous degradation. *Id*. at 1. Some photographs depicting Appellant's injuries can be found at Defense Exhibit Z.

After suffering this assault in his own house, Appellant "saw blood coming down and felt pain in [his] teeth." R. at 120. He went to his room and grabbed his handgun. R. at 121. After going back downstairs, he went out the front door of the house to find JR, KN, and KF in the front yard. Appellant pointed his handgun "at the group" and fired five times. *Id*. KN and KF were untouched and unharmed. Prosecution Exhibit (Pros. Ex.) 1 at 2. JR was hit in the arm and took some fragments in the back. *Id*. Appellant voluntarily relinquished his firearm to a friend. *Id*.

Appellant was originally charged with an attempted murder of JR. *See* ROT Vol. 1, Charge Sheet, preferred on 21 May 2021 (Charge I and its Specification). After the preliminary hearing officer (PHO) recommended adding additional specifications for the attempted unpremeditated murder of KN and KF, the Government preferred an Additional Charge and two specifications of attempted unpremeditated murder of KN and KF. *See* ROT Vol. 1, Charge Sheet, preferred on 6 August 2021 (Specifications 1 and 2 of the Additional Charge); ROT Vol. 4, PHO Report at 26.

By plea agreement with the convening authority while he was in pretrial confinement, Appellant pleaded guilty to aggravated assault with a dangerous weapon in violation of Article 128, UCMJ, instead of the attempted murder charges and specifications. App. Ex. VIII at 1-2; R. at 91-92. In his providence inquiry related to his assaults on KP and KF, Appellant offered no new information than he already had in relation to the assault on JR. *See* R. at 137 ("Your Honor, my attack on [KN] was simultaneous with my attack on [KF] and [JR], and I made it exactly as I previously described."), 147 ("Your Honor, my attack on [KF] was simultaneous with my attack on [KN] and [JR], and I made it exactly as I previously described.").

Argument

I.

THE FINDINGS OF GUILTY TO THE ADDITIONAL CHARGE AND ITS SPECIFICATIONS SHOULD BE SET ASIDE AND DISMISSED BECAUSE THEY ARE UNREASONABLY MULTIPLIED WITH THE SPECIFICATION OF CHARGE I.

Standard of Review

This Court may only affirm such findings of guilty as the Court finds correct in law and fact and determines, based on the entire record, should be approved. Article 66(d)(1), UCMJ. Review under Article 66, UCMJ, is *de novo*. *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)).

Law

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

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

> a. whether each charge and specification is aimed at distinctly separate criminal acts,
>
> b. whether the number of charges and specifications misrepresent or exaggerate the accused's criminality,
>
> c. whether the number of charges and specifications unreasonably increase the accused's punitive exposure, and/or
>
> d. whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges.

United States v. Campbell, 71 M.J. 19, 24 (C.A.A.F. 2012). These factors are not all-inclusive, nor is any one or more factors a prerequisite. Likewise, one or more factors may be sufficiently

compelling, without more, to warrant relief for UMC. *Id*. at 23. Moreover, the concern of multiple convictions existed long before *Campbell* and *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). The Court of Military Appeals has explained:

> [Q]uite apart from any sentence that is imposed, each separate criminal conviction typically has collateral consequences, in both the jurisdiction in which the conviction is obtained and in other jurisdictions. . . . The number of convictions is often critical to the collateral consequences that an individual faces. . . . Furthermore, each criminal conviction itself represents a pronouncement by the State that the defendant has engaged in conduct warranting the moral condemnation of the community. Because a criminal conviction constitutes a formal judgment of condemnation by the community, each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation.

United States v. Doss, 15 M.J. 409, 411-12 (C.M.A. 1983) (quoting *Missouri v. Hunter*, 459 U.S. 359, 372-73 (1983) (Marshall, J., dissenting)).[4]

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

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

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

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

Analysis

To the extent an unreasonable multiplication of charges issue was waived by a "waive all waivable" motions provision in the plea agreement or waived by operation of law, this Court should pierce waiver under its Article 66(d), UCMJ, authority and review the issue *de novo*. *See United States v. Chin*, No. ACM 38452, 2015 CCA LEXIS 140 at *10 (A.F. Ct. Crim. App. 7 Apr. 2015 (unpub. op.) (concluding *de novo* review was appropriate to rectify a waived UMC issue in a guilty plea context) *affirmed by United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016). It is simply unjust for Appellant to be saddled with three convictions for one bad act amounting to "substantially one transaction." R.C.M. 307(c)(4), Discussion; *see also Massey*, unpub. op. at *38 (invoking justice as an appropriate Article 66(d), UCMJ, consideration in the UMC context). Appellant shot at "the group" of three individuals. R. at 121. It happened in a matter of seconds, a heat of the moment, passionate impulse that came after Appellant was brutally assaulted. R. at 120-21; Def. Ex. X. The Government did not charge Appellant with shooting at KF or KN until the PHO recommended it, at least raising the question whether the Government itself felt the additional specifications were unreasonable in the first instance. If this Court pierces a potential waiver and dismisses the Additional Charge and its Specifications, Appellant will not receive a windfall; he will have the same sentence due to the nature of the concurrent terms of confinement. R. at 226.

The *Campbell*/*Quiroz* factors lead to the same conclusion. All three specifications were aimed at the same criminal act: firing the gun. Three convictions misrepresents and exaggerates Appellant's criminality; to any outside observer or future employer, it looks like he performed

three criminal actions when, in fact, there was only one. By virtue of the plea agreement, the punitive exposure factor is inapplicable. There is no evidence of prosecutorial overreach; the Government did not charge the additional two allegations until the PHO recommended it; arguably the PHO overstepped. At worst for Appellant, this factor is neutral.

The Government obtained convictions in different ways for the exact same conduct. The prejudice flowing from these additional charges and specifications is rather simple: Appellant has two more federal convictions than he ought to for doing the exact same thing. *See supra* at n. 4 (cataloging cases standing for this proposition). The appropriate thing to do in this circumstance is to set aside and dismiss the Additional Charge and its Specifications because Appellant ought not maintain additional, cumulative convictions on his record. Article 66(d)(1), UCMJ, provides this Court ample authority to remedy the concern. The same course of action this Court took in *Massey* is appropriate here; this Court could consolidate three specifications into one and dismiss, with prejudice, the Additional Charge and its Specifications.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss, with prejudice, Specifications 1 and 2 of the Additional Charge, and the Additional Charge.

II.

THE SENTENCE IS INAPPROPRIATELY SEVERE.

Additional Facts

The Defense offered character letters from 20 people who know Appellant from various aspects of his life. *See* Def. Ex. B-U. Some know Appellant simply as "Michael" irrespective of any military affiliation. *See, e.g.*, Def. Ex. B. Others, like a confinement guard and chaplain, know Appellant precisely because of his misconduct, yet still offered flattering evaluations of his

character. Def. Ex. D, E. Supervisors and peers rushed to Appellant's corner to support him. Def. Ex. J-L. Family near and far showed unwavering faith to Appellant's ability to come out of this situation better than before; they attest he is ready, willing, and able to contribute to a better society. Def. Ex. B, C, F, N, O, P, R, S. While in pretrial confinement, Appellant applied to, and was offered two different jobs; these employers knew of his misconduct and incarceration but offered him a job anyway because they knew his true character. Def. Ex. V, W.

The non-commissioned officer in charge of confinement where Appellant served his pretrial confinement described Appellant as a "model detainee," maintaining "exemplary military bearing" and an individual who "sought self-improvement." Def. Ex. E. This prison official has "developed a great deal of respect for [Appellant's] resiliency." *Id*. According to the chaplain, Appellant "has always exhibited an urgent desire for self-improvement and penitence." Def. Ex. D. Appellant is a "humbled man of faith who is seeking to right his wrongs." *Id*. He "encourages other confinees to stay strong and do the right thing" and is "passionate about his life, his military duties, his goals, and his recovery." *Id*. When comparing Appellant to the hundreds of Airmen the chaplain had spiritually counseled over his career, the chaplain considered Appellant's "maturity and understanding of his life" to be "momentous." *Id*. Appellant's rehabilitative potential is "enormous" because he has "recognized his wrongdoing and is returning to his bedrock principles." *Id*. His desire for change is "authentic." *Id*. Appellant even garnered a letter of support from a Los Angeles County Sherriff. Def. Ex. Q. The Deputy wrote, "This is a man, a friend, and a brother that I can vouch for. I'd put my life on it, because I know he would do the same for me." *Id.*

BH calls Appellant her "biggest supporter and greatest influence." Def. Ex. F. She recognized his genuine repentance as demonstrated by his choice to get baptized on base during

pretrial confinement. *Id*. He encourages others to "strive for the best." *Id*. CH would "still trust [Appellant] with his life." Def. Ex. R. DH calls Appellant "one of the most upstanding people I know." Def. Ex. G. Appellant's attitude is "altruistic." *Id*. Appellant once invited a classmate who was in foster care to come over to their house and stay with their family until he found a long-term place to live. *Id*. A friend, AG, noted Appellant has been an "amazing friend" who "helped [her] through [her] hardest days." Def. Ex. M. No matter what, he is there for his friends and "doesn't think twice" about helping someone. *Id*. Appellant would "give the shirt off his back for anyone in need." Def. Ex. P.

Unsurprisingly, Appellant's duty performance is consistent with this character assessment. *See* Def. Ex. J-L. A 17-year NCO supervising 104 personnel at the time ranked Appellant "highly amongst his peers for his determination, work ethic, and positive attitude." Def. Ex. J. A peer wrote that Appellant "made you want to work. It's hard to shuffle your feet and procrastinate after seeing his motivation." Def. Ex. K. Appellant was a "good teacher" and always came into work "with a smile and a positive attitude." Def. Ex. L.

Those who know Appellant well think this experience will make him stronger. A friend remarked, "This experience has changed him and made him realize how your whole life can change in a blink of an eye when you make a bad choice." Def. Ex. M. Appellant is "a young man learning how to live life the right way." *Id*. "Mikey" is "repentant for his terrible decision." Def. Ex. N. He has the "drive to right his wrongs." *Id*. He can still be a "great asset to the community." Def. Ex. O. Appellant's potential is "unlimited" and will be held in check by "his whole family [who] will be there to hold him accountable." *Id*. The Sheriff's Deputy concluded, "As a law enforcement officer, and as a friend of [Appellant's] I believe [he] will recover from this mistake." Appellant has "all the traits he needs for long-term success." Def. Ex. S.

Appellant's rehabilitative potential is "enormous" (Def. Ex. B), "immense" (Def. Ex. C), "great" (Def. Ex. E), "enormously high" (Def. Ex. I), "fantastic" (Def. Ex. J), "tremendous" (Def. Ex. L), "excellent" (Def. Ex. M), and "high" (Def. Ex. N). The Government offered no character evidence to the contrary, though permitted to under the Rules for Courts-Martial once Appellant put his character at issue. R.C.M. 1001(e).

Standard of Review

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

Law

This Court may only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused."[5] *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (internal quotations and citations omitted). In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (alteration in original) (citation omitted).

[5] Prior versions of Article 66(c), UCMJ, have included the same or substantially similar language about sentence appropriateness, such that case law interpreting these provisions should be honored, even for cases referred after 1 January 2019. *See* Executive Order 13,825, 83 Fed. Reg. 9889, 9890 (8 Mar. 2018).

Analysis

If there was ever a person the CCA's sentence appropriateness mandate was meant to benefit, it is Michael Hernandez. Congress gave the CCA's plenary authority to only "approve the sentence, or such part or amount of the sentence" it determines "should be approved." Article 66(d)(1), UCMJ. Sentence appropriateness can be used to downwards-adjust a sentence that is plainly excessive,[6] or it can be used in recognition of a good person who has lived a good, honest, decent life for decades and made a poor decision under the stress of a startling event. Appellant's case qualifies for both these considerations.

When looking at the offenses[7] themselves, they are certainly not as aggravating as the original charge sheet indicated with multiple attempted unpremeditated murder allegations, an endangerment offense related to the firearm discharge, and an obstruction of justice allegation. Moreover, even with aggravated assault with a dangerous weapon as the convicted offenses, it must be kept in mind that this was essentially one offense,[8] and it is not as bad as a more typical aggravated assaults with a dangerous weapon. *See, e.g.*, *United States v. McCameron*, No. ACM 40089, 2022 CCA LEXIS 663 at *6 (A.F. Ct. Crim. App. 17 Nov. 2022) (unpub. op.) (describing a case where the charged offense alleged the appellant—after he smashed a phone in the victim's face, leaving her bloodied—retrieved a loaded gun, pointed the gun at the victim, and told her to "get on [her] f[**]king knees"). In *McCameron*, despite being sentenced for this and other offenses, the appellant only received 27 months confinement; here, Appellant was adjudged 60

[6] *See, e.g.*, *United States v. Driskill*, No. ACM 39889 (f rev), 2022 CCA LEXIS 496 at *55-57 (A.F. Ct. Crim. App. 23 Aug. 2022) (unpub. op.) (in a case where the appellant offered no evidence in presentencing or even an unsworn statement and the misconduct was "severe," this Court reduced a term of confinement from 40 years and 9 months to 30 years).
[7] Or offense, if this Court agrees with the first Assignment of Error.
[8] *See* AOE I.

months for this one sporadic event. The facts of Appellant's case, by contrast, are much less significant, and his punishment should not be more than double.

Appellant was the victim of an assault. He legally attempted to expel uninvited guests to a birthday gathering at his own house. For that effort, he was repeatedly bashed in the face, leaving him bloodied, disoriented, his vision blurred, and teeth chipped. R. at 120-21; Def. Ex. X-Z. While under the stress of that event, which resulted in a TBI and/or post-concussion syndrome, Appellant made the poor decision to retrieve his firearm and oust the trespassers by another means. Def. Ex. X. He shot the gun five times in a matter of seconds, and from this, his whole life changed. Admittedly, JR suffered some injuries; however, KN and KF did not. The harm to JR and the endangerment of the community is why *some* punishment is appropriate, but not *five years* of confinement. This Court should consider the lack of injury to KN and KF as a reason, among others, why this sentence is excessive. Everything could have been much worse that night. People could have been killed or grievously injured. Fortunately, no one perished and no one was harmed to the point of becoming paralyzed or anything of the sort. No damage to the homes in the community or any other property in the community resulted from the firearm discharge. Thus, the circumstances surrounding the reasons for Appellant's behavior are extremely mitigating[9] and extenuating[10] *and* the consequences of his actions are not as aggravating as they may seem at first blush.

Equally as important as the comparison between the significant mitigation and extenuation with the absence of material aggravation, is this Court's consideration of the person who was

[9] Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial. R.C.M. 1001(d)(1)(B).

[10] Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse. R.C.M. 1001(d)(1)(A).

sentenced at the court-martial. Plainly, this Court should do what the military judge failed to at trial: based on the entire record, this Court should downwards-adjust Appellant's sentence because by all accounts he was and is an incredible man and a good troop who acted impulsively for a blink of time within the arc of his life, while under the effects of a TBI and/or concussion. This Senior Airman introduced *twenty-seven* individual documents in support of his sentencing case; this Court should recognize based on its collective experience that such a showing, indeed, is rare. The number of documents pales in comparison to the content of those documents. The evidence tells the true story of who Michael Hernandez is. The non-commissioned officer in charge of confinement at F.E. Warren AFB wrote a letter *in support of an inmate*, calling Appellant a "model detainee," who maintained "exemplary military bearing" and "sought self-improvement." Def. Ex. E. In counsel's experience and research of the same, such a circumstance is uncommon. The unrebutted evidence in this record of trial demonstrates this is the exact type of person Appellant always has been since he was a child, through Junior Reserve Officer Training Corps (JROTC), and into his active-duty military service. Def. Ex. B-W. It all syncs to tell the story of a person who ought to be admired, a person who the Air Force desires Airmen to be. After the Defense presentation in presentencing, the Government could have introduced just about anything that hinted of Appellant's misconduct, misbehavior, or bad character. It did not, likely because it did not possess such evidence.

No one is perfect. This includes Appellant. He messed up, partially injuring JR, and Appellant is the first to admit to that. *See* R. at 122 (speaking to the military judge under oath, "I apologize specifically to him for the pain and suffering I caused. I regret what I did every single day. What I did was wrong, I feel horrible, and I wish I could take it back."). In his unsworn statement, Appellant wrote:

> I would like for you to understand my regret and contrition for what I've done. . . . I would like to begin by apologizing to everyone that I've harmed. . . . I give my sincere apology . . . I am sorry. I let you down. You raised me better. . . . I am ashamed of my conduct. . . . I am disgusted with the selfishness and egoism I displayed. I am frightened at the risk I placed on other's lives. I lose sleep thinking about what could have happened because of me.

Def. Ex. AA. But a single outburst, while under the stress of being the victim of a brutal injurious assault, cannot and should not be the basis for *five years* confinement. That is not fair. That is not just. This Court can use its collective experience to understand five years confinement is inappropriately severe. Congress intended the plenary review of sentences—specifically the addition of sentence appropriateness review in addition to whether the sentence is correct in law—to provide opportunities for this Court to allow individuals like Appellant to start the next phase of life sooner. He cannot do that in confinement.

WHEREFORE, Appellant respectfully requests this Honorable Court approve only so much of the sentence that calls for reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for two years, and a bad conduct discharge.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[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 23 March 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERRORS
v.	)	Before Panel No. 2
Senior Airman (E-4) **MICHAEL E. HERNANDEZ** United States Air Force *Appellant.*	)	No. ACM 40287 24 April 2023

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

ISSUES PRESENTED

I.

WHETHER THE FINDINGS OF GUILTY TO THE ADDITIONAL CHARGE AND ITS SPECIFICATIONS SHOULD BE SET ASIDE AND DISMISSED BECAUSE THEY ARE UNREASONABLY MULTIPLIED WITH THE SPECIFICATION OF CHARGE I?

II.

WHETHER THE SENTENCE IS INAPPROPRIATELY SEVERE?

STATEMENT OF CASE

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

STATEMENT OF FACTS

In the late evening of 13 March 2021, Appellant, his roommates, and various guests gathered for a birthday celebration at a home in Clearfield, Utah that later went awry. (Pros. Ex. 1 at 1.) Appellant rented a room from the homeowner who was also present at the party when strangers began showing up. (Id.) About 75 people were at the residence at one point that night.

(R. at 130.) Appellant had two or three drinks of "jungle juice" from a plastic tote bin containing approximately 12 bottles of alcohol and fruit juice by this time in the night. (R. at 141.) Around midnight, a woman approached Appellant and the homeowner, among others, asking them to remove a male who had laid hands on her. (Pros. Ex. 1 at 1; R. at 121.) The male was standing with victims JR, KN, and KF in the kitchen. (Pros. Ex. 1 at 1-2.) When Appellant and the homeowner were ushering the men out of the house they began to argue, and JR and KN each punched Appellant in the face on the porch. (Pros. Ex. 1 at 2.) Appellant was "angry at having been beat up in [his] own house by people who [came] uninvited and refused to leave." (R. at 120.)

Although bleeding and disoriented, Appellant took the time to go upstairs, grab his loaded handgun from its holster on his desk, and come back downstairs. (Pros. Ex. 1 at 2.) Appellant could have stopped and reflected when he was upstairs, or remove himself from the situation, but he did not. (Id.) As Appellant walked out of the front door of the house looking for the men, at least one witness stated that Appellant said, "Where they at? Where they at?" (Pros. Ex. 1 at 2.) Another witness also yelled that Appellant had a gun. (Pros. Ex. 1 at 2.) Appellant saw the three men, JR, KN, and KF, near the sidewalk and fired five shots. (Id.) Appellant "fired in anger and . . . desired to hurt one or more of the people [he] was shooting at. If [he] hadn't wanted to hit them, [he] would have fired at the ground or in the air. Instead, [he] fired at them with intent to do harm." (R. at 121.) Appellant shot JR in the forearm with shrapnel hitting JR's side. (Pros. Ex. 1 at 2.) Appellant also hit a nearby trailer. (Id.) The group of men ran from Appellant down the sidewalk. (R. at 121.) A friend of Appellant at the party took the gun from him and gave it to someone else who threw it in a neighboring yard. (Pros. Ex. 1 at 2.)

Multiple calls reporting gunshots were made to police. (Id.) While police were en route, a car with victim JR flagged the officer down who promptly called an ambulance. (Id.) Other officers arrived at the scene of the party, and Appellant told them he had been punched, then heard gunshots, and he and his friends ran to the backyard. (Pros. Ex. 1 at 2-3.) Through conversations with witnesses, Appellant was determined to have been the one who fired the gun. (Pros. Ex. 1 at 3.) Appellant was brought to the police station where he reiterated his initial story that he heard gunshots and ran to the backyard with his friends. (Id.) After continued questioning, Appellant changed his story and truthfully stated that he had fired the gun. (Pros. Ex. 1 at 3.) However, he lied again, stating he had fired the gun at the ground. (Id.)

ARGUMENT

I.

APPELLANT WAIVED THIS ISSUE. EVEN IF HE HAD NOT, THE ADDITIONAL CHARGE AND ITS SPECIFICATIONS DID NOT UNREASONABLY MULTIPLY THE CHARGES AGAINST APPELLANT.

Additional Facts

Appellant was initially charged in Charge I and its Specification with attempted murder of JR. (Charge Sheet, preferred on 21 May 2021, ROT Vol. 1.) After the preliminary hearing officer (PHO) recommended adding additional specifications for the attempted unpremeditated murder of KN and KF, the Government added an Additional Charge and two specifications of attempted unpremeditated murder of KN (Specification 1) and KF (Specification 2). (Charge Sheet, preferred on 6 August 2021, ROT Vol. 1; PHO Report at 26, ROT Vol. 4.)

Appellant's plea agreement with the convening authority contained a term that Appellant would waive all waivable motions. (App. Ex. VIII.) Appellant pleaded guilty through the plea agreement to aggravated assault with a dangerous weapon against JR in violation of Article 128,

UCMJ, under Charge I and its Specification and aggravated assault against KN and KF, respectively, under Specifications 1 and 2 of the Additional Charge, instead of the attempted murder. (App. Ex. VIII; R. at 91-92.) Appellant pleaded not guilty to all other charges. (Id.) The military judge granted the Government's request to withdraw and dismiss with prejudice Charge II and its Specification and Charge IV and its Specification. (R. at 175, 226.) The military judge found Appellant guilty according to his pleas. (R. at 175-76.)

The military judge explained Appellant's plea to each of the aggravated assault offenses involving JR, KN, and KF (referenced as VICTIM) as follows:

> By pleading guilty to this offense, you are admitting that the following elements are true and accurately describe what you did: one, that on or about 14 March 2021, at or near Clearfield, Utah, you assaulted VICTIM by offering to do bodily harm to him; two, that you did so by shooting him with a certain weapon, to wit: a gun; three, that you intended to do bodily harm; four, that the weapon was a dangerous weapon; and five, that the weapon was a loaded firearm.

(R. at 118, 136, 147).

Appellant told the military judge during his providence inquiry, "The bottom line is that I shot at [KN, JR, and KF] with the desire to do *them* bodily harm, and I hit JR with a bullet." (R. at 122) (emphasis added).

The military judge sentenced Appellant to a reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for five years, and a dishonorable discharge. (R. at 226.) Under the plea agreement, Appellant could have received a maximum total of seven years of confinement and either a dishonorable or bad conduct discharge among the other terms of his given sentence. (App. Ex. VIII; R. at 167.) The military judge awarded 372 days of pretrial confinement credit to Appellant. (Id.)

The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, dated 7 April 2022, ROT Vol. 1). He denied Appellant's various requests for deferments of forfeitures and reduction in grade. (Id.) The military judge entered judgment accordingly. (*See Entry of Judgment*, dated 18 April 2022, ROT Vol. 1.).

Standard of Review

"Whether an appellant has waived an issue is a legal question that this Court reviews *de novo*." United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020) (citation and internal quotation marks omitted). If appellant did not affirmatively waive his unreasonable multiplication of charges claim, then his failure to raise it at trial now subjects it to plain error review. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2019) (*citing* United States v. Harcrow, 66 M.J. 154, 156 (C.A.A.F 2008)). Appellant bears the burden under a plain error analysis of showing: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right of Appellant. United States v. Magyari, 63 M.J. 123, 125 (C.A.A.F. 2001).

Law

1. Waiver

"Waiver must be established by affirmative action of the accused's counsel, and not by a mere failure to object to erroneous instructions or to request proper instructions." United States v. Smith, 50 M.J. 451, 455-56 (C.A.A.F. 1999) (emphasis in original) (citations and internal quotation marks omitted).

2. Unreasonable Multiplication of Charges

Rule for Court-Martial 307(c)(4) provides that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."

Unreasonable multiplication of charges concerns "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." United States v. Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001). A five-part test determines whether the prosecution has unreasonably multiplied charges:

> (1) Did the Accused object at trial to an unreasonable multiplication of charges or specifications?
>
> (2) Does each charge and specification address distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the Appellant's criminality?
>
> (4) Does the number of charges and specifications unfairly increase the appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Id. at 338.

CAAF has noted that "where acts constitute separate criminal conduct under the applicable statute . . . drafting separate charges and cumulative punishments for those acts are not unreasonable." United States v. Forrester, 76 M.J. 389, 395 (C.A.A.F. 2017)

A. Appellant waived the issue of unreasonable multiplication of charges through his plea agreement.

Despite Appellant's assertion that his unreasonable multiplication of charges assignment of error should be renewed de novo, the only question this Court should review de novo is whether or not Appellant waived the error already. Otherwise, even if this Court does not find waiver, the applicable standard of review for this type of issue when not raised at trial and not alleging legal or factual insufficiency of the specifications is plain error, rather than the carte blanche analysis Appellant requests under Article 66, UCMJ.

Appellant waived error regarding unreasonable multiplication of charges because he agreed to waive all motions that could be waived under the Rules for Courts-Martial in his plea agreement and then waived all such motions on the record when questioned by the military judge about that provision of his plea agreement. (App. Ex. VIII; R. at 163-164). Unreasonable multiplication of charges is a waivable motion. R.C.M. 905(e)(2); R.C.M. 906(b)(12). Therefore, Appellant's assertion of error was waived.

Appellant argues that "this Court should pierce waiver under its Article 66(d), UCMJ, authority." (App. Br. at 7.) Waiver notwithstanding, this Court has the authority under Article 66, UCMJ, to "assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error." United States v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016). But piercing waiver is not appropriate in this case despite Appellant's assertions. "By pleading guilty, an accused does more than admit that he did the various acts alleged in a specification; 'he is admitting guilt of a substantive crime.'" United States v. Campbell, 68 M.J. 217, 219 (C.A.A.F. 2009) (quoting United States v. Broce, 488 U.S. 563, 575 (1989) (additional citations omitted)). "'Just as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does [an accused] who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes.'" Id.

Appellant secured a favorable plea agreement, securing him a maximum of seven years of confinement instead of the maximum authorized under the law of 24 years, in part, by pleading guilty to three distinct aggravated assaults and agreeing to waive all waivable motions. Appellant should not be allowed to reap the significant benefits of his plea agreement at trial and now get additional relief on appeal for a matter he promised not to raise in exchange for those benefits. (App. Ex. VIII.) The windfall sought by Appellant is "inconsistent with the fair and

efficient administration of justice." *See* United States v. Kennedy, No. ACM S32660, 2021 CCA LEXIS 575, at *8 (A.F. Ct. Crim. App. Nov. 1, 2021).

The United States respectfully requests this Court find Appellant waived this assignment of error at trial.

B. The Additional Charge and its two Specifications did not result in an unreasonable multiplication of charges under the Quiroz factors, thus the military judge did not plainly err when she accepted Appellant's plea of guilty for the three specifications.

If this Court decides to pierce Appellant's affirmative waiver, the military judge did not plainly err in accepting Appellant's plea of guilty to the Specification of Charge I and Specifications 1 and 2 of the Additional Charge as modified by the plea agreement, because the Quiroz factors weigh in favor of the government.

1. The Appellant did not object at trial to an unreasonable multiplication of charges or specifications.

Appellant did not object at trial on the issue but made an unconditional guilty plea expressly waiving all waivable motions. This point is argued above and allows this Court to decide to dismiss this issue on waiver alone. This factor weighs heavily in favor of the government.

2. *Each charge and specification addresses distinctly separate criminal acts.*

First, Appellant argues that because he shot at a *group* of three victims, his five bullets are "substantially one transaction" under R.C.M. 307(c)(4). (App. Br. at 7.) However, the mere fact that the three individuals left the party together does not mean Appellant shooting at them is "substantially one transaction." R.C.M. 307(c)(4). Under each specification of Charge I and of the Additional Charge, Appellant offered to do each victim individual harm by firing at them with a loaded weapon and intended to do each of them harm. (R. at 118, 136, 147). Appellant

then intentionally pulled the trigger of a handgun at them five times, which is more times than there were victims present. (R. at 126, 139, 152.) Victim JR was struck by a bullet in the forearm and suffered an injury from shrapnel in his side. (R at 127.) Thus, in keeping with the elements of aggravated assault to which Appellant plead guilty, it was not unreasonable for Appellant's egregiously harmful acts to be counted as separate "transactions" under R.C.M. 307(c)(4) supporting three specifications and two charges, because they each involve distinct criminal acts against different human beings. To demand that the victims be taken in the aggregate tends to diminish the value of a human life. Appellant's conduct put each of the three victims' lives in serious danger, and so it was appropriate to charge each criminal act separately.

Second, Appellant's comparison of the facts in United States v. Massey with the facts of the current case is a stretch. No. ACM 40017, 2023 CCA LEXIS 46 (A.F. Ct. Crim. App. 30 Jan. 2023) (unpub. op.); (App. Br. at 8.) In Massey, the appellant was convicted of three separate solicitations for sending one text message to one victim; and, here, Appellant fired five shots at three people as they were near a sidewalk leaving a house party and ultimately was convicted of a total of three specifications. 2023 CCA LEXIS 46 at *1; (App. Br. at 6; R. at 126.) One bullet, much less five, fired at three people still supports charging all three offenses, if Appellant intended to cause harm to each of the people shot at, and each person feared for his life. Furthermore, in Massey this Court reasoned the "[a]ppellant's offenses were complete the moment he sent his message—he did not have the ability to commit just one of the offenses but abandon the others." 2023 CCA LEXIS 46, at *12. This Court based its reasoning on the fact that the crime at issue in Massey, solicitation, was an inchoate offense where the essence of the offense was the request itself. Id. at *39. In contrast, each specification in the present case

"addresses a distinct criminal purpose" – intent to harm each of the fleeing victims and offering to do them harm with a loaded firearm. *See* Campbell, 71 M.J. at 24.

Even though Appellant only lifted the gun once, Appellant then fired the gun five times, which only further demonstrates his intent. Appellant could have fired just one bullet at any of the three victims, or none at all, but he pulled the trigger at them five times. (R. at 121.) Regardless of the number of times Appellant pulled the trigger, he (1) offered to do harm to *each* victim and (2) shot at *each* victim intending to do harm to *each* victim. Appellant's argument lacks a logical connection to the real world – a person can assault or kill multiple people through a single act, e.g. bombing, ramming with a car, throwing anything at a group. The individual is liable for the harm to each person. *See* United States v. McCarson, No. ACM 39178, 2018 CCA LEXIS 452, at *23 (A.F. Ct. Crim. App. May 2, 2018) (finding no abuse of discretion where the military judge ruled that the accused pointing a loaded handgun at a group of individuals in a sweeping motion supports "distinctly separate criminal act against a distinctly separate victim.").

However, the three specifications Appellant pleaded guilty to were for Appellant's intent to cause harm to each victim individually and offering to do that harm by shooting a loaded firearm at them. Therefore, Appellant's argument for unreasonable multiplication of charges does not prevail under the second factor of the Quiroz test. Appellant offered and intended to do harm to each victim by firing the gun five times in their direction as they walked away from him. He developed the intent necessary for distinct criminal acts and pleaded guilty to those facts. (R. at 126, 139, 152.) Dismissing the additional charge of aggravated assault with a dangerous weapon would not be justice, because Appellant shot at three people with the intent to harm each of them. This Court in United States v. Forrester held that "where acts constitute separate criminal conduct under the applicable statute . . . drafting separate charges and cumulative

punishments for those acts are not unreasonable." 76 M.J. at 485. Appellant intended to do them bodily harm; he had the means to do each bodily harm, so it wasn't an impossibility; and offered to do bodily harm to each by firing at them, thus placing them in fear of bodily harm. (R. at 122). Furthermore, he did harm victim JR, but Appellant only had to plead to the *offer* to do bodily harm rather than actual harm. Thus, separate charges are not unreasonable.

3. The number of charges and specification accurately depict Appellant's criminality.

Appellant's criminality is not "misrepresent[ed] [or] exaggerate[d]" through the charges as Appellant argues. Instead, the charges are a truthful representation of the multiple criminal acts Appellant intentionally performed. (App. Br. at 7-8.) While the three specifications are a result of Appellant shooting his firearm five times all at once, they accurately reflect Appellant's criminality in a way that one charge would not. Here, Appellant developed the requisite intent to harm multiple people – the three individuals walking away from him – thus, the specifications do not misrepresent or exaggerate his criminality. He then raised a loaded firearm and shot five times at them. Therefore, his offer to do them bodily harm is not exaggerated by charging him with assaulting each by offering to do them harm with a loaded firearm. The number of shots he fired only goes to demonstrate his stated intent to harm each of the people in the group individually. Thus, Appellant's criminality is not exaggerated through the multiple charges.

4. The number of charges and specifications does not unfairly increase the appellant's punitive exposure.

The number of charges and specification did not increase Appellant's punitive exposure for two straightforward reasons, which Appellant concedes. Appellant's offer of plea agreement limited his exposure for each individual specification to seven years apiece and to no more than seven years confinement for all specifications whether they ran concurrently, consecutively, or in

any combination thereof. (App. Ex. VIII). In United States v. Espinoza, the Army Court of Criminal Appeals concluded that appellant's punitive exposure was capped by the jurisdictional limits of his special court-martial and was not unreasonably increased by an additional specification, which is comparable to Appellant's plea terms here. 2013 CCA LEXIS 65 (Army Crim. App. Jan. 25, 2013). Furthermore, the military judge sentenced Appellant to five years confinement for each specification with all terms of confinement running concurrently; therefore, even if the specifications of the Additional Charge went away, Appellant's term of confinement would remain the same. (*Entry of Judgement*, ROT Vol.1). Finally, as addressed above, Appellant's conduct represented three distinct criminal acts, thus being exposed to confinement for each did not *unfairly* increase his punitive exposure. This factor weighs heavily in favor of the United States rather than supporting any sort of relief for Appellant.

5. There is no evidence of prosecutorial overreaching nor abuse in drafting of the charges.

Appellant concedes this factor in his brief, "[t]here is no evidence of prosecutorial overreach." (App. Br. at 8.) Furthermore, despite Appellant's argument otherwise, the PHO did not overreach. (Id.) It is within a PHO's purview to recommend additional charges and, thus, not inappropriate or unreasonable for the government to act on such a recommendation. *See* Air Force Legal Operations Agency, Military Justice Division, *Article 32 Preliminary Hearing Officer's Guide* (24 June 2019), Section 5, Reviewing the Charge Sheet. There is no evidence that the PHO was assuming a prosecutorial function when recommending additional charges be preferred.

For all of the above reasons, the military judge did not plainly err when she found Appellant guilty of the Specification of Charge I and Specification 1 and 2 of the Additional

Charge, because all five Quiroz factors weigh in favor of the specifications being distinct criminal conduct.

Since Appellant affirmatively waived this Assignment of Error at trial, and all five Quiroz factors weigh in favor of the United States, this Court should reject Appellant's request for relief for unreasonable multiplication of charges and uphold his convictions and sentence.

II.

APPELLANT'S SENTENCE IS APPROPRIATE.

Standard of Review

This Court reviews sentence appropriateness de novo. United States v. Baier, 60 M.J. 382, 383-384 (C.A.A.F. 2005). The Court may only affirm the sentence if it finds the sentence to be "correct in law and fact and determines, on the basis of the entire record, [it] should be approved." Article 66(d)(1), UCMJ.

Law

Sentence appropriateness is assessed "by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009).

Although this Court has great discretion to determine whether a sentence is appropriate, the Court has no authority to grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, CCAs are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

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.). "Absent evidence to the contrary, accused's own sentence proposal is a reasonable indication of its probable fairness to him." United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979) (citing United States v. Johnson, 41 C.M.R. 49, 50 (U.S.C.M.A. 1969)).

Analysis

First, Appellant argues that his sentence, specifically, confinement for five years and a dishonorable discharge, is inappropriately severe because the facts of his care are "not as bad as a more typical aggravated assaults with a dangerous weapon." (App. Br. at 12.) Appellant cites United States v. McCameron in support of his argument. No. ACM 40089, 2022 CCA LEXIS 663, at *6 (A.F. Ct. Crim. App. 17 Nov. 2022) (unpub. op.). Even if this were an appropriate case for sentence comparison, which Appellant has not established, his argument is still unpersuasive. In McCameron, the appellant did not fire the gun despite pointing it at the sole victim in a domestic violence incident. Here, unlike in McCameron, Appellant reacted to an altercation by retrieving his loaded gun, specifically asking where the victims went, confirming their identity through their clothing, and *actually firing* five shots at multiple victims leaving the premises. (R. at 144.) Despite Appellant's argument otherwise, pulling the trigger five times at multiple victims reasonably increased his confinement period in comparison to an incident with the same charge where the weapon was never fired.

Second, Appellant concedes that the injuries suffered by victim JR are why Appellant deserves "some punishment, but not five years of confinement," and that "the lack of injury" to the other two victims supports the sentence's excessiveness. (App. Br. at 13.) Appellant's

confinement of five years was not the maximum allowed under the plea agreement, which was seven years, and certainly nowhere close to the maximum authorized by law at 24 years of confinement. (R. at 156, 167.) Appellant received the benefit of his plea in more than just limiting his confinement exposure, too. Rather than being tried for attempted unpremeditated murder, Appellant pleaded to the lesser included offenses with Article 128, UCMJ and received the benefit of specifications against him being withdrawn and dismissed. (*Entry of Judgment*, ROT Vol 1.; App. Ex. VIII). Without the plea agreement, Appellant faced potential life imprisonment for attempted unpremeditated murder. 2019 MCM, Appendix 12.

Further, the lack of physical harm to victims KN and KF does not mean that they suffered no harm in surviving this crime. Victim KN testified that he had to take his shirt off to stop his friend of eight years from bleeding out and that this experience has made him jumpier, "scared with loud noises," and affected his mood at work. (R. at 190, 191.) Appellant will never be able to take back the effect he had on all the victims – physically injurious or not. Thus, five years of confinement is appropriate.

Using Appellant's collection of documents compiled in support of his sentencing and his eagerness to admit his wrongdoing, he argues that his criminal actions constituted a "passionate impulse" and "a single outburst" in the aftermath of a head injury. (App. Br. at 7, 15.) However, Appellant had enough time and wherewithal to pick himself up off the floor, go upstairs, unholster the loaded gun, come back down, ask where the victims were, point the gun, and pull the trigger five times. (R. at 132.) This demonstrated cognizance and intention to do harm cannot be overlooked in sentencing, since Appellant could have stopped himself before retrieving the gun or stayed upstairs to cool off, but he did not. He did not stop firing after one,

two, three, or four, but five bullets while aiming at three people. Appellant's adjudged sentence reflects his blatant disregard for the lives and safety of his three victims from that night.

Appellant's downplaying of his violent criminal conduct is concerning. Appellant had the opportunity to disengage from the situation when he went upstairs. Instead, he grabbed a firearm and callously endangered the lives of three human beings who were no longer posing any threat to him. He *intended* to harm each of those three human beings when he shot at them. He successfully hit one of them, causing injury. The adjudged sentence is necessary to deter Appellant and others from engaging in such wantonly violent and dangerous behavior and to send a message that such potentially lethal violence cannot be tolerated in our military or society. Appellant himself agreed in his plea agreement that his conduct could be deserving of up to 7 years in confinement – a strong indicator that his ultimate sentence was fair. Appellant's sentence within his own proposed range was fair and just, not inappropriately severe.

For these reasons, this court should reject Appellant's claim and uphold his sentence.

CONCLUSION

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

ALEXIS R. WOOLDRIDGE
Legal Intern[1]
Government Trial and Appellate Operations Division
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(240) 612-4800

[1] In accordance with Rule 9.1 of this Court's Rules of Practice and Procedure, Ms. Wooldridge was at all times supervised by attorneys of AF/JAJG during her participation in the writing of this motion.

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CERTIFICATE OF FILING AND SERVICE

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

MICHAEL E. HERNANDEZ
Senior Airman (E-4),
United States Air Force,
Appellant.

No. ACM 40287

REPLY BRIEF ON BEHALF OF APPELLANT

DAVID L. BOSNER, Maj, USAF
Air Force Appellate Defense Division
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SAMANTHA P. GOLSETH, Capt, USAF
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel 2
Senior Airman (E-4), **MICHAEL E. HERNANDEZ,** United States Air Force, *Appellant*.	)	No. ACM 40287
	)	Filed on: 28 April 2023

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

COMES NOW, Appellant, Senior Airman (SrA) Michael E. Hernandez, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and files this reply to Appellee's Answer [hereinafter Gov. Ans.],[1] filed on 24 April 2023. Appellant primarily rests on the arguments contained in the Brief on Behalf of Appellant [hereinafter App. Br.], filed on 23 March 2023, but submits the following additional matters for this Court's consideration.

[1] The Government's Answer is signed by a legal intern assigned to the Government Trial and Appellate Operations Division. The Government cited "Rule 9.1 of this Court's Rules of Practice and Procedure" as its authority for the intern to write and/or sign the brief. Gov. Ans. at 16 n. 1. Rule 9.1, however, states, "No attorney shall practice before this Court unless admitted to practice before this Court or appearing *pro hac vice* or as *amicus curiae* by leave of the Court." There has been no affirmative showing the intern is an attorney, is admitted to practice before this Court, is appearing *pro hac vice*, or is appearing as *amicus curiae* by leave of this Court.

I.

THE FINDINGS OF GUILTY TO THE ADDITIONAL CHARGE AND ITS SPECIFICATIONS SHOULD BE SET ASIDE AND DISMISSED BECAUSE THEY ARE UNREASONABLY MULTIPLIED WITH THE SPECIFICATION OF CHARGE I.

As a factual matter, the Government highlights in its Answer the exact reason why the three specifications are unreasonably multiplied. It wrote, "[Appellant] pulled the trigger *at them*." Gov. Ans. at 10 (emphasis added). That is correct. Appellant shot a weapon "at the group" of three people. R. at 121. For doing one bad act—firing a weapon over a matter of seconds—the Government obtained convictions for three assaults because three people happened to be in a singular group. Separately criminalizing this act three-fold is unreasonable and overreaches. To the extent the Government repeatedly mentions Appellant shot the weapon five times, that argument is unavailing. Gov. Ans. at 9, 10, 11, 14, 15. The five bullets did not inflict five injuries, or even three. Only JR was hit. R. at 127. By definition, this was "substantially one transaction." R.C.M. 307(c)(4), Discussion. Thus, it should not form the basis of three federal convictions. *Id*.

The crux of the disagreement on this issue has ramifications for Article 66 review well beyond Appellant's case and is something this Court should contend with. Appellant argued if this Court pierces waiver, review would be *de novo*. App. Br. at 7 (citing *United States v. Chin*, No. ACM 38452, 2015 CCA LEXIS 140 at *10 (A.F. Ct. Crim. App. 7 Apr. 2015) (unpub. op.) (concluding *de novo* review was appropriate to rectify a waived unreasonable multiplication of charges issue in a guilty plea context) *affirmed by United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016)). Without citation to authority, the Government wrote, "the applicable standard of review for this type of issue when not raised at trial and not alleging legal or factual insufficiency of the specifications is plain error[.]" Gov. Ans. at 6.

The Government ignores *Chin*, which directly answered this question. The Government did not argue *Chin* was wrongly decided or distinguishable, and therefore, inapplicable to the case at bar. It merely asserted plain error was the correct standard "rather than the carte blanche analysis Appellant requests under Article 66, UCMJ." Gov. Ans. at 6. But carte blanche Article 66 review is *exactly* what Congress authorized and the Court of Appeals for the Armed Forces (CAAF) has recognized. *See United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (describing the Court of Criminal Appeals' Article 66 review as a mandate to "carte blanche to do justice") (citation omitted)). This makes sense. Plain error review is a deferential form of review. This Court need not give such deference when it finds such deference is inappropriate and it seeks to "substitute its judgment for that of the military judge." *Chin*, unpub. op. at *10 (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). That is the purpose of piercing waiver.

Forfeiture is inapplicable to this case. Either no review may proceed because the issue is waived, or such waiver shall be pierced and the UMC issue reviewed *de novo*. The latter should occur in this case. The cardinal principle guiding this Court's decision ought to be justice. At the end of the day, is it appropriate for Appellant to be saddled with triple-convictions for shooting at a group over a second or two time-span? Or are the interests of the military justice system, the victims, and society sufficiently vindicated by affirming only one consolidated conviction?

The Government argues, "While the three specifications are a result of Appellant shooting his firearm five times all at once, they accurately reflect Appellant's criminality in a way that one charge would not." Gov. Ans. at 11. This fails to account for what Appellant actually asked for in his prayer for relief. *See* App. Br. at 8. Appellant did not ask for the specifications related to KN and KF to vanish. He asked for the three specifications to be consolidated into one and for this Court to dismiss the other two. *Id*. *Cf. United States v. Massey*, No. ACM 40017, 2023 CCA

LEXIS 46 (A.F. Ct. Crim. App. 30 Jan. 2023) (unpub. op.) (in the interest of justice, consolidating three specifications into one and dismissing the other two). No matter if there are analytically proper methods to distinguish *Massey* from the instant case, the core of *Massey* should guide this Court in Appellant's case. Namely, this Court was "not persuaded . . . that allowing [Massey] to stand convicted of three separate offenses [was] a just outcome." *Id*. at *38. This Court should similarly conclude allowing Appellant to stand convicted of three separate offenses is an unjust outcome. Finally, Appellant respectfully objects to the Government's contention that Appellant seeks a "windfall." Gov. Ans. at 7. Through this assignment of error, Appellant seeks no sentence reduction. Applying notions of fairness and justice to the findings can hardly be considered a windfall. If it is, the military justice system is unhealthy.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss, with prejudice, Specifications 1 and 2 of the Additional Charge, and the Additional Charge.

II.

THE SENTENCE IS INAPPROPRIATELY SEVERE.

It is black letter law that this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial" when assessing sentence appropriateness. *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (alteration in original) (citation omitted). However, the Government's Answer does not even mention *a single piece* of evidence related to Appellant's positive character evidence or matters in mitigation. A complete sentence severity analysis from the Government would have, at least, acknowledged such evidence, yet gone on to argue that the sentence is appropriate in light of the nature and seriousness of the offenses, or other matters. It

failed to do this. This Court may properly infer the Government's omission of these facts and arguments as an indication it could not adequately confront or counter that which Appellant presented in his appeal.

Appellant respectfully directs the Court's attention to the facts and argument offered on opening brief which vector this Court's *de novo* sentence appropriateness analysis towards the conclusion that Appellant is entitled to sentence relief. *See* App. Br. at 8-15.

WHEREFORE, Appellant respectfully requests this Honorable Court approve only so much of the sentence that calls for reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for two years, and a bad conduct discharge.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 28 April 2023.

Respectfully submitted,

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