IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **STEVE D. MANRIQUEZ,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 2 No. ACM 40527 7 December 2023

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 60 days, which will end on **13 February 2024.** The record of trial was docketed with this Court on 16 October 2023. From the date of docketing to the present date, 52 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 7 December 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
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8 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) STEVE D. MANRIQUEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40527 Panel No. 2

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

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

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

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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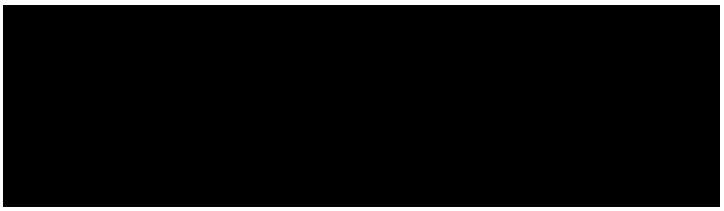
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 December 2023.



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **STEVE D. MANRIQUEZ,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 No. ACM 40527 5 February 2024

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **14 March 2024.** The record of trial was docketed with this Court on 16 October 2023. From the date of docketing to the present date, 109 days have elapsed. On the date requested, 150 days will have elapsed. Counsel withdraws the previously filed EOT 2 because it contained an error in the heading.

On 12 April 2023, at a general court-martial at Barksdale Air Force Base, Louisiana, a military judge found Senior Airman (SrA) Steve D. Manriquez guilty, consistent with his plea, of four specifications of abusive sexual contact, one specification of indecent recording, and one specification of indecent conduct in violation of Articles 120, 120c, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 920c, 934 (2021). (R. at 84; Entry of Judgment (EOJ), 27 Jul. 2023.) The judge sentenced SrA Manriquez to a dishonorable discharge, 36 months'

confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. (R. at 128; EOJ.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, 6 Jun. 2023.)

The record of trial consists of 3 prosecution exhibits, 1 defense exhibits, 19 appellate exhibits, and 2 court exhibits. The transcript is 129 pages. SrA Manriquez is currently confined.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 5 February 2024.

[redacted]

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5 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) STEVE D. MANRIQUEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40527 Panel No. 2

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

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

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

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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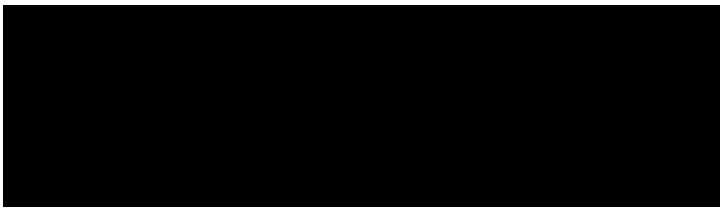
CERTIFICATE OF FILING AND SERVICE

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



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **STEVE D. MANRIQUEZ,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 2 No. ACM 40527 5 March 2024

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **13 April 2024.** The record of trial was docketed with this Court on 16 October 2023. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 12 April 2023, at a general court-martial at Barksdale Air Force Base, Louisiana, a military judge found Senior Airman (SrA) Steve D. Manriquez guilty, consistent with his plea, of four specifications of abusive sexual contact, one specification of indecent recording, and one specification of indecent conduct in violation of Articles 120, 120c, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 920c, 934 (2021). (R. at 84; Entry of Judgment (EOJ), 27 Jul. 2023.) The judge sentenced SrA Manriquez to a dishonorable discharge, 36 months' confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

(R. at 128; EOJ.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, 6 Jun. 2023.)

The record of trial consists of 3 prosecution exhibits, 1 defense exhibits, 19 appellate exhibits, and 2 court exhibits. The transcript is 129 pages. SrA Manriquez is currently confined.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
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(240) 612-4770

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 Government Trial and Appellate Operations Division on 5 March 2024.

MATTHEW L. BLYTH, Maj, USAFR
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5 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) STEVE D. MANRIQUEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40527 Panel No. 2

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 2024.

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

UNITED STATES *Appellee,* v. Senior Airman (E-4) **STEVE D. MANRIQUEZ,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 2 No. ACM 40527 3 April 2024

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

Pursuant to Rule 23.3(m)(3) and (m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **13 May 2024.** The record of trial was docketed with this Court on 16 October 2023. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 12 April 2023, at a general court-martial at Barksdale Air Force Base, Louisiana, a military judge found Senior Airman (SrA) Steve D. Manriquez guilty, consistent with his plea, of four specifications of abusive sexual contact, one specification of indecent recording, and one specification of indecent conduct in violation of Articles 120, 120c, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 920c, 934 (2021). (R. at 84; Entry of Judgment (EOJ), 27 Jul. 2023.) The judge sentenced SrA Manriquez to a dishonorable discharge, 36 months' confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

(R. at 128; EOJ.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, 6 Jun. 2023.)

The record of trial consists of 3 prosecution exhibits, 1 defense exhibits, 19 appellate exhibits, and 2 court exhibits. The transcript is 129 pages. SrA Manriquez is currently confined.

Counsel is currently assigned 22 cases, with 5 pending initial briefs before this Court. Counsel has begun review of the record. There is one pending case before this Court with higher priority:

United States v. Menard, ACM 40496. The record of trial consists of 9 prosecution exhibits, 10 defense exhibits, and 31 appellate exhibits, and 1 court exhibit. The transcript is 531 pages. Counsel has completed the brief in *Menard* and will file shortly.

Counsel is also working on a reply in *United States v. Williams*, ACM 40410, which is due on 8 April 2024.

Through no fault of SrA Manriquez, undersigned counsel has been working on other assigned matters and has yet to complete the assignments of error. SrA Manriquez was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SrA Manriquez's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 Government Trial and Appellate Operations Division on 3 April 2024.

MATTHEW L. BLYTH, Maj, USAFR
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4 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) STEVE D. MANRIQUEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40527 Panel No. 2

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

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

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

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 April 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
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S IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 2
Senior Airman (E-4) **STEVE D. MANRIQUEZ,** United States Air Force *Appellant*	)	No. ACM 40527 6 May 2024

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

Pursuant to Rules 23(b) and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to attach the following document to the record: Declaration of Steve D. Manriquez, dated 18 April 2024, 1 page. This document is relevant and necessary to establish the date when Senior Airman (SrA) Manriquez actually received the record of trial, which relates to Assignment of Error (AOE) I on post-trial processing delay. The document also provides additional information on the prejudice suffered because of post-trial delays, which is a mandatory part of this Court's analysis under that AOE.

In *United States v. Jessie*, 79 M.J. 437, (C.A.A.F. 2020), the Court of Appeals for the Armed Forces did not bar the consideration of declarations, such as this one, that explain the timing and impact of post-trial actions, or inaction. Moreover, the information contained within addresses key matters this Court must consider when assessing prejudice.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the motion and attach the document to the record.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 Government Trial and Appellate Operations Division on 6 May 2024.

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Joint Base Andrews NAF, MD 20762
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Senior Airman (SrA) **STEVE D. MANRIQUEZ,** United States Air Force *Appellant*	)	No. ACM 40527 6 May 2024

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

Assignments of Error

I.

WHETHER SENIOR AIRMAN MANRIQUEZ IS ENTITLED TO SENTENCE RELIEF BECAUSE OF THE 187-DAY DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT.

II.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE ALLOWED BOTH VICTIMS TO GO BEYOND PERMISSIBLE GROUNDS IN THEIR UNSWORN STATEMENTS.

III.

WHETHER SENIOR AIRMAN MANRIQUEZ'S SENTENCE IS INAPPROPRIATELY SEVERE.

IV.

WHETHER, AS APPLIED TO SENIOR AIRMAN MANRIQUEZ, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM

REGULATION"[1] WHEN HE STANDS CONVICTED OF NONVIOLENT OFFENSES.

V.[2]

WHETHER A PLEA AGREEMENT REQUIRING A BAD-CONDUCT DISCHARGE RENDERS THE SENTENCING PROCEEDING AN "EMPTY RITUAL" AND THUS VIOLATES PUBLIC POLICY.

Statement of the Case

On 12 April 2023, at a general court-martial at Barksdale Air Force Base (AFB), Louisiana, a military judge found Senior Airman (SrA) Steve D. Manriquez guilty, consistent with his plea, of four specifications of abusive sexual contact, one specification of indecent recording, and one specification of indecent conduct in violation of Articles 120, 120c, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 920c, 934 (2018).[3] (R. at 84; Entry of Judgment (EOJ), 27 Jul. 2023.) The judge sentenced SrA Manriquez to a dishonorable discharge, 36 months' confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. (R. at 128; EOJ.) The convening authority took no action on the findings or sentence.[4]

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[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

[2] Assignment of Error (AOE) V is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and is located in the appendix.

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

[4] Once again, it appears the Government did not provide an accused the opportunity to respond to victim-submitted matters. BR submitted matters on 18 April 2023, and the defense counsel representative signed the receipt on 26 June 2023. (Receipt from Area Defense Counsel Representative, ROT Vol. 3, dated 27 April 2023 but signed 26 June 2023.) There is no indication that SrA Manriquez received the submission. This

(Convening Authority Decision on Action, 6 Jun. 2023.)

Statement of Facts

SrA Manriquez was born in California to hardworking parents. (Def. Ex. A at 1.) Although a good student, his school experience was disjointed as his parents moved for work both within and outside the country. (*Id.* at 1–2.) Later in high school he used alcohol to help establish the social connections he "was lacking and craving." (*Id.* at 2.) SrA Manriquez joined the Air Force to help his family financially and attain "the stability that [he] never had growing up." (*Id.* at 2–3.) He came into the Air Force open mechanical and drew an assignment to Barksdale AFB to work on B-52s. (*Id.* at 3.) Although he was growing as an Airman, in 2020 his parents' business was failing and he pursued Palace Chase to leave the military and help them through. (*Id.*) COVID-19 disrupted these plans, and he instead was chosen to join Honor Guard, a position whose emotional toll, including providing flags to the families of the fallen, wore on him. (*Id.* at 4.)

Offenses involving BR

SrA Manriquez and BR were friends and co-workers. (R. at 39.) One night, SrA Manriquez met BR and other friends at a club where both consumed alcohol. (R. at 37.) They left the club early in the morning with two other Airman and returned to BR's home. (*Id.*) BR slept in the car on the way to her home and had to be carried inside. (R. at 37–38.) SrA Manriquez placed BR on a mattress, left the room, and

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was clear error. *United States v. Valentin-Andino*, 83 M.J. 537, 542–43 (A.F. Ct. Crim. App. 2023). But because BR said essentially the same thing as she did in her unsworn statement, SrA Manriquez does not assert prejudice.

later returned. (R. at 42–43.) While BR slept, SrA Manriquez took photographs of her clothed body, touched her breast over her bra, and touched her vagina through her underwear. (R. at 38.) BR awoke and left the room, then returned and appeared to fall back asleep. (R. at 59.) He then removed her shorts and put his mouth on her anus to perform oral sex. (*Id.*) He was interrupted when another Airman came into the room; BR then awoke and began hitting SrA Manriquez. (R. at 59–60, 94–96.)

The military judge sentenced SrA Manriquez to 12 months' confinement for touching her breast, 36 months' confinement for touching her anus with his mouth, and 16 months' confinement for touching her vulva. (R. at 128.)

Offenses involving SG

SrA Manriquez and SG were roommates. (R. at 46; Pros. Ex. 1 at 3.) After a New Year's Eve party, SrA Manriquez entered the bathroom early in the morning to find SG asleep on the floor. (R. at 46.) He began recording SG and then pulled out his penis and briefly began masturbating. (*Id.*) He put his penis away and touched SG's groin area underneath her underwear. (*Id.*) She awoke and then went to bed. (*Id.*)

The military judge sentenced SrA Manriquez to 18 months' confinement for masturbating in SG's presence, 18 months' confinement for touching her groin, and 28 months' confinement for indecent recording of the masturbation and touching. (R. at 128.)

Additional facts necessary to resolve specific issues are provided below.

ARGUMENT

I.

SENIOR AIRMAN MANRIQUEZ IS ENTITLED TO SENTENCE RELIEF BECAUSE OF THE 187-DAY DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT.

Additional Facts

SrA Manriquez's court-martial concluded on 12 April 2023. (R. at 128.) The first time the legal office reached out to the court reporter about the case status was on 22 June 2023, 71 days later. (Legal Office *Moreno* Chronology, Record of Trial (ROT) Vol. 2, 5 Sep. 2023.) The court reporter did not begin transcription until 10 July 2023, 89 days after the sentence. (Court Reporter's Chronology, ROT Vol. 3, undated). The transcription finished 35 days later. (*Id.*) The transcript is 129 pages; thus, the transcription proceeded at an average of less than four pages per day. On 5 September 2023, the legal office sent the record to the Numbered Air Force and JAJM. (Legal Office *Moreno* Chronology.) This Court docketed the case on 16 October 2023, 187 days after announcement of sentence. There is no indication what occurred between 5 September and 16 October 2023.

The legal office sent an electronic ROT to the Air Force liaison at NAVCONBRIG Charleston on 31 August 2023. (DoD SAFE Transmission, ROT Vol. 3, 31 Aug. 2023.) The liaison never delivered the ROT. After intervention by undersigned counsel, the ROT was finally delivered in March 2024. (Declaration of SrA Steve Manriquez, 18 April 2024.)

Standard of Review

Whether an appellant has been deprived of his due process right to speedy appellate review is a question of law reviewed de novo. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law and Analysis

SrA Manriquez is entitled to sentence relief from this Court because of the Government's dilatory processing violated *Moreno*. Even if this Court were to find no prejudice from the due process violation, he is nevertheless entitled to relief under *Gay*, *Toohey*, and *Tardif*.[5]

Convicted servicemembers have a due process right to timely review of courts-martial convictions. *Moreno*, 63 M.J. at 135. Presumptive prejudicial delay occurs in three scenarios: (1) the action of the convening authority is not taken within 120 days of the completion of trial; (2) the record of trial is not docketed by the service Court of Criminal Appeals (CCAs) within 30 days of the convening authority's action; or (3) appellate review is not completed and a decision is not rendered by a CCA 18 months after docketing. 63 M.J. at 142. This Court also adapted *Moreno*'s benchmark standards for the new post-trial processing scheme. *See United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (applying the aggregate *Moreno* standard of

[5] *United States v. Gay*, 74 M.J. 736 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016); *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

150 days from the day an appellant was sentenced to the docketing of the case with the CCA to determine presumptively unreasonable delay).

The initial inquiry starts with the presumption of unreasonable post-trial delay. The 187-day delay between the 12 April 2023 announcement of sentence and the 16 October 2023 docketing with this Court amply exceeds the 150-day limit from *Livak*.

A presumption of unreasonable post-trial delay triggers a four-part analysis. *Moreno*, 63 M.J. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). It includes: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id*. Prejudice considers "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Id*. at 138–39 (citations omitted). The Court of Appeals for the Armed Forces (CAAF) "expect[s]" the CCAs to "document the reasons for delay" and "exercise [] institutional vigilance." *Id*. at 143. Once a presumptive delay or facially unreasonable delay triggers the analysis, the factors are balanced with no single factor being required and none being dispositive. *Id*. at 136 (citations omitted).

The total length of delay and the reasons for the delay weigh in favor of SrA Manriquez. This was a relatively straightforward guilty-plea case that took 187 days to docket. From the chronology, it appears almost nothing occurred in the first

three months after the court-martial. As to the demand for speedy appellate review, SrA Manriquez has not yet demanded speedy appellate review but does so here. As to prejudice, SrA Manriquez remains confined with the inability to care for his family. (Declaration of SrA Steve Manriquez.) He has shown sufficient prejudice to warrant relief under *Moreno*.

Even if this Court finds no prejudice, SrA Manriquez is still entitled to post-trial relief. *See Tardif*, 57 M.J. at 225; *Gay*, 74 M.J. at 744. The factors for *Tardif* relief include:

> (1) How long did the delay exceed the standards set forth in [*Moreno*]? (2) What reasons, if any, has the [G]overnment set forth for the delay? Is there any evidence of bad faith or gross indifference to the overall post-trial processing of this case? (3) Keeping in mind that our goal under *Tardif* is not to analyze for prejudice, is there nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay? (4) Has the delay lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline? (5) Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation? (6) Given the passage of time, can this court provide meaningful relief in this particular situation?

Gay, 74 M.J. at 744. These factors also favor SrA Manriquez. First, the 187 days far exceeded the 150 days authorized from the announcement of sentence to docketing a complete record of trial. Second, there is no discernable reason why the Government could not make the deadline here. As articulated above, the reasons for delay also weigh in SrA Manriquez's favor. To the extent the prejudice analysis above did not persuade the Court, at the very least, there is still "some evidence of harm"—the unique circumstances of SrA Manriquez's family's reliance upon him for financial

support. Next, providing sentencing relief will have no impact on good order and discipline and will not lessen the disciplinary effect of the sentence. He has already served the minimum confinement agreed to in the plea agreement.

On the issue of institutional neglect, this Court is well aware of the trend of untimely docketing and incomplete records of trial. Indeed, the frequency of such incomplete records is disturbing and disconcerting—27 cases in just over two years.[6]

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[6] *See United States v. Howard*, No. ACM 40478, 2024 CCA LEXIS 137 (A.F. Ct. Crim. App. 9 Apr. 2024) (remand order); *United States v. Moore*, No. ACM 40442, 2024 CCA LEXIS 118 (A.F. Ct. Crim. App. 21 Mar. 2024) (remand order); *United States v. Donley*, No. ACM 40350, 2024 CCA LEXIS 115 (A.F. Ct. Crim. App. 19 Mar. 2024) (unpub. op.) (remanding due to record of trial issues); *United States v. Smith*, No. ACM 40437, 2024 CCA LEXIS 109 (A.F Ct. Crim. App. 11 Mar. 2024) (remand order); *United States v. Harnar*, No. ACM 40559, 2024 CCA LEXIS 39 (A.F. Ct. Crim. App. 31 Jan. 2024) (remand order); *United States v. Wells*, No. ACM S32762, 2024 CCA LEXIS 15 (A.F. Ct. Crim. App. 18 Jan. 2024) (remand order); *United States v. Conway*, No. ACM 40372, 2023 CCA LEXIS 501 (A.F. Ct. Crim. App. 5 Dec. 2023) (unpub. op.); *United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. 11 Sep. 2023) (remand order); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. 1 Aug. 2023) (remand order); *United States v. Manzano Tarin*, No. ACM S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. 27 Jun. 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. 15 Jun. 2023) (remand order); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Gammage*, No. ACM S32731, 2023 CCA LEXIS 240 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Goodwater*, No. ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. 31 May 2023) (remand order); *United States v. Irvin*, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim. App. 12 May 2023) (remand order); *United States v. Valentin-Andino*, 83 M.J. 537, 544 (A.F. Ct. Crim. App. 2023) (remanding because of audio issue); *United States v. Lake*, No. ACM 40168, 2022 CCA LEXIS 706 (A.F. Ct. Crim. App. 7 Dec. 2022) (remand order); *United States v. Fernandez*, No. ACM 40290, 2022 CCA LEXIS 668 (A.F. Ct. Crim. App. 17 Nov. 2022) (remand order); *United States v. Stafford*, No. ACM 40131, 2022 CCA LEXIS 654 (A.F. Ct. Crim. App. 8 Nov. 2022) (remand order); *United States v. Lampkins*, No. ACM 40135, 2020 CCA LEXIS 500 (A.F. Ct. Crim. App. 25 Oct. 2022) (remand order); *United States v. Romero-Alegria*, No. ACM 40199, 2022 CCA LEXIS 558 (A.F. Ct. Crim. App. 22 Sep. 2022) (remand order); *United States v. Payan*, No. ACM 40132, 2022 CCA LEXIS 242 (A.F. Ct. Crim. App. 28 Apr.

Even if the record here is mostly complete,[7] this untimely docketing still fits within the broader pattern of institutional neglect. At a certain point, which has now been surpassed, an appellant should get relief—in part—to motivate the Government to do its job correctly in preparing and docketing a correct record of trial within 150 days of announcement of sentence.

WHEREFORE, SrA Manriquez respectfully requests this Honorable Court grant sentencing relief by disapproving any more than two years' confinement for Specification 1 of the Second Additional Charge and disapproving any more than two years' confinement for the Specification of Charge II, and downgrading the dishonorable discharge to a bad-conduct discharge. SrA Manriquez also demands speedy appellate review.

2022) (remand order); *United States v. Cooper*, No. ACM 40092, 2022 CCA LEXIS 243 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. 17 Mar. 2022) (unpub. op.); *United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43 (A.F. Ct. Crim. App. 20 Jan. 2022) (unpub. op.) (requiring second remand for noncompliance with initial remand order), *United States v. Goldman*, No. ACM 39939 (f rev), 2022 CCA LEXIS 511 (A.F. Ct. Crim. App. 30 Aug. 2022) (remand order); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10 (A.F. Ct. Crim. App. 6 Jan. 2022) (unpub. op.); *United States v. Daley*, No. ACM 40012, 2022 CCA LEXIS 7 (A.F. Ct. Crim. App. 5 Jan. 2022) (unpub. op.).

[7] This record of trial is not complete, but SrA Manriquez does not claim substantial omissions. Appellate Exhibits IV and VI are duplicate victim's counsel responses to Mil. R. Evid. 513 motions, which are not sealed. (None of the exhibits relating to Mil. R. Evid. 412 or 513, Appellate Exhibits II-VII, are sealed.) Also, the second attachment to the Defense's Mil. R. Evid. 513 motion (App. Ex. II) does not function.

II.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE ALLOWED BOTH VICTIMS TO GO BEYOND PERMISSIBLE GROUNDS IN THEIR UNSWORN STATEMENTS.

Additional Facts

BR's Unsworn Statement

During presentencing, BR, through her victims' counsel, provided her unsworn statement to the court. (R. at 109.) The Defense objected to the portion that stated: "His actions are worth time in jail." (R. at 110.) The military judge ruled that she would give "it it's due consideration as appropriate, and I will not take it as a request for a specific sentence." (*Id.*)

SG's Unsworn Statement

SG similarly provided her unsworn statement to the court through her victims' counsel. (R. at 111.) In her statement, she explained the direct impact upon her. (Ct. Ex. B.) She also claimed she "later discovered that SrA Manriquez had at least 5 other phones and a camera bag with lotion in it in his bedroom." (*Id.* at 2.) She wrote that she was "probably going to regret for the rest of [her] life and bear the guilt for not 'anonymously depositing' those somewhere on base," and that she would, "for the rest of [her] life . . . have to question and worry about what else exists on those devices." (*Id.*) The Defense did not object to these statements.

SG also wrote about the impact upon her father. She explained that her father was once active-duty Air Force and seemingly had some experience with sexual assault (she did not clarify). (*Id.* at 1.) She told the court, "There was a level of hurt

and burden that I had to watch my dad carry. After all these years, it was so painful for me to see him have to carry all of that again on my behalf." (*Id.* at 3.) The Defense also did not object to these statements.

It did, however, object to SG's claim that the allegations prevented her from seeking mental health services. She stated that she and her spouse were:

> told by the [Military Family and Readiness Center (MFRC)] staff that if we sought out professional support for this situation, SrA Manriquez and his lawyers would likely motion for it and we'd be at risk of having our privacy violated. The idea that the effects that my trauma responses have on my marriage would be taken and twisted against us to protect and defend the man tha[t] caused this harm to us was too disgusting of an idea to risk. So, our marriage has struggled without proper help for almost a year now, as we wait for some sense of justice.

(Id. at 3.) The Defense argued this harm was speculative and too attenuated to constitute victim impact of SrA Manriquez's actions. (R. at 111.) The military judge, in ruling, stated:

> So I think that as my role as the military judge, I think I can put things into the proper perspective. I think I can give the victim impact statement the weight that it deserves and gauge whether or not the harm is too attenuated. But I need all of the evidence before I can make that determination. But as you are aware, and in courts [phonetics], it was the authorized means for a victim to bring -- brought the attention to the -- to the attention of the Court, and so I'll give it its appropriate consideration.

(R. at 112–13 (bracketed content in original).) SG also claimed that SrA Manriquez showed no remorse. (Ct. Ex. B at 3–4.) She rested this on an interaction she had with him "one day" after he was under investigation. (*Id.*) She asked him if he was in trouble for not coming into work, and he said, "'Nah' in a giggly tone." (*Id.* at 3.) She said that he "looked [her] in the face, knowing that [she] was one of the victims

of what he was actually being investigated for, and laughed." (*Id.* at 3–4.) The investigation began on 10 April 2022, and the Air Force Office of Special Investigations (OSI) interviewed SrA Manriquez that same day, but that only involved the offenses against BR. (Report of Investigation (ROI) at 7, 9, ROT Vol. 3.) SG was only confirmed as a potential victim on 12 May 2022. (*Id.* at 21–22.) SrA Manriquez was first interviewed about SG on 31 May 2022. (*Id.* at 23.)

Finally, SG also asked the military judge to

> sentence him to an amount of time that forces him to reflect on his egregious crimes, but also that causes him to remember that there are consequences waiting for those who commit these types of actions against members of our society. Enough confinement to stop him and cause him to question if his perversion is worth it the next time he even thinks about doing something similar to another person.

(Ct. Ex. B at 4.) The Defense did not object to this statement.

Standard of Review

This Court reviews a military judge's decision to accept a victim impact statement for an abuse of discretion. *United States v. Cunningham*, 83 M.J. 367, 371 (C.A.A.F. 2023). When an appellant does not raise an issue at trial, this Court reviews a military judge's decision for plain error. *See United States v. Schmidt*, 82 M.J. 68, 73 (C.A.A.F. 2022). An appellant must establish all the following prongs to meet the burden of showing plain error: (1) that there was error; (2) that the error was clear or obvious; and (3) the error results in material prejudice to the appellant's substantial rights. *Id.*

Law and Analysis

1. The Rules for Courts-Martial explicitly bar specific sentence recommendations.

R.C.M. 1001(c)(3) states that unsworn victim impact statements "may not include a recommendation of a specific sentence." But BR told the military judge that SrA Manriquez deserved time "in jail," and SG told the judge to adjudge enough confinement "to stop him and cause him to question if his perversion is worth it the next time he even thinks about doing something similar to another person." (Ct. Exs. A, B at 4.) Both of these are specific enough to run afoul of R.C.M. 1001(c)(3). *Cf. United States v. Holland*, ARMY 202000311, 2021 CCA LEXIS 38, at *9–10 (A. Ct. Crim. App. 29 Jan. 2021) (unpub. op.) (reading the victim's testimony that she would feel "[s]o unsafe" if the appellant was released from confinement as commentary on a specific sentence, "that being lengthy confinement"). It was an abuse of discretion (with regard to BR) and plain error (with regard to SG) to permit such commentary. Indeed, probably the only reason the Defense did not object to SG's commentary is because the military judge had already rejected the same objection to BR.

2. SG went far beyond the impact of this offense.

R.C.M. 1001(c)(2)(B) limits victim impact to that which is "directly relating to or arising from the offense of which the accused has been found guilty." SG made three comments that went beyond impact directly relating to or arising from the offense. First, she claimed to have discovered that SrA Manriquez had five other phones and a camera bag with lotion in it in his bedroom. (Ct. Ex. B at 2.) She wished that she had destroyed those devices and would always worry about "what else exists

on those devices." (*Id.*) While this may have concerned SG, the limits of her imagination do not define the permissible scope of an unsworn statement: it is confined to impact "directly relating to or arising from the offense." This was impermissible commentary about what she feared, not about what he actually did.

Second, SG brought up the perceived impact upon her father. Her unsworn statement had cryptic details about her father's position while he was on active duty and claimed that there was a "level of hurt and burden that [she] had to watch [her] dad carry." (Ct. Ex. B at 3.) The problem is that the Rule allows for victim impact "on the crime victim." R.C.M. 1001(c)(2)(B). SG explained the impact on her father. This may have been true, but it was beyond the scope of an unsworn victim impact statement.

Third, SG impermissibly blamed SrA Manriquez for her failure to obtain mental health services. She relayed only that someone at MFRC told her that lawyers *might* file a motion for records. Because she thought the idea of SrA Manriquez obtaining and using these records was "too disgusting of an idea to risk," her marriage struggled. (Ct. Ex. B at 3.) This time, the Defense properly objected, yielding a hard-to-comprehend ruling from the military judge that was clear only in that she found the statement permissible. (R. at 112–13.) It stretches "directly relating to or arising from" too far to suggest it covers a victim's voluntary and probably poorly informed choice not to pursue mental health services. A victim's downstream choices *not* to pursue available help should not count against an accused for purposes of victim impact.

3. The premise for SrA Manriquez's "lack of remorse" was factually incorrect.

SG improperly claimed that SrA Manriquez lacked "any remorse" for his actions. This rested on the assumption that SrA Manriquez was under investigation for the offenses involving SG when she questioned him. But it was quite likely he was not yet under investigation for the offenses involving her. It was over a month after the investigation began when she was first identified as a victim. (ROI at 21–22.) Thus, what she took as laughing in her face and denying that she was a victim in the investigation was likely wrong. SG was only confirmed as a potential victim on 12 May 2022. (*Id.* at 21–22.) OSI spoke with SrA Manriquez weeks later on 31 May, and at that point he had not spoken to SG since returning from leave earlier in May. (*Id.* at 23.) And yet SG was allowed to claim that SrA Manriquez smilingly denied she was a victim in the investigation of his case.

4. The numerous improper admissions prejudiced SrA Manriquez.

When there is error regarding the presentation of victim statements under R.C.M. 1001(c), the test for prejudice "is whether the error substantially influenced the adjudged sentence." *See United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018) (quoting *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009)). This Court considers the following factors: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *Id.* (quoting *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017)).

On the first factor, the Government provided a basic sentencing case that consisted of routine evaluations, a personal data sheet, and witness testimony on victim impact. (Pros. Exs. 2–3; R. at 90–108.) On the second factor, the Defense case focused on SrA Manriquez's compelling unsworn statement.

Concerning the third factor, the evidence was material to the sentence—it directly encouraged the military judge to provide for extended confinement. The other errors in SG's statement encouraged the military judge to weigh how the misconduct affected third parties, or her ability to seek mental health treatment, or whether SrA Manriquez felt remorse. Each of these are material to the ultimate sentence. Even though this was a military judge-alone case, the fact that the military judge incorrectly believed these matters were admissible in the first place indicates that she would weigh this evidence when deciding on SrA Manriquez's sentence. In addition, the rulings, while unclear, at a minimum establish that the military judge is weighing the improper matters when making a decision. (R. at 110 ("I will give it due consideration."); R. at 112–13 ("I'll give it its appropriate consideration.").)

Finally, the quality of the matters is significant. BR and SG provided moving statements; the improper matters only amplify the power of the statements.

Taken together, the numerous improper matters substantially influenced the sentence, where the military judge provided the maximum under the plea agreement for BR. This Court should recognize the military judge's errors and reassess the sentence.

WHEREFORE, SrA Manriquez respectfully requests this Honorable Court reassess his sentence.

III.

SENIOR AIRMAN MANRIQUEZ'S SENTENCE IS INAPPROPRIATELY SEVERE.

Additional Facts

SrA Manriquez expressed his deep remorse and shame for his actions through his providence inquiry and his unsworn statement. (R. at 38, 47, 53, 60, 65, 69–70; Def. Ex. A.) His shame was so profound that he could not bring himself to inform his parents until just before the court-martial. (Def. Ex. A.) During his years of service, he was a valued member of his unit at Barksdale AFB, was selected for Honor Guard, and worked to help resettle Afghan refugees. (Def. Ex. A.)

Standard of Review

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). This Court reviews each aspect of a segmented sentence independently for sentence appropriateness. *United States v. Flores*, 2024 CAAF LEXIS 162, at *9 (C.A.A.F. 14 Mar. 2024).

Law and Analysis

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

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

SrA Manriquez's sentence to 36 months' confinement for Specification 1 of the Second Additional Charge and 28 months' confinement for indecent recording in the Specification of Charge II are inappropriately severe in light of: (1) the nature and specifics of each offense and (2) SrA Manriquez's understanding of victim impact.

First, SrA Manriquez concedes that the offenses were serious and caused repercussions for BR and SG. (R. at 38, 47, 53, 60, 65, 69–70; Def. Ex. A.) But this Court reviews each segmented sentence individually, and through this lens, each sentence is inappropriately severe. For abusive sexual contact against BR, the plea agreement specifically referred a charge that was not sexual assault. Indeed, the exact words of the specification constitute sexual assault. But because the convening authority and SrA Manriquez agreed to a different charging scheme, the military judge and this Court must view the offense as it was referred, not as it could have been referred. SrA Manriquez received a sentence in line with a sexual assault case, not an abusive sexual contact case.

Similarly, for the indecent recording, the circumstances render 28 months' confinement inappropriately severe. The recording is of a clothed SG passed out on the bathroom floor. While SrA Manriquez does masturbate while she sleeps and touch her groin, he was separately charged with each of those offenses. Again, while serious, it is difficult to explain why the recording alone would warrant 28 months' confinement. If this offense stood apart from the other misconduct, it would never receive such a sentence. Of course, the military judge looks at the full context when assessing rehabilitation potential. But viewing the other misconduct as aggravation for this offense should not yield such a sentence: the military judge sentenced SrA Manriquez to *more* confinement for the recording than the actual underlying acts of masturbating while SG slept and touching her groin. A segmented sentence of 28 months' confinement for the video recording is too severe.

Second, SrA Manriquez repeatedly and profusely apologized for his actions. He recognized that his conduct would "forever stain" BR and SG and told the Court of his sincere regret. (R. at 60, 70.) Perhaps the military judge read too much into SG's accusation that SrA Manriquez lacked remorse. He expressed that remorse repeatedly. Given the maximum sentence under the plea agreement for the abusive sexual contact and near-maximum for indecent recording, the military judge seems to have ignored this rehabilitation potential.

In sum, taking into account the nature of the offense and the offender, the confinement adjudged is inappropriately severe.

WHERFORE, SrA Manriquez respectfully requests this Honorable Court

approve only two years' confinement for Specification 1 of the Second Additional Charge and no more than one year of confinement for the Specification of the Additional Charge, and downgrade the dishonorable discharge to a bad-conduct discharge.

IV.

AS APPLIED TO SENIOR AIRMAN MANRIQUEZ, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN HE STANDS CONVICTED OF NONVIOLENT OFFENSES.

Additional Facts

After his conviction, the Government determined that SrA Manriquez's case qualified for a firearms prohibition under 18 U.S.C. § 922. (EOJ.) The EOJ does not indicate which subsection of § 922 applies to SrA Manriquez's conduct.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021).

Law and Analysis

1. 18 U.S.C. § 922 is unconstitutional as applied to SrA Manriquez.

The test for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. at 2129–30 (citation omitted).

Section 922(g)(1) bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, subsection (g)(1) cannot constitutionally apply to SrA Manriquez, who stands convicted of abusive sexual contact, indecent recording, and indecent conduct that are not violent offenses. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter what the convicted offense, as long as the punishment could exceed one year of confinement. Murder or mail fraud, rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show.

The distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition.

> [A]ctual "longstanding" precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates *a present danger that one will misuse arms against others and the disability redresses that danger*.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not own or have in his possession or under his control, a pistol or revolver." *Id.* at 701, 704 (quotations omitted). A "crime of violence" meant "committing or attempting to commit murder,

manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking." *Id.* at 701 (quotations omitted). SrA Manriquez was charged with abusive sexual contact, not rape. It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit recently adopted this logic to conclude that § 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years' confinement. *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. 2023), *petition for cert. filed*, No. 23-374 (U.S. 5 Oct. 2023).[8] Evaluating § 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals." *Id.* at 104 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05.

In addition to the distinction on violence, a felony conviction today is vastly different from what constituted a felony prior to the 20th century, let alone at the time of this country's founding. This is problematic because categorizing crimes as

[8] Both the United States and Range have asked the Supreme Court to grant certiorari in this case. Brief for Respondent David Bryan Range, No. 23-374 (U.S. 18 Oct. 2023.)

felonies has not only increased, but done so in a manner inconsistent with the traditional understanding of a felony:

> The need [for historical research] is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.

Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y at 697. Notably, the "federal "felon" disability--barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm--is less than [63] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with this country's history and tradition.

This is not the only provision of § 922 to have come under fire in light of *Bruen*. The Fifth Circuit recently held that § 922(g)(8), which applies to possession of a firearm while under a domestic violence restraining order, was unconstitutional because such a "ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.'" *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023) (citation omitted), *cert. granted*, 143 S. Ct. 2688 (2023). Notably, Rahimi was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at 448–49.

The Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 450 (citing *Bruen*, 142 S. Ct. at 2129–30). Therefore, the Government bears the burden of justifying its regulation. *Id.*

Second, it recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at 451 (citing *Heller*, 554 U.S. at 635). Based on historical precedent, there are certain groups "whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* at 452 (citing *Heller*, 554 U.S. at 627 n.26). Here, the issue is whether the Founders would have "presumptively" tolerated a citizen being stripped of his right to keep and bear arms after being convicted of a nonviolent offense. *Id.*

Third, *Rahimi* found the Government failed to show "§ 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id.* at 460. If the Nation's historical tradition of firearm regulation did not include violent offenders who pled guilty to an agreed-upon domestic violence restraining order violation, then it similarly does not include barring SrA Manriquez from *ever* possessing firearms for a nonviolent offense.

In addition to *Rahimi*, the Fifth Circuit has found that § 922(g)(3)—which bars firearm possession for unlawful drug users or addicts—is unconstitutional. *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). In *Daniels*, the appellant was arrested for driving without a license, but the police officers found marijuana butts in his

ashtray. *Id.* at 340. He was later charged and convicted of a violation of § 922(g)(3). *Id*. In finding § 922(g)(3) unconstitutional, the Fifth Circuit's bottom line was:

> [O]ur history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users.

Id. The reasoning in both *Rahimi* and *Daniels* further supports the limited scope of relevant historical firearms regulation.

In light of *Bruen*, § 922(g)(1) is unconstitutional as applied to SrA Manriquez.

2. This Court may order correction of the EOJ.

In *United States v. Lepore*, citing to the 2016 R.C.M., this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. at 763. Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760.

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*. The CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals' (ACCA) decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex

offender." 82 M.J. 263, at n.* (C.A.A.F. 2022) (unpublished). This disposition stands in tension with *Lepore*.[9]

The CAAF's decision in *Lemire* reveals three things. First, the CAAF has the power to correct administrative errors in promulgating orders.[10] Second, the CAAF believes that Courts of Criminal Appeals (CCAs) have the power to address collateral consequences under Article 66 as well since it "directed" the ACCA to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCA's have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders, even if the Court deems them to be a collateral consequence.

Moreover, *Lepore* relates to a prior version of the Rules for Courts-Martial—"[a]ll references in this opinion to the UCMJ and [R.C.M.] are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at n.1. In the 2019 *MCM*, both the Statement of Trial Results (STR) and the Entry of Judgment (EOJ) contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6), 1111(b)(3)(F). Under DAFI 51-201, *Administration of*

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[9] The CAAF is currently reviewing this issue in *United States v. Williams*, No. 24-0015/AR, 2024 CAAF LEXIS 43 (C.A.A.F. Jan. 24, 2024) (granting review on application of another § 922 subsection and whether CCAs can correct the EOJ and STR in these circumstances).

[10] While a promulgating order was at issue in *Lemire*, the same should apply to the EOJ, which replaced the promulgating order as the "document that reflects the outcome of the court-martial." *MCM*, App. 15 at A15-22.

Military Justice, dated 14 April 2022, ¶ 29.32, the STR and EOJ must include whether the offenses trigger a prohibition under § 922. As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered.[11] Thus, this Court can rule in SrA Manriquez's favor without taking the case en banc. If this Court disagrees, SrA Manriquez offers the above argument to overrule *Lepore* under Joint Rule of Appellate Procedure 27(d).

WHEREFORE, SrA Manriquez respectfully requests this Court hold § 922(g)'s firearm prohibition unconstitutional as applied to him and order correction of the STR and EOJ to indicate that no firearm prohibition applies in his case.

Respectfully submitted,

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[11] *See also United States v. Robertson*, No. 202000281, 2021 CCA LEXIS 531 (N.M. Ct. Crim. App. 18 Oct. 2021) (unpub. op.) (ordering correction of an STR because it incorrectly stated § 922 did not apply); *United States v. Moreldelossantos*, ARMY 20210167, 2022 CCA LEXIS 164 (17 Mar. 2022) (unpub. op.) (ordering correction of the STR to change the Section 922(g)(1) designator to "No").

APPENDIX

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

V.

A PLEA AGREEMENT REQUIRING A BAD-CONDUCT DISCHARGE RENDERS THE SENTENCING PROCEEDING AN "EMPTY RITUAL" AND THUS VIOLATES PUBLIC POLICY.

Additional Facts

The plea agreement required the military judge to adjudge at least a bad-conduct discharge. (App. Ex. XVII.) The military judge did not discuss the provision, or, surprisingly, any of the specifics on permissible sentences under the plea.[1] (R. at 80.) The plea agreement contains a severability clause for any unenforceable provision. (App. Ex. XVII at 5 ¶ 9.)

Standard of Review

Whether a condition of a plea agreement violates R.C.M. 705(c)(1)(B) is a question of law that this Court reviews de novo. *See United States v. Tate*, 64 M.J.

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[1] While SrA Manriquez does not challenge the providence of the plea, the military judge's plea agreement inquiry fell far short of that envisioned by R.C.M. 910. *See United States v. Felder*, 59 M.J. 444, 445 (C.A.A.F. 2004) ("This Court has emphasized the importance of the providence inquiry as it relates to guilt or innocence and that portion of the inquiry relating to the critical role that a military judge and counsel must play to ensure that the record reflects a clear, shared understanding of the terms of any pretrial agreement between the accused and the convening authority." (citations omitted)).

269, 271 (C.A.A.F. 2007).[2]

Law and Analysis

The mandatory bad-conduct discharge provision is contrary to public policy and this Court should not enforce it.

1. Legal framework for assessing plea agreements.

A plea agreement between an accused and convening authority may require either one to fulfill promises or conditions unless barred by relevant legal provisions. R.C.M. 705(a)-(c). The agreement may contain a minimum punishment, maximum punishment, or both. R.C.M. 705(d). Yet the terms cannot be contrary to law or public policy, R.C.M. 705(e)(1), such as those that "interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity and fairness of the disciplinary process." *United States v. Cassity*, 36 M.J. 759, 762 (N.M.C.M.R. 1992) (citations omitted).

It is the military judge's "responsibility to police the terms of pretrial agreements to insure compliance with statutory and decisional law as well as adherence to basic notions of fundamental fairness." *United States v. Partin*, 7 M.J. 409, 412 (C.M.A. 1979) (citation omitted). "To the extent that a term in a pretrial agreement violates public policy, it will be stricken from the pretrial agreement and

[2] This case implicates R.C.M. 705 from the 2019 *MCM*. However, the body of law on the plea agreement's predecessor, the pretrial agreement, is still applicable, as this Court has recognized. *See, e.g.*, *United States v. Marable*, No. ACM 39954, 2021 CCA LEXIS 662, at *10 (A.F. Ct. Crim. App. 10 Dec. 2021) (unpub. op.) ("We find our superior court's precedent with respect to [pretrial agreements] instructive when interpreting plea agreements.").

not enforced." *United States v. Edwards*, 58 M.J. 49, 52 (C.A.A.F. 2003) (citing *United States v. Clark*, 53 M.J. 280, 283 (C.A.A.F. 2000); R.C.M. 705(c)(1)(B)).

2. A plea agreement cannot render a proceeding an "empty ritual."

The mandatory discharge provision of the agreement is contrary to public policy and requires severance from the plea agreement. "A fundamental principle underlying [the CAAF's] jurisprudence on pretrial agreements is that 'the agreement cannot transform the trial into an empty ritual.'" *United States v. Davis*, 50 M.J. 426, 429 (C.A.A.F. 1999) (citing *United States v. Allen*, 25 C.M.R. 8, 11 (C.M.A. 1957)).

The mandatory discharge term hollowed out the presentencing proceeding and deprived Appellant of his opportunity to secure a fair and just sentence. While addressing a different issue, *United States v. Libecap* provides helpful insight for this case. There, the Coast Guard Court of Criminal Appeals (CGCCA) addressed a pretrial agreement that required the accused to request a punitive discharge. 57 M.J. 611, 615 (C.G. Ct. Crim. App. 2002). The court wrote that "whether or not to impose a punitive discharge as a part of the sentence in a court-martial is always a significant sentencing issue, and often is the most strenuously contested sentencing issue." *Id.* at 616. While the provision at issue still allowed the presentation of a complete presentencing case, the CGCCA believed the request for a bad-conduct discharge undercut any presentation. The court wrote:

> [W]e are convinced that although such a sentencing proceeding might in some sense be viewed as complete, the requirement to request a bad conduct discharge would, in too many instances, largely negate the value of putting on a defense sentencing case, and create the impression, if not the reality, of a proceeding that was little more than an empty ritual, at least with respect to the question of whether a

> punitive discharge should be imposed. Therefore, we conclude that such a requirement may, as a practical matter, deprive the accused of a complete sentencing proceeding.

Id. at 615–16. It reasoned that the Government had placed the appellant in a position where he would either be forced to forego a desirable deal or sacrifice a complete presentencing hearing. *Id*. For these reasons, the term violated public policy because the public would lose confidence in the integrity and fairness of the appellant's court-martial. *Id*.

Requiring the request for a punitive discharge, like the *mandatory* punitive discharge here, "create[s] the impression, if not the reality, of a proceeding that was little more than an empty ritual." *Id.* at 616. This presentencing session was, for all intents and purposes, the "empty ritual"—where the result is a foregone conclusion—prohibited by *Allen*, *Davis*, and their progeny. 25 C.M.R. at 11; 50 M.J. at 429. If it violates public policy to require a *request* for a punitive discharge, it violates public policy to mandate the result.

3. A mandatory bad-conduct discharge obstructs individualized sentencing.

Court-martial sentences must be individualized; they must be appropriate to the offender and the offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). "[A] court-martial shall impose punishment that is sufficient, *but not greater than necessary*, to promote justice and to maintain good order and discipline in the armed forces." Article 56(c)(1), UCMJ (emphasis added); R.C.M. 1002(f). Because the statute sets forth this mandate, and because Article 53a(b)(4), UCMJ, prohibits plea agreement terms that are "prohibited by law," the mandatory bad-conduct

discharge term is unenforceable because it prevents individualized sentencing.[3] If Congress wanted to strip discretion from the sentencing authority and make such an offense bear a mandatory minimum sentence, it could have. But it did not for these Article 120, 120c, or Article 134, UCMJ, offenses. Article 56(b), UCMJ. And its choice to leave discretion to the sentencing authority means the convening authority cannot usurp that role by mandating a certain result.

The *Manual for Courts-Martial* has, for generations, cherished the concept of individualized sentencing. *Snelling*, 14 M.J. at 268. If a court-martial *shall* impose punishment that is sufficient, but not greater than necessary, this mandatory discharge provision impermissibly precludes the sentencing authority from determining what is sufficient, but not greater than necessary, to achieve the principles of sentencing. No one in this case knows if the military judge believed a bad-conduct discharge was "not greater than necessary." All anyone knows is she was bound by the term mandating it. This Court should not enforce the provision and should reassess the sentence.

WHEREFORE, SrA Manriquez requests this Honorable Court sever the term for the mandatory bad-conduct discharge, uphold the remainder of the plea agreement, and reassess the sentence.

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[3] This argument is premised on what the statute dictates. But even if one considers R.C.M. 705, it was not until the 2024 version of the *MCM* that the Rule explicitly allowed for a specific sentence. *Compare* R.C.M. 705(c)(2)(F) (2019 *MCM*) *with* R.C.M. 705(d)(1)(D) (allowing a plea agreement to contain "a specified sentence or portion of a sentence that shall be imposed by the court-martial). Thus, under the applicable version of R.C.M. 705, the provision is impermissible.

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 Government Trial and Appellate Operations Division on 6 May 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 2
Staff Sergeant (E-4) **STEVE D. MANRIQUEZ** United States Air Force *Appellant.*	)	No. ACM 40527
	)	5 June 2024

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

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V.

A PLEA AGREEMENT REQUIRING AT LEAST A BAD CONDUCT DISCHARGE DID NOT RENDER THE SENTENCE PROCEEDING AN "EMPTY RITUAL" AND THUS DID NOT VIOLATE PUBLIC POLICY.

TABLE OF AUTHORITIES

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

ISSUES PRESENTED

I.

WHETHER APPELLANT IS ENTITLED TO SENTENCE RELIEF BECAUSE OF THE 187-DAY DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT.

II.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE ALLOWED BOTH VICTIMS TO GO BEYOND PERMISSIBLE GROUNDS IN THEIR UNSWORN STATEMENTS.

III.

WHETHER APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE.

IV.

WHETHER, AS APPLIED TO APPELLANT, 18 U.S.C § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN HE STANDS CONVICTED OF NONVIOLENT OFFENSES.

V.[1]

WHETHER A PLEA AGREEMENT REQUIRING A BAD-CONDUCT DISCHARGE RENDERS THE SENTENCE PROCEEDING AN "EMPTY RITUAL" AND THIS VIOLATES PUBLIC POLICY.

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant's Plea Agreement

On 23 June 2022, Appellant submitted an offer for a plea agreement. (App. Ex. XVII.) The convening authority accepted the offer for a plea agreement. (Id.) The plea agreement permitted a term of confinement between one and three years and authorized a punitive discharge of at least a bad conduct discharge. (Id. at 3.) The plea agreement had no other limits on other punishments. The plea agreement involved dismissal of specifications. In exchange for Appellant's guilty pleas, the convening authority dismissed with prejudice three specifications of sexual assault in violation of Article 120, UCMJ.[2] (App. Ex. XVII; *Entry of Judgement*, 27 July

[1] This issue was raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

[2] Unless otherwise indicated, all citations to the UCMJ, the Military Rules of Evidence, and the Rules for Courts-Martial are to the Manual for Courts-Martial, United States 2019 edition.

2023, ROT, Vol. 1.) Also, in exchange for Appellant's guilty pleas, the convening authority referred a second additional charge with three specifications charging abusive sexual contact in violation of Article 120, UCMJ. (Id.)

Appellant's Crimes Against BR

On the evening of 9 April 2022, BR, Appellant, and their friends went to a club where they consumed alcohol. (Pros. Ex. 1 at 1.) They all left the club early the next morning. (Id.) Due to intoxication, BR slept during the car ride home from the night club and had to be carried and put in bed. (Id. at 2.) While BR was asleep in a guest room in her own home, Appellant laid down next to her and touched her breast without her consent. (Id.) Next, Appellant moved his hand down under BR's shorts and over her underwear and touched her vagina without her consent. (Id.) Throughout Appellant's crimes, BR was in and out of consciousness. (Id.) At one point, BR was awake and went to the bathroom and tried to wake up her friends who slept in the living room. (Id.) BR went back into her room and texted her friend the word "help." (Id.) BR did not want Appellant to notice her concerns and thought that if she did not do anything to upset Appellant, then it would all be over soon. (Id.) BR lost consciousness again and Appellant then moved BR into a position on her stomach and pulled her shorts down to above her knee level. (Id.) Appellant then put his mouth on BR's anus without her consent. (Id.) Although Appellant consumed alcohol during the night of his crimes, he understood that what he was doing and did so with an intent to gratify his sexual desires. (Id.)

While Appellant was on top of BR, SrA TB walked into the room. (Id.) BR appeared to be unconscious. (Id.) SrA TB saw BR with her pants down and saw Appellant's pants and zipper undone. (Id.) BR eventually woke up, slapped Appellant, and began to cry. Appellant then left BR's home. (Id.)

Appellant's Crimes Against SG

SG and Appellant were roommates but were never involved in an intimate or sexual relationship. (Pros. Ex. 1 at 3.) On 31 December 2020 through 1 January 2021, Appellant, SG, and their third roommate, RD, hosted a New Year's Eve party. (Id.) SG's husband also attended. Throughout the party SG consumed a substantial amount of alcohol. (Id.) SG passed out on the bathroom floor. (Id.) While SG was unconscious on the bathroom floor, Appellant began to record her without her consent. (Id.) Next, Appellant pulled his penis out of his pants and masturbated while standing over SG while she was passed out. (Id.) Then Appellant placed his fingers underneath the top of SG around her mid-torso. (Id.) Appellant also placed his fingers underneath SG's underwear and touched her groin without her consent while she was unconscious. (Id.) When Appellant touched SG, he did so with the intent to gratify his sexual desires. (Id.) SG did not know the video of her existed until agents from the Air Force Office of Special Investigations (OSI) informed her. (Id.)

ARGUMENT

I.

APPELLANT IS NOT ENTITLED TO RELIEF DUE TO THE 187-DAY DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT.

Additional Facts

Appellant was sentenced on 12 April 2023. (*Entry of Judgement*, 27 July 2023, ROT, Vol. 1.) After United States v. Manriquez, the court reporter had a trial at Barksdale AFB on 25 -26 April 2023. (*Court Reporter's Chronology*, undated, ROT, Vol. 2.) Then she had a board proceeding on 9 May 2023. From there the court reporter had to transcribed three other unrelated cases. It was not until on or about 10-12 July 2023 that the court reporter began

working on United States v. Manriquez. (Id.) The court reporter's chronology demonstrated that between 12 July 2023 and 18 August 2023, she was working on completing the transcript for this case, as well as working on other cases. (Id.) The transcript was complete and sent to the Barksdale legal office on 18 August 2023. (Id.) From there, the legal office finalized the record of trial. (*Moreno*[3] *Chronology*, undated, ROT, Vol. 2.) On 31 August 2023, the record of trial and receipts were sent to Appellant through the prison liaison, via DoDSAFE with instructions for the record of trial to be provided to Appellant. (*TSgt Danley's Declaration*, 31 May 2024.) Also, the record of trial was provided to trial defense counsel and a receipt was signed by the defense paralegal on 5 September 2023. (Id.) The base legal office delivered the record of trial to the Eighth Air Force legal office. (Id.) Between 6 September 2023 and 27 September 2023, the 8th Air Force legal office was in possession of the record of trial. (*Ms. Owings' Declaration*, 31 May 2024.) During this time frame, Eighth Air Force was functioning with one paralegal to handle all military justice taskers. (Id.) The sole paralegal and Chief of Military Justice at Eighth Air Force legal office reviewed the record of trial. (Id.) After they completed their review, the record of trial was mailed to JAJM on 27 September 2023. Eighth Air Force recognized that it was not ideal to take this amount of time to review the record of trial but attributed the delay to staffing constraints. (Id.) On 2 October 2023, the Barksdale Legal Office received the ROT/AMJAMS Examination Record from JAJM with a due date of 11 October 2023 to complete any errors. (*TSgt Danley's Declaration*, 31 May 2024.) The legal office responded back by the due date with corrections. (Id.) The record of trial was served on this Court 16 October 2023. Appellant demanded speedy appellate review in his assignment of errors filed with this Court on 6 May 2024. (App. Br. at 8.)

[3] United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)

Standard of Review

This Court reviews de novo an appellant's entitlement to relief for post-trial delay. United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law

In Moreno, CAAF established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision more than 18 months after the case is docketed with the court. 63 M.J. at 142-143. Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633. Now, this Court applies an aggregate standard threshold of 150 days from the day an appellant was sentenced to docketing with this Court. Id.

When a case does not meet one of the above standards, the delay is presumptively unreasonable and in reviewing claims of unreasonable post-trial delay this Court evaluates (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 135 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). All four factors are considered together and "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

To find a due process violation when there is no prejudice under the fourth Barker factor, a court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the

military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). In United States v. Tardif, CAAF determined that an appellant may be entitled to relief under Article 66(c), UCMJ, because it allows courts "to grant relief for excessive post-trial delay without a showing of 'actual prejudice'…if it deems relief appropriate under the circumstances." 57 M.J. 219, 224 (C.A.A.F. 2002). The existence of a post-trial delay does not necessitate relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225.

Analysis

Applying Livak, there is a facially unreasonable delay. From announcement of sentence to the docketing of Appellant's case with this Court, 187 days passed, which is more than the 150-day threshold required to show a facially unreasonable delay. Given that there is a facially unreasonable delay, this Court must assess whether there was a due process violation by considering the four Barker factors. Analyzing each of the Barker factors, Appellant is not entitled to relief for post-trial delay because there are reasonable explanations for the delay, Appellant never asserted his right to speedy post-trial processing until the filing of his assignments of error, and Appellant suffered no prejudice.

Length of the Delay

Even though the delay is presumptively unreasonable, it does not end the inquiry. The delay alone is not sufficient to justify relief—it merely triggers a due process analysis. First courts look at the length of the delay and this factor weighs in favor of the Government. The length of time was not "egregious," it was only 37 days more than the 150-day benchmark set out in Livak. Even in cases where the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case, courts have not awarded sentence relief.

See generally United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding that 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.")

Reasons for the Delay

There was no "deliberate attempt to delay the trial in order to hamper the defense." Barker, 407 U.S. at 531. The court reporter's busy schedule caused the delay in this case because she had to manage the transcription of five courts-martials, in addition to attending hearings that were scheduled after Appellant's court-martial. (*Moreno Chronology*, undated, ROT, Vol. 2.) Also, Eighth Air Force's legal office had manning constraints in that there was only one paralegal to assist with all military justice matters. (*Ms. Owings' Declaration*, 31 May 2024.) Eighth Air Force mentioned that it was not ideal that it took about 20 days to review the record of trial due to manning constraints. (Id.) With this said, there was no bad faith or deliberate attempt to delay the post-trial process on behalf of the government. The delay was not intentional and therefore should not weigh heavily against the government.

Appellant's Assertion of the Right of Timely Review and Appeal

This factor also favors the Government. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (quoting Barker, 407 U.S. at 528). In this case, Appellant did not assert his right to speedy post-trial processing until the filing of his assignments of error on 6 May 2024. Although Appellant requested speedy appellate review in

his assignments of error, Appellant is not entitled to strong evidentiary weight for this factor, and therefore this factor weighs in the government's favor.

Prejudice

The prejudice factor also favors the Government. CAAF has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in case of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.

Appellant states that his continued confinement impairs his ability to care for his family. (App. Br. at 8.) Although Appellant states that his family relies upon him for financial support, this is a general claim of prejudice. In United States v. Dunbar, our superior Court said that a "general assertion" is insufficient to establish prejudice. 31 M.J. 70, 73 (C.M.A. 1990) ("appellant made the general assertion that he has been denied two college scholarships because he had not received his DD Form 214, although he failed to support this claim in his affidavit by identifying the institutions or organizations sponsoring the scholarships.").

Appellant provided no indication of oppressive incarceration pending appeal, undue anxiety and concern other than not being able to financially provide for his family, impairment of a retrial, or any other prejudice. All incarcerated criminals have limited ability to provide for their family. Appellant has not cited any law or other compelling arguments to support his position that his family's reliance on him financially is the type of prejudice that entitles him to relief.

If Appellant was so concerned with his post-trial expediency, he should not have agreed to appellate defense counsel's fourth request for an enlargement of time, which only delayed his appellate review. *(Appellant's Motion for Enlargement of Time (fourth)*, 3 April 2024). The four enlargements of time granted in this case, 143 days, far exceeded the 37-day post-trial delay in contention. Appellant's enlargements of time resulted in 203 days of delay from docketing the case with this Court to the filing of his assignments of error. To the extent that Appellant was "prejudiced" by the post-trial processing delay, he was arguably more prejudiced by his own delay in filing an appeal. The enlargements of time granted in this case, 143 days, far exceeded the 37-day post-trial delay in contention.

Because no prejudice occurred, the Court then turns to the analysis under Toohey to determine whether the delay was "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." 63 M.J. at 362. The Court looks at all four Barker factors considering the public perception standard. Id. In Toohey no prejudice was found, but the length of the delay played largely into the Court's public perception analysis. Id. Approximately 47 months passed between docketing of the appellant's appeal and the Navy-Marine Court of Criminal Appeals making their decision. Id. at 357. This delay far exceeded Moreno's 18-month threshold and negatively affected the public's perception of the military justice system. Id. at 358. In contrast, there was only a couple of weeks delay in docketing Appellant's record with this Court. And this Court has not even exceeded the 18-month threshold required in Moreno. In fact, Appellant's case was docketed with this Court less than a year ago. Because no facially unreasonable delay has occurred and any prejudice to the Appellant is speculative, a determination about the public's perception of the fairness and integrity of the military justice system is premature.

Alternatively, Appellant alludes to the fact that he did not receive his copy of the record of trial until March 2024. (App. Br. at 5.) His declaration only states that the delay in starting his appellate case and receiving his copy of the record of trial made it hard for him to apply for parole, which was denied in March 2024. (*Appellant's Declaration*, 18 April 2024.) This Court does not know why his parole was denied and whether it had any relation to Appellant not receiving his record of trial until March 2024 or any delay associated with post-trial processing. However, the government was diligent in sending Appellant his copy of the record of trial. On 31 August 2023, the legal office sent Appellant the record of trial through the prison liaison via DoD SAFE. (*TSgt Danley's Declaration*, 31 May 2024.) The legal office also provided a copy of the record of trial to his trial defense counsel on 5 September 2023. (Id.) Had the government known sooner about Appellant's nonreceipt of the record of trial, the government could have remedied the issue earlier. Regardless, Appellant has failed to articulate any prejudice in his assignments of error regarding the fact that he received his copy of the record of trial in March 2024.

For these reasons, Appellant did not suffer any prejudice because of the 37-day post-trial delay.

Relief Under Tardif and Gay

Appellant alludes to an unspecific request for relief when he cited Tardif in his brief. (App. Br. at 8.) An appellant may be entitled to relief under Tardif even without a showing of actual prejudice "if [the court] deems relief appropriate under the circumstances." 57 M.J. at 224. The existence of post-trial delay does not necessitate relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225. However, this authority to grant appropriate relief is "for unreasonable *and* unexplained post-

trial delays." Id. at 220 (emphasis added). Relief is not required, but the court may "tailor an appropriate remedy, if any is warranted, to the circumstances of the case." Id. at 225. Further, relief under Article 66, UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Id. In deciding whether to invoke Article 66, UCMJ, to grant relief as a "last recourse," this Court laid out a non-exhaustive list of factors to be considered, including:

> (1) How long the delay exceeded the standards set forth in Moreno;
>
> (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;
>
> (3) Whether there is some evidence of harm (either to the appellant or institutionally) caused by the delay;
>
> (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;
>
> (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing; and
>
> (6) Given the passage of time, whether the court can provide meaningful relief.

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). The delay in this case does not meet any of the non-exhaustive Gay factors. Here, the delay was only 37 days. The delay was attributed to manning issues at Eighth Air Force, in addition to the court reporter's demanding schedule. There was no bad faith nor neglect concerning the post-trial processing. And also there was no institutional neglect from the government to delay Appellant's case. Appellant asserts that there was institutional neglect given the trend of untimely docketing and incomplete records of trial filed with this Court. (App. Br. at 9-10.) But there was no neglect in Appellant's own post-trial process. The government was undermanned and diligently worked on

creating Appellant's record of trial. Thus, there was also no institutional neglect. Although Appellant claims that the record of trial was not complete, he is not claiming substantial omissions. (App. Br. at 10 n.7.) Thus, this Court can still complete meaningful appellate review.

As a result, this Court cannot provide Appellant relief. Appellant makes the incredible claim that providing sentence relief would have no impact on good order and discipline and will not lessen the disciplinary effect of the sentence. (App. Br. at 9.) This argument fails because Appellant's actions had an impact on good order and discipline given that the two victims in this case were in the Air Force. Appellant's crimes impacted good order and discipline because both victims claimed emotional harm that impacted their everyday life and their ability to work in the Air Force. Granting relief would amount to an appellate windfall which is not consistent with justice or good order and discipline, given the seriousness of the charges of which Appellant pleaded guilty to and the absence of governmental bad faith.

The existence of a post-trial delay does not require relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225. Appellant did not experience any prejudice from the minor 37-day delay, and a remedy is not warranted. The four Barker factors and the six Gay factors weigh in the government's favor, and the three-day delay is not an egregious and prejudicial delay requiring post-trial sentencing relief from this Court. This Court should deny this assignment of error.

II.

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION BECAUSE BOTH VICTIMS DID NOT GO BEYOND PERMISSIBLE GROUNDS IN THEIR UNSWORN STATEMENTS.

Additional Facts

Before a military judge alone, BR provided a written unsworn statement through her Victims' Counsel. (R. at 109.) Trial defense counsel objected to the statement that said "[Appellant's] actions are worth time in jail" on the grounds that it opines on a specific punishment contrary to R.C.M. 1001. (R. at 110.) Trial defense counsel noted that while "it's not specifically like 'I think he should get X number of days' or 'this characterization of discharge is most appropriate,' it is still opining on a specific portion of the sentence." (Id.) The military judge then stated, "I will give the unsworn victim impact statement the – I'll give it it's due consideration as appropriate, and I will not take it as a request for a specific sentence." (Id.) Trial defense counsel did not object to any other statement in BR's unsworn victim impact statement. BR did not read her unsworn victim impact statement out loud in open court.

SG also provided an unsworn victim impact statement through her Victims' Counsel. (R. at 111.) SG mentioned in her statement that the allegations against Appellant prevented her from seeking mental health services. (Court Ex. B.) She mentioned that she and her spouse were told by Military and Family and Readiness Center (MFRC) staff that if they sought professional help, Appellant's lawyers would most likely request the records risking their privacy. (Id.) Trial defense counsel objected to this statement as being too attenuated to the crimes committed against SG. (R. at 111.) The military judge then noted that she "can put things in the proper perspective…and give the victim impact statement the weight that it deserves and gauge whether

or not the harm is too attenuated." (R. at 112.) The military judge said she would give this statement its appropriate consideration. (R. at 113.)

Trial defense counsel did not object to any other matters stated in SG's unsworn victim impact statement. SG mentioned that she discovered that Appellant had five other phones and a camera bag with lotion in it in his bedroom. (Court. Ex. B.) And she wished that she had "anonymously deposited" the devices and would worry about "what else exist[ed] on those devices." (Id.) Further, SG explained that [t]here was a level of hurt and burden that [she] had to watch [her] dad carry. After all these years, it was so painful for [her] to see [her dad] carry all of that again on [her] behalf." (Id.) Lastly, SG asked the military judge to "sentence [Appellant] to an amount of time that forces him to reflect on his egregious crimes…Enough confinement to stop him and cause him to question if his perversion is worth it the next time he even thinks about doing something similar to another person." (Id.)

Standard of Review

The Court reviews a military judge's decision to admit a victim statement for abuse of discretion. United States v. Edwards, 82 M.J. 239, 243 (C.A.A.F. 2022). A military judge abuses his discretion when his "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted). A court should find more than a mere difference of opinion. Instead, the military judge's ruling must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. United States v. Uribe, 80 M.J. 442, 451 (C.A.A.F. 2021) (internal citations omitted).

When an issue is forfeited, this Court views it for plain error. United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013). Under the plain error standard, an appellant "bears the burden of establishing: (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right." United States v. Robinson, 77 M.J. 294, 299 (C.A.A.F. 2018). To establish plain error, "all three prongs must be satisfied." United States v. Gomez, 76 M.J. 76, 79 (C.A.A.F. 2017) (internal quotation marks omitted) (quoting United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006)). The third prong is satisfied if the appellant shows "a reasonable probability that, but for the error [claimed], the outcome of the proceeding would have been different." United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017) (citation omitted) (internal quotation marks omitted).

Law

Rules for Courts-Martial, Rule 1001(c)(2) defines "crime victim" and "victim impact":

> (A) Crime victim. For purposes of this subsection, a crime victim is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules.
>
> (B) Victim impact. For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty.

When there is error related to the presentation of victim statements under R.C.M. 1001(c), the test for prejudice is whether the error substantially influenced the adjudged sentence. United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018) (internal citation omitted). When determining whether an error had a substantial influence on a sentence, this Court considers the next four factors: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence

in question." United States v. Bowen, 76 M.J. 83, 89 (C.A.A.F. 2017). When a "fact was already obvious from…testimony at trial" and that evidence "would not have provided any new ammunition," an error is likely to be harmless. United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007).

Analysis

A. BR's and SG's sentencing recommendations did not explicitly request a specific sentence.

Appellant is correct that R.C.M. 1001(c)(3) states that unsworn victim impact statements "may not include a recommendation of a specific sentence." (App. Br. at 14.) But his claim that BR and SG impermissibly requested a specific sentence is unfounded. (Id.) With regard to BR's statement, she merely stated that Appellant warranted time "in jail." Nothing more. Even trial defense counsel noted that this was not a specific request for a certain number of days in confinement but an opinion about a specific type of punishment. (R. at 110.) The military judge did not abuse her discretion when allowing BR to mention jail in her unsworn statement because the military judge gave BR's statement the due consideration as appropriate and would not accept it as a request for a specific sentence." (Id.) The military judge's response undercuts Appellant's argument that the military judge abused her discretion. The sentencing proceedings were before a military judge, who is presumed to know the law. *See* United States v. Cunningham, 83 M.J. 367, 372 (C.A.AF. 2023). The military judge understood the law and said that she would not accept BR's request as a request for a specific sentence. This was not an abuse of discretion.

Under this same logic, there was no plain error concerning SG's commentary about requesting a term of "confinement long enough to stop [Appellant] and cause him to question if his pervasion is worth it the next time he even thinks about doing something similar." (Court Ex.

B.) SG's statement did ask for a term of confinement, but it did not request a specific or certain term of days, months, or years. The error, if any, did not prejudice Appellant. The victims' requests for jail time for Appellant were unremarkable, considering that as3 part of his plea agreement, Appellant had already agreed that we would serve confinement. The record demonstrated that the military judge knew the law, and she would give a victim impact statement the weight it deserved. (R. at 110.) The sentence recommendations by SG and BR did not substantially impact the sentence because the military judge adjudged segmented terms of confinement for each offense Appellant pleaded guilty to – ranging from 12 to 36 months. Had the military judge taken into consideration the victims' request for a harsh term of confinement she would have adjudged 36 months of confinement for all offenses, which was the maximum sentenced allowed per the plea agreement. This showed that the military judge in turn adjudged segmented sentences based on the weight of the evidence presented at trial and not based on the victims' sentencing recommendations. Thus, Appellant suffered no prejudice from the victims' discussion of jail time in their unsworn statements. *See* Barker, 77 M.J. at 384.

B. SG's unsworn victim impact statement was "directly relating to or arising from the offense" of which Appellant pleaded guilty to.

Appellant asserts that SG made three comments that were impermissible victim impact. (App. Br. at 14.)

First, SG commented that she discovered that Appellant had five other phones and a camera bag with lotion in it in his bedroom. (Id.) SG wished that she had destroyed these devices and would "always worry about 'what else exist[ed] on those devices.'" (Id.) This was not impermissible victim impact. In fact, this was psychological and emotion harm directly related to an offense for which Appellant pleaded guilty to. *See* R.C.M. 1001(c)(2)(B). Appellant was found guilty of recording SG while she was unconscious on the bathroom floor

where she had a reasonable expectation of privacy in addition to masturbating in her presence while unconscious. SG's claim that she wished she had deposited the devices knowing what could exist on them directly related to Appellant's crimes of indecent recording and the indecent conduct – masturbating in the presence of SG while she was unconscious. This event triggered guilt in SG as there could be more videos or victims that were unknown. SG explained that she will "sit in regret for the rest of [her] life knowing that OSI was never able to recover those devices." (Court Ex. B.) Finding the phones, along with lotion, in conjunction with the indecent recording and indecent conduct would make any reasonable victim feel remorse and guilt. SG's emotions about the other devices were a direct harm caused by Appellant's convicted offenses. SG had the right to be reasonably heard at Appellant's presentencing hearing and to tell the military judge about this emotional impact. *See* R.C.M. 1001(c)(1). These statements were not plain error.

Second, Appellant asserts that it was impermissible for SG to bring up the perceived impact on her father because it explained the impact Appellant's crime had on her father and not the crime victim. (App. Br. at 15.) It was not plain error for SG to explain that there was a "level of hurt and burden that [she] had to watch [her] dad carry." (Court Ex. B.) Immediately after Appellant's conduct, SG explained that "it was so painful for [her] to see [her dad] have to carry all of that again on [her] behalf." (Id.) In the end, SG was talking about how hard it was for her to see her dad suffer due to Appellant's crimes. This was not beyond the scope of victim impact. In order for SG to put into context how hard it was for *her* to see her dad suffer, she had to explain how Appellant's crimes impacted her father. The pain she endured having to see her father suffer was psychological impact that was directly related to the crimes of which Appellant was found guilty of. *See* R.C.M. 1001(c)(2)(B). Regardless, this Court has recognized that

parents can experience impact as a result of harm done to their children. *See* United States v. Schauer, 83 M.J. 575, 579-80 (A.F. Ct. Crim. App. 2023) (citing United States v. Dunlap, ACM 39567, 2020 CCA LEXIS 148, at *25-26 (A.F. Ct. Crim. App. 4 May 2020) (unpub. Op.) ("[A] parent responsible for the safety and well-being of children and who witnesses the suffering of those children may be harmed as much as, if not more than, the children themselves.") While SG was no longer a child, she was nonetheless raised by a single parent, her dad. It was not surprising for her father to also be impacted by Appellant's crimes. And it was not plain error for SG to comment on her dad's reactions especially when it perpetuated her own emotional harm.

Third, Appellant claims that it was impermissible for SG to blame him for her failure to obtain mental health services. (App. Br. at 15.) SG mentioned that someone at MFRC told her that Appellant's lawyers would likely file a motion to obtain her records, and she would be at risk of having her privacy violated. (Court Ex. B.) Once again, this was directly related to an offense which Appellant pleaded guilty to – the indecent recording and abusive sexual contact. But for Appellant's crimes, SG would not need to seek mental health services. Although Appellant claims that this statement was too attenuated from the offense (App. Br. at 15), he fails to recognize that SG endured much emotional pain because of Appellant's crimes and did not have the proper support, especially given that her husband did not live with SG at the time of the crime or investigation. (Court Ex. B.) SG wanted to seek care but could not because she felt that her privacy would be violated. SG had a valid concern for her privacy. The MFRC was correct in that had SG sought assistance, she risked her records becoming admissible at trial. *See generally,* Mil. R. Evid. 513(e). SG made decision to forego mental health treatment, and that was directly related to Appellant's crimes. In any event, the military judge mentioned that she

would give the appropriate weight to SG's comment regarding seeking mental health services. (R. at 112.) The military judge said, "that she can put things into the proper perspective…and give the victim impact statement the weight that it deserves and gauge whether or not the harm is too attenuated." (Id.) Thus, the military judge did not abuse her discretion when allowing SG to mention that she did not receive mental health services.

Appellant next asserts that SG improperly claimed that Appellant lacked any remorse for his actions. (App. Br. at 16.) SG, while unaware of what Appellant did to her, thought he was in trouble for not showing up to work, so she confronted him about it. (Court. Ex. B.) Appellant looked at SG and laughed and said it was nothing or words to that effect. (Id.) Looking back, SG took it as if Appellant was laughing at her as one of his victims. (Id.) Appellant claims that when SG confronted Appellant, he was not under investigation yet for the crimes involving her so therefore her claims of lack of remorse have no merit because Appellant would not have known that SG was a victim. (App. Br. at 16.) The timeline of when Appellant was made aware of the crimes concerning SG is irrelevant. When SG confronted Appellant, he knew that he recorded SG while she was asleep and touched her in a sexual manner without her consent. In hindsight SG was correct to feel that Appellant had no remorse for his actions against her. And, in any event, SG was entitled to discuss in her statement how she personally experienced emotional harm from Appellant's actions, even if Appellant now disagrees with how she should have interpreted them. This statement was not plain and obvious error.

The military judge did not abuse her discretion when admitting SG's and BR's unsworn victim impact statement as Court Exhibits. Further, trial defense counsel only objected twice – regarding SG's statement concerning her mental health access, and BR's statement concerning a request for a sentence. For the rest of the statements made by both BR and SG, this Court must

apply the plain error standard. BR's and SG's statements were permissible victim impact. Appellant has not met his burden of proving that there was clear and obvious error, and did not meet his burden of proving that he was materially prejudiced by the victim impact statements. Discussed in greater detail below, the unsworn victim impact statements did not prejudice Appellant.

C. The unsworn victim impact statements did not prejudice Appellant.

BR's and SG's victim impact statements contained permissible victim impact. But, assuming error, the test for prejudice is "whether the error substantially influenced the adjudged sentence." Barker, 77 M.J. at 384. This Court considers the following factors when assessing for prejudice – 1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." Bowen, 76 M.J. at 89. For the following reasons, the victim impact statements did not influence the adjudged sentence.

The government's case was strong. First, the military judge, at the presentencing hearing, had access to the stipulation of fact that detailed the accounts of Appellant's crimes against the victims. Second, Appellant understood that anything he said in his Care[4] Inquiry could be used against him in the sentencing portion of the trial. (R. at 28.) Third, the government called SrA TB to provide victim impact testimony. SrA TB testified how BR was not herself and very nervous to do anything at all, and not as social as she used to be. (R. at 98.) SSgt EC also testified and reiterated that BR was very upset after the assaults, "crying, sobbing, and inconsolable." (R. at 104.) SSgt EC stated that BR was initially "happy go lucky; wanting

[4] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (requiring the military judge to make a finding that the accused made a knowing, intelligent, and a conscious waiver to accept the guilty plea).

to learn her job; wanting to excel;…after that night, it was like it all got squashed." (R. at 105.) SSgt EC then said that after the incident BR was "scared" and had high anxiety. (R. at 105.) The government also provided Appellant's performance reports and the personal data sheet. (Pros. Ex. 2-3.) The defense case contained only Appellant's written unsworn statement. He did not provide any character letters or called any character witnesses.

Regarding the third factor, the evidence contained in the unsworn victim impact statements were not material in comparison to the other evidence before the sentencing authority. Contrary to Appellant's assertions, the victim impact statements did not encourage the military judge to provide for extended amount of confinement. (App. Br. at 17.) BR and SG's sentence "recommendations" did not specify a specific term of confinement. The military judge properly adjudicated a sentence per the plea agreement Appellant voluntarily signed.

Further, Appellant avers that SG's statements about her father's impact, her lack of ability to seek mental health treatment, and comments of Appellant's lack of remorse were material. (App. Br. at 17.) And thus, the materiality of the statements prejudice Appellant. (Id.) But BR's and SG's victim impact statements, although impactful and possibly material, did not provide "new ammunition" that was not already before the military judge or could not be gleaned through other testimony or evidence and therefore any error was harmless. *See* Harrow, 65 M.J. at 200. In fact, the strength of the government's case encouraged the sentence. For example, the government called two witnesses who testified under oath as to the impact Appellant's crimes had on BR. The crime for which Appellant received the highest sentence, 36 months, was a crime for which BR was the victim. The evidence against Appellant for this crime, where he caused his mouth to touch the anus of BR, was extensive absent BR's unsworn victim impact statement. Lastly, the circumstances regarding Appellant's crimes against SG

were also aggravating absent her victim impact statement. Appellant and SG, a married woman, lived together and he violated her trust when he committed three offenses against her, such as recording her while she was unconscious passed out on the bathroom floor, masturbating in her presence while she was unconscious, and touching her groin with his finger–all without her consent. Thus, the victim impact statements did not provide new ammunition to the military judge to adjudge an appropriate sentence. Appellant's crimes influenced the sentence adjudged.

Appellant asserts that although that "this was a military judge along case, the fact that the military judge incorrectly believed these matters were admissible in the first place indicates that she would weigh this evidence when deciding [Appellant's] sentence." (App. Br. at 17.) But regarding trial defense counsel's objections to BR's sentence recommendation, the military judge stated that she would not take BR's sentence recommendation as a request for a specific sentence. (R. at 110.) This demonstrated that the military knew the law and would not consider BR's sentence recommendation. Regarding trial defense counsel's objecting regarding SG's comment about not receiving mental health services because she feared an invasion of her privacy, the military judge stated that she would give "the victim impact statement the weight that it deserves and gauge whether or not the harm [was] too attenuated." (R. at 112.) Once again demonstrating that the military judge would give the statement its appropriate weight. Nothing in the record undermined the presumption that the military judge did not know the law.

Regarding the last Barker factor, the quality of evidence was not significant. Unsworn victim impact statements are not evidence, but a means for victims to be reasonably heard under R.C.M. 1001(c). Statements under R.C.M. 1001(c) in Appellant's case were not made under oath and not subject to cross-examination, and the military judge would have known that as she was presumed to know the law.

The military judge did not abuse her discretion. The victim impact statements, assuming error, did not substantially influence the sentence. The underlying offenses for which Appellant pleaded guilty to influenced his sentence. Thus, this Court should deny this assignment of error.

III.

APPELLANT'S SENTENCE IS NOT INAPPROPRIATELY SEVERE.

Additional Facts

Appellant entered into a voluntary plea agreement with the government. (R. at 81.) In exchange for his guilty plea, Appellant received a limit on his sentencing liability. (App. Ex. XVII.) The terms of the agreement required the military judge to adjudge a punitive discharge of at least a bad conduct discharge and adjudge a sentence to confinement between one and three years. (Id.) Without the plea agreement, Appellant risked 107 years of confinement and a dishonorable discharge. Based on Appellant's guilty plea alone, without the plea agreement sentence limitations, the maximum punishment authorized by law was reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 38 years, and a dishonorable discharge. (R. at 81.) Appellant pleaded guilty to various sexually based offenses against two victims. Both victims provided victim impact statements. (Court Ex. A-B.) Appellant provided a written unsworn statement. (Def. Ex. A.) The military judge adjudged the following sentence:

> To be reduced to the grade of E-1;
>
> To forfeit all pay and allowances;
>
> To be discharged from the service with a dishonorable discharge; and
>
> To be confined as follows:
>
> For Specification 3 of Charge I: To be confined for 12 months;

> For the Specification of Charge II: To be confined for 28 months;
>
> For the Specification of the Additional Charge: To be confined for 16 months;
>
> For Specification 1 of the Second Additional Charge: To be confined for 36 months;
>
> For Specification 2 of the Second Additional Charge: To be confined for 16 months; and
>
> For Specification 3 of the Second Additional Charge: To be confined for 18 months.
>
> All sentences to confinement will run concurrently.

(R. at 128.)

Standard of Review

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

Law

The appropriateness of a sentence is assessed "by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). Unlike the act of bestowing mercy through clemency, which was delegated to other hands by Congress, Courts of Criminal Appeals are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

This Court has recognized the use of aggravating circumstances in sentencing to inform the "sentencing authority regarding the charged offense and 'putting appellant's offenses into

context.'" United States v. Tanner, No. ACM 39301, 2019 CCA LEXIS 43, at *5 (A.F. Ct. Crim. App. 5 Feb. 2019) (unpub. op.) (quoting United States v. Nourse, 55 M.J. 229, 232 (C.A.A.F. 2011)). According to R.C.M. 1001(b)(4), trial counsel may "present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." Appellant's sentence should "fit the offender" and his convictions. United States v. Mack, 9 M.J. 300, 317 (C.M.A. 1980) (citations omitted).

Analysis

Appellant's sentence is not inappropriately severe. Rather, his sentence fits his crimes and the findings of guilt, and this Court should affirm Appellant's sentence as a reasonable consequence of pleading guilty to four specifications of abusive sexual contact, one specification of indecent recording, and one specification of indecent conduct. (*Entry of Judgement*, 27 July 2023, ROT, Vol. 1.)

Appellant challenges the sentence to 36 months' confinement for Specification 1 of the Second Additional Charge (abusive sexual contact against SG) and 28 months' confinement for Specification of Charge II (indecent recording against BR) as inappropriately severe in light of the nature and specifics of each offense. (App. Br. at 19.) First, Appellant asserts that he received a sentence in line with a sexual assault offense and not an abusive sexual contact offense. (App. Br. at 19.) But Appellant fails to recognize that the maximum punishment for abusive sexual contact was seven years. The agreed upon sentence range, per the plea agreement, was well-below the congressionally approved maximum sentence for the types of crimes Appellant committed. Moreover, a plea agreement is indicative of the reasonableness of Appellant's sentence. "[A]ccused's own sentence proposal is a reasonable justification of its probable fairness to him." United States v. Fields, 74 M.J. 619, 625 (A.F. Ct. Crim. App 2015)

(quoting United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979)). Appellant's sentence for abusive sexual contact of 36 months of confinement was not inappropriately severe. It was within the range of the agreed upon sentence parameters outlined in the plea agreement. This crime warranted three years of confinement because Appellant sexually abused BR while she was unconscious and therefore incapable of consenting. Appellant admitted to the military judge that he did not touch her while she was awake. (R. at 61.) At some point BR woke up and it was not until BR lost unconsciousness again that Appellant positioned her on her stomach and pulled her shorts down, and then put his mouth on her anus without her consent. (Pros. Ex. 1 at 2.) Appellant was very deliberate and made sure that BR was asleep before he proceeded to commit his third crime against her. Appellant never gave BR the opportunity to consent. Once Appellant heard a noise he stopped and stepped back from behind BR, and SrA TB walked into the room where Appellant was assaulting BR. (R. at 59.) SrA TB saw Appellant with his pants and zipper undone and BR with her pants pulled down. (Pros. Ex. 1 at 2.) Appellant's conduct was a gross violation of BR. For these reasons, 36 months' confinement for the abusive sexual contact offense against BR was not inappropriately severe.

Next, Appellant argues that the indecent recording of SG was inappropriately severe because SG was passed out on the bathroom floor with her clothes on. (App. Br. at 20.) He also asserts that although he masturbated while SG was asleep on the bathroom floor, this was a separate offense he pleaded guilty to. (Id.) Thus, if the indecent recording stood apart from the other misconduct, it would never receive a sentence of 28 months. (Id.) This argument fails. Appellant's indecent recording warranted 28 months' confinement. First SG and Appellant were roommates. (Pros. Ex. 1 at 3.) During a New Year's Eve party, he abandoned her trust and recorded her without her consent while she was passed out from consuming too much

alcohol. (Id.) To make matters worse, SG was a married woman, and her husband was present at the New Year's Eve party. (Id.) Furthermore, this Court cannot separate the fact that Appellant recorded SG while lying unconscious on the bathroom floor, and continued to record himself as he subsequently pulled his penis out of his pants and masturbated while standing over SG. (R. at 46.) The masturbation was an essential fact of the indecent recording. SG had a reasonable expectation of privacy in the bathroom and Appellant invaded her privacy by recording SG and masturbating while standing over SG. Although Appellant was separately charged for the indecent recording and indecent conduct (masturbating while standing over SG), the military judge per the plea agreement had all the sentences run concurrently. (R. at 128.) The facts underlying the indecent recording and indecent conduct overlapped, and both offenses could be viewed as one act. Given that the segmented sentences ran concurrently, the offenses were in other words merged for sentencing and therefore there were no concerns regarding unreasonable multiplication of charges.

Appellant further argues that the indecent recording received more confinement than Appellant's crimes of masturbating while SG slept (indecent conduct) and touching her groin (abusive sexual contact). (App. Br. at 20.) But when Appellant invaded SG's privacy and recorded her without her consent, that recording remained on his phone and had the potential to perpetuate other crimes further invading SG's privacy. Regardless, the indecent recording remained on Appellant's phone for him to view, and each time he viewed the recording that was an invasion of SG's privacy. For these reasons, 28 months' confinement for indecent recording was appropriate.

While Appellant repeatedly apologized for his actions during his Care inquiry and written unsworn statement, his crimes were nonetheless egregious. Appellant asserts that the

military judge did not consider rehabilitative potential because she sentenced Appellant to the maximum for the sexual contact and near maximum for the indecent recording. (App. Br. at 20.) But the fact that the military judge did not adjudge the maximum sentence for the indecent recording demonstrated that she did consider rehabilitative potential. The crime in which the military judge sentenced Appellant to the maximum sentence allowed per the plea agreement was the most egregious crime Appellant pleaded guilty to, where he caused his mouth to touch the anus of BR. Another military member, SrA TB, walked in and saw Appellant sexually abusing BR while she was unconscious. (R. at 94.) There were aggravating factors warranting 36 months' confinement for the Specification 1 of the Second Additional Charge. Despite what Appellant argues, he provided a very limited sentencing case. He did not provide any character letters, no witness testified in his sentencing case, and his written unsworn statement that articulated slight, if any, rehabilitative potential. Other than showing remorse and pleading guilty, Appellant did not indicate steps he would take to rehabilitate and become a productive member of society. (Def. Ex. A.) For example, Appellant had a past of abusing alcohol, and he did not present any means of combating this addiction, which would demonstrate rehabilitative potential.

Finally, Appellant asks this Court to downgrade his dishonorable discharge to a bad conduct discharge. (App. Br. at 21.) Here, Appellant victimized two victims when they were in a vulnerable state of unconsciousness from consuming alcohol. What started off as a night out with friends ended with Appellant placing his own desires and needs over the privacy and respect for the victims, he once called his friends. This Court is allowed to look at the sentence as whole to determine that a dishonorable discharge is an appropriate punishment given the numerous crimes Appellant pleaded guilty to. *See* United States v. Flores, ___M.J. ___,

(CA.A.F. 14 March 2024) ("In addition to reviewing the appropriateness of each segment, the CCAs must also continue to review the appropriateness of the entire sentence." (citing United States v. Sessions, 45 C.M.R. 931 (C.M.A. 1972)) (internal citations omitted.). It should not be lost on this Court that Appellant repeatedly committed crimes while the victims were unconscious and unable to consent. A dishonorable discharge "should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment." Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 2-6-10 (Dishonorable Discharge). Appellant's crimes violating multiple victims warranted this severe punishment.

For these reasons, Appellant's sentence is appropriate. This Court should deny this assignment of error.

IV.

AS APPLIED TO APPELLANT, 18 U.S.C. § 922 IS CONSTITUTIONAL.

Additional Facts

The military judge, sitting as the general court-martial, sentenced Appellant to a reduction to the grade of E-1, to forfeit all pay and allowances, 36 months' confinement, and a dishonorable discharge. (*Entry of Judgement*, 12 April 2023, ROT, Vol. 1.) The first indorsement to the Entry of Judgement included the following annotation: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (Id.)

Standard of Review

The scope and meaning of Article 66, UCMJ, is a matter of statutory interpretation, which is reviewed de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law & Analysis

The Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he has been, *inter alia*, "convicted in any court of a crime punishable by imprisonment for a term exceeding one year" or "discharged from the Armed Forces under dishonorable conditions." 18 U.S.C. § 922(g)(1), (g)(6). Appellant, having been convicted and sentenced to over a year in confinement, unquestionably falls into the former category. Having been adjudged a dishonorable discharge, he will fall into the latter category as well. Given that a plain reading of the statute is all it takes to reach this conclusion, this Court should not entertain any notion that Appellant does not know which subsection of 18 U.S.C. § 922 applies to him. (App. Br. at 21.)

After all, Appellant was convicted of a "violent" offense as articulated elsewhere in the Manual For Courts-Martial. In Article 128b, the term "violent offense" means a violation of Article 120, UCMJ – an article Appellant violated four times with two different victims. Manual for Courts-Martial, United States part IV, para. 78.c.(1) (2024 ed.) (MCM). Although Appellant pleaded guilty to violent felonies, he now asks this Court to find the firearms prohibition unconstitutional as applied to him and order correction of post-trial paperwork. (App. Br. at 26.)

Appellant is not entitled to relief—first and foremost, because this nation has long barred the possession of firearms by persons who are not law-abiding, responsible citizens; and second, irrespective of whether the statute is constitutional, this Court lacks jurisdiction to grant any relief. This Court should deny this assignment of error.

A. The firearms prohibition is constitutional as applied to Appellant because this nation has a historical tradition of disarming the dangerous.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST., amend. II. But as the Supreme Court has repeatedly emphasized, "the right secured by the Second Amendment is not unlimited." District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 20 (2022); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion).

While the Second Amendment guarantees "the right of *law-abiding, responsible citizens* to use arms for self-defense," Bruen, 597 U.S. at 26 (emphasis added), the same cannot be said for those who have broken the law. The history of firearms regulation reflects "a concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons," Barrett v. United States, 423 U.S. 212, 220 (1976), and "an intent to impose a firearms disability on *any* felon based on the fact of conviction." Lewis v. United States, 445 U.S. 55, 62 (1980) (emphasis added).

Therein lies the rub. As someone whose right to possess firearms was restricted as a consequence of his conviction, Appellant is in a fundamentally different position than the law-abiding, non-criminal petitioners in Bruen, Heller, and McDonald.[5] For Appellant—now a felon—falls into a class of "irresponsible persons." Barrett, 423 U.S. at 220. Nevertheless, Appellant contends that the firearms prohibition is unconstitutional as applied to him because he

[5] *See* Bruen, 597 U.S. at 8 (where "law-abiding New York residents" challenged a state restriction on carrying a firearm outside the home); Heller, 554 U.S. at 573 (where a policeman challenged the District of Columbia's ban on handgun possession in the home); McDonald, 561 U.S. at 790 (challenging a city ordinance that effectively banned "law-abiding members of the community" from having handguns in the home).

was not convicted of a violent offense, (App. Br. at 21) and asserts that the Government cannot "show a historical tradition of applying an undifferentiated ban on firearm possession, no matter what the convicted offense, as long as the punishment could exceed one year of confinement." (App. Br. at 22.) As mentioned, Appellant was convicted of violent offenses. *See* MCM, pt. IV, para. 78.c.(1).

Additionally, there exists a "historical analogue"—the disarmament of "dangerous persons." In the early days of the republic, the law was frequently used to disarm groups that were considered dangerous, such as British loyalists. *See* Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders*, DUKE LAW SCHOOL PUBLIC & LEGAL THEORY SERIES NO. 2020-80 (2020). This tradition of disarming the dangerous endures today—in part, through the "longstanding prohibitions on the possession of firearms by felons," which the Supreme Court has identified as "presumptively lawful regulatory measures." Heller, 554 U.S. at 626, 627 n.26.

Nevertheless, those convicted of abusive sexual contact may be required to register as sex offenders in accordance with DoDI 1325.07. Such sex offenders "are a serious threat in this Nation." McKune v. Lile, 536 U.S. 24, 32 (2002). Their risk of recidivism is "frightening and high," Smith v. Doe, 538 U.S. 84, 103 (2003) (citation omitted), and when they reenter society, "they are much more likely than any other type of offender to be rearrested for a new [sex offense]." McKune, 536 U.S. at 33.

Appellant is not only a violent offender, but also, he is a danger to our society. *See* United States v. Lattin, 82 M.J. 192, 204 (C.A.A.F. 2003) (recognizing that a defendant charged with sexual assault and abusive sexual contact as a dangerous person if found guilty). Given this

nation's historical tradition of disarming violent and dangerous persons, 18 U.S.C. § 922 is constitutional as applied to Appellant, and he is not entitled to relief.

B. Irrespective of its constitutionality, the firearms prohibition is a collateral matter outside the scope of this Court's authority under Article 66, UCMJ.

"The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute." United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015). Article 66(d), UCMJ, provides that this Court "may only act with respect to the findings and sentence as entered into the record under section 860c of this title." 10 U.S.C. § 866(d). It does not authorize this Court to act on the collateral consequences of a conviction, such as the firearms prohibition. And this Court has said as much before. In Lepore, this Court held that the firearms prohibition was a collateral matter outside the scope of this Court's authority under Article 66, UCMJ, and that the Court therefore lacked authority to "direct correction of the 18 U.S.C. § 922 firearms prohibition" on a court-martial order. 81 M.J. at 760-63. In so holding, this Court reasoned that the firearms prohibition "relates to a reporting mechanism external to the UCMJ and Manual for Courts-Martial," and "was not a finding or part of the sentence, nor was it subject to approval by the convening authority." Id. at 763. "[T]he mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within [this Court's] limited authority under Article 66, UCMJ." Id. This rationale remains viable today, and this Court should decline to deviate from it.

Naturally, Appellant disagrees. According to Appellant, Lepore is no longer controlling law given that the Rules for Courts-Martial now requires—by incorporation—a determination on whether the firearm prohibition is triggered. (App. Br. at 28.) Citing the 2019 versions of R.C.M. 1101(a)(6) and R.C.M. 1111(b)(3)(F)—which provide for the inclusion of "[a]ny

additional information … required under the regulations prescribed by the Secretary concerned" in the statement of trial results and entry of judgment, respectively—Appellant suggests that the rules now require the firearms prohibition annotation "by incorporation." (App. Br. at 27-28.) But what Appellant fails to realize is that annotation by incorporation has *always* been the posture, even under the 2016 rules that governed in Lepore. R.C.M. 1114(a) in the 2016 Manual for Courts-Martial provided that promulgating orders were to be prepared as set forth in the rule, "[u]nless otherwise prescribed by the Secretary concerned." At the time the court-martial order at issue in Lepore was published, Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 15.30 (18 Jan. 2019), prescribed the following requirement: "'FIREARMS PROHIBITION - 18 U.S.C. § 922 must be annotated in the header [of the court-martial order]." *See* Lepore, 81 M.J. at 761. Thus, there is no appreciable distinction between the entry of judgment in this case and the court-martial order in Lepore.

Appellant also avers that Lepore is "no longer controlling" in light United States v. Lemire, in which the Court of Appeals for the Armed Forces ordered the Army to delete an annotation regarding sex offender registration from a promulgating order. 82 M.J. 263 n.* (C.A.A.F. 2022) (decision without published opinion). Relying entirely on a 20-word footnote[6] in a summary decision without a published opinion, Appellant insists that the Lemire decision stands for the proposition that CAAF can order correction of administrative errors in post-trial paperwork; that CAAF believes the CCA can address collateral consequences; and that CAAF and the have the power to address "constitutional errors…even if the Court deems them to be a collateral consequence." (App. Br. at 27.) This Court should be unpersuaded. Although Lemire

[6] "It is directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." Lemire, 82 M.J. at 263 n.*.

is technically a published decision, it is devoid of substance—it did not call attention to a rule of law or procedure, nor did it analyze why the ordered correction was viable and appropriate in that case. Accordingly, it is not the kind of decision that can be treated as precedent. *See* Rule 30.4(a), Air Force Court of Criminal Appeals, Rules of Practice and Procedure.[7] In a recent published decision, this Court upheld Lepore and denied the appellant's claim that this Court had jurisdiction to direct correction of an 18 U.S.C. § 922(g) firearm prohibition annotated on a court-martial promulgating order. United States v. Vanzant, __ M.J. __ (AF. Ct. Crim. App. 28 May 2024).

Ultimately, the constitutional question posed here is unrelated to the actual findings and sentence in the case, and therefore outside the scope of this Court's authority. Thus, Appellant is not only unentitled to relief, but also powerless to obtain any from this Court at all. This court should deny this assignment of error.

[7] "Published opinions are those that call attention to a rule of law or procedure that appears to be overlooked or misinterpreted or those that make a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the Court's decision to the public, the parties, military practitioners, and judicial authorities." Rule 30.4(a), Air Force Court of Criminal Appeals, Rules of Practice and Procedure.

V.[8]

A PLEA AGREEMENT REQUIRING AT LEAST A BAD CONDUCT DISCHARGE DID NOT RENDER THE SENTENCE PROCEEDING AN "EMPTY RITUAL" AND THUS DID NOT VIOLATE PUBLIC POLICY.

Additional Facts

Appellant entered into a voluntary plea agreement with the government. (R. at 81.) In exchange for his guilty plea, Appellant received a limit on his sentencing liability. (App. Ex. XVII.) The terms of the agreement required the military judge to adjudge a punitive discharge of at least a bad conduct discharge and adjudge a sentence to confinement between one and three years. (Id.) Based on Appellant's guilty plea alone, without the plea agreement limitations, the maximum punishment authorized by law was reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 38 years, and a dishonorable discharge. (R. at 81.)

Standard of Review

This Court determines whether a term in a plea agreement violates Rule for Courts-Martial (R.C.M.) 705 de novo. United States v. Hunter, 65 M.J. 399 (C.A.A.F. 2008). Even where the appellate court is reviewing an issue de novo, it normally defers to any findings of fact by the military judge unless they are clearly erroneous. United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995).

[8] This issue was raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Law and Analysis

The term requiring the military judge to adjudge at least a bad conduct discharge did not render the sentencing proceeding into an empty ritual which violated public policy. Neither case law nor the Rules for Courts-Martial preclude a provision in a plea agreement that requires the military judge to adjudge a bad conduct discharge or dishonorable discharge. This Court addressed a similar issue in United States v. Geier, where an appellant argued a mandatory bad conduct discharge provision in his plea agreement turned his presentencing proceeding into an empty ritual that violated public policy. ACM S32679, 2022 LEXIS CCA 468, at *4 (A.F. Ct. Crim. App. 2 Aug. 2022) (unpub. op.). This Court concluded the term "violate[d] neither the Constitution nor the UCMJ, nor [did] it run afoul of public policy under the arguments raised on appeal." Id. at *13.

R.C.M. 705(a) allows for an appellant and a convening authority to enter into a plea agreement in accordance with this rule, subject to limitations prescribed by the service's secretary. Case law favors the "ability of an [appellant] to waive his rights as part of a pretrial agreement, absent some affirmative indication the accused entered the agreement unknowingly and involuntarily." United States v. Edwards, ACM S29885, 2001 LEXIS 302, at *7 (A.F. Ct. Crim. App. 29 Nov 2001) (unpub. op.) (citing United States v. Mezzanatto, 513 U.S. 196 (1995)). The record supports that Appellant knowingly and voluntarily entered into this plea agreement and all its terms to receive benefit of the bargain. (R. at 59-65.)

A. The punitive discharge provision did not violate Appellant's right to a complete presentencing proceeding.

The agreed upon terms of a plea agreement will be enforced unless they deprive an appellant of "the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete presentencing proceedings; the complete and effective exercise of post-trial and appellate rights." R.C.M. 705(c)(1)(B). Appellant argues that the mandatory discharge term of his plea agreement "hollowed out the presentencing proceeding" and deprived him of "his opportunity to secure a fair and just sentence." (App. Br. Appendix at 3.)

Appellant's presentencing proceeding was not transformed into an empty ritual. Not only has this Court already dismissed this argument about this exact plea agreement term, but also our superior court has held that "[j]udicial scrutiny of [plea agreement] provisions at the trial level helps to ensure" trials are not turned into empty rituals. United States v. Soto, 69 M.J. 304, 307 (C.A.A.F. 2011). Here, in the plea agreement inquiry, the military judge told Appellant that should the court accept the "plea agreement, the court and parties, to include [Appellant] would be bound by the terms of the agreement, to include imposing a sentence that contorts [sic] with the limitation contained in the agreement." (R. at 80.); *See* Soto, 69 M.J. at 306-07 (citing United States v. King, 3 M.J. 458, 459 (C.M.A. 1977) ("[J]udicial scrutiny of plea agreements at the trial level enhances public confidence in the plea bargaining process.")).

Moreover, the plea agreement did not limit Appellant's ability to present matters in mitigation and extenuation, showing that Appellant was not deprived of complete presentencing proceedings. It has been commonly held that a provision limiting an appellant's ability to present a sentencing case is prohibited. *See* United States v. Cummings, 38 C.M.R. 174, 177 (C.M.A. 1968) (citing United States v. Callahan, 22 M.J. 443 (A.B.R. 1956) (finding that a term

preventing an appellant from presenting matters in extenuation and mitigation violated the appellant's right to due process)); United States v. Sunzeri, 59 M.J. 758 (N-M. Ct. Crim. App. 2004) (holding that a provision that prevented the appellant from calling any witnesses in his sentencing case prevented him from having a complete presentencing hearing and was not enforceable.) Nothing in Appellant's plea agreement prevented him from presenting a full sentencing case. And the record showed that he had the option to present a full sentencing case. When asked by the military judge about his decision not to testify or provide a verbal unsworn statement, Appellant affirmed that it was his personal decision not to testify or provide a verbal unsworn statement. (R. at 114-115.) While Appellant chose not to call any witnesses, he did submit a four-page written unsworn statement. (Def. Ex. A.) The mandatory discharge term did not transform Appellant's presentencing proceedings into an empty ritual.

B. The punitive discharge provision did not violate public policy.

Despite having negotiated for the terms of his plea agreement, Appellant now argues the exchange of his guilty plea for a specific sentence violated public policy. In part, he argues such a term precluded the sentencing authority from determining what is sufficient, but not greater than necessary, to achieve the principles of sentencing. (App. Br. Appendix at 5.) Still, the military judge did determine what sentence was appropriate for Appellant, and he received an individualized sentence. The military judge, after hearing all matters in aggravation, extenuation, and mitigation, sentenced Appellant be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for three years, and to be dishonorably discharged from service. (R. at 128.) The requirement that Appellant receive a minimum punishment as a result of his bargained for plea agreement no more violates public policy than a term that limits confinement or a statutorily required minimum punishment for certain crimes.

Appellant argues that "no one in this case knows if the military judge believed a mandatory discharge was "not greater than necessary" to promote justice and to maintain good order and discipline because the plea agreement required a mandatory discharge. (App. Br. Appendix at 5.) But Congress has determined that a punitive discharge is within the range of an appropriate sentences for the crime Appellant pleaded guilty to. Furthermore, as this Court noted in Geier,

> Congress has authorized plea agreements which involve 'limitations on the sentence that may be adjudged.' Given the fact Congress elsewhere in the UCMJ addresses minimum and maximum sentences, the absence of such qualifications with respect to the 'limitations' in Article 53a, UCMJ, is strong evidence such limitations may apply to both the upper and lower ends of the punishment spectrum. We see no indication Congress intended a contrary outcome.

Geier, unpub. op. at *13.

To support that a mandatory discharge is against public policy, Appellant relies on United States v. Libecap, 57 M.J. 611 (C.G. Ct. Crim. App. 2002). Appellant argues that "[i]f it violates public policy to require requesting a punitive discharge, surely it violates public policy to mandate the result." (App. Br. Appendix at 3.) That said, Appellant does not distinguish his case from Geier. This Court explained that the issue in Libecap "was the accused was required to give up his bargaining position, thereby undermining the sentencing process in place at the time, in which the accused would typically try to obtain a sentence lighter than the limitations in the pretrial agreement," but because under the current rules a military judge was "aware of, and bound by the sentence limits in the plea agreement, the concerns in Libecap do not exist." Id. at *11-12.

Appellant, here, did not have to request a sentence he did not want. The term requiring a mandatory punitive discharge was negotiated by Appellant in return for a cap on the amount of

confinement Appellant could have received. (App. Ex. V.) The plea agreement ensured Appellant was not exposed to over 100 years of confinement. Unlike Libecap, where the appellant was put in a position where he had to ask for a punishment he did not want, Appellant negotiated his sentence in exchange for the dismissal of three sexual assault specifications carrying a maximum of 30 years of confinement. If Appellant did not want to agree to those terms, he did not have to sign the plea agreement. The military judge rendered an individualized sentence within the parameters of the plea agreement. The mandatory punitive discharge did not violate public policy.

C. Appellant was not prejudiced.

Even if the term requiring the military judge to adjudge a punitive discharge is not enforceable and violated public policy, there was no prejudice to Appellant. As a result of the plea agreement, Appellant faced criminal liability for various crimes that allowed a punitive discharge as part of the range of punishment. (*Entry of Judgment*, 27 July 2023, ROT, Vol. 1.) Had the Appellant did not voluntarily agree to a punitive discharge provision, the military judge could have and would have adjudged a punitive discharge of at least a bad conduct discharge. The fact that the military judge adjudged a dishonorable discharge showed that the punitive discharge was inevitable. If the military judge felt compelled to give a punitive discharge solely based on the plea agreement, one would have expected a bad conduct discharge not a dishonorable discharge.

No prejudice existed when the plea agreement and the mandatory discharge provision ensured Appellant was protected from 38 years of confinement. (App. Ex. V.) Appellant voluntarily and knowingly agreed to all the terms of the plea agreement and, as a result, received the benefit of his bargain. If the provision was in error, the error was harmless, and Appellant

suffered no prejudice from the term of his plea agreement being enforced.

Given that the plea agreement provision here did not violate Appellant's right to a complete presentencing hearing or violate public policy, there was no error, and Appellant suffered no prejudice. Thus, this Court should deny this assignment of error.

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 5 June 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 2
Staff Sergeant (E-4) **STEVE D. MANRIQUEZ** United States Air Force *Appellant.*	)	No. ACM 40527
	)	5 June 2024

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

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

- Appendix A – *TSgt Sheri L. Danley Declaration*, dated 31 May 2024 (1 page)
- Appendix B – *Ms. Mandy Owings Declaration*, dated 31 May 2024 (1 page)

Appellant's first assignment of error asserts that he is entitled to relief due to post-trial processing delays. The record of trial chronology provided in the record had a final entry date of 5 September 2023 on which the base legal office forwarded the record of trial to the Numbered Air Force. (*Moreno Chronology*, undated, ROT, Vol. 2.) But this case was not docketed with this Court until 16 October 2023.

In evaluating the reasonableness of a post-trial delay this Court reviews (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice. Moreno, 63 M.J. 135 (citing Barker v. Wingo, 407 U.S. 514, 530) (1972). The declarations explain the reason for the delay between 5 September 2023 and 16 October 2023 not accounted for in the chronology.

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442. (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). The issue of prejudicial post-trial delay was directly raised by materials in the record because they show, but do not fully explain, the delays in the post-trial processing of Appellant's case. These documents are relevant to address Appellant's claims of prejudice from a processing delay.

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 5 June 2024.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40527**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Steve D. MANRIQUEZ	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

Upon review of the record of trial in the above-captioned case, we note that Attachment 6 to Prosecution Exhibit 1, Preliminary Hearing Officer (PHO) Exhibit 7, and Cellebrite Extraction Report pages 3–35 which are included in the Air Force Office of Special Investigations (OSI) Report of Investigation (ROI), contain sexually explicit material. Therefore, we order these materials be sealed. The Clerk of Court will ensure the items to be sealed are properly sealed in the original record of trial retained by the court, and we order the Government to take the corrective action outlined in the decretal paragraph below.

Accordingly, it is by the court on this 6th day of November, 2024,

ORDERED:

The Government shall take all steps necessary to ensure **Attachment 6 to Prosecution Exhibit 1; PHO Exhibit 7; and Cellebrite Extraction Report pages 3–35 of the OSI ROI** in the possession of any government office, Appellant, or any other known copy, be retrieved and destroyed with the following exceptions.*

Appellate government counsel and appellate defense counsel may retain copies of these items in their possession until completion of our Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's case, to include the period for reconsideration in accordance with A.F. CT. CRIM. APP. R. 31. After which,

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* 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, as amended by Department of the Air Force Guidance Memorandum 2024-01, 11 Jul. 2024).

counsel shall destroy any retained copies of the above-named attachments or documents in their possession.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40527**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Steve D. MANRIQUEZ	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

Acknowledging our superior court's recent decision in *United States v. Mendoza*, ___ M.J.___, No. 23-0210, 2024 CAAF LEXIS 590 (C.A.A.F. 7 Oct. 2024), this court specifies the following issues for supplemental briefing in the above-captioned case:

> I. WHETHER APPELLANT'S PLEAS OF GUILTY TO SPECIFICATION 3 OF CHARGE I, AND SPECIFICATIONS 1 AND 2 OF THE SECOND ADDITIONAL CHARGE, FOR ABUSIVE SEXUAL CONTACT UPON BR IN VIOLATION OF ARTICLE 120, UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 920, ARE PROVIDENT IN LIGHT OF *UNITED STATES V. MENDOZA*.
>
> II. WHETHER APPELLANT'S PLEA OF GUILTY TO SPECIFICATION 3 OF THE SECOND ADDITIONAL CHARGE FOR ABUSIVE SEXUAL CONTACT UPON SG IN VIOLATION OF ARTICLE 120, UCMJ, 10 U.S.C. § 920, IS PROVIDENT IN LIGHT OF *UNITED STATES V. MENDOZA*.

Accordingly, it is by the court on this 22d day of November, 2024,

ORDERED:

Appellant and Appellee shall file briefs on the specified issues with the court **not later than 23 December 2024**. No further briefs will be permitted without leave from the court.

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 FOR ENLARGEMENT OF TIME OUT OF TIME**
v.	)	Before Panel No. 2
Senior Airman (E-4) **STEVE D. MANRIQUEZ,** United States Air Force, *Appellant.*	)	No. ACM 40527
	)	17 December 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) for both Appellant and the Government to file specified issue briefs. Appellant requests an enlargement for a period of 30 days, which will end on **22 January 2025.** The record of trial was docketed with this Court on 16 October 2023. From the date of docketing to the present date, 428 days have elapsed. On the date requested, 464 days will have elapsed.

There is good cause to grant this motion and for the out of time filing. Appellant is filing a motion to withdraw from appellate review contemporaneously with this motion, and he signed the DD Form 2330 on 17 December 2024, fewer than seven days before the current deadline to file specified issue briefs. Appellant recognizes that if his motion to withdraw from appellate review is granted, this motion for an EOT will be moot. If this Court is unable to act on Appellant's motion to withdraw from appellate review before the current deadline for filing specified issue briefs, Appellant requests this enlargement of time to allow the Court to act on that motion. The parties have consulted, and the Government consents to this motion for enlargement of time for the current filing deadline for both parties.

On 12 April 2023, at a general court-martial at Barksdale Air Force Base, Louisiana, a military judge found Senior Airman (SrA) Steve D. Manriquez guilty, consistent with his plea, of four specifications of abusive sexual contact, one specification of indecent recording, and one specification of indecent conduct in violation of Articles 120, 120c, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920, 920c, 934 (2021). (R. at 84; Entry of Judgment (EOJ), 27 Jul. 2023.) The judge sentenced SrA Manriquez to a dishonorable discharge, 36 months' confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. (R. at 128; EOJ.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, 6 Jun. 2023.)

The record of trial consists of 3 prosecution exhibits, 1 defense exhibits, 19 appellate exhibits, and 2 court exhibits. The transcript is 129 pages. Appellant is currently confined.

Counsel is currently representing 30 clients; 16 clients are pending initial AOEs before this Court. Additionally, one client has a pending brief before the United States Court of Appeals for the Armed Forces (CAAF). One matter currently has priority over this case:

1) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has completed his review of the record of trial and drafted the AOE in this case.

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 17 December 2024.

Respectfully submitted,

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO WITHDRAW FROM APPELLATE REVIEW AND MOTION TO ATTACH**
v.	)	Before Panel No. 2
Senior Airman (E-4) **STEVE D. MANRIQUEZ,** United States Air Force, *Appellant.*	)	No. ACM 40527
	)	17 December 2024

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

Pursuant to Rule 16 of this Honorable Court's Rules of Practice and Procedure, and Rule for Courts-Martial (R.C.M.) 1115, Appellant, Senior Airman Steve D. Manriquez, hereby moves to withdraw his case from appellate review. Appellant has fully consulted with Major Frederick Johnson, his appellate defense counsel, regarding this motion to withdraw. No person has compelled, coerced, or induced Appellant by force, promises of clemency, or otherwise to withdraw his case from appellate review.

Further, pursuant to Rules 23(b) and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant asks this Court to attach the eight-page document appended to this pleading to Appellant's Record of Trial. The document is Appellant's completed Department of Defense Form 2330, *Waiver/Withdrawal of Appellate Rights in General and Special Courts-Martial Subject to Review by a Court of Criminal Appeals*, to include the entry of judgment referenced in the top line of the form, and is therefore necessary to comply with R.C.M. 1115(d) and Rule l6.1 of this Honorable Court's Rules of Practice and Procedure.

WHEREFORE, this Honorable Court should grant this motion to withdraw from appellate review and attach the requested document to the record.

Respectfully submitted,

[redacted]

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Counsel for Appellant

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 December 2024.

Respectfully submitted,

[redacted]

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