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

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| **UNITED STATES,**<br>*Appellee,*<br><br>v.<br><br><br>Captain (O-3),<br>**Michael J. Hymel,**<br>United States Air Force,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ**<br><br><br><br><br>No. ACM XXXXXX<br><br>21 May 2024 |

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

On 12 September 2023, a general court-martial convened at Keesler Air Force Base, Mississippi, convicted Captain (Capt) Michael J. Hymel, consistent with his pleas, of one charge and specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892. The military judge sentenced Capt Hymel to 7 days of confinement, a reprimand, and to forfeit pay in the amount of $3,945.00 per month for one month. (Record of Trial (ROT) Vol. 1, Entry of Judgment, dated 27 September 2023; R. at 631.)

On 29 February 2024, the Government purportedly sent Capt Hymel the required notice by mail of his right to appeal within 90 days. Pursuant Article 66(b)(1)(A), UCMJ, Capt Michael J. Hymel files his notice of direct appeal with this Court.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4784
Email: michael.bruzik@us.af.mil

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 21 May 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4784
Email: michael.bruzik@us.af.mil

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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| **UNITED STATES** | ) | **No. ACM _____** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **NOTICE OF** |
| **Michael J. HYMEL** | ) | **DOCKETING** |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | |

On 21 May 2024, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

As of the date of this notice, the court has not yet received a record of trial in Appellant's case.

Accordingly, it is by the court on this 21st day of May, 2024,

**ORDERED:**

The case in the above-styled matter is referred to Panel 1.

**It is further ordered:**

The Government will forward a copy of the record of trial to the court forthwith.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

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

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|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME, OUT OF TIME (FIRST)** |
| v. | ) | Before Panel 1 |
| Captain (O-3), **MICHAEL J. HYMEL,** United States Air Force, *Appellant.* | ) | No. ACM 40627 |
| | ) | 14 August 2024 |

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Errors (AOE). Appellant request an enlargement for a period of 59 days, which will end on 12 October 2024. This case was docketed with this Court on 21 May 2024. This Court appears to have acknowledged receipt of the record of trial on 14 June 2024. From the date of that receipt to the present date, 61 days have elapsed. On the date requested 120 days will have elapsed.

Good cause exists to file this motion out of time. On 14 June 2024, the Air Force Appellate Defense Division ("Division") office signed for receipt of the complete Record of Trial and the Notice of Right to Submit Direct Appeal after transmittal by AFLOA/JAJM. This receipt also provided notice of the assigned ACM number. The receipt signed by the Division did not indicate whether the record of trial had been referred to this Court. (Appendix). The Division received no other notice to indicate that the record of trial had been docketed with this Court, despite the rule that "AFLOA/JAJM shall notify the Court, AFLOA/JAJA, and AFLOA/JAJG of the receipt of docketing of cases." A.F. CT. CRIM. APP. R. 3.2(d). This lack of notice prevented undersigned counsel from being aware that the record of trial had been filed with this Court so as to trigger the timing requirements of this Court's rules. A.F. CT. CRIM. APP. R. 18(d) ("Any brief for an accused shall be filed within 60 days after appellate counsel has been notified that the Judge Advocate General has referred the record to the Court.") Counsel remained unaware that the record of trial

had been received by this Court until 14 August 2024, thus preventing the timely submission of a request for enlargement of time.

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

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division 1500 West Perimeter Road, Suite 1100 Joint Base Andrews NAF, MD 20762-6604 Office: (240) 612-4770
michael.bruzik@us.af.mil

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 14 August 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division 1500 West Perimeter Road, Suite 1100 Joint Base Andrews NAF, MD 20762-6604 Office: (240) 612-4770
michael.bruzik@us.af.mil

15 August 2024

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>MICHAEL J HYMEL, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME, OUT OF TIME<br><br>ACM 40627<br><br>Panel No. 1 |

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

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

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

[redacted]

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 August 2024.

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

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

| | | |
|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (SECOND)** |
| v. | ) | Before Panel 1 |
| Captain (O-3), **MICHAEL J. HYMEL,** United States Air Force, *Appellant.* | ) | No. ACM 40627 |
| | ) | 14 August 2024 |

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

Pursuant to Rule 23.3(m) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignment of Errors (AOE). Appellant request an enlargement for a period of 30 days, which will end on **11 November 2024**. This case was docketed with this Court on 21 May 2024. This Court appears to have acknowledged receipt of the record of trial on 14 June 2024. From the date of that receipt to the present date, 112 days have elapsed. On the date requested 150 days will have elapsed.

On 4 December 2023, Captain (Capt) Michael J. Hymel was convicted, consistent with pleas, by a general court-martial convened at Keesler Air Force Base of one specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ). (R. at 501.) The military judge sentenced Capt Hymel to seven days of confinement and to forfeit $3,945.00 pay per month for one month. (R. at 631.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of five volumes. The transcript is 634 pages. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Of those, the following cases are counsel's highest priorities:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its twelfth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors with civilian counsel.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its ninth enlargement of time. Counsel has nearly completed an assignment of errors.
3) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its eighth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Counsel has been working diligently to complete work on *United States v. Martinez*, while also lending support towards an assignment of errors for *United States v. Hilton* with civilian counsel. Counsel has had to balance this while preparing for oral arguments in *United States v. Saul* which is before the Court of Appeals for the Armed Forces on 22 October 2024. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division 1500 West Perimeter Road, Suite 1100 Joint Base Andrews NAF, MD 20762-6604 Office: (240) 612-4770
michael.bruzik@us.af.mil

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 4 October 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division 1500 West Perimeter Road, Suite 1100 Joint Base Andrews NAF, MD 20762-6604 Office: (240) 612-4770
michael.bruzik@us.af.mil

7 October 2024

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>MICHAEL J HYMEL, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40627<br><br>Panel No. 1 |

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

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

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

[redacted]

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 October 2024.

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

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

| | | |
|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (THIRD)** |
| v. | ) | Before Panel 1 |
| Captain (O-3), **MICHAEL J. HYMEL,** United States Air Force, *Appellant.* | ) | No. ACM 40627 |
| | ) | 29 October 2024 |

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

Pursuant to Rule 23.3(m) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **11 December 2024**. This case was docketed with this Court on 21 May 2024. This Court appears to have acknowledged receipt of the record of trial on 14 June 2024. From the date of that receipt to the present date, 137 days have elapsed. On the date requested 180 days will have elapsed.

On 4 December 2023, Captain (Capt) Michael J. Hymel was convicted, consistent with pleas, by a general court-martial convened at Keesler Air Force Base of one specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ). (R. at 501.) The military judge sentenced Capt Hymel to seven days of confinement and to forfeit $3,945.00 pay per month for one month. (R. at 631.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of five volumes. The transcript is 634 pages. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Of those, the following cases are counsel's highest priorities:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its twelfth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors with civilian counsel.

2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its ninth enlargement of time. Counsel has nearly completed an assignment of errors.

3) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its eighth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Counsel has been work-saturated over the past thirty days. Counsel was busy preparing for oral arguments before the Court of Appeals for the Armed Forces (CAAF) in *United States v. Saul*, ACM 40341. Additionally, counsel submitted assignments of error to this Court in both *United States v. Martinez* and *United States v. Cepeda*. Finally, counsel submitted a supplement to petition for review to the CAAF in *United States v. Schneider*. Since completion of these, Counsel has been working through pending deadlines before the CAAF for *United States v. Bates* and *United States v. Vargo*, while attempting to take leave between 30 October 2024 and 5 November 2024. Counsel's top priority right now is completion of an assignment of errors for *United States v. Hilton*. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division 1500 West Perimeter Road, Suite 1100 Joint Base Andrews NAF, MD 20762-6604 Office: (240) 612-4770
michael.bruzik@us.af.mil

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 29 October 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division 1500 West Perimeter Road, Suite 1100 Joint Base Andrews NAF, MD 20762-6604 Office: (240) 612-4770
michael.bruzik@us.af.mil

31 October 2024

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

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|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>MICHAEL J. HYMEL, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40627<br><br>Panel No. 1 |

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

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

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

[redacted]

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 October 2024.

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

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

| | | |
|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (FOURTH)** |
| v. | ) | Before Panel 1 |
| Captain (O-3), **MICHAEL J. HYMEL,** United States Air Force, *Appellant.* | ) | No. ACM 40627 |
| | ) | 4 December 2024 |

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

Pursuant to Rule 23.3(m) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 January 2025**. This case was docketed with this Court on 21 May 2024. This Court appears to have acknowledged receipt of the record of trial on 14 June 2024. From the date of that receipt to the present date, 173 days have elapsed. On the date requested 210 days will have elapsed.

On 4 December 2023, Captain (Capt) Michael J. Hymel was convicted, consistent with pleas, by a general court-martial convened at Keesler Air Force Base of one specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ). (R. at 501.) The military judge sentenced Capt Hymel to seven days of confinement and to forfeit $3,945.00 pay per month for one month. (R. at 631.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of five volumes. The transcript is 634 pages. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined.

Undersigned counsel is currently assigned 20 cases; 11 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its fourteenth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting an assignment of errors along with civilian counsel.

2) *United States v. Jenkins*, ACM S32765 – The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. This case in its tenth enlargement of time. Counsel is working towards completion of an assignment of errors.

3) *United States v. Titus*, ACM 40557 - The record of trial consists of four volumes. The transcript is 142 pages. There are five prosecution exhibits, five defense exhibits, 31 appellate exhibits, and five court exhibits. This case is on its ninth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete an in-depth review of Appellant's case. Counsel has been busy working towards completion of an assignment of errors for *United States v. Jenkins*. The brief for that case is due to this Court on 12 December 2024, and Counsel worked on it through the Thanksgiving weekend. Additionally, counsel has been working with civilian counsel in *United States v. Hilton*, which required him to dedicate time to coordinate the transmission of sealed exhibits. Counsel has had to balance his work before this Court with other priorities before the Court of Appeals for the Armed Forces (CAAF). On 13 November 2024, counsel submitted a supplement for petition for review to the CAAF in *United States v. Bates*. This supplement addressed five issues. Additionally, counsel submitted a supplement for petition for review and a response to motion to dismiss to the CAAF in *United States v. Vargo* on 20 November 2024. Counsel worked through the weekend on 16 November 2024 in order to comply with the deadline set by the CAAF, while tending to a lingering illness that required him to go home from the office on multiple days. Additionally,

counsel was on leave between 30 October 2024 and 5 November 2024. These circumstances and priorities have prevented counsel from being able to dedicate the time necessary for this case beyond a preliminary review. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division 1500 West Perimeter Road, Suite 1100 Joint Base Andrews NAF, MD 20762-6604 Office: (240) 612-4770
michael.bruzik@us.af.mil

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 4 December 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division 1500 West Perimeter Road, Suite 1100 Joint Base Andrews NAF, MD 20762-6604 Office: (240) 612-4770
michael.bruzik@us.af.mil

5 December 2024

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

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|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>MICHAEL J. HYMEL, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40627<br><br>Panel No. 1 |

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

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

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

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 December 2024.

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

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40627** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Michael J. HYMEL** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 6 January 2025, counsel for Appellant submitted a Motion for Enlargement of Time Out of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposed 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 8th day of January, 2025,

**ORDERED:**

Appellant's Motion for Enlargement of Time Out of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **9 February 2025**.

Each request for an enlargement of time will be considered on its merits. Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

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

| | | |
|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME, OUT OF TIME (FIFTH)** |
| v. | ) | Before Panel 1 |
| Captain (O-3), **MICHAEL J. HYMEL,** United States Air Force, *Appellant.* | ) | No. ACM 40627 |
| | ) | 6 January 2025 |

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

Pursuant to Rule 23.3(m) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignment of Errors (AOE).[1] Appellant requests an enlargement for a period of 30 days, which will end on **9 February 2025**. This case was docketed with this Court on 21 May 2024.[2] This Court appears to have acknowledged receipt of the record of trial including the verbatim transcript on 14 June 2024. From the date of that receipt to the present date, 206 days have elapsed. On the date requested 240 days will have elapsed.

On 4 December 2023, Captain (Capt) Michael J. Hymel was convicted, consistent with pleas, by a general court-martial convened at Keesler Air Force Base of one specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ). (R. at 501.) The military judge sentenced Capt Hymel to seven days of confinement and to forfeit $3,945.00 pay per month for one month. (R. at 631.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

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[1] Counsel originally filed for a fifth enlargement of time in this case on 3 January 2025. However, that motion did not contain the time that had elapsed since docketing or the amount time that will have elapsed between docketing and the requested date. Counsel withdraws that motion and submits this one instead at the direction of the court. Good cause exists because Counsel's filing on 3 January 2025 was timely and contained the relevant information to rule on this motion under Rule 18(d)(2) of the Joint Rules of Appellate Procedure, which is the timeline beginning with this Court's receipt of the record of trial with the verbatim transcript. This is the same information that this Court has used in granting each of the previous requests for enlargement of time in this case.

[2] From the date of docketing until the present date, 230 days have elapsed. From the date of docketing until the date requested, 264 days will have elapsed.

The record of trial consists of five volumes. The transcript is 634 pages. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined.

Undersigned counsel is currently assigned 20 cases; 10 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Rodriguez*, ACM 40565 – The record of trial consists of two volumes. The transcript is 86 pages. There are two prosecution exhibits, six defense exhibits, and five appellate exhibits. This case is on its ninth enlargement of time.
2) *United States v. Sanger*, ACM S32773 – The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. This case is on its seventh enlargement of time.
3) *United States v. Licea*, ACM 40602 - The record of trial consists of seven electronic volumes, and the transcript is 173 pages. There are 12 prosecution exhibits, five defense exhibits, 22 appellate exhibits, and one court exhibit. This case is on its sixth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters which has prevented him from completing an in-depth review of the record of trial. Counsel was occupied with the completion of an assignment of errors for *United States v. Jenkins*, which counsel worked on through the Thanksgiving weekend and submitted to this Court on 12 December 2024. Additionally, counsel worked through his leave over the Christmas holiday to complete work on an assignment of errors for *United States v. Hilton*, which was submitted to this Court on 27 December 2024. Counsel is also occupied with the completion of a supplement for petition for review for the Court of Appeals for the Armed Forces in *United States v. Scott* which is due on 7 January 2025, which counsel worked on through the New Year holiday. Accordingly, an enlargement of time is necessary for counsel to continue reviewing the record of trial and to advise appellant on potential errors.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division 1500 West Perimeter Road, Suite 1100 Joint Base Andrews NAF, MD 20762-6604 Office: (240) 612-4770
michael.bruzik@us.af.mil

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 6 January 2025.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
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michael.bruzik@us.af.mil

7 January 2025

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>MICHAEL J. HYMEL, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40627<br><br>Panel No. 1 |

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

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

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

[redacted]

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 January 2025.

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

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

| | | |
|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (SIXTH)** |
| v. | ) | Before Panel 1 |
| Captain (O-3), **MICHAEL J. HYMEL,** United States Air Force, *Appellant.* | ) | No. ACM 40627 |
| | ) | 1 February 2025 |

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

Pursuant to Rule 23.3(m) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **11 March 2025**. This case was docketed with this Court on 21 May 2024.[1] This Court appears to have acknowledged receipt of the record of trial including the verbatim transcript on 14 June 2024. From the date of that receipt to the present date, 232 days have elapsed. On the date requested 270 days will have elapsed.

On 4 December 2023, Captain (Capt) Michael J. Hymel was convicted, consistent with pleas, by a general court-martial convened at Keesler Air Force Base of one specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ). (R. at 501.) The military judge sentenced Capt Hymel to seven days of confinement and to forfeit $3,945.00 pay per month for one month. (R. at 631.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of five volumes. The transcript is 634 pages. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined. Counsel has advised Capt Hymel on his right to speedy appellate review as well as this request for an enlargement of time. Capt Hymel agrees to the request. Additionally, counsel has

[1] From the date of docketing until the present, 256 days have relapsed. From the date of docketing until the date requested, 294 days will have elapsed.

advised Capt Hymel as to the current status of the case.

Undersigned counsel is currently assigned 20 cases; 9 cases are pending initial AOEs before this Court. Undersigned military counsel's top priorities before this Court are as follows:

1) *United States v. Sanger*, ACM S32773 – The record of trial consists of two electronic volumes. The transcript is 141 pages. There are four prosecution exhibits, one defense exhibit, and four appellate exhibits. This case is on its eighth enlargement of time.
2) *United States v. Licea*, ACM 40602 - The record of trial consists of seven electronic volumes, and the transcript is 173 pages. There are 12 prosecution exhibits, five defense exhibits, 22 appellate exhibits, and one court exhibit. This case is on its seventh enlargement of time.
3) *United States v. Torres Gonzalez*, ACM 24001 - The record of trial consists of six volumes and a 608-page transcript. There are 46 prosecutions exhibits, eight defense exhibits, and 25 appellate exhibits. This case is on its seventh enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters which has prevented him from completing an in-depth review of the record of trial. Undersigned military counsel has recently been detailed to *United States v. Cook*, a case which the C.A.A.F. granted for review on 29 January 2025. The grant brief and joint appendix are due for that case on 19 February 2025. Additionally, counsel has been hard at work on an Assignment of Errors in *United States v. Sanger*. That case has presented wide complexity, and counsel anticipates raising five errors before this Court. Given this, counsel has worked through the previous two weekends on it. These efforts have been strained by medical issues that one of counsel's close family members has experienced which has required counsel to drive to the Walter Reed Medical Center three days a week for treatment during hours of operation. Accordingly, an enlargement of time is necessary for counsel to continue reviewing the record of trial and to advise appellant on potential errors.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division 1500 West Perimeter Road, Suite 1100 Joint Base Andrews NAF, MD 20762-6604 Office: (240) 612-4770
michael.bruzik@us.af.mil

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 February 2025.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division 1500 West Perimeter Road, Suite 1100 Joint Base Andrews NAF, MD 20762-6604 Office: (240) 612-4770
michael.bruzik@us.af.mil

4 February 2025

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Captain (O-3)<br>MICHAEL J. HYMEL, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40627<br><br>Panel No. 1 |

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

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

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

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 February 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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

| | | |
|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** |
| v. | ) | Before Panel 1 |
| Captain (O-3), **MICHAEL J. HYMEL,** United States Air Force, *Appellant.* | ) | No. ACM 40627 |
| | ) | 3 March 2025 |

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

Pursuant to Rule 23.3(m) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 April 2025**. This case was docketed with this Court on 21 May 2024.[1] This Court appears to have acknowledged receipt of the record of trial including the verbatim transcript on 14 June 2024. From the date of that receipt to the present date, 262 days have elapsed. On the date requested 300 days will have elapsed.

On 4 December 2023, Captain (Capt) Michael J. Hymel was convicted, consistent with pleas, by a general court-martial convened at Keesler Air Force Base of one specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ). (R. at 501.) The military judge sentenced Capt Hymel to seven days of confinement and to forfeit $3,945.00 pay per month for one month. (R. at 631.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of five volumes. The transcript is 634 pages. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined. Counsel has advised Capt Hymel on his right to speedy appellate review as well as this request for an enlargement of time. Capt Hymel agrees to the request. Additionally, counsel has

[1] From the date of docketing until the present, 286 days have relapsed. From the date of docketing until the date requested, 324 days will have elapsed.

advised Capt Hymel as to the current status of the case.

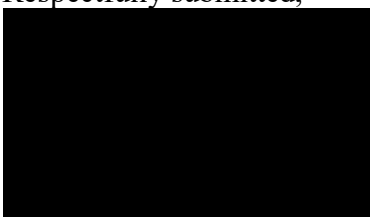
Undersigned counsel is currently representing 6 clients; 6 clients are pending initial AOEs before this Court. This record has not yet been reviewed. One matter currently has priority over this case:

1. *Lovell*, No. ACM 40614 – 85 pages – presently on EOT 7. The record has been reviewed and is in the process of being briefed. The record is two volumes, includes 4 prosecution exhibits, 5 appellate exhibits, and 85 pages of transcript. SrA Lovell is confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters which has prevented him from completing an in-depth review of the record of trial. Accordingly, an enlargement of time is necessary for counsel to continue reviewing the record of trial and to advise appellant on potential errors.

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

Respectfully submitted,



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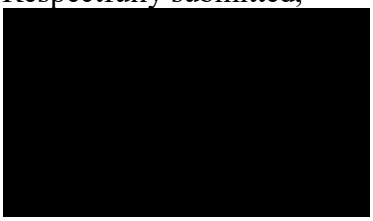
**CERTIFICATE OF FILING AND SERVICE**

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 3 March 2025.

Respectfully submitted,



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5 March 2025

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br><br>v.<br><br><br>Captain (O-3)<br>MICHAEL J. HYMEL, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES'<br>OPPOSITION TO APPELLANT'S<br>MOTION FOR ENLARGEMENT<br>OF TIME<br><br>Before Panel No. 1<br><br>No. ACM 40627<br><br>5 March 2025 |

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstance, 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.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 March 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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United States Air Force
(240) 612-4800

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

| | | |
|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** |
| v. | ) | Before Panel 1 |
| Captain (O-3), **MICHAEL J. HYMEL,** United States Air Force, *Appellant.* | ) | No. ACM 40627 |
| | ) | 24 March 2025 |

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

Pursuant to Rule 23.3(m) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 May 2025**. This case was docketed with this Court on 21 May 2024.[1] This Court appears to have acknowledged receipt of the record of trial including the verbatim transcript on 14 June 2024. From the date of that receipt to the present date, 283 days have elapsed. On the date requested 330 days will have elapsed.

On 4 December 2023, Captain (Capt) Michael J. Hymel was convicted, consistent with pleas, by a general court-martial convened at Keesler Air Force Base of one specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ). (R. at 501.) The military judge sentenced Capt Hymel to seven days of confinement and to forfeit $3,945.00 pay per month for one month. (R. at 631.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

The record of trial consists of five volumes. The transcript is 634 pages. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined. Counsel has advised Capt Hymel on his right to speedy appellate review as well as this request for an enlargement of time. Capt Hymel agrees to the request. Additionally, counsel has

[1] From the date of docketing until the present, 307 days have relapsed. From the date of docketing until the date requested, 354 days will have elapsed.

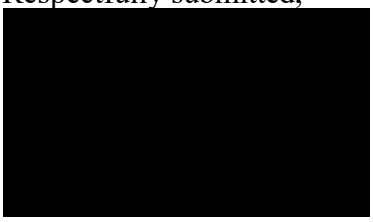
advised Capt Hymel as to the current status of the case.

Undersigned counsel is currently representing 6 clients; 5 clients are pending initial AOEs before this Court. This record has been reviewed and potential issues are being researched. No matters have priority over this case.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters which previously prevented him from completing an in-depth review of the record of trial. Accordingly, an enlargement of time is necessary for counsel to continue researching the potential issues and to advise appellant on potential errors.

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

Respectfully submitted,



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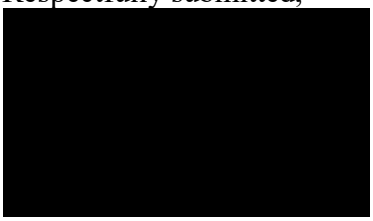
**CERTIFICATE OF FILING AND SERVICE**

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 24 March 2025.

Respectfully submitted,



LUKE D. WILSON, Lt Col, USAF
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Email: luke.wilson.14@us.af.mil

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

| | | |
|---|---|---|
| **UNITED STATES**, *Appellee,* | ) | UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME |
| v. | ) | |
| | ) | Before Panel No. 1 |
| Captain (O-3) **MICHAEL J. HYMEL,** United States Air Force, *Appellant.* | ) | No. ACM 40627 |
| | ) | 24 March 2025 |

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

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

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

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

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
1500 W. Perimeter Road, Suite 1190
Joint Base Andrews, MD
DSN: 612-4809

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 March 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
1500 W. Perimeter Road, Suite 1190
Joint Base Andrews, MD
DSN: 612-4809

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40627** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Michael J. HYMEL** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 8 April 2025, counsel for Appellant moved this court by way of a consent motion to permit Appellant's counsel and government appellate counsel to examine the following materials, sealed by the military judge: Appellate Exhibits (A.E.) III–VI and VIII. These materials were viewed by trial counsel and trial defense counsel at trial.

Our review of the record revealed the following discrepancies that we order corrected: (1) that A.E. XV was ordered sealed by the military judge, but is not sealed in the record; (2) that the closed session transcript pages 18–35 are not sealed in the record; (3) that the audio recording of the closed session is not separated from the audio recording of the open sessions and is not sealed; and (4) that upon this court's review of the United States Air Force Judge Advocate General's Corps WebDocs knowledge management system, these same transcript pages, pages 18–35, are not sealed and are available for anyone with access to WebDocs.

Neither party has brought these matters to the court's attention. Nor has either party requested that these matters be sealed. Nevertheless, the court may *sua sponte* order these materials sealed in accordance with Rule for Courts-Martial (R.C.M.) 1113, *Manual for Courts-Martial*, *United States* (2024 ed.) (2024 *MCM*).

The Clerk of the Court will ensure transcript pages 18–35, A.E. XV, and the disc containing the audio recording of the trial are properly sealed. However, we order the Government to produce an audio recording of the open sessions of Appellant's court-martial on a disc separate from the disc containing the closed session and move to have it attached to the record of trial, and to remove transcript pages 18–35 from the WebDocs system online.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a

proper fulfillment of the appellate counsel's responsibilities." R.C.M. 1113(b)(3)(B)(i) (2024 *MCM*).

The court has considered Appellant's motion, the Government's consent, and this court's Rules of Practice and Procedure. The court finds Appellant's counsel has made a colorable showing that review of the following sealed materials is necessary to fulfill counsel's duties of representation to Appellant: A.E. III–VI, VIII, and XV; transcript pages 18–35; and the closed hearing audio.

Accordingly, it is by the court on this 9th day of April, 2025,

**ORDERED:**

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

Appellate defense counsel and appellate government counsel may view **A.E. III–VI, VIII, and XV; transcript pages 18–35; and the closed hearing portions of the audio recording** subject to the following conditions:

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

Except as outlined in this order, no counsel will photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.

**It is further ordered:**

The Government shall take all steps necessary to ensure **transcript pages 18–35, A.E. XV, and the current audio disc containing closed session audio** in the possession of any Government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.[*]

However, if appellate defense counsel and appellate government counsel possess any of the sealed materials, counsel are authorized to retain copies of same in their possession until completion of this court's Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's case, to include the period for reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After this period, appellate defense counsel and appellate government counsel shall destroy any retained copies of the sealed materials in their possession.

The Government will also take all steps necessary to produce an audio recording of the open sessions of Appellant's court-martial on a disc separate

[*] The base legal office may maintain a sealed copy in accordance with Department of the Air Force Manual 51-203, *Records of Trial*, ¶ 9.3.6 (21 Apr. 2021).

from the disc containing the closed session and properly move to have the disc attached to Appellant's record of trial.

Further, the Government will ensure that the Air Force Judge Advocate General's Corps WebDocs knowledge management system removes closed-session transcript pages 18–35 of Appellant's court-martial proceeding as soon as practicable.

The Government will provide this court notice that it has complied with this order, and produce an audio recording disc of the open sessions of Appellant's court-martial for the court **not later than 7 May 2025**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

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

| | | |
|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **CONSENT MOTION TO EXAMINE SEALED MATERIALS** |
| v. | ) | |
| | ) | Before Panel No. 1 |
| | ) | |
| Captain (O-3) **MICHAEL J. HYMEL** United States Air Force, *Appellant.* | ) | No. ACM 40627 |
| | ) | 8 April 2025 |

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

Pursuant to Rules 3.1, 23.1(b), and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine the following sealed materials in Appellant's record of trial:

1) Appellate Exhibits III-VI, and VIII.

**Facts**

On 4 December 2023, Captain (Capt) Michael J. Hymel was convicted, consistent with pleas, by a general court-martial convened at Keesler Air Force Base of one specification of dereliction of duty in violation of Article 92, Uniform Code of Military Justice (UCMJ). (R. at 501.) The military judge sentenced Capt Hymel to seven days of confinement and to forfeit $3,945.00 pay per month for one month. (R. at 631.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

During the proceedings, the parties reviewed and discussed the relevant appellate exhibits. They are related to an MRE 412 motion filed by the defense. The military trial judge ordered the

materials to be sealed. See Appellate Exhibit XV.

**Law**

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

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

*United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[1] perform "reasonable diligence,"[2] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[3] These requirements are consistent with those imposed by the state bar to which counsel belong.[4]

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel detailed by the Judge Advocate General shall

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[1] Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).
[2] *Id*. at Rule 1.3.
[3] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).
[4] Undersigned counsel is licensed to practice law in Mississippi.

represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870.

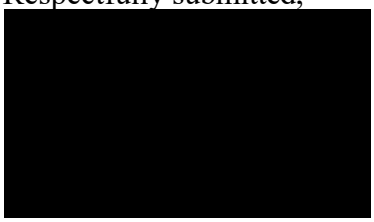
**Analysis**

The parties "presented" and "reviewed" the sealed material at trial. It is reasonably necessary for Appellant's counsel to review this sealed exhibit for counsel to competently conduct a professional evaluation of Appellant's case and to uncover all issues which might afford him relief. Because examination of the material in question is reasonably necessary to the fulfillment of counsel's Article 70, UCMJ, duties, and because the contents of the disc were made available to the parties at trial, Appellant has provided the "colorable showing" required by R.C.M. 1113(b)(3)(B)(i) to permit his counsel's examination of the sealed material and has shown good cause to grant this motion.

The Government consents to both parties viewing the sealed material detailed above.

**WHEREFORE**, Appellant respectfully requests that this Honorable Court grant this consent motion and permit appellate counsel for the Appellant and the Government to examine the aforementioned sealed material contained within the original record of trial.

Respectfully submitted,



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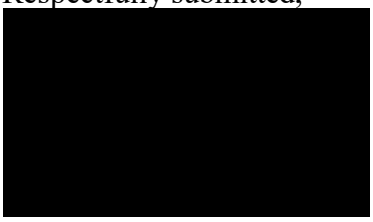
**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 8 April 2025.

Respectfully submitted,



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# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40627** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Michael J. HYMEL** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

In its 9 April 2025 order, this court granted Appellant's Consent Motion to Examine Sealed Materials. As part of this order, the court ordered in error that Appellate Exhibit XV was to be sealed as it believed the military judge ordered it sealed. Appellate Exhibit XV is an "Order to Seal" by the military judge and does not need to be sealed. The court amends its 9 April 2025 order.

Accordingly, it is by the court on this 11th day of April, 2025,

**ORDERED:**

The Government shall take all steps necessary to ensure **transcript pages 18–35 and the current audio disc containing closed session audio** in the possession of any Government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.[*] **Appellate Exhibit XV** no longer needs to be retrieved and destroyed.

The remainder of this court's order of 9 April 2025 remains in effect.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

[*] The base legal office may maintain a sealed copy in accordance with Department of the Air Force Manual 51-203, *Records of Trial*, ¶ 9.3.6 (21 Apr. 2021).

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

| | | |
|---|---|---|
| **UNITED STATES**,<br>*Appellee,* | ) | NOTICE OF STATUS OF COMPLIANCE |
| v. | ) | Before Panel No. 1 |
| Captain (O-3)<br>**MICHAEL J. HYMEL**<br>United States Air Force<br>*Appellant.* | ) | No. ACM 40627<br><br>7 May 2025 |

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

Pursuant to this Court's 9 April 2025 order, and 11 April amendment, the United States provides notice of the status of compliance with this Court's order.

This Court ordered the Government to:

- Ensure transcript pages 18-35 and the current audio disc containing closed sessions audio in the possession of any Government office, Appellant, counsel for Appellant (trial or appellate), or any other known copy, be retrieved and destroyed.
- Produce an audio recording of the open sessions of Appellant's court-martial on a disc separate from the disc containing the closed session and properly move to have the disc attached to Appellant's record of trial.
- Ensure that the Air Force Judge Advocate General's Corps WebDocs knowledge management system (WebDocs) removes closed-session transcript pages 18-35 of Appellant's court-martial proceeding as soon as practicable.

(Order, dated 9 April 2025; Order, dated 11 April 2025).

The United States has complied with this Court's order. Both of Appellant's trial defense counsel and the base legal office have confirmed that the electronic copies of pages 18-35 of the

transcript have been destroyed. The base legal office confirmed that the audio disc that contained both the open and closed sessions of Appellant's court-martial have been destroyed and replaced with one disc containing the open sessions and one, under seal, containing the closed sessions. WebDocs has removed the closed-session transcript pages, pages 18-35 of Appellant's court-martial, from the site. Appellant's appellate defense counsel has directed Appellant to destroy his copy of the sealed material. Finally, the Government has produced an audio recording of the open sessions of Appellant's court-martial on a disc separate from the disc containing the closed sessions and has properly moved to have the disc attached to Appellant's record of trial.

**WHEREFORE**, the United States requests this Honorable Court accept this filing as confirmation of the Government's compliance with its 9 April 2025 order.

[redacted]

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[redacted]

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 7 May 2025.

HEATHER R. BEZOLD, Capt, USAF
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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

---

**UNITED STATES,**
*Appellee*,

v.

**MICHAEL J. HYMEL,**
Captain (O-3),
United States Air Force,
*Appellant*.

---

**No. ACM 40627**

---

**BRIEF ON BEHALF OF APPELLANT**

---

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*Counsel for Appellant*

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

| | | |
|---|---|---|
| **UNITED STATES** | ) | BRIEF ON BEHALF OF APPELLANT |
| | ) | |
| *Appellee,* | ) | Before Panel No. 1 |
| | ) | |
| v. | ) | ACM 40627 |
| | ) | |
| Captain (O-3) | ) | |
| **MICHAEL J. HYMEL**, | ) | 12 May 2025 |
| United States Air Force, | ) | |
| | ) | |
| *Appellant.* | ) | |

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

**Assignments of Error**

**I.**

**WHETHER APPELLANT'S PLEA TO DERELICTION OF DUTY IS IMPROVIDENT BECAUSE (1) THE MILITARY JUDGE FAILED TO ELICIT A FACTUAL BASIS THAT APPELLANT'S DRINKING AND DANCING WAS INAPPROPRIATE AND UNPROFESSIONAL CONDUCT WITH AIRMAN FIRST CLASS AB THAT DETRACTED FROM THE SUPERIOR-TO-SUBORDINATE RELATIONSHIP, AND (2) THE MILITARY JUDGE FAILED TO ELICIT A VIOLATION OF AIR FORCE INSTRUCTION 1-1.**

**II.**

**APPELLANT, A MEMBER OF THE LOUISIANA AIR NATIONAL GUARD, WAS ALLEGEDLY INVOLUNTARILY RECALLED TO ACTIVE DUTY TO STAND TRIAL BY GENERAL COURT-MARTIAL. DESPITE THIS, THE RECORD IS MISSING THE FACTS NECESSARY TO ESTABLISH PERSONAL JURISDICTION OVER APPELLANT AT THE TIME OF THE REQUIRED STAGES OF THE COURT-MARTIAL. WHETHER THE CHARGE AND SPECIFICATION MUST BE DISMISSED BECAUSE THE RECORD DOES NOT ESTABLISH THAT THOSE ACTIONS WERE PROPERLY TAKEN AND THE GOVERNMENT CANNOT PROVE THA T THE COURT-MARTIAL HAD PERSONAL JURISDICTION OVER APPELLANT.**

**Statement of the Case**

Appellant was tried by a general court-martial composed of a military judge alone at Keesler Air Force Base (AFB), Mississippi, on 26-27 September 2024. The Charges and Specifications on which he was arraigned, his pleas, and the findings of the court-martial are summarized as follows:

| Charge | UCMJ Art | Spec | Summary of Offense | Plea | Finding |
|---|---|---|---|---|---|
| I | 120 | | | NG | Withdrawn and dismissed (with prejudice attaching upon completion of appellate review) |
| | | 1 | Did at or near Andersen Air Force Base, Guam, between on or about 6 July 2019 and on or about 7 July 2019, cause Airman First Class AB to touch his penis with her hand with an intent to gratify his sexual desire without her consent. | NG | Withdrawn and dismissed (with prejudice attaching upon completion of appellate review) |
| | | 2 | Did at or near Andersen Air Force Base, Guam, between on or about 6 July 2019 and on or about 7 July 2019, touch the groin of Airman First Class AB with his hand with an intent to gratify his sexual desire, without her consent. | NG | Withdrawn and dismissed (with prejudice attaching upon completion of appellate review) |
| II | 128 | | | NG | Withdrawn and dismissed |

| | | | | | |
|---|---|---|---|---|---|
| | | | | | (with prejudice attaching upon completion of appellate review) |
| | | 1 | Did at or near Andersen Air Force Base, Guam, between on or about 6 July 2019 unlawfully kiss Airman First Class AB on the neck with his lips | NG | Withdrawn and dismissed (with prejudice attaching upon completion of appellate review) |
| III | 131b | | | NG | Withdrawn and dismissed (with prejudice attaching upon completion of appellate review) |
| | | 1 | Did at or near Andersen Air Force Base, Guam, between on or about 6 July 2019 and on or about 17 September 2019, on diverse occasions, wrongfully do certain acts, to wit: telling Airman First Class AB to not report his misconduct, with the intent to impede the due administration of justice in his own case of which he had reason to believe that there were or would be criminal proceedings pending. | NG | Withdrawn and dismissed (with prejudice attaching upon completion of appellate review) |
| IV | 134 | | | NG | Withdrawn and dismissed (with prejudice |

| | | | | | |
|---|---|---|---|---|---|
| | | | | | attaching upon completion of appellate review) |
| | | 1 | Did at or near Andersen Air Force Base, Guam, between on or about 10 June 2019 and on or about 17 September 2019, knowingly fraternize with Airman First Class AB, an enlisted person, on terms of military equality, to wit: socializing and drinking alcohol in an inappropriate personal capacity with Airman First Class AB in violation of the custom of the United States Air Force that officers shall not fraternize with enlisted persons on terms of military equality and that said conduct was to the prejudice of good order and discipline in the armed forces. | NG | Withdrawn and dismissed (with prejudice attaching upon completion of appellate review) |
| | | 2 | Did at or near Andersen Air Force Base, Guam, between on or about 10 June 2019 and on or about 17 September 2019 knowingly fraternize with Airman First Class AB, an enlisted person, on terms of military equality, to wit: socializing and drinking alcohol in an inappropriate personal capacity with Master Sergeant DRB in violation of the custom of the United States Air Force that officers shall not fraternize with enlisted persons on terms of military equality and that said conduct was to the prejudice of good order and discipline in the armed forces. | NG | Withdrawn and dismissed (with prejudice attaching upon completion of appellate review) |
| Add'l Charge | 92 | | | G | G |
| | | 1 | Who knew of his duties at or near Andersen Air Force, Guam, on or about 6 July 2019, was derelict in the performance of those duties in that he willfully failed to refrain from engaging in inappropriate and unprofessional conduct with A1C AB, that detracted from the superior to subordinate authority in violation of Air Force Instruction 1-1, Air Force Standards, as it was his duty to do. | G | G |

*See* R. at Vol 1, Entry of Judgment.

The military judge sentenced Appellant to seven days of confinement and to forfeit $3,945.00 pay per month for one month. Tr. at 631. The convening authority took no action on the findings or sentence. *See* R. at Vol 1, Convening Authority Decision on Action.

## Statement of Facts

**1. The deployment.**

At the time of the alleged offense, Appellant was a lieutenant in the Louisiana Air National Guard (LAANG). *See* Volume 3, Preliminary Hearing Officer (PHO) Exhibit 5. Around June of 2019 he was placed on Title 10 orders to lead group of fellow LAANG members on a three-to-four-month deployment to Andersen Air Force Base (Andersen AFB), Guam. Tr. at 437-38. During the deployment, he was assigned to the 201st Mission Support Squadron (201 MSS), Joint Base Andrews, Maryland, for administrative control (ADCON), and assigned to the 36th Munitions Group (36 MG), Andersen AFB, for operational control (OPCON). Tr. at 438. In that deployed group of LAANG members was Airman First Class (A1C) AB. *See* R. at Vol 1, Pros. Ex. 1.

One night early in the deployment, Appellant went to eat with eighteen to twenty LAANG members from his flight for an unofficial outing. Pros. Ex. 1 at 2; Tr. at 441-42. A1C AB was a part of that group. Tr. at 441. Appellant was not drinking that night as the flight sat at a single table. Tr. 441-42. At some point during the night, A1C AB began to engage in a conversation of a sexual nature with other members of the flight. Tr. at 441. Members of the flight drew Appellant's attention to the conversation, at which time Appellant said, "[I]f I were enlisted I would engage in the conversation," but, because he was an officer, "they knew that

[he] could not," and he did not engage in the conversation further. *Id*. At no point did Appellant make an inappropriate sexual comment to A1C AB. Tr. 595-96.

Later during the deployment, around 6 July 2019, Appellant went socializing with the flight's First Sergeant, Master Sergeant (MSgt) DB. Pros. Ex. at 2; Tr. at 442. During the evening, people bought Appellant drinks. Tr. at 448. Eventually, he drank to the point of intoxication. Tr. at 442.

Although unplanned, Appellant and MSgt DB ended up at the same bar as other enlisted members of the flight. Tr. 443. At some point during this evening, Appellant ended up dancing on a crowded dance floor in close proximity to A1C AB. Tr. at 447. Appellant did not touch A1C AB, nor did he make "any sexual displays of any kind to her." Tr. at 447, 596.

That night, upon returning to the hotel where the flight was staying, Appellant and A1C AB walked to the beach to meet up with other members of the flight who were congregating there. Tr. at 444. When he arrived, Appellant separated from the group, found a lounge chair, and went to sleep. *Id*.

**2. The recall.**

Although it is unclear from the record exactly how the Second Air Force (2 AF) and the 81st Training Wing (81 TRW) at Keesler AFB, Mississippi, became involved in the case, at some point they became instrumental in the involuntary recall of Appellant onto active duty for his court-martial. *See* R. at Volume 2, Pretrial Documents.

This appears to have resulted in three charge sheets with three preferrals and two referrals. *See* R. at Volume 2 (Charge Sheet with 201 MSS/CC preferral dated 8 Jun 2022), Volume 1 (Charge Sheet with 201 MSS/CC preferral dated 30 June 2022, 2 AF referral dated 16 Sept 2022), Volume 1 (Charge Sheet 2 AF preferral dated 26 Sep 23, 2 AF referral dated 26 Sept

2023). The 8 June 2022 charges were withdrawn and dismissed on 22 June 2022. *See* R. at Volume 2.

Additionally, the record contains three sets of orders for Appellant: an 18 April 2019 set of orders (*see* R. at Volume 3, PHO Exhibit 5), an 8 June 2022 set of orders placing Appellant in Title 10 status for a day (*see* R. at Volume 2), and a 29 June 2022 set of orders placing Appellant in Title 10 status for a day (*see* R. at Volume 2). At some point, Appellant requested to be put on continuous Title 10 orders, but was denied. Tr. at 457, 583.

**3. The court-martial.**

At trial, Appellant pled guilty to one specification of dereliction of duty in violation of Article 92, UCMJ, 10 U.S.C. § 892. Tr. at 419. During the providence inquiry, the military judge explained the elements of the offense as follows:

> (1) That [Appellant] had a certain duty, that is: refraining from engaging in inappropriate and unprofessional conduct with Airman First Class [AB] that detracted from the superior-to subordinate authority, in violation of Air Force Instruction 1-1, Air Force Standards;
>
> (2) That [Appellant] knew of that duty, and
>
> (3) That on or about 6 July 2019, [Appellant was] willfully derelict in the performance of that duty by willfully failing to refrain from engaging in inappropriate and unprofessional conduct with Airman First Class [AB] that detracted from the superior-to subordinate authority, in violation of Air Force Instruction 1-1, Air Force Standards.

Tr. at 435.

The military judge explained the source of the duty described in element one as being "captured" in Air Force Instruction (AFI) 1-1. Tr. at 445. Specifically, the judge pointed to paragraph 2.2.2. of AFI 1-1. Tr. at 598. Paragraph 2.2.2. of AFI 1-1 states,

> With respect to relationships between superiors and subordinates, whether they are other military members or civilian employees, there is a balance that recognizes the

> appropriateness of a relationship. Social interaction that contributes appropriately to unit cohesiveness and effectiveness is encouraged. Relationships are unprofessional when they detract from the supervisor-to-subordinate authority or reasonably create the appearance of favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests. This is true whether pursued and conducted on or off duty.

During the trial, the trial counsel entered a Stipulation of Fact into evidence. Pros. Ex. 1. Among other things, it stated the following:

> Capt Hymel socialized with Airmen in the unit and engaged [in] conversations of a personal nature that were inappropriate between a commissioned officer and enlisted servicemembers.
>
> Capt Hymel was overly familiar with A1C [AB], discussing topics topics [sic] of a nature and in a manner that suggested they were on terms of military equality. This undermined his superior-to-subordinate authority both in his dealings with A1C [AB] and others.
>
> Capt Hymel participated in a group conversation that included discussion of a sexual intercourse, past sexual experiences, and A1C [AB]'s viewing of her boyfriend's penis.
>
> Capt Hymel danced in very close proximity and in a provocative manner inappropriate between a commissioned officer and an enlisted servicemember.
>
> Capt Hymel was so inebriated that he fell asleep in a chair and remained there until the morning.

Pros. Ex. 1 at 2.

However, during the providence inquiry, the reopened providence inquiry, and the unsworn statement, Appellant denied these facts. Tr. at 441 (Appellant only engaged in the conversation at the restaurant to say that he could not engage in the conversation), 447 (stating that proximity to A1C AB on the dance floor was only due to the crowded nature of the floor), 573 (denying offering to show A1C AB his penis), 574 (denying buying A1C AB drinks), 577 (denying sexually assaulting A1C AB), 578 (denying making sexual advances toward A1C AB), 595 (denying making any inappropriate sexual comments to A1C AB), and 596 (denying making comments regarding A1C AB's boyfriend's penis, denying any sexual contact with A1C AB, and denying "sexual displays of any kind" to A1C AB); *see also* Def. Ex. G.

The military judge accepted Appellant's statements and summed up the facts remaining on the record to support the offense as, "excessive drinking passing out on a chair in front of subordinates," and "dancing on a tight dance floor with subordinates[.]" Tr. at 597. Appellant then agreed that the conduct was inappropriate. Tr. at 598.

## Argument

## I.

**APPELLANT'S PLEA TO DERELICTION OF DUTY IS IMPROVIDENT BECAUSE (1) THE MILITARY JUDGE FAILED TO ELICIT A FACTUAL BASIS THAT APPELLANT'S DRINKING AND DANCING WAS INAPPROPRIATE AND UNPROFESSIONAL CONDUCT WITH A1C AB THAT DETRACTED FROM THE SUPERIOR-TO-SUBORDINATE RELATIONSHIP, AND (2) THE MILITARY JUDGE FAILED TO ELICIT A VIOLATION OF AIR FORCE INSTRUCTION 1-1.**

### *Standard of Review*

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea. *United States v. Passut*, 73 M.J. 27, 29 (C.A.A.F. 2014).

### *Law and Analysis*

"Article 45(a), UCMJ, 10 U.S.C. § 845(a) (2000), requires military judges to reject a plea of guilty 'if it appears that [an accused] has entered the plea of guilty improvidently.'" *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009). "To prevent the acceptance of improvident pleas, [the] Court [of Appeals for the Armed Forces] has long placed a duty on the military judge to establish, on the record, the factual bases that establish that 'the acts or omissions of the accused constitute the offense or offenses to which he is pleading guilty.'" *Id*. (citation omitted).

"If the military judge fails to establish that there is an adequate basis in law and fact to support the accused's plea during the *Care* inquiry, the plea will be improvident." *Id*.

**A. The military judge failed to elicit a factual basis that Appellant's drinking and dancing was inappropriate and unprofessional conduct with A1C AB that detracted from the superior-to-subordinate relationship.**

Before accepting a guilty plea, a military judge must ensure that there is a factual basis for the accused's plea. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). A sufficient factual basis for a plea, in turn, requires *a sufficient factual basis for each element* of the offense for which the accused is pleading. *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004)(emphasis added). Additionally, "a military judge must elicit *actual facts* from an accused and not merely legal conclusions." *United States v. Moratalla*, 82 M.J. 1, 3 (C.A.A.F. 2021) (citing *United States v. Price*, 76 MJ 136, 138 (C.A.A.F. 2017)). *See also United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996) ("Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea."). Additionally, "[a] providence inquiry into a guilty plea must establish, *inter alia*, 'not only that the accused himself believes he is guilty but also that the factual circumstances as revealed by the accused himself objectively support that plea.'" *United States v. Higgins*, 40 M.J. 67, 68 (C.A.A.F. 1994) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)).

A military judge's failure to obtain an adequate factual basis for a guilty plea constitutes an abuse of discretion. *Inabinette*, 66 M.J. at 322. However, military judges are afforded significant deference on this point and are granted substantial leeway in conducting providence inquiries. *Moratalla*, 82 M.J. at 4. In determining whether a military judge abused his or her discretion, a court applies the "substantial basis" test. *Inabinette*, 66 M.J. at 322. Specifically,

the court asks "whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Id*.

The elements applicable to the specification for a *Dereliction in the performance of duties* offense are:

(a) That the accused had certain duties;

(b) That the accused knew or reasonably should have known of the duties; and

(c) That the accused was willfully derelict in the performance of those duties.

*Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 18(b)(3).

In the instant case, the military judge stated the relevant duty at issue as "refraining from engaging in inappropriate and unprofessional conduct with Airman First Class [AB] that detracted from the superior-to-subordinate authority, in violation of Air Force Instruction 1-1, Air Force Standards." Tr. at 435.

Although the Stipulation of Fact listed a number of different instances of Appellant's conduct that, presumably, were meant to have provided the factual basis for Appellant's alleged duty violation, Appellant denied most of the allegations during the providence inquiry. For instance:

| Stipulation of Fact | Providence Inquiry |
|---|---|
| "Capt Hymel socialized with Airmen in the unit and engaged [in] conversations of a personal nature that were inappropriate between a commissioned officer and enlisted servicemembers." Pros. Ex. 1 at para. 6. | Appellant said he only engaged in the conversation to tell the members that he could not engage in the conversation. Tr. at 441. |
| "Capt Hymel was overly familiar with A1C [AB], discussing topics topics [sic] of a nature and in a manner that suggested they were on terms of military equality. This undermined his superior-to-subordinate authority both in his dealings with A1C [AB] and others." Pros. Ex. 1 at para. 6. | Appellant denied stating any inappropriate sexual comments to A1C AB, Tr. at 595, and no other conversations were elicited from Appellant by the military judge. |

| | |
|---|---|
| "Capt Hymel participated in a group conversation that included discussion of a sexual intercourse, past sexual experiences, and A1C [AB]'s viewing of her boyfriend's penis." Pros. Ex. 1 at para. 7. | Appellant denied participation in the group conversation, Tr. at 441, denies stating any inappropriate sexual comments to A1C AB, Tr. at 595, and denies stating anything about A1C AB seeing her boyfriend's penis, Tr. at 596. |
| "Capt Hymel danced in very close proximity and in a provocative manner inappropriate between a commissioned officer and an enlisted servicemember." Pros Ex. 1 at para. 8. | Appellant agreed that he danced in close proximity, but stated it was due to a crowded dance floor. Tr. at 447. Appellant denied touching A1C AB on the dance floor, Tr. at 447, denied any sexual contact with A1C AB, and denied "sexual displays of any kind to her." Tr. at 596. |

These apparent inconsistencies were not reconciled by the military judge, as is required Article 45(a), UCMJ. *See also Outhier*, 45 M.J. at 331. In fact, by the end of the reopened providence inquiry, the military judge had elicited only two facts to act as a factual basis to the specification. The military judge summed those facts up as "excessive drinking passing out on a chair in front of subordinates," and "dancing on a tight dance floor with subordinates[.]" Tr. at 597.

After narrowing the bases for the specification, the military judge failed to elicit any facts to establish what exactly it was that made the drinking and dancing "inappropriate and unprofessional conduct with" A1C AB. Presumably, there is nothing *inherently* inappropriate or unprofessional about drinking and dancing in the presence of subordinates; otherwise, many official Air Force functions are inherently violations of the UCMJ. Indeed, although set in the context of Conduct Unbecoming an Officer, a similar conclusion was recently reached in *United States v. Hilton*. No. ACM 40500, 2025 CCA Lexis 142 (A.F. Ct. Crim. App. 4 Apr. 2025) (unpub. op.). The appellant in *Hilton* was charged with, among other things, conduct unbecoming an officer for being intoxicated in the presence of enlisted subordinates. *Id*. at *12. This Court held that "there [were] insufficient facts to support the conclusion that merely being

drunk in the presence of the subordinates actually dishonored or disgraced Appellant by seriously compromising his standing as an officer." *Id*. Similarly, in the instant case merely drinking to the point of intoxication in the presence of enlisted subordinates by itself is not inappropriate or unprofessional. More facts would be needed to establish the inappropriate or unprofessional nature of the drinking.

Not only did the military judge fail to elicit how—beyond mere conclusions—drinking and dancing was "inappropriate and unprofessional," he never elicited how the alleged inappropriate and unprofessional drinking and dancing "detracted from the superior-to subordinate authority."

Lastly, the military trial judge failed to elicit any facts to explain how Appellant's alleged inappropriate and unprofessional drinking and dancing that somehow detracted from the superior-to-subordinate relationship crossed from the encouraged "[s]ocial interaction that contributes appropriately to unit cohesiveness and effectiveness" into an unprofessional relationship as described by AFI 1-1.

The military judge's actions of eliciting only that Appellant drank and danced in the presence of his subordinates, and later fell asleep, without eliciting how those acts were inappropriate and unprofessional conduct that detracted from the superior-to-subordinate authority in violation of AFI 1-1 was an abuse of discretion.

**B. The military judge failed to elicit a violation of AFI 1-1 because the duties contained in AFI 1-1 do not prohibit the conduct alleged in the specification.**

Appellant's plea is also improvident because the military judge failed to elicit a violation of AFI 1-1 because the duties contained in AFI 1-1 do not prohibit the conduct alleged in the specification. That is to say, while AFI 1-1 does contain a number of duties, it does not contain a duty "to refrain from engaging in inappropriate and unprofessional conduct … that detract[s]

from the superior-to subordinate authority." The judge did not elicit the necessary facts, because he could not elicit them; it was not possible for "inappropriate and unprofessional conduct" to violate AFI 1-1.

"Article 92(3), UCMJ, requires the existence of a duty." *United States v. Hayes*, 71 M.J. 112, 114 (C.A.A.F. 2012). "The *MCM* states that the duty 'may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.'" *Id*. (quoting *MCM*, pt. IV, para. 16.c.(3)(a)). Dereliction of duty "requires proof of certain military duties, it does not assume such duties." *Id*. Stated another way, "When a servicemember is tried for dereliction of duty, 'the existence of the duty must be demonstrated by the evidence.'" *United States v. Tanksley*, 36 M.J. 428, 430 (C.M.A. 1993) (quoting *United States v. Shelly*, 19 M.J. 325, 328 (C.M.A. 1985)).

The alleged duty in the specification of the instant case was the duty to refrain "from engaging in inappropriate and unprofessional conduct with Airman First Class [AB] that detracted from the superior-to-subordinate authority." *See* DD Form 458, *Charge Sheet*, 26 Sept 2023. According to the specification, that duty exists and was imposed upon Appellant by AFI 1-1. Tr. at 446. Specifically, paragraph 2.2.2. of AFI 1-1 was allegedly implicated. *Id*., Tr. at 598. This is the only source of a duty the military trial judge went over with Appellant, Tr. at 445-46, and it was the duty the military judge explained as the essential element of the offense. Tr. at 435.

However, the focus of AFI 1-1 is on *relationships* between superiors and subordinates and what happens when those relationships turn unprofessional. The duty it establishes, if any, is the duty to maintain professional relationships; it does not create a duty to generally abstain from all inappropriate or unprofessional conduct. AFI 1-1 states,

> With respect to relationships between superiors and subordinates, whether they are other military members or civilian employees, there is a balance that recognizes the appropriateness of a relationship. Social interaction that contributes appropriately to unit cohesiveness and effectiveness is encouraged. Relationships are unprofessional when they detract from the supervisor-to-subordinate authority or reasonably create the appearance of favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests. This is true whether pursued and conducted on or off duty.

AFI 1-1, para. 2.2.2.

Thus, even if the military did properly establish that Appellant "engag[ed] in inappropriate and unprofessional conduct with Airman First Class AB that detracted from the superior-to subordinate authority," – which, as discussed above, he did not establish– it would not matter because that behavior does not violate AFI 1-1. DD Form 458, *Charge Sheet.* It does not violate AFI 1-1 because AFI 1-1 does not prohibit the charged behavior. Paragraph 2.2.2. only prohibits maintaining relationships that are unprofessional.

The existence of a duty to refrain from engaging in inappropriate and unprofessional conduct with A1C AB that detracted from the superior-to-subordinate authority, was assumed by the military judge. Such assumptions are legally insufficient to support a conviction. *See Hayes*, 71 M.J. at 114; *Tanksley*, 36 M.J. at 430. Because the duty Appellant allegedly violated was not established by the evidence, and was only assumed, the conviction is legally insufficient.

A failure to establish an underlying duty created a similar result in *Hayes*, 71 M.J. 112. In *Hayes*, the appellant was found guilty of, among other offenses, dereliction of duty. *Id*. The specification alleged the appellant had a duty to refrain from "drinking alcohol while under the age of 21." *Id*. at 113. The trial counsel explained that the source of that duty came from the state law of Nevada, and the appellant had a "military duty to obey state law." *Id*. The C.A.A.F. disagreed, saying, "There is no evidence in the record, and the Government points to none on appeal, to support the proposition that Appellant was bound by a military duty, stemming from a

custom of the service and subject to sanction under Article 92(3), UCMJ, to obey Nevada's alcohol law, or in the alternative, all state laws in Nevada." *Id*. at 114.

The appellant in *Hayes* may in fact had a duty to refrain from underage consumption of alcohol, but the government's proffered source for the duty failed to actually impose that duty. That is precisely the flaw in the instant case. Appellant may have had a general duty to act professionally and appropriately, but AFI 1-1 does not impose such a duty. Thus, any duty in this case was assumed by the military judge, rather than being demonstrated by the evidence.

**WHEREFORE**, Appellant respectfully requests this Honorable Court set aside his conviction.

## II.

**APPELLANT, A MEMBER OF THE LOUISIANA AIR NATIONAL GUARD, WAS ALLEGEDLY INVOLUNTARILY RECALLED TO ACTIVE DUTY TO STAND TRIAL BY GENERAL COURT-MARTIAL. DESPITE THIS, THE RECORD IS MISSING THE FACTS NECESSARY TO ESTABLISH PERSONAL JURISDICTION OVER APPELLANT AT THE TIME OF THE REQUIRED STAGES OF THE COURT-MARTIAL. THE CHARGE AND SPECIFICATION MUST BE DISMISSED BECAUSE THE RECORD DOES NOT ESTABLISH THAT THOSE ACTIONS WERE PROPERLY TAKEN AND THE GOVERNMENT CANNOT PROVE THA T THE COURT-MARTIAL HAD PERSONAL JURISDICTION OVER APPELLANT.**

### *Standard of Review*

"The question of jurisdiction is a question of law that [appellate courts] review de novo." *United States v. Begani*, 81 M.J. 273, 276 (C.A.A.F. 2021).

### *Law and Analysis*

**A. Establishing Personal Jurisdiction over an ANG member who is no longer on Title 10 to stand trial via court martial**

**1. Court Martial Jurisdiction**

"Generally, there are three prerequisites that must be met for courts-martial jurisdiction to vest: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial." *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006) (citing Rule for Courts-Martial (R.C.M.) 201(b)).

"The test for [personal] jurisdiction . . . *is one of status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'" *Kinsella v. United States*, 361 U.S. 234, 240-41 (1960) (emphasis added). "[J]urisdiction over the person depends on the person's status as a 'person subject to the Code' *both at the time of the offense and at the time of trial*." *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012) (emphasis added).

**2. Jurisdictional issues cannot be waived, and they are the Government's burden to prove**.

"When challenged, the Government must prove jurisdiction by a preponderance of evidence." *United States v. Morita*, 74 M.J. 116, 121 (C.A.A.F. 2015). It does not matter at what stage of the proceedings the jurisdictional challenge is raised. *See* R.C.M. 907(b)(1) ("*Grounds for dismissal*. Grounds for dismissal include the following— (1) *Nonwaivable grounds*. A charge or specification shall be dismissed at any stage of the proceedings if the court-martial lacks jurisdiction to try the accused for the offense.").

The non-waivablity applies to personal jurisdiction, as well as subject matter jurisdiction. "Questions of jurisdiction are not subject to waiver." *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005). "Jurisdiction over the person, as well as jurisdiction over the subject matter, may not be the subject of waiver." *Id*. (citing *United States v. Garcia*, 17 C.M.R. 88, 94 (C.M.A. 1954)).

**3. To establish personal jurisdiction, the military must abide by its own regulations.**

As discussed below, the cases of *United States v. Kilbreth* and *United States v. Peel* stand for the proposition that the failure to abide by the appropriate procedures to place a member of the national guard on active duty divests a court of personal jurisdiction over the accused. 47 C.M.R. 327 (C.M.A. 1973); 4 M.J. 28 (C.M.A. 1977).

In *United States v. Kilbreth*, the accused, a member of the Arkansas National Guard was ordered to active duty because of unsatisfactory participation with his guard unit. 47 C.M.R. at 328. He failed to appear for that recall, was apprehended, and tried for unauthorized absence. *Id*. He was then ordered to an active-duty unit, for which he again failed to appear. *Id*. He was again apprehended and again tried for unauthorized absence. *Id*. During this second court-martial the accused's defense counsel argued that the Army procedures used to initially determine unsatisfactory participation "were not followed, with the result that the accused was not properly a member of the Army, and, therefore, was not subject to the Uniform Code." *Id*. The court agreed, holding "that the failure to comply with essential procedural requirements in the call-up of a reservist . . . constitutes a denial of due process and invalidates the order to active duty." *Id*. at 329. Because of this, the court dismissed the charge "for lack of jurisdiction over the accused." *Id*. at 330.

A similar result occurred in *United States v. Peel*. 4 M.J. 28. In *Peel*, the accused, a member of the Missouri National Guard, consented to being called to active duty for specific training at Fort Leonard Wood that was set to last a specific amount of time. *Id*. at 28-29. However, once those orders ended, he was further ordered to report for additional training at Fort Knox. *Id*. at 29. The accused did not consent to the Fort Knox orders, nor did the Missouri National Guard give authority to change the orders. *Id*. The court found that the accused's

original "Fort Leonard Wood orders" required the state adjutant general's (TAG) to order the accused to active duty, and that trying to extend those orders without TAG approval was impermissible. The court held, "Army and National Guard regulations implement the mandate of the statute [used to call the accused to active duty] vesting the state adjutant general with the authority to order to active duty." *Id*. The court further held, "[R]etention of a national guardsman after the term of active duty specified in orders by state officials without further authorization by them is not allowable." *Id*. The court then dismissed the charges "for lack of jurisdiction over the accused." *Id*.

Again, *Kilbreth* and *Peel* stand for the proposition that the military must follow its own procedures when involuntarily recalling a service member; the failure to abide by the appropriate procedures to place a member of the national guard on active duty divests a court of personal jurisdiction over the accused. *See* 47 C.M.R. 327 (C.M.A. 1973); 4 M.J. 28 (C.M.A. 1977). Thus, unless the appropriate procedures were followed in the instant case, the court had no personal jurisdiction over the accused.

**4. The requirements to involuntarily recall a member of the Air National Guard to stand trial by court-martial.**

As stated above, services must abide by their procedures to place a member of the national guard on active duty in order to effect personal jurisdiction over the accused; failure to do so renders the jurisdiction of a court-martial void.

The creation of the involuntary recall procedures begins with Congress and the UCMJ. In Article 2 of the UCMJ, Congress directed the President to create the required rules needed to involuntarily recall a member of the Air Reserve Component to active duty in order to subject them to the personal jurisdiction of a court martial. *See* 10 U.S.C. § 802. Article 2 states, among others, that "[a] member of a reserve component who is not on active duty and who is made the

subject of [court-martial] proceedings . . . may be ordered to active duty involuntarily . . . ." 10 U.S.C. § 801(d)(1). But the "[a]uthority to order a member to active duty" for such proceedings is limited by statute to when involuntary recall is "exercised under regulations prescribed by the President." 10 U.S.C. § 802(d)(3).

The President then directed the Secretaries of the branches to create the required rules needed to involuntarily recall a member of the Air Reserve Component to active duty in order to subject them to the personal jurisdiction of a court-martial. R.C.M. 204 states,

> Rule 204. Jurisdiction over certain reserve component personnel
>
> (a) *Service regulations*. The Secretary concerned shall prescribe regulations setting forth rules and procedures for the exercise of court-martial jurisdiction … over reserve component personnel under Article … 2(d)

The Air Force then issued Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice* (24 January 2024). Section 3B—Jurisdiction, UCMJ Authority, and Recall Process—spells out exactly what must occur to involuntarily recall a member of the Air Reserve Component to active duty in order to subject them to the personal jurisdiction of a court-martial.

Before a court martial may exercise jurisdiction over a member of the Air National Guard, DAFI 51-201 requires, among other things, the following:

> The "[c]onvening authorities with concurrent jurisdiction *must* coordinate before disposition is determined." Paras. 3.3.1. and 3.3.2.2. (emphasis added);
>
> "[P]rior to taking judicial action against an ANG member, legal offices, commanders, and convening authorities at all attached Regular DAF unit or host commands *must* coordinate with 201 MSS through Air National Guard Readiness Center (ANGRC)." Para. 3.3.2.2. (emphasis added);
>
> "Attached/host command legal office coordination with the Military Justice Attorney for the National Guard Bureau, Office of the General Counsel (NGB-GC) is *required*." Para. 3.3.2.2. (emphasis added);

"When ANGUS members have or are about to revert to a State or Title 32 status, the previously attached Regular DAF unit or host command legal office *must* contact the Military Justice Attorney for NGB-GC . . . to discuss the timing of exercising jurisdiction and options for maintaining jurisdiction." Para. 3.3.3.2.1. (emphasis added);

"If the attached Regular DAF unit or host command will not be able to complete UCMJ disciplinary action by . . . court-martial before an ANGUS member's status reverts to a non-federal status, the Regular DAF unit or host command should contact the SJA for the Regular Air Force or Space Force unit that is geographically closest to the member's home state ANG wing." Para. 3.3.3.2.2.;

"In order for an ARC member to be adjudged confinement or any other restriction on liberty, SecAF must approve the recall to active duty." Para. 3.5.1.;

"[T]he local legal office supporting the relevant SPCMCA will coordinate with the GCMCA legal office and the Military Justice Attorney for NGB-GC . . . when determining whether ANG member recall to active duty is appropriate in each applicable case." Para. 3.6.2.2.1.;

The "local SPCMCA legal office will work with the NGB-GC legal advisor on the process to involuntarily recall the ANG member to active duty." Para. 3.6.2.2.1.;

The GCMCA, in consultation with its SJA, evaluates recall recommendations made by the subordinate unit, legal office, and, as applicable, servicing OSTC District Office. Para. 3.7.1.

In order to proceed with recall, the GCMCA SJA concurs with the local SPCMCA SJA's evaluation of the evidence that establishes a probable cause standard has been met and that NJP or court-martial is an appropriate UCMJ process. Para. 3.7.1.1.

"[T]he Military Justice Attorney for NGB-GC forwards the [recall] recommendation to the 201 MSS/CC for concurrence." Para. 3.7.3;

"[T]he 201 MSS/CC requests the applicable state TAG's documented consultation and concurrence with the decision to seek the ANG member's involuntary recall to active duty." Para. 3.7.3;

"If confinement is sought, the recall request is routed through AF/JAJI to the SecAF for approval." Para. 3.7.4.

Further, DAFI 51-201 also explains that "[a]n ARC member must be in a Title 10 federal status for the following stages in the court-martial process:"

- Preferral, (para. 3.5.2.2.);

- Article 32 preliminary hearing, (para. 3.5.2.3.);

- Service of referral documents, (para. 3.5.2.4.);

- Any court-martial proceeding at which the accused has a right to be present, to include arraignment and sentencing proceedings, (para. 3.5.2.5.).

DAFI 51-201, Section 3B, para. 3.5.2.

**B. The Record of Trial must contain sufficient evidence to establish that a court martial had personal jurisdiction of an accused.**

Especially in the case of a member of the Air National Guard who has been involuntarily recalled onto active duty to stand trial, simple averments on the record by trial counsel that personal jurisdiction exists to try a member are insufficient. Once all the jurisdictional procedures described above are abided by, and the court has personal jurisdiction over the member by virtue of the member being properly ordered onto active duty for every critical stage of the court-martial process, there must be sufficient evidence on the record to prove that the court-martial had personal jurisdiction over an accused during preferral, the Article 32 hearing, the service of referral documents, and all court-martial proceedings. *See* DAFI 51-201, para. 3.5.2.; *Runkle v. United States*, 122 U.S. 543 (1887); and *United States v. Singleton*, 45 C.M.R. 206 (C.M.A. 1972).

The Supreme Court has stated, "To give effect to [courts-martial] sentences it must appear affirmatively and unequivocally that the court . . . had jurisdiction . . . ." *Runkle*, 122 U.S. at 556. "There are no presumptions in its favor so far as these matters are concerned." *Id*. "[A]verment of jurisdiction shall be positive; the declaration shall state expressly the fact on which jurisdiction depends." *Id*. "It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments." *Id*.

The Court of Military Appeals (CMA) echoed *Runkle* in *United States v. Singleton*. 45 C.M.R. 206. In *Singleton*, the CMA was deciding a jurisdictional issue. *Id*. at 207. The specific

issue was, "Appellate defense counsel contend[ed] that the original court-martial order was defective and did not confer jurisdiction because no counsel had been detailed in the order; that the subsequent oral modification was ineffective in conferring jurisdiction to these otherwise defective proceedings." *Id*.

The CMA first held that detailed trial and defense counsel were necessary for a court-martial to establish jurisdiction. *Id*. at 208. But, more importantly for this argument, the CMA pointed out that, even though the military judge and the counsel stated on the record that they in-fact had been detailed to the court, that they acted "on the basis of alleged oral orders alone." *Id*. The CMA then held,

> We in no way intend to disparage the statements of the military judge and trial and defense counsel as to their appointments. We are constrained, however, to hold that this record is silent with regard to the contents of the oral appointment, when it was made or by whom. In sum, it is impossible to determine that the convening authority, or one acting as such in his absence, made the appropriate appointments as he is required to do so by both the Code and the Manual.
>
> We hold, therefore, that the court-martial in this case not having been convened "in entire conformity with the provisions of the statute," it was without jurisdiction to proceed.

*Id*. at 208 (citation omitted).

In other words, *Runkle* and *Singleton* taken together stand for the proposition that a record of trial must contain sufficient evidence to show that a court-martial has personal jurisdiction over an accused, and mere averments and inferences are insufficient.

Additionally, the requirement that sufficient evidence of personal jurisdiction appear in the record of trial makes logical sense. If jurisdiction is not waivable and can be raised at any time -- including on appeal -- it makes sense to require that sufficient evidence of personal jurisdiction appear in the record so that a reviewing court has the facts necessary to do the necessary review.

**C. Appellant's Record of Trial lacks sufficient evidence to demonstrate the court-martial had personal jurisdiction over him at all the necessary stages of the court martial.**

Although Appellant's record of trial does contain *some* evidence that the DAFI 51-201 procedures to involuntarily recall a member of the National Guard to stand trial by court-martial, it does not contain sufficient evidence that the Government abided by all the necessary steps. As discussed above, these steps are jurisdictional and, therefore, must adequately appear on the record.

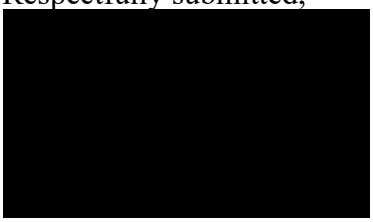
Further, the record is devoid of any evidence that Appellant was on active duty during the preferral of the charges, the Article 32 preliminary hearing, the service of referral documents, or during court-martial proceeding at which he had a right to be present.

**D. Prejudice**

"A jurisdictional defect goes to the underlying authority of a court to hear a case." *Alexander*, 61 M.J. at 269. "Thus, a jurisdictional error impacts the validity of the entire trial and mandates reversal." *Id*.

**WHEREFORE**, Appellant respectfully requests this Honorable Court set aside his conviction.

Respectfully submitted,



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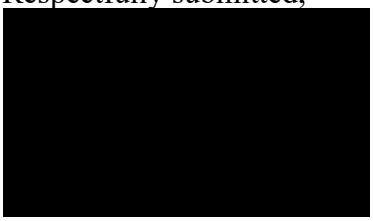
**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 12 May 2025.

Respectfully submitted,



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# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40627** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Michael J. HYMEL** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 9 April 2025, this court ordered the Government to "take all steps necessary to produce an audio recording of the open sessions of Appellant's court-martial on a disc separate from the disc containing the closed session and properly move to have the disc attached to Appellant's record of trial," with a suspense date of 7 May 2025.

On 7 May 2025, the Government complied with the court's 9 April 2025 order by moving this court to attach a disc that purports to contain the audio recording of the open sessions of Appellant's court-martial. However, nothing in the motion to attach avers that the parties an opportunity to examine the audio and there is no attached certification of the audio file.

Accordingly, it is by the court on this 20th day of May, 2025,

**ORDERED:**

The Government's motion to attach dated 7 May 2025 is **DENIED**. The Government will again take all steps necessary to produce a *certified* audio recording of the open sessions of Appellant's court-martial on a disc separate from the disc containing the closed session and properly move to have the disc attached to Appellant's record of trial.

The Government will produce the certified audio recording disc of the open sessions of Appellant's court-martial for the court **not later than 30 May 2025**.

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

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

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| **UNITED STATES**,<br>*Appellee,* | ) | **MOTION TO ATTACH DOCUMENTS** |
| v. | ) | Before Panel No. 1 |
| Captain (O-3)<br>**MICHAEL J. HYMEL**<br>United States Air Force<br>*Appellant.* | ) | No. ACM 40627<br><br>7 May 2025 |

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

Pursuant to Rule 23(b) of this Honorable Court's Rules of Practice and Procedure, the United States moves to attach the following to the Record of Trial:

- Appendix - Recording of Open Sessions of US v. Michael J. Hymel (1 Disc containing 3 audio files)

The attached Appendix is responsive to this Courts 9 April 2025 order. This Court ordered the disc containing both the open and closed sessions of Appellant's court-martial sealed. In addition, this Court ordered:

> The Government will also take all steps necessary to produce an audio recording of the open sessions of Appellant's court-martial on a disc separate from the two discs containing closed sessions and properly move to have the disc attached to Appellant's record of trial not later than 7 May 2025.

(Order, 9 April 2025).

The Appendix contains the audio recording of the open sessions of Appellant's court-martial.

**WHEREFORE**, the United States respectfully requests this Court grant this motion.

[redacted]
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Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
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[redacted]
MARY ELLEN PAYNE
Associate Chief
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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 7 May 2025. Undersigned counsel hand delivered the Appendix to the Court and the Air Force Appellate Defense Division on 7 May 2025.

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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(240) 612-4800

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

| | | |
|---|---|---|
| **UNITED STATES**,<br>*Appellee,* | ) | NOTICE OF STATUS OF COMPLIANCE |
| v. | ) | Before Panel No. 1 |
| Captain (O-3)<br>**MICHAEL J. HYMEL**<br>United States Air Force<br>*Appellant.* | ) | No. ACM 40627<br><br>30 May 2025 |

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

Pursuant to this Court's 21 May 2025 order, the United States provides notice of the status of compliance with this Court's order.

Appellate government counsel previously attempted to attach a disc containing the open sessions of the court-martial to the record without a certification from the court reporter. This Court denied that motion and issued a new order on 21 May 2025. This Court ordered the Government to produce a *certified* audio recording of the open sessions of Appellant's court-martial on a disc separate from the disc containing the closed session and properly move to have the disc attached to Appellant's record of trial by 30 May 2025.

To comply with this Court's order, appellate government counsel engaged with the previously detailed court reporter and the Air Force Trial Judiciary (JAT). JAT informed the Air Force Trial and Appellate Operations Division (JAJG) that they were unable to locate any authority that would allow the court reporter to re-certify the audio under R.C.M. 1112(d) without a remand from this Court. (Email Col Hernandez, dtd 30 May 2025). As a result, JAT declined to provide JAJG with a certified audio recording of the open sessions to submit to this Court. JAJG regrets that it is currently unable to comply with this Court's 21 May 2025 order.

**WHEREFORE**, the United States respectfully requests this Court issue whatever order it determines necessary to all parties below that will assist JAJG with producing the certified audio of the open sessions.

[redacted]

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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 30 May 2025.

REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
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| **UNITED STATES**,<br>*Appellee,* | ) | UNITED STATES' MOTION TO ATTACH |
| v. | ) | Before Panel No. 1 |
| Captain (O-3)<br>**MICHAEL J. HYMEL**<br>United States Air Force<br>*Appellant.* | ) | No. ACM 40627<br><br>30 May 2025 |

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

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

- Appendix - *Col Elizabeth Hernandez's E-Mail to Appellate Government*, dated 30 May 2025 (2 page)

To comply with this Court's order, appellate government counsel engaged with the Chief Judge of the Air Force Trial Judiciary (JAT). JAT informed appellate government counsel that they were unable to locate any authority that would allow the court reporter to re-certify the audio under R.C.M. 1112(d) without a remand from this Court.

This Court should consider this attachment to understand the attempts appellate government counsel has made to comply with this Court's order, and JAT's position with respect to producing a certified audio recording.

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

[redacted]
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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 30 May 2025.

REGINA HENENLOTTER, Maj, USAF
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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**,<br>*Appellee,* | ) | ANSWER TO ASSIGNMENTS OF ERROR |
| v. | ) | Before Panel No. 1 |
| Captain (O-3)<br>**MICHAEL J. HYMEL**<br>United States Air Force<br>*Appellant.* | ) | No. ACM 40627<br><br>11 June 2025 |

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

## ISSUES PRESENTED

**I.**

**WHETHER APPELLANT'S PLEA TO DERELICTION OF DUTY IS IMPROVIDENT BECAUSE (1) THE MILITARY JUDGE FAILED TO ELICIT A FACTUAL BASIS THAT APPELLANT'S DRINKING AND DANCING WAS INAPPROPRIATE AND UNPROFESSIONAL CONDUCT WITH AIRMAN FIRST CLASS AB THAT DETRACTED FROM THE SUPERIOR-TO-SUBORDINATE RELATIONSHIP, AND (2) THE MILITARY JUDGE FAILED TO ELICIT A VIOLATION OF AIR FORCE INSTRUCTION 1-1.**

**II.**

**APPELLANT, A MEMBER OF THE LOUISIANA AIR NATIONAL GUARD, WAS ALLEGEDLY INVOLUNTARILY RECALLED TO ACTIVE DUTY TO STAND TRIAL BY GENERAL COURT-MARTIAL. DESPITE THIS, THE RECORD IS MISSING THE FACTS NECESSARY TO ESTABLISH PERSONAL JURISDICTION OVER APPELLANT AT THE TIME OF THE REQUIRED STAGES OF THE COURT-MARTIAL. WHETHER THE CHARGE AND SPECIFICATION MUST BE DISMISSED BECAUSE THE RECORD DOES NOT ESTABLISH THAT THOSE ACTIONS WERE PROPERLY TAKEN AND THE GOVERNMENT CANNOT PROVE THAT THE COURT-**

**MARTIAL HAD PERSONAL JURISDICTION OVER APPELLANT.**

## STATEMENT OF CASE

Appellant was originally charged with one charge and two specifications of abusive sexual contact in violation of Article 120, one charge and specification of battery in violation of Article 128, one charge and specification of obstructing justice in violation of Article 131b, and one charge and two specifications of fraternization in violation of Article 134, UCMJ. (ROT, Vol. 1, *Charge Sheet*, dated 23 September 2022). On 15 September 2023, Appellant offered to enter into a plea agreement to plead not guilty to all the charges above and guilty to a new charge of dereliction of duty in violation of Article 92, UCMJ:

> In that Captain Michael J. Hymel, United States Air Force, 201st Mission Support Squadron, Joint Base Andrews, Maryland, who knew of his duties at or near Andersen Air Force Base, Guam, on or about 6 July 2019, was derelict in the performance of those duties in that he willfully failed to refrain from engaging in inappropriate and unprofessional conduct with [AB] that detracted from the superior-to-subordinate authority, in violation of Air Force Instruction 1-1, Air Force Standards, as it was his duty to do.

(App. Ex. XVII).

In exchange, Appellant would enter into a reasonable stipulation of fact with the Government for the additional charge. (Id.). In addition, Appellant's maximum punishment would be lowered from dismissal, forfeiture of all pay and allowances, six months' confinement, and a reprimand to no dismissal and no more than 30 days confinement. (Id.). All other punishments remained available. (Id.).

On 22 September 2023, the convening authority accepted the plea agreement. Charges were preferred, referred, and served on Appellant on 26 September 2023. (ROT, Vol 1, *Charge Sheet*, dated 26 September 2023). On 26 September 2023, Appellant pled guilty to the additional

specification of dereliction of duties in violation of Article 92, UCMJ, and the military judge sentenced Appellant to seven days confinement, forfeiture of $3,945.00 pay per month for one month, and a reprimand. (R. at 631; ROT, Vol 1, *Entry of Judgement*, dated 4 December 2023). As bargained for in the plea agreement, the remaining charges were withdrawn and dismissed without prejudice to ripen into prejudice upon completion of appellate review. (Id.).

## STATEMENT OF FACTS

At the time of the convicted offense, Appellant was a First Lieutenant in the Louisiana Air National Guard (LAANG). (Pros. Ex. 1). From 9 June 2019 until 13 October 2019, Appellant was placed in federal Title 10 status and deployed to Andersen Air Force Base (AFB), Guam, with the 159th Maintenance Squadron (159 MXS). (R. at 438; Pros. Ex. 1; ROT, Vol 2). Another LAANG member, AB, was with Appellant for this deployment to Andersen AFB. (R. at 440, Pros. Ex. 1). AB was a junior enlisted member within 159 MXS. (Pros. Ex. 1 at 2). Appellant was in AB's "direct chain of command" and he "exercised authority" over her. (Id.).

Appellant explained in the stipulation of fact that, while on this deployment together, Appellant engaged in inappropriate behavior with AB and other unspecified enlisted airman. (Id.). This included conversations of a personal nature that were "inappropriate between a commissioned officer and enlisted servicemembers." (Id.). These conversations included "discussion of sexual intercourse, past sexual experiences, and [AB]'s viewing of her boyfriend's penis." (Id.).

According to the stipulation of fact, on 6 July 2019, Appellant went out for the evening and "consumed alcohol to the point of intoxication." (Id.). Appellant eventually "met up with [AB] and other enlisted Airmen in their unit." (Id.). Appellant was the only commissioned officer present, and he danced with AB in "very close proximity and in a provocative manner."

(Id.). Appellant, AB, and a senior enlisted member returned to the hotel together. (Id.). Per the stipulation of fact, AB would have testified that Appellant made sexual advances toward her at that time and "encouraged" her to "sit on the floor of the taxi between them without a seatbelt." (Id.). Appellant "dispute[d] AB's claims" with respect to making sexual advances toward her or encouraging her to sit between them but did recall that AB sat on the ground between himself and the other senior enlisted member in the taxi. (Id.).

After returning to the hotel, Appellant and AB went to the "beach area." (Id.). Appellant "was so inebriated that he fell asleep in a chair and remained there until the morning." (Id.).

## ARGUMENT

### I.

### APPELLANT'S GUILTY PLEA WAS PROVIDENT.

#### *Additional Facts*

*Guilty Plea Colloquy*

The military judge advised Appellant of his rights and which he was waiving with respect to a guilty plea. (R. at 419-420). The military judge then went through the stipulation of fact with Appellant. (R. at 421-434; Pros. Ex. 1). Appellant confirmed that he read the stipulation of fact thoroughly before he signed it. (R. at 422). Appellant stated he understood that the contents of the stipulation of fact would be treated as uncontradicted facts in the case. (Id.). The military judge also explained to Appellant that if the stipulation of fact was contradicted, the military judge might have to reopen the plea inquiry, which Appellant understood. (R. at 423). Appellant agreed that every paragraph in the stipulation of fact was true and correct to the best of his knowledge and belief. (R. at 424-434).

The military judge explained the elements of the offense for dereliction of duty to Appellant as follows:

> (1) That you had a certain duty, that is: refraining from engaging in inappropriate and unprofessional conduct with Airman First Class [AB] that detracted from the superior-to subordiante [sic] authority, in violation of Air Force Instruction 1-1, Air Force Standards;
>
> (2) That you knew of the duty; and
>
> (3) That on or about 6 July 2019, you were willfully derelict in the performance of that duty, by willfully failing to refrain from engaging in inapproiprate [sic] and unprofessional conduct with Airman First Class [AB] that detracted from the superior-to-suboridnate [sic] authority, in violation of Air Force Instruction 1-1, Air Force Standards.

(R. at 435).

The military judge then provided the following definitions to Appellant:

> Duty: A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.
>
> A person is "derelict" in the performance of a duty when he willfully fails to perform his duties. "Dereliction" is defined as a failure in duty, a shortcoming, or delinquency.
>
> "Willfully" means intentionally. It refers to the doing of an act knowingly and purposefully, specifically intending the natural and probable consequences of the act.

(R. at 436).

Appellant confirmed he understood the definitions provided. (Id.).

Appellant stated that during the deployment, he "engage[d] with enlisted members, socialized with them in a manner that was not appropriate to the standards required of me under AFI 1-1." (R. at 439).

The military judge asked Appellant if he had "a duty to refrain from engaging in inappropriate and unprofessional conduct with [AB] that detracts from the superior-to-

subordinate authority?" (R. at 444). Appellant agreed that he had such a duty. (R. at 445). Appellant stated this duty came from what he was taught back when he was enlisted and not an officer. (Id.). Appellant stated it is "basic to not have those engagements with superiors." (Id.). Upon commissioning, Appellant "was taught and learned that you just don't engage that way and you maintain a professional appearance." (Id.). "Anything that would . . . detract from your good order and discipline, your unit, [could] potentially issue a loss of confidence in your subordinates and how you are perceived." (Id.). The military judge asked if that duty was "captured" in AFI 1-1, to which Appellant said "yes." (Id.). Appellant stated he had reviewed AFI 1-1 and referenced paragraph 2.2.2. regarding superior-to-subordinate authority. (R.at 445-446). Appellant believed paragraph 2.2.2. said "there is a balance that recognizes the appropriateness of the relationship" between superiors and subordinates. (R. at 446). Using paragraph 2.2.2., Appellant said:

> Social interactions contribut[ing] appropriately to unit cohesiveness and effectiveness is [sic] encouraged, relationships are unprofessional when they detract from the supervisor to subordinate authority or reasonably create the appearance of favoritism misuse of office or position or the abandonment of organizational goals for personal interest. This is true whether pursued and conducted on or off duty.

(Id.)

Appellant clarified several paragraphs from the stipulation of fact. Paragraph 6 of the stipulation of fact said Appellant was "overly familiar" with AB "[t]hroughout the deployment" and "discuss[ed] topics of a nature and in a manner that suggested they were on terms of military equality." (Pros. Ex. 1 at 2). During the guilty plea inquiry, Appellant clarified that these interactions took place prior to the charged offense on 6 July 2019. (R. at 441-442). Appellant recalled a night before 6 July 2019 with 18 to 20 other enlisted members engaging in

conversations, and AB and other members had a conversation "of a sexual nature." (R. at 441). Appellant said he told the other members "if I were enlisted I would engage [sic] that conversation but they knew . . . that I could not." (Id.). Appellant said that "the fact that I even engage[d] them at all is probably something that I wouldn't do or is something that I wouldn't do if I had the chance to go back and make those choices." (Id.). Appellant stated that he did engage in private conversations with AB. (R. at 449).

During the plea inquiry, Appellant also said that on 6 July 2019, he drank alcohol and a senior enlisted member served as his designated driver. (R. at 442). They moved from "bar to bar" and saw familiar faces. (R. at 448). While he did not intend to meet up with other enlisted members or AB, Appellant did cross paths with them that night. (R. at 443). Appellant lost count of how many alcohol drinks he consumed between bars because people kept buying him drinks. (R. at 448).

After meeting up, Appellant explained that he danced "in close proximity" to AB on a crowded dance floor. (R. at 447). Appellant denied "putting hands on her or touching her in any way shape or form." (Id.). Appellant acknowledged that if he had not been intoxicated, he would have noticed that their dancing "could have been perceived to other people as something of a nature that was not what an officer and enlisted should be doing." (Id.).

In the plea inquiry, Appellant stated his behavior on 6 July 2019 fell below the standard set by AFI 1-1, paragraph 2.2.2. by "indulging in alcohol to a position what made me appear outside of my normal actions. . . as far as the dancing, as far as the way I carry myself. (R. at 446). Appellant stated falling asleep at the hotel beach in front of AB could detract from the superior-to-subordinate relationship. (R. at 447). AB could have perceived him as unprofessional or been "unable to trust [him] as a leader" because Appellant did not control his

alcohol intake or conduct himself "in a professional manner while partaking alcohol." (R. at 447).

Appellant stated that he "willfully made those choices" with "willful intent," and that they were poor choices. (R. at 451). The military judge explained the defense of voluntary intoxication to Appellant. (R. at 452). Appellant stated that he had had the opportunity to discuss the defense with his defense counsel. (R. at 453). After receiving instructions on voluntary intoxication from the military judge and advice from his defense counsel, Appellant still stated he was "willfully derelict in the portion of [his] duties as charged." (R. at 454). When asked if Appellant could have "avoided being derelict," Appellant recounted receiving guidance in the past from "senior enlisted mentors" about proper behavior with junior enlisted, such as the need to have "an extra person around whether they were involved or not." (R. at 454). Appellant had been told having an additional person could have "mitigated some of those perceptions in private conversations," but Appellant had continued to have one-on-one conversations with his enlisted members. (R. at 454). Appellant also said that he had thought of himself as "off the radar" that night because he was in civilian clothes. (R. at 454).

Appellant stated he intentionally failed to perform his duties as described in AFI 1-1 and could have maintained an appropriate superior to subordinate relationship if he had wanted to do so. (R. at 455). Appellant was not authorized to fail to perform his duties and knowingly and purposely choose not to perform them. (Id.).

*Unsworn Statement*

In pre-sentencing, trial counsel introduced a stipulation of expected testimony from AB. (Pros. Ex. 5). During his question-and-answer style unsworn statement, Appellant denied statements made by AB in her stipulation of expected testimony. (R. at 573, Pros. Ex. 5).

Contrary to AB's allegation in the stipulation of expected testimony, Appellant denied offering to show AB his penis. (Id.).

Appellant reiterated that all he said was that he "might have something to say if [he] was enlisted," or words to that effect, as he had said earlier during the plea colloquy. (R. at 574). Appellant further denied buying alcoholic drinks for AB. (R. at 574). Appellant denied making any sexual advances toward AB or of having sexual interest in her. (R. at 578). Appellant still agreed that his conduct toward AB was a "departure from standards" and that he "failed her as a Lieutenant." (Id.). Appellant stated his behavior was "a departure from [his] position of authority [sic] [He] felt wrong in [his] level of intoxication, [his] behavior, just in public on the dance floor, being in close enough proximity for [AB] to believe it was provocative sexual nature in her direction." (Id.). Appellant was embarrassed by the "entire night in question" and he did not like that he "let [him]self get that way around [his] own Airman. (R. at 578-79). Appellant stated that he "did not do anything sexual to [AB] in any way shape or form." (R. at 579).

*Re-opened Plea Colloquy*

Following this unsworn statement, the defense entered a ten-page affidavit from Appellant, dated 10 August 2022, into evidence. (Def. Ex. H). This affidavit was written the day after Appellant's Article 32 hearing. (ROT, Vol 2). In the affidavit, Appellant summarized his relationship with AB from the beginning of the deployment. (Def. Ex. H). Appellant also described events from the night of 6 July 2019. (Id.). Appellant stated that he did not "touch [AB] in any sexual, inappropriate, or unwanted manner" while they were on the dance floor. (Id. at 3). Appellant stated after returning to the hotel, he went with AB to the hotel beach and saw approximately 10 to 20 people there. (Id.). Appellant sat on a lounge chair away from the others. (Id.). AB then came over to the chair and tried to speak with Appellant. (Id.). Appellant

was falling asleep in the chair at the time. (Id. at 4). Appellant fell asleep in the chair while AB was talking to him, and he woke alone in the same position later. (Id.). Page 4 through page 9 referred to interactions with AB and other enlisted members not captured by the guilty plea but that pertained to the withdrawn charges. (Id. at 4-9).

Trial counsel brought a providence issue from pages 9 and 10 of the affidavit to the military judge's attention. (R. at 588). Specifically, Appellant wrote that he "never committed any act of misconduct toward [AB]. No physical assault or abuse of any kind. No inappropriate contact of any kind. No *inappropriate comments or displays* of any kind." (Def. Ex. H at 9-10) (emphasis added). Civilian defense counsel stated that was no "providence problem" because the affidavit did not contradict what Appellant had said earlier, which was that he had not touched AB but was unprofessional with her. (R. at 590-591).

The military judge re-opened the Care inquiry based on Appellant's statement that he made "no inappropriate comments or displays of any kind" toward AB, which contradicted the stipulation of fact. (R. at 593). The military judge said the stipulation and affidavit "create[d] an inconsistency." (R. at 594).

During the second colloquy, Appellant clarified that he wrote the affidavit while pending referral for the original charges that included abusive sexual contact, assault consummated by battery, and fraternization. (R. at 596). Appellant clarified that he had not known there would be a charge for dereliction of duty, and if he had, the language in his affidavit would have said there was "no sexual inappropriate contact . . . no inappropriate sexual comments or sexual displays of any kind with [AB]." (Id.).

The military judge clarified with Appellant that the behavior he felt was inappropriate conduct in a superior to subordinate relationship was "excessive drinking [sic] passing out on a

chair in front of subordinates, dancing on a tight dance floor with subordinates," even if no contact happened. (R. at 597-98). Appellant confirmed this to be the case. (R. at 598). The military judge directed Appellant to AFI 1-1, paragraph 2.2.2. and clarified that Appellant thought his behavior detracted from the superior-to-subordinate authority. (Id.). Appellant said yes. (Id.). Following this, the military judge found that Appellant's plea remained provident. (R. at 599).

***Standard of Review***

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion and questions of law arising from the guilty plea are reviewed de novo. *See* United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (finding a provident plea). A military judge can abuse this discretion "if he fails to obtain from the accused an adequate factual basis to support the plea – an area which [the Court must] afford significant deference." Id.

***Law and Analysis***

The military judge did not abuse his discretion by finding Appellant's plea provident.

When reviewing the adequacy of an appellant's plea, this Court must afford the military judge "significant deference" and uphold a guilty plea unless there is a "substantial basis" in law and fact for questioning the plea. Id.; *see* United States v. Hiser, 82 M.J. 60, 64 (C.A.A.F. 2022) (citing United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)). Here, no "substantial basis" in law or fact exists to question Appellant's plea because, as described below, the military judge developed a factual basis to support each element of dereliction of duty and resolved any inconsistencies on the record.

When taking a guilty plea, the military judge must ensure an accused understands the facts that support a guilty plea, be satisfied that the accused understands the law applicable to his

facts, and conclude that the accused is actually guilty. *See* United States v. Care, 18 U.S.C.M.A. 535, 541 (C.M.A. 1969). "The factual predicate is sufficiently established if the factual circumstances as revealed by the accused himself objectively support that plea." United States v. Castro, 81 M.J. 209, 215 (C.A.A.F. 2021) (citations omitted). In reviewing the providence of a guilty plea, courts consider the appellant's "colloquy with the military judge, as well [as] any inferences that may reasonably be drawn from it." United States v. Carr, 65 M.J. 39, 41 (C.A.A.F. 2007).

As a preliminary matter, this Court should strictly adhere to the abuse of discretion standard here. Appellant made a very advantageous plea agreement with the government that included withdrawal and dismissal of numerous more serious charges and avoided confinement of over 30 days and a dismissal. (App. Ex. XVII). In his offer, he specified the language of the charge and specification under Article 92 that he wanted to plead guilty to. (Id.). In his plea agreement, Appellant stated, "I assert that I am, in fact, guilty of the offense to which I am offering to plead guilty, and I understand that this agreement permits the government to avoid presentation in court of sufficient evidence to prove my guilt as to that offense." (Id.).

Then, despite agreeing to enter into a reasonable stipulation of fact as part of his plea agreement, and despite signing a stipulation of fact that he agreed was true, during sentencing, Appellant introduced an affidavit containing information that seemed to contradict the stipulation of fact. This caused the military judge to have to reopen the providence inquiry to ensure Appellant's plea was still provident. After the new colloquy, trial defense counsel assured the military judge that no additional inquiry was necessary. (R. at 599). Now on appeal, Appellant claims his explanations of why he was guilty were not good enough.

If Appellant did not want to plead guilty, then he did not have to plead guilty. Instead, Appellant reaped the benefits of a favorable plea agreement and now seeks a windfall on appeal by claiming that the military judge did not adequately establish his guilt. But "[t]his is a guilty plea, folks." United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996). This Court should afford the military judge maximum discretion considering that "facts are by definitions undeveloped in such cases." United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008).

Appellant was charged with dereliction of duty in violation of Article 92, UCMJ. (ROT, Vol 1). Specifically, that he "willfully failed to refrain from engaging in inappropriate and unprofessional conduct with [AB] that detracted from the superior-to-subordinate authority, in violation of Air Force Instruction 1-1, Air Force Standards, as it was his duty to do." (Id.).

The elements for dereliction of duty are: (1) That the accused had certain duties; (2) That the accused knew of the duties; and (3) That the accused was willfully derelict in the performance of those duties. Manual for Courts-Martial, United States (2019 ed.) (MCM), pt. IV, ¶ 18(b)(3).

A duty may be imposed by regulation. Id. at para. 18.c.(3)(a). A person is "derelict" in the performance of his duties when he willfully fails to perform them. Id. at para. 18.c.(3)(c). "Willfully" means intentionally. Id. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act. Id.

**A. Under AFI 1-1, Appellant had a duty to refrain from engaging in inappropriate and unprofessional conduct with AB that detracted from the superior-to-subordinate authority.**

"Article 92(3), UCMJ, requires proof of certain military duties." United States v. Hayes, 71 M.J. 112 (C.A.A.F. 2012).

AFI 1-1, para. 2.2.2., states:

> With respect to relationships between superiors and subordinates, whether they are other military members or civilian employees, there is a balance that recognizes the appropriateness of a relationship. Social interaction that contributes appropriately to unit cohesiveness and effectiveness is encouraged. Relationships are unprofessional when they detract from the supervisor-to-subordinate authority or reasonably create the appearance of favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests. This is true whether pursued and conducted on or off duty.

Appellant now reads paragraph 2.2.2. more narrowly on appeal than at the court-martial. The duty Appellant was charged with was to "refrain from engaging in inappropriate and unprofessional conduct with [AB] that detracted from the superior-to-subordinate authority, in violation of [AFI 1-1]." (ROT, Vol 1, *Charge Sheet*, dated 26 September 2023). The phrase "detract from the supervisor-to-subordinate authority" is taken directly from paragraph 2.2.2. Paragraph 2.2.2. is about maintaining professional relationships, but it need not explicitly say to refrain from creating unprofessional relationship for such a duty to exist based on the language in the AFI.

When charging Article 92 for dereliction of duty, "the existence of the duty must be demonstrated by the evidence." United States v. Shelly, 19 M.J. 325, 328 (C.M.A. 1985). But to the extent a duty is not "clearly assigned," then "common sense and military custom help fill in the gaps." Id.

This Court later applied this theory to dereliction of duty stemming from AFI 1-1. In United States v. Morgan, Appellant contested his conviction for dereliction of duty for violating AFI 1-1 by providing alcohol to a person under 21 years of age. 2015 CCA LEXIS 466 (A.F. Ct. Crim. App. Oct. 30, 2015). Specifically, Appellant argued that AFI 1-1's instruction to obey state and foreign country drinking laws only applied to "underage consumption by Airman,"

because the provision did not expressly prohibit providing alcohol to civilian minors. Id. at *21-22. This Court rejected this argument, finding that to "the extent the application of AFI-1-1 . . . is unclear, 'common sense and military custom help fill in the gaps." Id. at 22, citing Shelly, 19 M.J. at 328. This Court found that AFI 1-1's "reference to a state's drinking age laws" included a "broader scope of all the laws dealing with drinking age." Id. Therefore, the appellant's "conduct failed to live up to the duty established by a common sense reading of AFI 1-1." Id.

The same analysis should be applied here. AFI 1-1, paragraph 2.2.2., says that "social interaction that contributes appropriately to unit cohesiveness and effectiveness is encouraged." Common sense says that the opposite kind of social interactions would be *discouraged.* This means that AFI 1-1, paragraph 2.2.2. did impose a duty on Appellant to refrain from engaging in unprofessional conduct that would "detract from the supervisor-to-subordinate authority," as reflected on the charge sheet and within the AFI. It was not an abuse of discretion for the military judge to find such a duty existed based on a common sense reading of paragraph 2.2.2., which satisfied the military judge's obligation to "obtain from the accused an adequate factual basis" that a duty existed "to support the plea." Inabinette, 66 M.J. at 322.

**B. The military judge elicited a factual basis that Appellant's dancing with AB and drinking to the point of passing out in front of AB constituted dereliction of duty.**

Appellant's plea was provident, and the military judge correctly resolved any possible inconsistencies on the record.

To establish the factual predicate for dereliction of duty from Appellant, the military judge took Appellant through each element of the offense. (R. at 435-436). The military judge asked Appellant to clarify what Appellant believed his duty was, and Appellant specifically stated his duty was to refrain from inappropriate and unprofessional conduct with AB that detracted from their superior-to-subordinate authority was AFI 1-1, paragraph 2.2.2. (R. at 445-

446). Appellant knew of this duty not just from AFI 1-1 but also from his training at his initial enlistment and commissioning as an officer. (R. at 445).

Appellant knew that his conduct toward AB on 6 July 2019 would detract from the superior-to-subordinate relationship. (R. at 447, Pros. Ex. 1). Appellant did not just recite a "legal conclusion." United States v. Moratalla, 82 M.J. 1, 3 (C.A.A.F. 2021). Appellant focused on his incredible state of inebriation in front of AB and his drunken, provocative dancing in close proximity to her as inappropriate and unprofessional. (R. at 447-48, Pros. Ex. 1). He specifically stated that his dancing with AB could have led others to perceive that their behavior was not "something of a nature that . . . an officer and enlisted should be doing." (R. at 447). Appellant also felt his heavy intoxication could have caused AB to lose trust in him as her superior. (Id.). Appellant contrasted his behavior on 6 July 2019 with what he was taught at his enlistment and commissioning, which was that he had a duty not to "engage that way and [he should] maintain a professional appearance." (R. at 445). Therefore, according to Appellant, his drunkenness, provocative dancing, and resulting lack of trust could have detracted from AB's superior-to-subordinate relationship with him, resulting in a violation of his duty under AFI 1-1. (R. at 445-48).

In the stricter context of conduct unbecoming an officer, military courts have highlighted that proper superior-subordinate relationships within a unit are "vital to discipline in the armed forces." United States v. Adames, 21 M.J. 465, 467-468 (C.M.A. 1986). Appellant was correct in his colloquy that how his subordinates perceived him would detract from the superior-to-subordinate authority that should exist between them. (R. at 447). It is a "logical inference," Carr, 65 M.J. at 41, that a loss of trust or faith in leadership based on behavior an enlisted

member sees, "in public or in private," will detract from the superior-to-subordinate relationship. (R. at 447).

Appellant stated that he "willfully" and with "willful intent" made the choices that made up the failure of his duty, acknowledging that they were poor choices. (R. at 451). While Appellant felt he was "off the radar" while out drinking in civilian clothes, he still chose to consume too much alcohol, lose count of his drinks, dance provocatively in close proximity to AB, and then pass out in front of her at the hotel beach. (R. at 444-447). Because Appellant stated his choice to drink to intoxication and dance provocatively in close proximity to AB was willful, he satisfied the factual predicate for the third element of dereliction of duty.

Despite Appellant's assertions now, there was no requirement that Appellant admit to engaging in sexual behavior with AB for the plea to be provident and no inconsistencies remain unresolved on the record. (App. Br. at 12).

First, Appellant admitted to engaging in private conversations with AB. (R. at 449). He denied making sexual comments to her, but not the conversations themselves or being "overly familiar" with AB. (R. at 595; Pros. Ex. 1). This was not contrary to the stipulation of fact; paragraph 6 did not say Appellant engaged in *sexual* conversations with AB throughout the deployment. (Pros. Ex. 1). It only said "personal" conversations "that were inappropriate between a commissioned officer and enlisted servicemembers."

Second, Appellant did not deny in the stipulation of fact or either colloquy that the conversation in which he "participated in a group conversation that included discussion of sexual intercourse, past sexual experiences, and [AB]'s viewing of her boyfriend's penis" occurred. Appellant only clarified that it occurred before 6 July 2019, and that his participatory comment was that he *would* join in the conversation were he not an officer. (R. at 441). This was not the

outright denial of participation that Appellant now claims. It was an acknowledgement by Appellant that but for the officer-enlisted dichotomy, he *would* have had more to say in this sexual conversation. This is not a lingering inconsistency between the stipulation of fact or Care inquiry.

Lastly, Appellant did not say he was dancing in close proximity to AB *only* because the dance floor was crowded. (App. Br. at 12). He stated that it "was a crowded dance floor [and] we were in close proximity." (R. at 447). While Appellant made clear in both colloquies that he did not touch AB, provocative dancing in close quarters can occur even if Appellant never actually put his hands on her. These statements did not contradict the stipulation of fact that they were dancing in very close proximity and in a provocative manner inappropriate between and officer and enlisted member. (Pros. Ex. 1).

Appellant overreaches with the comparison to United States v. Hilton, 2025 CCA LEXIS 142 (A.F. Ct. Crim. App. Apr. 4, 2025). In Hilton, this Court found that the appellant's intoxication at an unofficial function was not enough to find that he engaged in conduct unbecoming an officer. Id. at *23. However, this was because conduct unbecoming an officer in violation of Article 133 requires the conduct to be:

> [A]ction or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer.

MCM, Part IV, ¶ 90.c.(2).

That is not the standard to be applied in Appellant's case, and it appears nowhere in Article 92 or AFI 1-1. Appellant did not plead guilty to conduct unbecoming an officer. Accordingly, the more stringent definitions within Article 133 were not and should not be

applied to this case; the Government was not obligated to show that Appellant's behavior dishonored or disgraced him. The elements and definitions from Appellant's guilty plea should not be equated to the higher standard of misconduct associated with conduct unbecoming an officer under Article 133.

The military judge ensured Appellant admitted to the facts that demonstrated he was derelict in his duties, that Appellant knew what he was pleading guilty to, and that Appellant acknowledged he was actually guilty. Appellant gave the court the relevant facts necessary for a factual basis to support the plea. In light of this, the military judge's acceptance of that plea should be afforded significant deference. *See* Inabinette, 66 M.J. at 322.

**C. Conclusion.**

This Court must uphold a guilty plea absent a "substantial basis" in law and fact to question it. *See* Hiser, 82 M.J. at 6. No such basis exists in this case, and the military judge did not abuse his discretion by finding a factual basis for the guilty plea. Accordingly, this Court should find the military judge did not abuse his discretion by accepting Appellant's plea of guilty to the additional charge and specification.

## II.

## THE GOVERNMENT HAD PERSONAL JURISDICTION OVER APPELLANT AT EACH REQUIRED STAGE OF THE COURT-MARTIAL.

### *Additional Facts*

On 24 April 2020, the Adjutant General for the Louisiana National Guard (TAG-LA) concurred with the recall of Appellant for court-martial. (ROT, Vol 2). On 10 May 2020, the legal advisor to the Air National Guard Readiness Center informed 81 TRW/JA that the

201st Mission Support Squadron commander (201 MSS/CC) concurred with the decision to bring Appellant to court-martial.

On 1 December 2020, the Government requested approval from the Secretary of the Air Force (SECAF) to recall Appellant to active duty to preserve the possibility of confinement or restriction on liberty as a punishment option should he be convicted at a court-martial. (Appendix D). On 29 October 2021, SECAF granted approval for any recall to active duty that might be ordered. (Id.).

201 MSS/CC preferred the charges against Appellant. (ROT, Vol 1, *Charge Sheet,* dated 23 September 2022). Appellant was placed in Title 10 federal status on 30 June 2022 for preferral of the original charges. (ROT, Vol 1, *Charge Sheet*, dated 23 September 2022; ROT, Vol 2, *Pretrial*). Appellant was placed in Title 10 status again from 8 to 10 August 2022 for his Article 32 hearing. (Appendix E; ROT, Vol 3, *Preliminary Hearing*). Appellant was then placed in Title 10 status on 23 September 2022 for service of the referred charges. (Appendix F; ROT, Vol 1, *Charge Sheet,* dated 23 September 2022).

Appellant was placed in Title 10 status again from 4 to 6 December 2022 for his arraignment. (Appendix G). During the arraignment, civilian defense counsel alluded to a possible motion regarding federal jurisdiction over Appellant, although the basis for this motion was never specified. (R. at 12). Civilian defense counsel also stated he understood Appellant was "on orders" the day of the arraignment. (R. at 12). No motion contesting the Government's jurisdiction over Appellant was ultimately filed.

Following arraignment, Appellant's court-martial was scheduled for 10 April 2023. (R. at 38). Appellant was placed in Title 10 status again from 2 to 16 April 2023. (Appendix H).

Following an unexpectedly lengthy voir dire, the court was continued on 14 April 2023 until 25 September 2023. (R. at 394).

On 15 September 2023, Appellant offered a plea agreement to the Government. (App. Ex. XVII). Within the terms of the plea agreement, Appellant offered to plead guilty to a new, previously uncharged specification for a violation of Article 92, UCMJ. (Id.). In exchange, Appellant would plead not guilty to the original charges and those would be withdrawn and dismissed without prejudice pending appellate review. (Id.). If the plea agreement was accepted, Appellant agreed to waive his right to an Article 32 hearing on the new charge as well as the five-day statutory waiting period between service of referral and commencement of the court-martial. (Id.). Appellant also waived his right to a trial by members and agreed to be tried and sentenced by military judge alone. (Id.). The convening authority accepted the offer of a plea agreement on 22 September 2023. (Id.).

Appellant was placed in Title 10 status from 25 to 28 September 2023 for the final phase of his court-martial. (Appendix I). The new charge in violation of Article 92 was preferred, referred, and referral served on Appellant on 26 September 2023. (ROT, Vol 1, *Charge Sheet*, dated 26 September 2023).

During the plea colloquy on 26 September 2023, civilian defense counsel informed the court that the defense had not seen copies of the orders placing Appellant in Title 10 status for the session. (R. at 457). Civilian defense counsel mentioned that they had requested for Appellant to be put in Title 10 status for "the process," but the request had been denied. (Id.). Civilian defense counsel stated Appellant had been "brought on and off" orders for each Article 39(a) session. (Id.). Trial counsel stated Appellant had been placed on orders from 25 to 28 September 2023, and that trial counsel had only received the orders on 26 September 2023. (R.

at 458). The military judge instructed trial counsel to provide the defense and Appellant with copies of the orders on the next break and for the defense to review them. (R. at 458-59). Civilian defense counsel confirmed Appellant was on orders, saw "no jurisdictional issues," he "would affirmatively waive" any jurisdictional issue, and he was "satisfied proper jurisdiction existed." (R. at 464).

***Standard of Review***

This court reviews questions of jurisdiction de novo. United States v. Hale, 78 M.J. 268, 270 (C.A.A.F. 2019). "When challenged, the [G]overnment must prove jurisdiction by a preponderance of evidence." Id. (citing United States v. Morita, 74 M.J. 116, 121 (C.A.A.F. 2015)).

***Law***

"Generally, there are three prerequisites that must be met for courts-martial jurisdiction to vest: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial." United States v. Harmon, 63 M.J. 98, 101 (C.A.A.F. 2006) (citing Rule for Courts-Martial (R.C.M.) 201(b)).

"[J]urisdiction over the person depends on the person's status as a 'person subject to the Code' both at the time of the offense and at the time of trial." United States v. Ali, 71 M.J. 256, 265 (C.A.A.F. 2012) (internal citations omitted).

Failure by the defense to move to dismiss for lack of jurisdiction at trial does not result in a waiver, and lack of jurisdiction may be raised for the first time on appeal. United States v. Reid, 46 M.J. 236, 240 (1997); R.C.M. 905(e); R.C.M. 907(b)(1)(A).

When lack of jurisdiction is raised for the first time on appeal, the Government may meet its burden by submitting documents to demonstrate that jurisdiction existed over the appellant.

United States v. Oliver, 57 M.J. 170, 172 (C.A.A.F. 2002). This Court can consider "appropriate documentation" submitted by the Government on appeal to prove jurisdiction existed at the contested time. United States v. Heimer, 34 M.J. 541, 548 (A.F.C.M.R. 1991). Copies of official orders are sufficient to establish personal jurisdiction over an accused. United States v. Gardner, 2003 CCA LEXIS 198, at *5-6 (A.F. Ct. Crim. App. Mar. 27, 2003).

Article 2(d)(1), UCMJ, states in relevant part that:

"A member of a reserve component who is not on active duty and who is made the subject of proceedings under . . . section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of—(A) a preliminary hearing under section 832 of this title (article 32); [or] (B) trial by court-martial."

Article 2(d)(3) states that "[a]uthority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President."

The MCM provides:

Rule 204. Jurisdiction over certain reserve component personnel

> (a) *Service regulations*. The Secretary concerned shall prescribe regulations setting forth rules and procedures for the exercise of court-martial jurisdiction . . . over reserve component personnel under Article 2(a)(3) and 2(d), subject to the limitations of this Manual and the UCMJ."

At the time of Appellant's preferral, Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, dated 14 April 2022, had several relevant provisions regarding recall to active-duty of reserve component members for judicial action:

> 3.6.2.2: Convening authorities with concurrent jurisdiction must coordinate before disposition is determined. Accordingly, prior to taking judicial action against an ANG member, legal offices, commanders, and convening authorities at all attached Regular DAF unit or host commands must coordinate with 201 MSS through ANGRC (NGB).) . . . Such coordination is required to ensure

> jurisdiction properly attaches. Note: Attached/host command legal office coordination with the National Guard Bureau, Office of the General Counsel (NGB-GC) is required; however, the NGB-GC is not an active duty SJA, but a legal advisor assigned to support 201 MSS/CC in ensuring appropriate Total Force Discipline with regard to current and former ANGUS members.
>
> 3.8.2. An ARC member must be in a Title 10 federal status for the following stages in the court-martial process:
>
> 3.8.2.1. While in pretrial confinement;
>
> 3.8.2.2. Preferral;
>
> 3.8.2.3. Article 32 preliminary hearing;
>
> 3.8.2.4. Service of referral documents; and
>
> 3.8.2.5. Any court-martial proceeding at which the accused has a right to be present, to include arraignment and sentencing proceedings.

Prior to arraignment, the Government must acquire approval from SECAF to allow confinement or restriction on liberty as a punishment at a court-martial. Article 2(d)(5) UCMJ; DAFI 51-201, para. 3.8.1.

***Analysis***

At trial, trial defense counsel reviewed the orders placing Appellant on active duty and conceded that there were no jurisdictional issues "as he sits here," at the time of any Article 39(a), or at the time of the offense. (R. at 464). They said they "would affirmatively waive" the issue. (Id.). Appellant also stated his belief that he was currently on active duty orders. (Id.). "[T]he prosecution must only prove personal jurisdiction over an accused reservist when the accused raises the issue at trial." United States v. Oliver, 56 M.J. 695, 699 (N-M Ct. Crim. App. 2001) *aff'd*, 57 M.J. 170 (2002). Since Appellant conceded jurisdiction in this case, "the government was not required to introduce additional evidence to establish personal jurisdiction at

trial." United States v. Gardner, 2003 CCA LEXIS 198, at *4 (A.F. Ct. Crim. App. Mar. 27, 2003).

It is true that Appellant can raise the issue of jurisdiction at any time, including for the first time on appeal. R.C.M. 907(b)(1). But given trial defense counsel's and Appellant's concession of jurisdiction after reviewing Appellant's orders at trial, and the lack of requirement for the government to put additional evidence supporting jurisdiction into the record, it is unclear how Appellant has a good faith basis to challenge jurisdiction now. Based on trial defense counsel's and Appellant's averments at trial, this Court could find jurisdiction by a preponderance of the evidence based on that alone. Nonetheless, the United States has moved to attach materials to the record to established jurisdiction over Appellant.

The record and attachments demonstrate by a preponderance of the evidence that the Government correctly obtained personal jurisdiction over Appellant for each required portion of his court-martial process.

Prior to taking any judicial action, 81 TRW/JA coordinated with both TAG-LA and 201 MSS, the respective guard and active-duty units with concurrent jurisdiction over Appellant. (ROT, Vol 2). Both units concurred with recalling Appellant to active-duty for court-martial. This satisfied the requirement under DAFI 51-201, para. 3.6.2.2.

The Government provided Appendices A-I, which capture SECAF's approval to recall Appellant to active-duty to preserve the possibility of confinement, Appellant's 10 USC 802(d) orders, and declarations from trial counsel and 81 TRW/JA certifying the veracity and accuracy of these documents.

The Government acquired SECAF's approval to recall Appellant to active-prior to arraignment, preserving the ability to sentence Appellant to a period of confinement.

(Appendix D). The 2nd Air Force commander, the GCMCA, requested SECAF's approval in December 2020. (Id.). The approval was granted on 29 October 2021, before charges were preferred in this case. (Id.).

The Government subsequently acquired personal jurisdiction over Appellant at every stage of his court-martial. In accordance with Article 2(d) and DAFI 51-201, para. 3.8, and Appellant was placed in Title 10 status through involuntary recall orders as follows:

| **Stage of Court-Martial** | **Date** | **Dates of Appellant's Title 10 Status** |
|---|---|---|
| Preferral | 30 June 2022 | 30 June 2022 |
| Article 32 Hearing | 9 August 2022 | 8-10 August 2022 |
| Referral | 23 September 2022 | 23 September 2022 |
| Arraignment | 5 December 2022 | 4-6 December 2022 |
| Trial (member selection) | 11-14 April 2022 | 2-16 April 2023 |
| Preferral, Service of Referral, and Trial (guilty plea) | 26-27 September 2023 | 25-28 September 2023 |

(ROT, Vol 2; Appendices A-I.)

At every relevant portion of the court-martial process, Appellant was on orders and the Government had personal jurisdiction over him. For the convicted charge, Appellant waived his right to an Article 32 hearing, so the Government was not required to hold one. (App. Ex. XVII; R. at 469). By similarly waiving his right to the statutory five-day waiting period following service of referral for the additional charge, the Government was able to keep the scheduled trial date in September and bring Appellant on orders for only those dates. (Id.; R. at 473). These facts were known to Appellant and his defense team, given the comments made by civilian defense counsel at both arraignment and the guilty plea. (R. at 12, 464).

The Government complied with procedural requirements under Article 2 and DAFI 51-201, so this case bears little resemblance to either United States v. Kilbreth, 47 C.M.R. 327 (C.M.A. 1973) or United States v. Peel, 4 M.J. 28 (C.M.A. 1977). In Kilbreth, CAAF found

issue with the Army's "failure to comply with essential procedural requirements in the call-up of a reservist *for unsatisfactory participation in reserve training* constitutes a denial of due process and invalidates the order to active duty." 47 C.M.R. at 329 (emphasis added). The issue of jurisdiction hinged on unique procedural requirements for unsatisfactory performance that do not exist in the present case, such as the need for the Army to provide the accused with a "letter of instruction," and notice of the right to appeal for "every unexcused absence." Id. While CAAF stated procedural requirements must be followed, Appellant's court-martial process was not subjected to such additional requirements; his charge is unrelated to any kind of absence without leave, and there are no mirroring regulations to Appellant's situation in Air Force guidance. DAFI 51-201 was followed from the originally required coordination with concurrent convening authorities to the Title 10 orders issued until the day Appellant was found guilty and sentenced.

Similarly, in Peel the Government attempted to extend the active-duty enlistment of an Army National Guard member without the "appropriate authority of the State," which in that case meant the state adjutant general. 4 M.J. at 29. CAAF set aside Appellant's conviction for lack of jurisdiction. Id. Here, the Government had the concurrence of TAG-LA in accordance with DAFI 51-201, para. 3.6.2.2, and so no such jurisdictional error is present. (ROT, Vol 2).

This case more closely aligns with Oliver, Heimer, and Gardner. Jurisdiction was raised as an issue for the first time on appeal, and the Government was able to provide "appropriate documentation" in the form of Appellant's official 10 USC 802(d) orders to demonstrate each occasion where Appellant was placed in Title 10 status as his court-martial proceeded. Heimer, 34 M.J. at 548; Gardner, 2003 CCA LEXIS 198, at *5-6.

"[A]verment of jurisdiction" must be "positive." Runkle v. United States, 122 U.S. 543, 556 (1887). All parties at this court martial, but most importantly the trial defense counsel,

acknowledged that Appellant had been put in Title 10 status for each Article 39(a) hearing of the court-martial. Civilian defense counsel affirmatively stated that Appellant was "on orders" at the time of both arraignment in December 2022 and the guilty plea in September 2023. (R. at 12, 464). Appellant requested to be permanently placed on orders, but the request was denied. (R. at 457). Civilian defense counsel stated Appellant "has been brought on and off" orders for each Article 39(a) hearing in the court-martial. (Id.). While Appellant may have requested to be placed on orders to receive pay for the duration of the court-martial process (R. at 583), the Government was under no obligation to grant that request. The Government's obligation, which it met, was to ensure Appellant was on orders for each stage of the court-martial process in compliance with Article 2, RCM 204, and DAFI 51-201.

The Government has met its burden to prove it had personal jurisdiction over Appellant for the court-martial process by a preponderance of the evidence. Therefore, this Court should not set aside Appellant's conviction on the basis of lack of personal jurisdiction.

## CONCLUSION

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

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 11 June 2025.

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

| | | |
|---|---|---|
| **UNITED STATES**,<br>*Appellee,* | ) | UNITED STATES' MOTION TO ATTACH (SECOND) |
| v. | ) | Before Panel No. 1 |
| Captain (O-3)<br>**MICHAEL J. HYMEL**<br>United States Air Force<br>*Appellant.* | ) | No. ACM 40627<br><br>11 June 2025 |

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

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

- Appendix A – *Capt William Barton Declaration*, dated 10 June 2025 (1 page)
- Appendix B – *Capt Connor Weber Declaration*, dated 5 June 2025 (1 page)
- Appendix C – *Capt Brian Friery Declaration*, dated 5 June 2025 (1 page)
- Appendix D – *SECAF Recall Approval Memorandum*, dated 29 October 2021 (1 page)
- Appendix E – *Capt Michael Hymel's Involuntary Recall Orders (Article 32)*, dated 4 August 2022 (3 pages)
- Appendix F – *Capt Michael Hymel's Involuntary Recall Orders (Referral)*, dated 23 September 2022 (3 pages)
- Appendix G – *Capt Michael Hymel's Involuntary Recall Orders (Arraignment)*, dated 30 November 2022 (3 pages)
- Appendix H – *Capt Michael Hymel's Involuntary Recall Orders(Trial)*, dated 24 March 2023 (3 pages)
- Appendix I – *Capt Michael Hymel's Involuntary Recall Orders (Guilty Plea)*, dated 26 September 2023 (3 pages)

The attached documents are responsive to Appellant's Assignment of Error concerning whether there is insufficient evidence in the record to show that the Government had personal jurisdiction over Appellant during his court-martial.

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442. (*quoting* United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). For matters of jurisdiction raised for the first time on appeal, the Government may meet its burden by submitting documents to demonstrate that jurisdiction existed over the appellant. United States v. Oliver, 57 M.J. 170, 172 (C.A.A.F. 2002). Accordingly, the attached documents are relevant and necessary to address Appellant's Assignment of Error.

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

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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 11 June 2025.

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

| | | |
|---|---|---|
| **UNITED STATES,** | ) | REPLY TO APPELLEE'S ANSWER |
| | ) | |
| *Appellee*, | ) | Before Panel No. 1 |
| | ) | |
| v. | ) | ACM 40627 |
| | ) | |
| Captain (O-3) | ) | |
| **MICHAEL J. HYMEL,** | ) | 17 June 2025 |
| United States Air Force, | ) | |
| | ) | |
| *Appellant*. | ) | |

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

Appellant, Captain Michael J. Hymel, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Government's Answer, dated 11 June 2025. In addition to the arguments in his opening brief, filed on 12 May 2025, Appellant submits the following arguments for the issues listed below.

**I.**

**APPELLANT'S PLEA TO DERELICTION OF DUTY IS IMPROVIDENT BECAUSE (1) THE MILITARY JUDGE FAILED TO ELICIT A FACTUAL BASIS THAT APPELLANT'S DRINKING AND DANCING WAS INAPPROPRIATE AND UNPROFESSIONAL CONDUCT WITH A1C AB THAT DETRACTED FROM THE SUPERIOR-TO-SUBORDINATE RELATIONSHIP, AND (2) THE MILITARY JUDGE FAILED TO ELICIT A VIOLATION OF AIR FORCE INSTRUCTION 1-1.**

**A. The Government's interpretation of the duty Air Force Instruction 1-1 is legally and logically deficient.**

Although the Government acknowledges that "[p]aragraph 2.2.2. is about maintaining professional relationships," it attempts to contort the plain language of AFI 1-1 to make it cover Appellant's conduct. Answer at 14. This logic is flawed for at least three reasons.

First, as was recently reiterated by the CAAF in *United States v. Taylor*, the law should be interpreted by its plain language. __ MJ __, No. 24-0234, 2025 CAAF LEXIS 449, at *9

(C.A.A.F. June 10, 2025). As the Government concedes, the plain language of paragraph 2.2.2. "is about maintaining professional relationships." Answer at 14. By its plain language, paragraph 2.2.2. is not broad enough to encompass all unprofessional conduct; it only covers relationships. For example, if an officer sexually harasses an enlisted member in the chain of command, the officer has engaged in unprofessional conduct; the officer has not established an unprofessional relationship with that enlisted member. While unprofessional conduct is plainly prohibited, it is not paragraph 2.2.2. of AFI 1-1 that prohibits it. On the other hand, if that officer is spending a lot of free time with an enlisted member in the chain of command, is socializing one-on-one while off duty with the enlisted member, and is going on vacation with the enlisted member that is an unprofessional relationship that would be prohibited by paragraph 2.2.2. of AFI 1-1.

Second, the language the Government cites to as the central tenant of its argument – i.e., that common sense and military custom can fill the gaps for the existence of a duty – is mere dicta with no precedential value. *See United States v. Shelly*, 19 M.J. 325, 328 (C.M.A. 1985)). In *United States v. Shelly* – the case the Government relies on for its argument – the court did not rely on "common sense and military custom" to fill gaps in the existence of duty; the court was merely expressing a hypothetical situation involving a hypothetical gate guard. *See* 19 M.J. at 328. Common sense and military custom played no role in the holding of the case. *Id*. Thus, the *Shelly* court was doing nothing more than considering an abstract and hypothetical situation. A court's consideration of abstract and hypothetical situations is dicta. *United States v. Flanner*, 85 M.J. 163, 174 (C.A.A.F. 2024). Thus, the Government's cited language is dicta and has no precedential value. *Id.*

Third, the Government's argument is a logical fallacy. The logical fallacy of denying the antecedent is the "incorrect assumption that if P implies Q, then not-P implies not-Q." *N.L.R.B. v. Canning*, 573 U.S. 513, 589 (2014) (Scalia, J., concurring). This is precisely the Government's argument. The Government argues that because AFI 1-1, paragraph 2.2.2., states, "social interaction that contributes appropriately to unit cohesiveness and effectiveness is encouraged" then "[c]ommon sense says that the opposite kind of social interactions would be *discouraged.*" Answer at 15. In other words, if social interaction contributes appropriately, then it is encouraged; if social interaction does not contribute appropriately, then it is not encouraged. If P (appropriate interaction), then Q (encouraged); If not-P (inappropriate interaction), then not-Q (not encouraged). This fallacy is the only argument the Government makes that paragraph 2.2.2. of AFI 1-1 prohibits the conduct the military judge elicited from Appellant.

**B. The Government's argument about the facts established by the military judge to support the plea is insufficient.**

As discussed in Appellant's initial brief (AOE), the military judge failed to reconcile inconsistencies between the Stipulation of Fact and Appellant's colloquy. AOE at 13. This narrowed the grounds for the conviction to two weak bases: "excessive drinking passing out on a chair in front of subordinates," and "dancing on a tight dance floor with subordinates[.]" *Id*. Recognizing the weakness of these bases, and in an effort to salvage a factual basis for Appellant's improvident plea, the Government makes a series of insufficient arguments.

First, the Government attempts to characterize Appellant's dancing as "provocative" in order to argue that it was inappropriate. *See* Answer at 3 ("[H]e danced with AB in a 'very close proximity and in a provocative manner[.]'"), 16 ("[H]is drunken provocative dancing in close proximity[.]"; "[P]rovocative dancing, and resulting lack of trust[.]"), 18 ("[P]rovocative dancing in close quarters[.]"; "[D]ancing in very close proximity and in a provocative manner[.]").

Presumably, when the Government argues Appellant danced "provocatively," it means he danced in a sexual manner (although, the Stipulation of Fact fails to clarify what exactly was being provoked by Appellant's dancing). While it is correct that the Stipulation of Fact describes the dancing as "provocative," Pros. Ex. 1 at para. 8, Appellant denied "sexual displays *of any kind* to" A1C AB during the providence inquiry. AOE at 13 (emphasis added). A denial of "sexual displays of any kind" is inconsistent with, and contradicts, the idea that Appellant was dancing in a sexually provocative manner. This inconsistency was never reconciled by the military judge, as is required under Article 45(a), UCMJ. Thus, the Government cannot now act as if the "provocativeness" of Appellant's dance is an established fact that can be argued on appeal.

The Government also makes a feeble argument that the proximity to A1C AB during Appellant's dancing was not due to the crowded nature of the dance floor. Answer at 18. In the context of Appellant's colloquy, however, it could not be clearer that Appellant was explaining that the proximity was due to the crowded floor. The military judge told Appellant to "[t]alk to [him] about the dancing." Tr. at 446. To which Appellant responded, "So the dancing was – the dancing was a crowded dance floor . . ." and "[h]owever, in the close proximity of a crowded dance floor . . ." Tr. at 447. Clearly, when read in context, Appellant was explaining the cause of the close proximity. To the degree that it was not clear, it was the military judge's responsibility to seek clarification.

Lastly, although the record is clear that the military judge only used the drinking and dancing to factually support the plea, the Government additionally attempts to argue that "private conversations with AB" support the providency of Appellant's plea. Answer at 17. This is unpersuasive for two reasons.

First, the Government is taking paragraph 6 of the Stipulation of Fact out of context. While conceding that Appellant denied conversations of a sexual nature with A1C AB (and that denial/inconsistency was never reconciled by the military judge), the Government argues that Appellant never denied ALL personal conversations with A1C AB and points to paragraph 6 of the Stipulation of Fact for support. *Id*. While it is correct that paragraph 6 only mentions "conversations of a personal nature," it is obvious that paragraph 7 is meant to explain the nature of the conversations discussed in paragraph 6 by stating that the "group conversation . . . included discussion of sexual intercourse, past sexual experiences, and A1C [AB's] viewing of her boyfriend's penis." Pros. Ex. 1.

Second, the bare assertion that "personal" conversations were "inappropriate" is a legal conclusion with no facts elicited support it. Without the details of the conversations (i.e., the facts) that allegedly made any conversation inappropriate, it would not be possible to assess whether the conversation was appropriate or not. This is insufficient to support a guilty plea because a "military judge must elicit *actual facts* from an accused and not merely legal conclusions." *United States v. Moratalla*, 82 M.J. 1, 3 (C.A.A.F. 2021) (quoting *United States v. Price*, 76 M.J. 136, 138 (C.A.A.F. 2017)).

**WHEREFORE**, Appellant respectfully requests this Honorable Cort set aside his conviction.

## II.

**APPELLANT, A MEMBER OF THE LOUISIANA AIR NATIONAL GUARD, WAS ALLEGEDLY INVOLUNTARILY RECALLED TO ACTIVE DUTY TO STAND TRIAL BY GENERAL COURT-MARTIAL. DESPITE THIS, THE RECORD IS MISSING THE FACTS NECESSARY TO ESTABLISH PERSONAL JURISDICTION OVER APPELLANT AT THE TIME OF THE REQUIRED STAGES OF THE COURT-MARTIAL. THE CHARGE AND SPECIFICATION MUST BE DISMISSED BECAUSE THE RECORD DOES NOT ESTABLISH THAT THOSE ACTIONS WERE PROPERLY TAKEN**

**AND THE GOVERNMENT CANNOT PROVE THAT THE COURT-MARTIAL HAD PERSONAL JURISDICTION OVER APPELLANT.**

**A. The Government's argument of waiver is contrary to well established law.**

The Government appears to argue that the issue of lack of jurisdiction was waived. *See* Answer at 24 ("They said they 'would affirmatively waive' the issue[.]"; "Appellant conceded jurisdiction[.]"), 25 ("But given trial defense counsel's and Appellant's concession of jurisdiction[.]"). Indeed, the Government feels so strongly that jurisdictional defects were waived that "it is unclear how Appellant has a good faith basis to challenge jurisdiction now." Answer at 25.

In reaching for waiver, the Government ignores Rule for Courts-Martial 907(b)(1): jurisdiction is "nonwaivable" and charges shall be dismissed if there was a lack of jurisdiction. The Government also ignores at least seventy years of the jurisprudence of our superior court plainly stating that jurisdiction cannot be waived. *See United States v. Garcia*, 5 C.M.A. 88, 94 (C.M.A. 1954) ("[J]urisdiction over the person, as well as jurisdiction over the subject matter, may not be the subject of waiver."); *United States v. Huff*, 29 C.M.R. 213, 222 (C.M.A. 1960) ("We have repeatedly held . . . that pleas of guilty waive all but jurisdictional errors."); *United States v. Martin*, 41 C.M.R. 211, 215 (C.M.A. 1970) ("His consent could no more give jurisdiction to the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians or of women."); *United States v. Wilson*, 21 M.J. 193, 197 (C.M.A. 1986) ("If the disqualification is not jurisdictional, we see no reason why it cannot be waived."); *United States v. Rivera*, 46 M.J. 52, 54 (C.A.A.F. 1997) ("On its face, this agreement was too broad and could conceivably violate the prohibition against waivers of . . . 'the right to challenge the jurisdiction of the court-martial[.]'"); *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000) ("The requirement that a record of trial be complete and substantially

verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived."); *United States v. Daly*, 69 M.J. 485, 486 (C.A.A.F. 2010) ("A question of jurisdiction is not subject to waiver and may be raised at any time."); *United States v. Tate*, 82 M.J. 291, 294 (C.A.A.F. 2022) ("The lack of a verbatim transcript is a jurisdictional error that cannot be waived.")

This well-established law gives Appellant ample basis to challenge jurisdiction on appeal.

**B. The Government's argument that Air Force procedures were properly followed when involuntarily recalling Appellant ignores a number of required procedures.**

The orders the Government has moved to attach to the record in this case are the alleged culmination of the jurisdictional procedures the Air Force requires to involuntarily recall an Air National Guard member. But those orders do not illuminate whether the underlying procedures –which must be followed in order to establish jurisdiction over an Air Force Reserve Component member – were properly abided by in the first place. *See* AOE at 18-22.

As pointed out in the AOE, before a court-martial may exercise jurisdiction over a member of the Air National Guard, Department of the Air Force Instruction (DAFI) 51-201 requires that the "[c]onvening authorities with concurrent jurisdiction *must coordinate before* disposition is determined." Paras. 3.3.1., 3.3.2.2. (emphasis added). There is nothing in the record showing predisposition coordination between the 36th Wing (the Special Court Martial Convening Authority at Andersen Air Force Base that exercised Operational Control over Appellant during the charged timeframe), or the 11th Air Force (the GCMCA operating Operational Control over Appellant during the charged timeframe), or the Convening Authority for Appellant's home station in Louisiana. All of these convening authorities had concurrent jurisdiction over Appellant during the charged timeframe, but none were coordinated with. The same holds true for coordination between these entities and the 201st Mission Support Squadron

as is required by paragraph 3.3.2.2. of DAFI 51-201. Similarly, nothing in the record shows that the 36th Wing or 11th Air Force coordinated with the geographically closest command when disciplinary action could not be completed before Appellant reverted to non-federal status as is required by paragraph 3.3.3.2.2.

It becomes apparent that the record is devoid of these necessary steps by looking at the Government's "Additional Facts" section. Answer at 19. The section starts by stating that the Louisiana Adjutant General (TAG) "concurred with the recall of Appellant for court-martial." *Id*. This stage of an involuntary recall occurs in the middle of the procedures required by DAFI 51-201; it is not the beginning of the process. As discussed above, as well as in the AOE, there were a number of requirements that had to occur before the TAG concurred with court martial.

And, as discussed in the AOE, these procedures – that the Air Force created for itself – must be abided by; the failure to do so divests a court-martial of jurisdiction. *See United States v. Peel*, 4 M.J. 28 (C.M.A. 1977); *United States v. Kilbreth*, 47 C.M.R. 327 (C.M.A. 1973).

**C. The Government's argument that a set of orders sufficiently establishes jurisdiction ignores the CAAF's recent decision in United States v. Taylor**.

The Government argues that the series of orders it has moved to attach to the record conclusively proves that there was personal jurisdiction over Appellant during the necessary stages of his court martial. *See* Answer at 25-28. This argument ignores the CAAF's recent decision in *United States v. Taylor*. __ MJ __, No. 24-0234, 2025 CAAF LEXIS 449 (C.A.A.F. June 10, 2025).

The appellant in *Taylo*r was also issued orders involuntarily recalling him onto active duty for his court martial. *Id*. at *4. However, the CAAF found that it was clear and obvious that the court lacked jurisdiction over the appellant despite the orders he received. *Id*. at *8-9. Thus, orders by themselves do not establish jurisdiction; at least not when issued without

authority. In *Taylor,* the Government lacked authority because it failed to abide by Article 2(d), UCMJ, when it issued the recall orders; in Appellant's case, the Government lacked authority because it failed to abide by DAFI 51-201 when it issued the recall orders.

**WHEREFORE**, Appellant respectfully requests this Honorable Court set aside his conviction.

Respectfully submitted,

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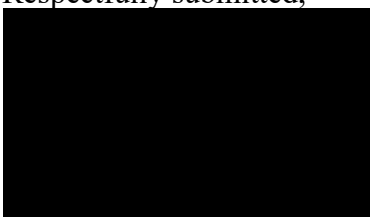
**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 17 June 2025.

Respectfully submitted,



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# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40627** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Michael J. HYMEL** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 11 June 2025, counsel for the Government submitted a Motion to Attach (Second), specifically requesting to attach Appendices A through I, which consists of the following documents: three declarations by Captains WB, CW, and BF; one Recall Approval Memorandum from the Secretary of the Air Force dated 29 October 2021; and five of Appellant's Involuntary Recall Orders, with dates ranging from 29 October 2021 to 26 September 2023. Appellant did not oppose the motion.

The court has considered the Government's unopposed motion, case law, and this court's Rules of Practice and Procedure. The court grants the Government's motion; however, it specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law to the attachments until it completes its Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's entire case.

Accordingly, it is by the court on this 24th day of June, 2025,

**ORDERED:**

Government's Motion to Attach (Second), dated 11 June 2025, is **GRANTED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40627** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **NOTICE OF PANEL CHANGE** |
| **Michael J. HYMEL** | ) | |
| **Captain (O-3)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | |

It is by the court on this 4th day of August, 2025,

**ORDERED:**

That the Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

AGNIESZKA M. GAERTNER, Capt, USAF
Commissioner