IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FIRST) OUT OF TIME (OOT)**
	)	
v.	)	Before Panel No. 2
	)	
HECTOR D. MANZANO TARIN,	)	No. ACM S32734
Senior Airman (E-4)	)	
United States Air Force	)	5 October 2022
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) and (m)(7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time out of time to file Appellant's Assignments of Error (AOE). Appellant's counsel respectfully requests to withdraw her previously submitted Motion for Enlargement of Time (First), filed on 4 October 2022. Good cause exists to grant Appellant's EOT OOT as counsel timely filed Appellant's Motion for EOT (First), on 4 October 2022, but counsel miscalculated the date upon which the requested enlargement of time would end stating it would end on 3 December 2022 when the correct date is 10 December 2022. In this filing, counsel has corrected this date to the correct end date. Appellant requests an enlargement for a period of 60 days, which will end on **10 December 2022.** The record of trial was docketed with this Court on 12 August 2022. From the date of docketing to the present date, 54 days have elapsed. On the date requested, 120 days will have elapsed.

Counsel is currently assigned 15 cases; 11 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant

regarding potential errors.

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 5 October 2022.

Respectfully submitted,

[redacted]

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

5 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) HECTOR D. MANZANO TARIN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32734 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 October 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **HECTOR D. MANZANO TARIN,** Senior Airman (E-4) United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 No. ACM S32734 2 December 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **9 January 2023**. The record of trial was docketed with this Court on 12 August 2022. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

Appellant was tried by a special court-martial composed of a military judge alone at Hill Air Force Base, Utah. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 6 June 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its Specification of conspiring to commit larceny, in violation of Article 81, Uniform Code of Military Justice (UCMJ), and Charge III and its Specification of larceny, in violation of Article 121, UCMJ. (*Id*. at 1-2.) On 6 June 2022, the military judge sentenced Appellant to be reprimanded; reduced to the grade of E-2; confined for three months each as to Charge I and Charge III, with both terms to run concurrently and one month of confinement to be suspended contingent upon payment to AAFES (Army and Air Force Exchange Service) of $3,333 within three months of the entry of

judgment; and discharged from the service with a bad conduct discharge. (ROT, Vol. 1, Statement of Trial Results (STR) at 2-3; Record at 73). On 29 June 2022, the convening authority took no action on the findings and took the following action on the sentence: "The period of confinement in excess of two (2) months for Charge I and Charge III is suspended for three (3) months from the Entry of Judgment, contingent upon the condition that [Appellant] repays $3,333 to the Army and Air Force Exchange Services [sic], at which time, unless the suspension is sooner vacated, the suspended confinement will be remitted without further action." (ROT, Vol. 1, Convening Authority Decision on Action at 1.) The convening authority denied Appellant's request to waive all automatic forfeitures. (*Id*.) On 5 July 2022, the military judge entered the following sentence: a reprimand, reduction to the grade of E-2, total confinement for two months, and a bad conduct discharge. (ROT, Vol. 1, EOJ at 3.) The record consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is seventy-five (75) pages. Appellant is not in confinement.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

5 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) HECTOR D. MANZANO TARIN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32734 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 December 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
HECTOR D. MANZANO TARIN, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM S32734 29 December 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **8 February 2023**. The record of trial was docketed with this Court on 12 August 2022. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

Appellant was tried by a special court-martial composed of a military judge alone at Hill Air Force Base, Utah. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 6 June 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its Specification of conspiring to commit larceny, in violation of Article 81, Uniform Code of Military Justice (UCMJ), and Charge III and its Specification of larceny, in violation of Article 121, UCMJ. (*Id*. at 1-2.) On 6 June 2022, the military judge sentenced Appellant to be reprimanded; reduced to the grade of E-2; confined for three months each as to Charge I and Charge III, with both terms to run concurrently and one month of confinement to be suspended contingent upon payment to AAFES (Army and Air Force Exchange Service) of $3,333 within three months of the entry of

judgment; and discharged from the service with a bad conduct discharge. (ROT, Vol. 1, Statement of Trial Results (STR) at 2-3; Record at 73). On 29 June 2022, the convening authority took no action on the findings and took the following action on the sentence: "The period of confinement in excess of two (2) months for Charge I and Charge III is suspended for three (3) months from the Entry of Judgment, contingent upon the condition that [Appellant] repays $3,333 to the Army and Air Force Exchange Services [sic], at which time, unless the suspension is sooner vacated, the suspended confinement will be remitted without further action." (ROT, Vol. 1, Convening Authority Decision on Action at 1.) The convening authority denied Appellant's request to waive all automatic forfeitures. (*Id*.) On 5 July 2022, the military judge entered the following sentence: a reprimand, reduction to the grade of E-2, total confinement for two months, and a bad conduct discharge. (ROT, Vol. 1, EOJ at 3.) The record consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is seventy-five (75) pages. Appellant is not in confinement.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 29 December 2022.

[redacted]

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

3 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) HECTOR D. MANZANO TARIN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32734 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 January 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **HECTOR D. MANZANO TARIN,** Senior Airman (E-4) United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 2 No. ACM S32734 1 February 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **10 March 2023**. The record of trial was docketed with this Court on 12 August 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

Appellant was tried by a special court-martial composed of a military judge alone at Hill Air Force Base, Utah. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 6 June 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its Specification of conspiring to commit larceny, in violation of Article 81, Uniform Code of Military Justice (UCMJ), and Charge III and its Specification of larceny, in violation of Article 121, UCMJ. (*Id*. at 1-2.) On 6 June 2022, the military judge sentenced Appellant to be reprimanded; reduced to the grade of E-2; confined for three months each as to Charge I and Charge III, with both terms to run concurrently and one month of confinement to be suspended contingent upon payment to AAFES (Army and Air Force Exchange Service) of $3,333 within three months of the entry of

judgment; and discharged from the service with a bad conduct discharge. (ROT, Vol. 1, Statement of Trial Results (STR) at 2-3; Record at 73). On 29 June 2022, the convening authority took no action on the findings and took the following action on the sentence: "The period of confinement in excess of two (2) months for Charge I and Charge III is suspended for three (3) months from the Entry of Judgment, contingent upon the condition that [Appellant] repays $3,333 to the Army and Air Force Exchange Services [sic], at which time, unless the suspension is sooner vacated, the suspended confinement will be remitted without further action." (ROT, Vol. 1, Convening Authority Decision on Action at 1.) The convening authority denied Appellant's request to waive all automatic forfeitures. (*Id*.) On 5 July 2022, the military judge entered the following sentence: a reprimand, reduction to the grade of E-2, total confinement for two months, and a bad conduct discharge. (ROT, Vol. 1, EOJ at 3.) The record consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is seventy-five (75) pages. Appellant is not in confinement.

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

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

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

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

c. *United States v. Hernandez*, No. ACM 40287 – The record of trial consists of 7 prosecution exhibits, 27 defense exhibits, and 10 appellate exhibits. The transcript is 226 pages. Appellant is confined.

d. *United States v. Gammage*, No. ACM S32731 – The record of trial consists of 3 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. The transcript is 105 pages. Appellant is not confined.

e. *United States v. Portillos*, No. ACM 40305 – The record of trial consists of 4 prosecution exhibits, 8 defense exhibits, 17 appellate exhibits, and 1 court exhibit. The transcript is 124 pages. Appellant is not confined.

f. *United States v. Goodwater*, No. ACM 40304 – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.

(2) In addition, before the United States Court of Appeals for the Armed Forces, undersigned counsel has one case pending petition for grant of review and supplement to the petition, *United States v. Brown*, No. ACM 40066.

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

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

2 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) HECTOR D. MANZANO TARIN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32734 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
HECTOR D. MANZANO TARIN, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM S32734 1 March 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **9 April 2023**. The record of trial was docketed with this Court on 12 August 2022. From the date of docketing to the present date, 201 days have elapsed. On the date requested, 240 days will have elapsed.

Appellant was tried by a special court-martial composed of a military judge alone at Hill Air Force Base, Utah. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 6 June 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its Specification of conspiring to commit larceny, in violation of Article 81, Uniform Code of Military Justice (UCMJ), and Charge III and its Specification of larceny, in violation of Article 121, UCMJ. (*Id*. at 1-2.) On 6 June 2022, the military judge sentenced Appellant to be reprimanded; reduced to the grade of E-2; confined for three months each as to Charge I and Charge III, with both terms to run concurrently and one month of confinement to be suspended contingent upon payment to AAFES (Army and Air Force Exchange Service) of $3,333 within three months of the entry of judgment; and discharged from the service with a bad conduct discharge. (ROT, Vol. 1, Statement

of Trial Results (STR) at 2-3; Record at 73). On 29 June 2022, the convening authority took no action on the findings and took the following action on the sentence: "The period of confinement in excess of two (2) months for Charge I and Charge III is suspended for three (3) months from the Entry of Judgment, contingent upon the condition that [Appellant] repays $3,333 to the Army and Air Force Exchange Services [sic], at which time, unless the suspension is sooner vacated, the suspended confinement will be remitted without further action." (ROT, Vol. 1, Convening Authority Decision on Action at 1.) The convening authority denied Appellant's request to waive all automatic forfeitures. (*Id*.) On 5 July 2022, the military judge entered the following sentence: a reprimand, reduction to the grade of E-2, total confinement for two months, and a bad conduct discharge. (ROT, Vol. 1, EOJ at 3.) The record consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is seventy-five (75) pages. Appellant is not in confinement.

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

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

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

b. *United States v. Ross*, No. ACM 40289 – The record of trial consists of 11 prosecution exhibits, 1 defense exhibit, 2 court exhibits, and 4 appellate exhibits.

The transcript is 130 pages. Appellant is not confined. Counsel has begun review of this record of trial.

c. *United States v. Hernandez*, No. ACM 40287 – The record of trial consists of 7 prosecution exhibits, 27 defense exhibits, and 10 appellate exhibits. The transcript is 226 pages. Appellant is confined.

d. *United States v. Gammage*, No. ACM S32731 – The record of trial consists of 3 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. The transcript is 105 pages. Appellant is not confined.

e. *United States v. Portillos*, No. ACM 40305 – The record of trial consists of 4 prosecution exhibits, 8 defense exhibits, 17 appellate exhibits, and 1 court exhibit. The transcript is 124 pages. Appellant is not confined.

f. *United States v. Goodwater*, No. ACM 40304 – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

2 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) HECTOR D. MANZANO TARIN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32734 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32734**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Hector D. MANZANO TARIN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 1 March 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 2d day of March, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **9 April 2023**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
HECTOR D. MANZANO TARIN, Senior Airman (E-4) United States Air Force *Appellant*	)	No. ACM S32734 27 March 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **9 May 2023**. The record of trial was docketed with this Court on 12 August 2022. From the date of docketing to the present date, 227 days have elapsed. On the date requested, 270 days will have elapsed.

Appellant was tried by a special court-martial composed of a military judge alone at Hill Air Force Base, Utah. (Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1.) On 6 June 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its Specification of conspiring to commit larceny, in violation of Article 81, Uniform Code of Military Justice (UCMJ), and Charge III and its Specification of larceny, in violation of Article 121, UCMJ. (*Id*. at 1-2.) On 6 June 2022, the military judge sentenced Appellant to be reprimanded; reduced to the grade of E-2; confined for three months each as to Charge I and Charge III, with both terms to run concurrently and one month of confinement to be suspended contingent upon payment to AAFES (Army and Air Force Exchange Service) of $3,333 within three months of the entry of judgment; and discharged from the service with a bad conduct discharge. (ROT, Vol. 1, Statement

of Trial Results (STR) at 2-3; Record at 73). On 29 June 2022, the convening authority took no action on the findings and took the following action on the sentence: "The period of confinement in excess of two (2) months for Charge I and Charge III is suspended for three (3) months from the Entry of Judgment, contingent upon the condition that [Appellant] repays $3,333 to the Army and Air Force Exchange Services [sic], at which time, unless the suspension is sooner vacated, the suspended confinement will be remitted without further action." (ROT, Vol. 1, Convening Authority Decision on Action at 1.) The convening authority denied Appellant's request to waive all automatic forfeitures. (*Id*.) On 5 July 2022, the military judge entered the following sentence: a reprimand, reduction to the grade of E-2, total confinement for two months, and a bad conduct discharge. (ROT, Vol. 1, EOJ at 3.) The record consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is seventy-five (75) pages. Appellant is not in confinement.

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

(1) Undersigned counsel currently represents 14 clients and is presently assigned 11 cases pending brief before this Court. Five cases pending brief before this Court currently have priority over the present case:

a. *United States v. Ross*, No. ACM 40289 – The record of trial consists of 11 prosecution exhibits, 1 defense exhibit, 2 court exhibits, and 4 appellate exhibits. The transcript is 130 pages. Appellant is not confined. Counsel is currently reviewing this record of trial and anticipates filing this Appellant's Assignments of Error in April 2023.

b. *United States v. Johnson*, No. ACM 40291 – The record of trial consists of 28 prosecution exhibits, 4 defense exhibits, and 23 appellate exhibits. The transcript is 395 pages. Appellant is confined. Counsel is currently reviewing this record of trial and discussing potential issues with this Appellant.

c. *United States v. Gammage*, No. ACM S32731 – The record of trial consists of 3 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. The transcript is 105 pages. Appellant is not confined. Counsel has begun reviewing this record.

d. *United States v. Portillos*, No. ACM 40305 – The record of trial consists of 4 prosecution exhibits, 8 defense exhibits, 17 appellate exhibits, and 1 court exhibit. The transcript is 124 pages. Appellant is not confined.

e. *United States v. Goodwater*, No. ACM 40304 – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 27 March 2023.

[redacted]

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

27 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) HECTOR D. MANZANO TARIN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32734 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **HECTOR D. MANZANO TARIN,** United States Air Force *Appellant.*	)))))))))	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2 No. ACM S32734 9 May 2023

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

Assignments of Error[1]

I.

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE THAT SRA MANZANO TARIN POSSESSED A MORTGAGE AS REBUTTAL TO HIS UNSWORN STATEMENT THAT HIS MOTIVE WAS TO ASSIST HIS BROTHER.

II.

WHETHER THE RECORD OF TRIAL IS INCOMPLETE BECAUSE THE ATTACHMENT TO THE STIPULATION OF FACT IN THE RECORD OF TRIAL IS NOT WHAT WAS ADMITTED DURING THE COURT-MARTIAL.

Statement of the Case

On 6 June 2022, a military judge sitting alone as a special court-martial convicted Senior Airman (SrA) Hector D. Manzano Tarin, consistent with his pleas in accordance with a plea agreement,[2] of one charge and one specification of conspiracy and one charge and one specification of larceny under Articles 81 and 121, Uniform Code of Military Justice (UCMJ),

[1] SrA Manzano Tarin raises one additional issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix.
[2] Appellate Exhibit III.

10 U.S.C. §§ 881 and 921.[3] Record (R.) at 13, 42. In accordance with the plea agreement, trial counsel withdrew, and the military judge dismissed with prejudice, Charge II and its Specification. R. at 42, 74. The military judge sentenced SrA Manzano Tarin to be reprimanded; reduced to the grade of E-2; confined for three months each as to Charge I and Charge III, with both terms of confinement to run concurrently and one month of confinement to be suspended contingent upon payment to the Army and Air Force Exchange Service (AAFES) of $3,333 within three months of the entry of judgment; and discharged from the service with a bad-conduct discharge. R. at 73. The Convening Authority took no action on the findings and suspended the period of confinement in excess of two months for Charge I and Charge III. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 29 June 2022.

Statement of Facts

General Background

SrA Manzano Tarin was born in Tijuana, Mexico, in a family of four sisters and three brothers; he was his parent's second youngest child. R. at 52; Defense Exhibit (Def. Ex.) B at 1. He lived with his family in an impoverished neighborhood and his father worked in Los Angeles, California, Monday through Friday, returning to the family only on weekends. *Id*. His mother took care of him while his father was gone, but at the age of seven, SrA Manzano Tarin's mother passed away from cancer. *Id*. SrA Manzano Tarin became the caretaker for his younger brother, E.M.T., while his father continued to work, and his older siblings had their own obligations. *Id*. At 12 years old, he immigrated to Los Angeles with his father and just two of his siblings, and began learning English. *Id*. SrA Manzano Tarin graduated high school and worked to become a citizen. Def. Ex. B at 1. As a full-time college student, he attained a bachelor's degree in

[3] All references to the Uniform Code of Military Justice and Rules for Courts-Martial are to the *Manual for Courts-Martial*, *United States* (2019 ed.).

sociology, making the Dean's list, while working as a dishwasher, valet, and armed security officer. *Id.* After college, he chose to join the Air Force. *Id.*

In addition to his career goals, he dreamt of building his own family and married his wife, V.L., and had his first child. *Id.* At his first duty station, SrA Manzano Tarin continued furthering his education by attaining a master's degree in public administration. *Id.* SrA Manzano Tarin also volunteered his time to the Airman Against Drunk Driving (AADD), Airmen Committed to Excellence (ACE), and squadron events. Def Ex. B at 2; Def. Ex. F.

However, while SrA Manzano Tarin was thriving, his little brother, E.M.T., was struggling with drug addiction. Def Ex. B at 2. When SrA Manzano Train received a permanent change of station to Hill Air Force Base in Utah, he took E.M.T. in to live with him and his family, but E.M.T. continued to struggle with debt and addiction. *Id.*

SrA Manzano Tarin had always managed to stay out of debt and take care of his family, but E.M.T. was deep in debt. Def. Ex. B at 2. E.M.T. worked at the base Exchange[4] and around November of 2021, E.M.T. approached SrA Manzano Tarin and V.L. about a plan to steal from the Exchange to help with E.M.T.'s financial troubles. R. at 23; Def. Ex. B at 2. SrA Manzano Tarin agreed to the plan, thinking he could help his brother without hurting anyone. Def. Ex. B at 2. SrA Manzano Tarin carried out this plan with E.M.T. and V.L. and admitted his misconduct to investigators prior to his court-martial, as well as to the military judge during his court-martial. Pros. Ex. 1, Attachment 3; R. at 23-24, 26-31.

[4] Prosecution Exhibit (Pros. Ex.) 1 at 2.

Argument

I.

THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE THAT SRA MANZANO TARIN POSSESSED A MORTGAGE AS REBUTTAL TO HIS UNSWORN STATEMENT THAT HIS MOTIVE WAS TO ASSIST HIS BROTHER.

Additional Facts

E.M.T. was not initially truthful with Exchange Loss Prevention personnel. *See* Pros. Ex. 1, Attachment 2 at 2.[5] E.M.T. verified that V.L. was his sister-in-law. Pros. Ex. 1, Attachment 2 at 2. But then lied when asked if he was being truthful about conducting a refund transaction to a person named "[L.V.]" *Id*. When confronted with CCTV video, E.M.T. admitted "[L.V.]" was actually V.L. *Id*. E.M.T. admitted he would ring out SrA Manzano Tarin and V.L. but he would avoid scanning the expensive items they brought to the register. *Id*. at 2-4, 11-12. SrA Manzano Tarin and V.L. would then return the items that were not paid for as though they just did not have a receipt, and E.M.T. would refund the items to Exchange Gift Cards. *Id*. at 12. E.M.T. would then allow SrA Manzano Tarin and V.L. to purchase "Visa Vanilla Gift Cards" with the Exchange Gift Cards. *Id*. However, E.M.T. minimized his involvement, stating, for example, "[V.L.] asked me not to ring it up"; "[m]y brother told me not make it seem like, I don't he thought it was better"; "[s]he asked me not to charge her for the iron so I did not"; "[s]he […] told me to ring up the cheaper items and not charge her for the expensive ones"; and "[t]here were probably a couple of times when I did not realize they grabbed so much stuff." *Id*. at 2-4, 12. When asked what SrA Manzano Tarin and V.L. did with the gift cards they obtained, E.M.T. stated:

> I guess they wanted to pay off the mortgage on their house and they used their income for the house and the gift cards to buy groceries, gas, and stuff. I think that

[5] Appellate defense counsel relies on Attachment 2 to the Stipulation of Fact in the ROT for purposes of this argument but as discussed *infra* in Issue II, the record does not render clear that this attachment was, in fact, admitted during SrA Manzano Tarin's court-martial.

> is what they did I don't know. I think you can pay off other stuff with them like car insurance or something.

Id. at 12.

During the defense's presentencing case, SrA Manzano Tarin explained in a written unsworn statement that he gave in to the scheme thinking he could help his brother, who came to him struggling with severe debt and addiction. Def. Ex. B at 2. In his oral unsworn statement, he continued:

> For almost my entire life, it has been my job to care for my brother. I tell you this not to place blame on [E.M.T.], but to explain why I made the choices I did. […] These allegations forced me to look inward and see that not only was I not helping [E.M.T.], I was hurting myself and my family.

R. at 52-53.

The Government offered two exhibits to rebut SrA Manzano Tarin's unsworn statements that his motivation was to care for his brother. R. at 53-54. First, the Government offered "a photo from SrA Manzano Tarin's Facebook," which appears to demonstrate SrA Manzano Tarin dining out, to which the defense objected. R. at 53, 55-56; Pros. Ex. 4 for Identification. The military judge queried "the connotation that you'd like the court to draw is that the dining out, presumably this was a nice dinner that cost money, is what – in what way is this rebutting the accused's statement in his unsworn that his motivation was to assist his brother in financial distress?" R. at 54. Trial counsel averred the Facebook "post shows that he was not taking care of his brother, prior to or after the larceny scheme, and instead was going to fancy dinners with this wife." R. at 55. The military judge sustained the defense objection finding "absent additional evidence by a sponsoring witness that […] the accused used ill-gotten gains from the proceeds of his crimes to pay for this meal, the court finds that this is not relevant evidence." R. at 56.

Second, the Government offered a six-page deed record from Lexis Nexis which purports to show that SrA Manzano Tarin obtained a Veterans Administration mortgage for a single-family

residence in April 2021, seven months prior to the charged offenses, with a loan amount of $327,360. R. at 56; Pros. Ex. 5. This record also indicates the home was built in 1951 and has 1,200 square feet of living space, with two bedrooms and one bathroom. Pros. Ex. 5.

Trial counsel sought to admit this exhibit as rebuttal again to SrA Manzano Tarin's statement that "he's taking care of his brother," stating "he had a new home purchased in early 2021, April to be specific." R. at 56-57. Trial counsel argued "per [E.M.T.'s statement,] the accused was using the gift cards to help pay off a mortgage." R. at 57.

The defense objected and explained this did not rebut SrA Manzano Tarin's statement. *Id*.

The military judge overruled the defense objection and admitted the deed record as Prosecution Exhibit 5, finding E.M.T.'s statement "taken in conjunction with the mortgage, could lead to an inference of a reasonable finder of fact that the entrance was perhaps dual, to assist the accused and his brother" and "[t]he court […] has very limited concerns about the court's ability to consider this for the limited purpose of whether it rebuts the accused's assertion that his primary motivator was to assist his brother and not himself." R. at 58.

Standard of Review

This Honorable Court reviews "a military judge's decision to admit evidence for an abuse of discretion." *United States v. Norwood*, 81 M.J. 12, 17 (C.A.A.F. 2021) (citation omitted). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003) (citation omitted). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997).

Law

Military judges are permitted to relax the rules of evidence with respect to defense matters in extenuation or mitigation. Rules for Courts-Martial (R.C.M.) 1001(d)(3). When these rules are relaxed, they may also be relaxed "to the same degree" for evidence offered by the Government in rebuttal. R.C.M. 1001(e). Relaxation of the rules regards "whether the evidence is authentic and reliable," and does not convert otherwise inadmissible evidence to admissible evidence. *United States v. Saferite*, 59 M.J. 270, 273 (C.A.A.F. 2004) (quoting *United States v. Boone*, 49 M.J. 187, 198 n.14 (C.A.A.F. 1998)).

The function of rebuttal evidence is to "explain, repel, counteract or disprove the evidence introduced by the opposing party." *Saferite*, 59 M.J. at 274 (quoting *United States v. Banks*, 36 M.J. 150, 166 (C.M.A. 1992)). "The scope of rebuttal is defined by evidence introduced by the other party." *Banks*, 36 M.J. at 166 (citations omitted).

"Military judges have wide latitude in controlling the presentation of rebuttal evidence." *United States v. Gittens*, 36 M.J. 594, 598 (A.F.C.M.R. 1992). "Rebuttal evidence, like all other evidence, may be excluded pursuant to [Mil. R. Evid.] 403 if its probative value is substantially outweighed by the danger of unfair prejudice." *Saferite*, 59 M.J. at 274 (citing *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001)).

In *United States v. Hursey*, the Court of Appeals for the Armed Forces found the military judge abused his discretion by admitting the testimony of the noncommissioned officer in charge (NCOIC) of the base Military Justice Division that the accused was late for his court-martial as rebuttal to defense evidence of the accused's dependability at work. 55 M.J. at 36. The Court reasoned the NCOIC was unable to say whether the accused was at fault or whether his being late was unavoidable, and determined this testimony had "virtually no probative value," was potentially misleading, and time wasting. *Id*.

"When there is error in the admission of sentencing evidence, 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) (quoting *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009)). This Honorable Court considers four factors when determining whether an error had a substantial influence on the sentence: "(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)). "An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." *Id.* (citation omitted).

Analysis

The military judge abused his discretion by admitting the deed record as Prosecution Exhibit 5, as it carried just as little probative value as the rejected Facebook post in Prosecution Exhibit 4 for Identification. The military judge had no evidence of how SrA Manzano Tarin's mortgage was paid, other than that he obtained a Veterans Administration long before the scheme began. Pros. Ex. 5. The closest he had was an equivocal and self-serving statement from E.M.T., which included "I guess," "I think," and "I don't know." R. at 58. No evidence was introduced to show SrA Manzano Tarin's mortgage payment per month, his Basic Allowance for Housing, or his total expenses. Similarly, no evidence was introduced that SrA Manzano Tarin could not afford to pay his mortgage prior to the scheme or that this was a luxurious house that he could not otherwise afford. *Id*. Like the rejected Prosecution Exhibit 4 for Identification, this evidence was irrelevant because no evidence showed his mortgage was paid for, directly or indirectly, with ill-gotten gains. Like the NCOIC's testimony in *Hursey*, this evidence had little to no probative value, was potentially misleading, and time wasting. 55 M.J. at 36.

Though SrA Manzano Tarin pleaded guilty, he had no history of misconduct. To the contrary, he presented a strong sentencing case in which his supervisors conveyed the belief that he had strong rehabilitative potential. Def. Ex. F-G. He explained to the military judge that had overlooked the consequences of his bad judgment in a desire to help his brother but understood and admitted to the wrongfulness of his decisions, desiring to never repeat them. Def. Ex. B. The introduction of the deed record was significantly prejudicial as it caused the military judge to question SrA Manzano Tarin's integrity in his statements *to the military judge* and whether he lied about his motivations to fabricate an extenuating circumstance. And the military judge determined SrA Manzano Tarin's motivations were "pivotal in [the court's] ultimate sentence in this case." R. at 71-72. "[T]he overriding point is that the accused himself sought to benefit from it. […] The evidence demonstrates that the accused was not disinterested in his scheme." *Id*. at 72.

The military judge erred in admitting this deed record, given its extremely low probative value, and SrA Manzano Tarin was prejudiced as the question of his own benefit was "pivotal" to the court's sentence determination. This exhibit improperly created the illusion of adding credibility to E.M.T.'s statements; but for this addition, SrA Manzano Tarin's accountability for his actions and rehabilitative potential would have been stronger, weighed more heavily by the military judge, and resulted in less punishment.

WHEREFORE, SrA Manzano Tarin requests this Court provide meaningful relief by setting aside his bad-conduct discharge.

II.

THE RECORD OF TRIAL IS INCOMPLETE BECAUSE THE ATTACHMENT TO THE STIPULATION OF FACT IN THE RECORD OF TRIAL IS NOT WHAT WAS ADMITTED DURING THE COURT-MARTIAL.

Additional Facts

The military judge admitted a stipulation of fact into evidence as Prosecution Exhibit 1. R. at 46. The stipulation of fact was a six-page document that also included four attachments. R. at 15. The military judge requested trial counsel state the page count of each of the attachments, finding the "attachments are not separately numbered and they are not numbered on the face of the stipulation of fact itself." *Id*. Trial counsel stated for the record that the first attachment was the AAFES return policy and was two pages. R. at 16. The second attachment was E.M.T.'s AAFES statement and was 13 pages. *Id*. The third attachment was SrA Manzano Tarin's statement and was one page. *Id*. The fourth attachment included various AAFES receipts and was 25 pages. *Id*. The ROT was certified on 21 July 2022. ROT, Vol. 2, Certification of Record of Trial, dated 21 July 2022.

Standard of Review

"Whether an omission from a record of trial is 'substantial' is a question of law which [appellate courts] review *de novo*." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000).

Law

Article 54(c)(2), UCMJ, requires that a "complete record of proceedings and testimony shall be prepared in any case" where the sentence includes a discharge. 10 U.S.C. § 854. The ROT in every general or special court-martial contains "any evidence or exhibits considered by the court-martial in determining the findings or sentence" including "[e]xhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in

evidence." R.C.M. 1112(b)(6).

A substantial omission renders a ROT incomplete and raises a presumption of prejudice that the government must rebut. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). A ROT that is missing exhibits may be substantially incomplete. *See Stoffer*, 53 M.J. at 27 (holding that the record was substantially incomplete for sentencing when all three defense sentencing exhibits were missing). "Insubstantial" omissions from a record of trial do not render the record incomplete. *See Henry*, 53 M.J. at 111 (holding that four missing prosecution exhibits were insubstantial omissions when other exhibits of similar sexually explicit material were included). The threshold question is whether the missing exhibits are substantial, either qualitatively or quantitatively. *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014). Omissions may be quantitatively insubstantial when, considering the entire record, the omission is "so unimportant and so uninfluential . . . that it approaches nothingness." *Id.* (citing *United States v. Nelson*, 13 C.M.R. 38, 43 (C.M.A. 1953)). This Court individually analyzes whether an omission is substantial. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

An incomplete record may be returned to the military judge for correction. R.C.M. 1112(d)(2); *e.g.*, *United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2-3 (A.F. Ct. Crim. App. 26 Oct. 2022) (unpub. op.) (explaining R.C.M. 1112(d) provides for correction of a defective or incomplete ROT after authentication); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10, at *9-10 (A.F. Ct. Crim. App. 6 Jan. 2022) (unpub. op.). R.C.M. 1112 (d)(2) states "[a] superior competent authority may return a [ROT] to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction."

Analysis

The plain language of R.C.M. 1112(b)(6) requires the inclusion of "any evidence or exhibits considered by the court-martial in determining the findings or sentence." The attachments to the stipulation of fact were admitted into evidence as part of Prosecution Exhibit 1 (R. at 46), argued by trial counsel (R. at 61-62, 65), and considered by the military judge in findings and sentencing (R. at 16, 59-60, 69-72).

Prosecution Exhibit 1 and its attachments do not appear to match what was described by the military judge or trial counsel. The military judge found the attachments were not numbered, whereas Prosecution Exhibit 1 in the ROT appears to be paginated on every page. *Compare* R. at 15 *with* Pros. Ex. 1. The military judge would not have needed trial counsel to state the page count for each attachment if the entire document was paginated when it was introduced and subsequently admitted at trial.

More concerning, the second attachment to Prosecution Exhibit 1 in the ROT appears to only be twelve pages, rather than thirteen. *Compare* R. at 16 *with* Pros. Ex. 1, Attachment 2. The second attachment in the ROT also includes a hand-written pagination that states this document is 12 pages on each page, which raises the question why trial counsel would have stated this attachment was 13 pages and why no other trial participant corrected his statement if this is what was introduced during SrA Manzano-Tarin's court-martial. *Id*. Moreover, the second attachment in the ROT is an "Exchange Form 3900-017" which was witnessed by Exchange Loss Prevention personnel, not law enforcement, but the military judge stated the second attachment was a "sworn statement to OSI."[6] *Compare* R. at 72 *with* Pros. Ex. 1, Attachment 2.

[6] OSI is an acronym commonly used for the Office of Special Investigations. *See* https://www.osi.af.mil/ (last visited 8 May 2023).

Finally, the fourth attachment in the ROT is 27 pages, not 25 pages as stated by trial counsel. *Compare* R. at 16 *with* Pros. Ex. 1, Attachment 4. Per trial counsel's count, there should only be 41 total pages of attachments, but Prosecution Exhibit 1 in the ROT contains 42 pages of attachments. *Compare* R. at 16 *with* Pros. Ex. 1.

This Court cannot meaningfully complete its duties under Article 66, UCMJ, and appellate defense counsel cannot meaningfully complete her duties under Article 70, UCMJ, because neither can be certain that the attachments present in the ROT are the attachments that were admitted at trial. 10 U.S.C. §§ 866, 870; *Cf. United States v. Tate*, 82 M.J. 291, 298 (C.A.A.F. 2022) (holding that the Army Court of Criminal Appeals could not perform its Article 66, UCMJ, function without knowing exactly what aggravating evidence the military judge considered, where the military judge relied upon unrecorded testimony).

The failure to provide the attachments to the stipulation of fact that were admitted at trial in the ROT qualifies as a substantial omission which renders the ROT incomplete. This substantial omission creates a presumption of prejudice which is not remedied elsewhere in the ROT and warrants relief. Where a record was so substantially lacking, the CAAF disapproved a punitive discharge. *See Stoffer*, 53 M.J. at 27. This Court should take the opportunity to remedy this prejudicial omission from the record of trial by remanding this case for the record to be corrected and to ensure the correct attachments are included in accordance with R.C.M. 1112 (d)(2). Upon remand, if the record cannot be corrected, this Court should disapprove and set aside the bad-conduct discharge. This would both offset the detrimental impact of these errors and send the appropriate message regarding the importance of accuracy and completeness when it comes to records of trial.

WHEREFORE, SrA Manzano Tarin respectfully requests this Honorable Court remand this case pursuant to R.C.M. 1112 and, if the record cannot be corrected, disapprove the bad-conduct discharge.

Respectfully submitted,

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

//SIGNED//
JACOB P. FRANKSON[7]
Legal Extern
Air Force Appellate Defense Division
[redacted]

[7] Mr. Frankson is a second-year law student at George Mason University, Antonin Scalia Law School. Mr. Frankson was at all times supervised by attorneys assigned to AF/JAJA during his participation in the writing of this brief, in accordance with Rule 14.1(c) of this Court's Rules of Practice and Procedure.

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 9 May 2023.

Respectfully submitted,

[redacted]

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

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 matter:

I.

SRA MANZANO TARIN'S SENTENCE IS INAPPROPRIATELY SEVERE.

Standard of Review

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

Law

Appellate courts have "not only the power but also the independent duty to consider the appropriateness" of adjudged sentences. *United States v. Baker*, 28 M.J. 121, 123 (C.M.A. 1989). Under Article 66, UCMJ, this Court may "affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866. "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (internal quotations and citations omitted). This Court's broad power to "do justice" is distinct from the power to grant mercy. *See United States v. Guinn*, 81 M.J. 195, 203 (C.A.A.F. 2021) (citations omitted). In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (quoting *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)) (alteration in original).

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

Analysis

SrA Manzano Tarin's sentence is inappropriately severe considering his acceptance of responsibility and remorse, his strong rehabilitative potential, and the nature of the offenses. During the sentencing phase of his court-martial, the military judge informed SrA Manzano Tarin that he had the "right to present matters in extenuation and mitigation, that is, matters about the offenses or yourself which you want me to consider in deciding your sentence." R. at 44. SrA Manzano Tarin availed himself of this opportunity and provided information to assist the military judge in crafting an appropriate sentence in his case. R. at 50-53; Def. Ex. A-G. While a reprimand, reduction to the grade of E-2, three months confinement, and a bad-conduct discharge was a permissible sentence in SrA Manzano Tarin's case, it is inappropriately severe given the nature of the offenses he was convicted of, and the matters offered in mitigation and extenuation. SrA Manzano Tarin demonstrated his acceptance of responsibility for his actions when he admitted his actions to investigators, pleaded guilty to his offenses, and expressed remorse. Pros. Ex. 1, Attachment 3; Def. Ex. B; R. at 23-24, 26-31.

SrA Manzano Tarin has strong rehabilitative potential. The character statements presented in evidence show SrA Manzano Tarin attained the respect of his peers through "remain[ing] professional no matter who he spoke to and volunteer[ing] to help in any situation" and that his peers "always trusted him to get the job done the right way." Def. Ex. F. Moreover, he was "always willing to volunteer for various wing events and led his peers to do the same" and "Airmen

looked up to him for his ability to identify issues and provides solutions to their problems when they were unsure what action they should take." Def Ex. G. SrA Manzano Tarin's superiors rated his rehabilitative potential as "high" and "enormous." Def. Ex. F; Def. Ex. G.

Even though the military judge did not impose a fine even though "one was otherwise certainly warranted" the sentence is still inappropriately severe. R. at 72. While a fine was not imposed, the fact that one was not imposed only helps SrA Manzano Tarin's rehabilitative efforts in the present, not in the future. A bad-conduct discharge will have a severe effect on SrA Manzano Tarin's ability to attain a job or career for the rest of his life. While a certain level of deterrence is warranted to stop others from committing similar crimes, SrA Manzano Tarin was punished for his actions with three months in solitary confinement. ROT, Vol. 2, *United States v. SrA Hector Manzano Tarin* – Submission of Clemency Matters and Request for Action Under Article 58(b), dated 15 June 2022. His punishment to confinement is sure to deter SrA Manzano Tarin, especially given his lack of prior misconduct, and others. A bad-conduct discharge merely piles on punishment when additional punishment is unnecessary.

The nature of the offenses committed by SrA Manzano Tarin does not have a long-lasting impact. This is purely a financial crime involving no physical or psychological harm to anyone. Additionally, the monetary damage is minimal considering SrA Manzano Tarin had already paid back a portion of what he owed prior to trial. R. at 65.

In the military justice system, every punishment must be individualized. *United States v. McNutt*, 62 M.J. 16, 19-20 (C.A.A.F. 2005) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 181 (C.M.A. 1959)). Here, the worst punishment available at SrA Manzano Tarin's court-martial—a bad-conduct discharge—is not appropriate when considering the facts and circumstances of the offenses to which he pleaded guilty, the matters in mitigation and extenuation

offered on the record, and who SrA Manzano Tarin is as a person, as revealed by the evidence of his excellent rehabilitative potential. By sentencing SrA Manzano Tarin to three months confinement, reduction to E-2, and a bad-conduct discharge, SrA Manzano Tarin did not receive appropriate credit for his acceptance of responsibility, his remorse, and his excellent rehabilitative potential.

WHEREFORE, SrA Manzano Tarin requests this Court exercise its authority under Article 66, UCMJ, to modify his sentence and set aside his bad-conduct discharge.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Senior Airman (E-4) **HECTOR D. MANZANO TARIN**, United States Air Force *Appellant*	)	No. ACM S32734 13 June 2023

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

COMES NOW, Appellant, Senior Airman (SrA) Hector D. Manzano Tarin, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure and submits this reply to the United States' Answer to Assignments of Error, filed on 8 June 2023 (hereinafter Gov. Ans.). Appellant primarily rests on the arguments contained in the Brief on Behalf of Appellant, filed on 9 May 2023, but provides the following additional argument in reply to the United States' Answer to Assignment of Error II.

Argument

II.

APPELLANT'S RECORD OF TRIAL IS INCOMPLETE BECAUSE THE ATTACHMENT TO THE STIPULATION OF FACT IN THE RECORD OF TRIAL IS NOT WHAT WAS ADMITTED DURING THE COURT-MARTIAL.

The Government asserts with the attachment of affidavits from a trial counsel and case paralegal, "[t]his Court, Appellant, and appellate defense counsel now know exactly what was entered and what the military judge considered is what is in the ROT." Gov. Ans. at 15. However, the Government's conclusion is deduced in part from an admission by the case paralegal that she altered the admitted exhibit post-trial. *See United States' Motion to Attach*, dated 8 June 2023, at

Appendix B. Given this alteration and the mismatch between what was stated on the record by trial counsel and the military judge (and never corrected) and what is present in the record of trial, this Court should act in an abundance of caution and return the record of trial to provide the military judge and trial defense counsel an opportunity to review and confirm whether the documents in the record are those that were admitted at trial.

In a different context in which ambiguity in the record existed, this Court determined remand under Rule for Courts-Martial (R.C.M.) 1112(d) was the appropriate action. *Cf. United States v. Jones*, No. ACM S32717, 2022 CCA LEXIS 652, at *4 (A.F. Ct. Crim. App. 7 Nov. 2022) (Order) (remanding "to resolve a substantial issue with post-trial processing, insofar as the convening authority's intent on Appellant's requested action on the adjudged reduction in grade is not clear."). While the Government attempts to resolve the ambiguity in Appellant's record of trial via the attachment of affidavits from Government actors, this Court, Appellant, and appellate defense counsel still have no assurance from the military judge or trial defense counsel that the documents in the record are those that were admitted at trial.

WHEREFORE, SrA Manzano Tarin respectfully requests this Honorable Court remand this case pursuant to R.C.M. 1112.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 13 June 2023.

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

8 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 2
Senior Airman (E-4) **HECTOR D. MANZANO TARIN**, USAF *Appellant.*	)	No. ACM S32734

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE THAT SRA MANZANO TARIN POSSESSED A MORTGAGE AS REBUTTAL TO HIS UNSWORN STATEMENT THAT HIS MOTIVE WAS TO ASSIST HIS BROTHER.

II.

WHETHER THE RECORD OF TRIAL IS INCOMPLETE BECAUSE THE ATTCHMENT TO THE STIPULATION OF FACT IN THE RECORD OF TRIAL IS NOT WHAT WAS ADMITTED DURING THE COURT-MARTIAL.

III.

[WHETHER] SRA MANZANO TARIN'S SENTENCE IS INAPPROPRIATELY SEVERE.[1]

STATEMENT OF THE CASE

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

[1] Appellant raises Issue VI pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF FACTS

At a special court-martial with a military judge sitting alone, Appellant pled guilty to Charge I and its specification for conspiring to commit larceny of gift cards from the base exchange in the amount of $10,100 in violation of Article 81, UCMJ, and Charge II and its specification for stealing gift cards from the base exchange valuing about $5,200 in violation of Article 121, UCMJ. (*Entry of Judgment*, dated 5 July 2022, ROT Vol. 1). The military judge sentenced Appellant to three months confinement, a bad conduct discharge, and reduction in grade to E-2. (Id.) The convening authority suspended 1 month of confinement contingent upon the condition that Appellant repay $3,333 to AAFES and then it would be remitted without further action. (Id.)

The United States will provide relevant facts for each issue below.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY ADMITTING EVIDENCE THAT APPELLANT POSSESSED A MORTGAGE AS REBUTTAL TO HIS UNSWORN STATEMENT THAT HIS MOTIVE WAS TO ASSIST HIS BROTHER.

Additional Facts

During the defense's sentencing case, the military judge relaxed the Military Rules of Evidence with respect to foundation, authenticity, and hearsay when admitting the defense documentary evidence, Defense Exhibits B-G. (R. at 51). Defense Exhibit B is Appellant's three-page written unsworn statement to the court-martial. (Def. Ex. B.) In his unsworn statement, Appellant tells the military judge:

> [Appellant's brother] was in deep debt, I did not know how to help him. He had issues with debt and with addiction. He told me about

> the ways he could get money from his job. In a lapse of judgment and love for my brother, I gave in thinking that I would help him and no one would get hurt by this temporal solution to his problems.

(Id.)

After the defense rested its sentencing case, trial counsel offered Prosecution Exhibit 5 in rebuttal. (R. at 56). Prosecution Exhibit 5 was a copy of the deed record for Appellant pulled from LexisNexis to rebut Appellant's statements from his unsworn statement that he engaged in the larceny scheme solely to help his brother. (Id.; Prosecution Exhibit 5). Trial counsel used Appellant's brother's statement to AAFES, Attachment 2 to the stipulation of fact, to support that Appellant used the money gained from the larceny to help pay off his mortgage. (R. at 57). In that statement, his brother said:

> I guess they wanted to pay off the mortgage on their home and that they used the income for the house and the gift cards to buy groceries, gas, and stuff. I think that is what they did I don't know. I think you can pay off other things with them like car insurance or something.

(Pros. Ex. 1, Attachment 2, page 12).

Trial defense counsel objected to Prosecution Exhibit 5 on the basis that EMT's (Appellant's brother) statement lacked authenticity and reliability as an out of court statement, even though it was attached to the Stipulation of Fact, and that it provided little to no weight with respect to Prosecution Exhibit 5. (Id.)

The military judge noted as a matter of judicial notice that LexisNexis

> [I]s a commonly recognized legal research tool utilized by all members of the JAG Corps and has as one of its components the ability to look up personal information on particular persons and property.
>
> On its face, this appears to be a property transaction drawn from LexisNexis. The court finds that's sufficient indicia of reliability, and objection as to authenticity is overruled, even without the regularly conducted business records affidavit, et cetera, et cetera,

> insofar as we are on rebuttal and the rules of authenticity have been relaxed, and also as to hearsay.

(R. at 56-57).

The military judge found the evidence of Appellant's mortgage qualified as rebuttal evidence since Appellant asserted his motive was to help his brother, and the Government asserted it was to help pay Appellant's own mortgage. (R. at 58). The military judge analyzed the statement from the Appellant's brother found in Attachment 2 to the stipulation of fact after noting that the stipulation of fact was agreed to by both parties. (Id.)

The military judge found the statement taken in conjunction with the mortgage "could lead to an inference of a reasonable finder of fact that the entrance[2] [*sic*] was perhaps dual, to assist the accused and his brother." (Id.) He determined those were matters in aggravation. (Id.) The military judge conducted a M.R.E. 403 balancing test on the record and found very limited concerns about himself sitting as a military judge alone considering the evidence for the limited purpose of whether it rebuts the "accused's assertion that his primary motivator was to assist his brother and not himself." (Id.)

When the military judge delivered Appellant's sentence in the case, he provided his rationale for the sentence he adjudged. (R. at 71-73). When citing his rationale, among other factors, he stated that Appellant's motivations impacted the sentence that he adjudged. (R. at 72).

> Three, the accused's motivations in the case. While both the accused and his brother accused the other of originating the larceny scheme, the overriding point is that the accused himself sought to benefit from it. The evidence demonstrates that the accused was not disinterested in his scheme. His brother's sworn statement to OSI [*sic*], Attachment 2, at page 12, recites that the accused was using

[2] The United States is interpreting "entrance" as either a transcription error or a verbal error on the part of the military judge, with the intended word being "interest" rather than "entrance."

> the proceeds for his own purposes in addition to any assistance that he was lending to his brother.

(Id.) The other factors the military judge considered were the recurrent nature of the misconduct, including that some of the misconduct was committed on Veterans Day 2021; Appellant was caught at the larceny scheme rather than after abandoning it and even created false names to continue it; Appellant's rehabilitative potential was evident from being a "devoted husband, father and brother" and having both a bachelor's and master's degree; he had the esteem of some of the NCO's he worked with, but could not find a better solution to financial issues than larceny; and Appellant knew better than to engage in a larceny scheme as the father of two with two degrees. (R. at 71-73).

Standard of Review

A military judge's decision to admit or exclude sentencing evidence is reviewed under an abuse of discretion standard. United States v. Stephens, 67 M.J. 233, 235 (C.A.A.F. 2009). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his rulings are not supported by the record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts was clearly unreasonable." United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010) (*citing* United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008)).

"To reverse for "an abuse of discretion involves far more than a difference of opinion. The challenged action must be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' in order to be invalidated on appeal."" United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (citations and ellipses omitted). "An abuse of discretion arises in cases in which the judge was controlled by some error of law or where the order, based upon factual, as

distinguished from legal, conclusions, is without evidentiary support." Id. (citation and internal quotation marks omitted).

"The abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004).

Law

During presentencing proceedings, the defense "may present matters in extenuation and mitigation." R.C.M. 1001(c)(1). "The prosecution may rebut matters presented by the defense." R.C.M. 1001(e). The function of rebuttal evidence is "to explain, repel, counteract or disprove the evidence introduced by the opposing party," and its scope is "defined by evidence introduced by the other party." United States v. Saferite, 59 M.J. 270, 274 (C.A.A.F. 2004) (*quoting* United States v. Banks, 36 M.J. 150, 166 (C.M.A. 1992)). After all, when an accused "opens the door, principles of fairness warrant the opportunity for the opposing party to respond, provided the response is fair and predicated on a proper testimonial foundation." United States v. Eslinger, 70 M.J. 193, 198 (C.A.A.F. 2011) (*citing* United States v. Blau, 17 C.M.R. 232, 244 (C.M.A. 1954)) (otherwise "an accused would occupy the unique position of being able to 'parade a series of partisan witnesses before the court'… without the slightest apprehension of contradiction or refutation"); *see also* United States v. Hill, 62 M.J. 271, 272 (C.A.A.F. 2006) (finding if the defense "elicits evidence that could not be introduced by the prosecution under R.C.M. 1001(b)(5), the door may be opened for the prosecution to present such evidence n rebuttal").

If the military judge has relaxed the Military Rules of Evidence, then they can be similarly relaxed with respect to the prosecution's rebuttal evidence. R.C.M. 1001(d).

"Sentencing evidence is subject to the requirements of Military Rule of Evidence 403." Stephens, 67 M.J. at 235. "The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of…unfair prejudice." M.R.E. 403. When the military judge performs the M.R.E. 403 balancing test on the record, the ruling will not be overturned unless there is a "clear abuse of discretion." United States v. Ruppel, 49 M.J. 247, 251 (C.A.A.F. 1998).

When a military judge improperly allows sentencing evidence, the accused is only entitled to relief if the error substantially influenced the adjudged sentence. United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018) (citations omitted). To determine whether an error substantially influenced the sentence, this Court considers (1) the strength of the prosecution's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence n question. Id. The potential for unfair prejudice is substantially less in a trial by military judge alone. United States v. Manns, 54 M.J. 164, 167 (C.A.A.F. 2000).

Analysis

The military judge did not abuse his discretion when he admitted Prosecution Exhibit 5, because his decision was not arbitrary, fanciful, clearly unreasonable, nor clearly erroneous.

Prosecution Exhibit 5 specifically rebutted Appellant's statement in his unsworn statement that his sole motivation for committing the larcenies was to support his brother by providing proof Appellant had a mortgage to pay at the time like his brother, said he did. Evidence of the mortgage was proper rebuttal. Appellant opened the door, which "warrant[ed] the opportunity for the opposing party to respond." Eslinger, 70 M.J. at 198.

The military judge did not cite any incorrect legal principles when conducting his analysis of Prosecution Exhibit 5, but correctly made trial counsel articulate the specific fact the

Government was seeking to rebut with the exhibit. (R. at 56). To satisfy the military judge's query, trial counsel articulated that the Government sought to rebut the specific fact that Appellant engaged in the larcenies only to support his addicted and in-debt brother. (R. at 56). However, trial counsel linked the exhibit to Appellant's motivation using EMT's statement from Attachment 2 to the stipulation of fact to show that part of Appellant's motivation in stealing from the base exchange was to pay off his mortgage. (R. at 56-57). Furthermore, the military judge appropriately conducted a M.R.E. 403 balancing test and placed his reasoning on the record. (R. at 58). He stated that he would only use the evidence for the specific purpose of rebutting Appellant's unsworn statement about his motivation, but not for any improper purpose. (Id.) Therefore, the military judge based his ruling on the correct legal principles.

Nor did the military judge connect the legal principles to the facts in a clearly unreasonable manner. He found that both sides could argue Appellant's motivation based on the evidence in the record, but that Prosecution Exhibit 5 still qualified as rebuttal evidence based on the linkage found in EMT's statement and the fact that Appellant did have a mortgage. (R. at 58).

Appellant argues the military judge abused his discretion by admitting Appellant's deed record as Prosecution Exhibit 5, because it carried little probative value since the military judge had no evidence of how Appellant paid for his mortgage nor whether Appellant could afford his home without the larcenies. (App. Br. at 8). He further argues that the evidence was irrelevant because "no evidence showed his mortgage was paid for, directly or indirectly, with ill gotten gains." (Id.) First, EMT's statement to Hill AFB Exchange personnel stated that his understanding was that Appellant would be using the money from the larcenies to offset other costs so that he and his wife could pay off their mortgage. (Pros. Ex. 1, Attachment 2). This is

evidence that the money obtained from the larcenies was being used in relation to Appellant's mortgage. Additionally, it does not matter whether Appellant could afford his mortgage without the larcenies, since the military judge found by relying on Attachment 2 from Prosecution Exhibit 1 that paying for his mortgage was part of Appellant's motivations for engaging in the larceny scheme. The military judge did not need to find that it was because Appellant *couldn't pay for* his mortgage he was thus motivated to steal. There is no rule that a person must first need money for day-to-day expenses to then have a reason to steal. Furthermore, whether a cent of the larceny money *actually* went to pay Appellant's mortgage was not a necessary fact to find paying for his mortgage was part of Appellant's motivation when he stole from the exchange. Appellant could have used the proceeds from the larcenies to pay for anything, and thereby would have had more money at his disposal to pay down his mortgage. The threshold for relevance is low, since evidence must only have "*any* tendency to make a face more or less probable." *See.* Mil. R. Evid. 401 (emphasis added). And in a military judge alone case, there was little chance that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice – especially since the record already contained information properly before the court that Appellant used the proceeds of his crimes to pay for his mortgage.

Even if this Court concludes the military judge abused his discretion, under the four-part prejudice analysis, the admission of Prosecution Exhibit 5 did not prejudice Appellant's substantial rights. Barker, 77 M.J. at 384. First, the Government presented a strong sentencing case. The stipulation of fact established Appellant repeatedly engaged in misconduct despite being well educated and respected, and the father of two children. The military judge assessed Appellant's motivation in conducting the larcenies as only one factor among many to determine Appellant's sentence. (R. at 72). And even then, the military judge stated that he relied on

Attachment 2 to the stipulation of fact to show Appellant's motivation but made no mention of Prosecution Exhibit 5. (Id.)

Second, Appellant presented an average sentencing case, which the military judge credited, but also used to show that Appellant knew better than to engage in larceny. (R. at 71-73).

Finally, the Government could have argued Appellant's motivation without the addition of Prosecution Exhibit 5 simply based on the evidence already in the record. This goes to the third and fourth factors under the Barker test, because it shows the exhibit lacked the quality necessary to affect Appellant's sentence. Appellant overstates the minimal effect of this evidence at the expense of the other evidence in the record, which both parties had already agreed to, in the stipulation of fact. Furthermore, the military judge specifically limited his review of the evidence to whether it rebutted a limited fact from Appellant's unsworn statement. (R. at 72).

The United States respectfully requests this Court find the military judge did not abuse his discretion in admitting Prosecution Exhibit 5; and even if he did err, the admission of the challenged exhibit did not prejudice Appellant's substantial rights.

II.

THE RECORD OF TRIAL IS COMPLETE BECAUSE THE ATTACHMENT TO THE STIPULATION OF FACT IN THE RECORD OF TRIAL IS WHAT WAS ADMITTED DURING THE COURT-MARTIAL.[3]

Additional Facts

When the military judge admitted the stipulation of fact in the case as Prosecution Exhibit 1, he made sure Appellant had a copy in front of him. (R. at 15). The military judge noted for the record that the exhibit was a six-page document, dated 2 June 2022, with four attachments, which were not numbered separately and not numbered on the face of the stipulation of fact. (Id.) He asked trial counsel to state for the record how many pages each attachment had. (Id.) He did so to make sure "all the attachments are what was included in the original and also in the copy that the accused saw and signed." (Id.)

Assistant trial counsel announced that the stipulation of fact had four attachments and the following information.

> [T]he first attachment being the AAFES return policy, and it's two pages. The second attachment being [EMT's] AAFES statement dated 15 December 2021. That is 13 pages. The third attachment, [Appellant's] answers to S21, dated 24 January 2022. That is one page. And the fourth attachment are the AAFES receipts, 25 pages.

(Id.) At that point, the military judge asked trial counsel to give the original of Prosecution Exhibit 1 and its four attachments to the court reporter, and trial counsel complied. (Id.)

After directing Appellant to paragraph 19 of the stipulation of fact, the military judge asked whether he admitted that the information contained in the attachments was true and accurate to the best of his knowledge and belief. Appellant answered for himself in the

[3] The United States is filing a motion to attach the missing audio and transcript certification to the record of trial contemporaneously with this answer.

affirmative. The stipulation of fact was then admitted as Prosecution Exhibit 1 without objection.

Prior to Trial

Prior to trial, trial counsel provided the full stipulation of fact, including attachments identical to the ones attached on the record, to trial defense counsel for consideration with his client. (Attachment 1, Appendix A, United States' Motion to Attach, dated 8 June 2023 [hereinafter "Motion Attch. 1"]). Trial defense counsel sent back the signed stipulation of fact, but the return email did not contain the attachments to the stipulation of fact. (Attachment 2, Appendix A, United States' Motion to Attach, dated 8 June 2023 [hereinafter "Motion Attch. 2"]). However, trial defense counsel stated in the email that he did not have any objections to anything with respect to the stipulation of fact. (Appendix A, United States' Motion to Attach, dated 8 June 2023 [hereinafter "Appendix A"]). Based on his conversations with trial defense counsel, trial counsel understood trial defense counsel and his client agreed to the attachments as sent to them when they sent back the signed stipulation of fact. (Appendix A).

The attachments in the email match the attachments in the record exactly when compared. (Attachment 1; *Stipulation of Fact*, Attachments 1-4, dated 2 June 2022, ROT. Vol. 1).

Post Trial

After completion of trial, SSgt BS, the case paralegal for the trial, compiled the ROT. (Appendix B, United States' Motion to Attach, dated 8 June 2023 [hereinafter "Appendix B"]). At the conclusion of trial, the court reporter provided all the original documents from the trial to her, including Prosecution Exhibit 1 and its attachments. (Id.) SSgt BS scanned the exhibits into electronic form. (Id.) The only alteration she made to the stipulation of fact was to apply page

numbers to the whole document, including the attachments, because she was under the impression it needed to be done to complete the ROT. (Id.) SSgt BS stated, "The version contained in the record of trial is an exact copy of what was admitted at trial minus the page numbers." (Id.)

Standard of Review

Whether the ROT is incomplete is a question of law that the Court reviews *de novo*. United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general or special court-martial where a sentence of "death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months" is adjudged. Article 54(c)(2), UCMJ. Appellate courts understand that inevitably records will be imperfect, and therefore review for substantial omissions. *See* United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982). A substantial omission renders a record incomplete and raises a presumption of prejudice that the government must rebut. Henry, 53 M.J. at 111 (*citing* United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as complete. Id. A substantial omission may not be prejudicial if the appellate courts are able to conduct an informed review. United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001); *see also* United States v. Morrill, ARMY 20140197, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App. 31 October 2016)(Unpub. op.) (finding the record "adequate to permit informed review by this court and any other reviewing authorities") (citation omitted).

Analysis

The ROT contains all the attachments to the stipulation of fact exactly as they were admitted at court and as they were reviewed by trial defense counsel, minus the inclusion of page numbers for the documents added by SSgt BS. (Appendix A; Appendix B). There was no substantial omission nor substantial inclusion to the record that would render the ROT incomplete.

Inevitably ROTS will be imperfect, but insubstantial omissions do not render the ROT incomplete. Henry, 53 M.J. at 111 (citation omitted). Here, Appellant argues that Prosecution Exhibit 1 and its attachments "do not appear to match what was described by the military judge or trial counsel" for five reasons. (App. Br. at 12). First, the attachments were not numbered when trial counsel admitted the document on the record. (Id). Second, the second attachment to the stipulation of fact in the ROT is twelve (12) pages rather than the thirteen (13) pages trial counsel announced on the record. (Id.) Third, the military judge called EMT's statement that is attached to the stipulation of fact an OSI statement not an AAFES statement. (Id.) Fourth, the fourth attachment to the ROT is actually twenty-seven (27) pages not twenty-five (25) pages as trial counsel stated on the record. (App. Br. at 13). And fifth, trial counsel announced forty-one (41) pages of attachments when there were in fact forty-two pages (42) of attachments. (Id.)

The basis for Appellant's argument is that this Court and appellate defense counsel cannot meaningfully complete their duties because they cannot be certain the attachments in the ROT are what was presented at trial. (App. Br. at 13). However, any discrepancies in what is contained in the ROT and what trial counsel stated on the record can be summed up as human error on the part of trial counsel when counting and announcing unmarked pages on the record. The human error does not render the ROT incomplete, because what the military judge considered and what Appellant agreed to are the same as what the record contains. The

attachment of Appendix A and B and their attachments to this proceeding rebut Appellant's arguments to the contrary. Otherwise, the record demonstrates that the military judge merely called EMT's statement an OSI statement rather than a AAFES statement by mistake, because the document clearly states what it is, and trial counsel stated it was an AAFES statement when he introduced it on the record.

Appendix B answers why the full stipulation of fact has page numbers but is otherwise exactly the same as admitted at trial. The case paralegal confirms in Appendix B that the only alteration made to the documents provided to her by the court reporter were the page numbers. Together, both appendices show that what was reviewed and signed by Appellant and what was entered on the record at trial are exactly the same as what is now in the ROT. This Court, Appellant, and appellate defense counsel now know exactly what was entered and what the military judge considered is what is in the ROT and can complete their duties accordingly.

Since the United States did not fail to provide the attachments to the stipulation of fact that were admitted at trial, Appellant has no argument that there was a substantial omission from the ROT that renders it incomplete. Additionally, nothing on the face of the documents currently in the ROT suggest they are incomplete or that information is missing. Furthermore, Appendix A and B rebut any presumption of prejudice; and therefore, Appellant deserves no relief. Rather than remanding the case for correction, granting the United States' Motion to Attach, which was filed contemporaneously with this Answer, remedies any doubt that the ROT is complete and rebuts any presumption of prejudice. Appellant is not entitled to relief.

The United States's respectfully requests this Court find there is no substantial omission from the ROT and Appellant is not entitled to any sentence relief.

III.

APPELLANT'S SENTENCE IS APPROPRIATE.[4]

Standard of Review

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

Law and Analysis

The appropriateness of a sentence is assessed "by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 14 Jul. 2006). Unlike the act of bestowing mercy through clemency, which was delegated to other hands by Congress, Courts of Criminal Appeals are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

Appellant agreed to plead guilty to Charge I and Charge III and enter into a reasonable stipulation of fact, among other things, and in exchange his sentence received the following limitation: a minimum of 1 month and maximum of 3 months of confinement for Charges I and III each, to run concurrently. (App. Ex. III). There were no other sentence limitations. (Id.) A plea agreement with the convening authority is "some indication of the fairness and appropriateness of [an appellant's] sentence." United States v. Perez, No. ACM S32637 (f rev), 2021 CCA LEXIS 501, at *7 (A.F. Ct. Crim. App. 28 September 2021) (unpub. op.). In total,

[4] Appellant raises Issue III pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Appellant received the benefit of the convening authority dismissing, with prejudice, one charge and its specification for soliciting theft and the convening authority limiting his confinement exposure from twelve months to three months. (App. Ex. III). Appellant's plea agreement did not preclude the military judge from adjudging him a bad conduct discharge. Here, Appellant received the sentence he agreed to and deserved based on his conduct and his agreement is a strong indication of its appropriateness.

Through his misconduct, Appellant preyed on the military community when he stole over $15,000 from the base exchange. As the military judge explained in the sentencing rationale he placed on the record, he considered "all matters in extenuation and mitigation, as well as those in aggravation, arising out of the facts in this case and evidence offered by the parties at sentencing[.]" Appellant made the decision to commit larceny no fewer than 10 times during the course of his criminal enterprise, which included Veterans Day – a day designated to commemorate fellow servicemembers' honorable service. (R. at 71). Appellant's criminal conduct only stopped because he was caught, not because he abandoned his criminal pursuits. (Id.) Even when AAFES sought to prevent EMT from checking out direct family members, Appellant attempted to circumvent this precaution by using false names. (Id). To the military judge, this demonstrated "an obvious recognition by the accused of his wrongdoing and the desire to cover it up." (R. at 71-72). Additionally, Appellant's motivation was in part to use the money he stole to support paying off his mortgage. (R. at 72). Appellant committed this litany of larcenies despite the fact that he had a family at home relying on him and despite the fact that he was pulling his brother further into criminal behavior rather than keeping him out of doing so, all the while taking advantage of services to support the military community. Appellant

deserved a bad conduct discharge for the severity of his actions and because it fits him as an individual. He had no hesitation in stealing to further his own selfish ends.

Appellant argues that his sentence is inappropriately severe in part because of his strong rehabilitative potential. (App. Br. at 17). However, the military judge considered Appellant's rehabilitative potential and credited it to him in his decision. (Id.) While Appellant presented evidence that he was a devoted husband, father, and brother and possessed both a bachelor's and master's degree, those facts do not negate his planned and repeatedly carried out thefts from the military community using the brother he was supposed to be helping.

Ultimately, this Court should find, as the military judge did, that Appellant's agreed to sentence represents justice in this case considering this particular Appellant and his misconduct. Appellant had the education and community, as seen from his character letters, to know better than to commit larceny over and over again, yet he made the decision to do so.

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

CONCLUSION

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

OLIVIA B. HOFF, Capt, USAF
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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 June 2023 via electronic filing.

OLIVIA B. HOFF, Capt, USAF
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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
Senior Airman (E-4) **HECTOR D. MANZANO TARIN,** United States Air Force *Appellant.*	)	No. ACM S32734 8 June 2023

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to attach two appendices to the record of trial (ROT) with this motion:

> A. **Appendix A** – Declaration from Capt JG with two attachments with a total page count of 69 pages (including attachment divider pages). Attachment 1 is a 49-page document consisting of an email where Capt JG provided trial defense counsel with the draft stipulation of fact and its attachments. Attachment 2 is a 17-page document where Capt JG received the signed version of the stipulation of fact back from trial defense counsel.
>
> B. **Appendix B** – Declaration from SSgt BS is a 1-page document where she describes how she handled the original of Prosecution Exhibit 1 when the court reporter provided it to her after trial to compile the ROT.

On 9 May 2023, Appellant alleged in Assignment of Error II of his brief that the ROT is incomplete because the attachments to the stipulation of fact in the record of trial are not what was admitted during his court-martial. (App. Br. at 10).

Attachment of the appendices is both relevant and necessary for this Court's review of the appellate record in light of Appellant's assignment of error alleging the ROT is incomplete. Attachments of these document explains the discrepancy between how Prosecution Exhibit 1 was

described on the record and how it appears in the ROT. Attachment of these matters is also consistent with United States v. Jesse, 79 M.J. 437, 445 (C.A.A.F. 2020), because the attachments relate to "issues raised by materials in the record but not fully resolvable by those materials."

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

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 April 2023.

[redacted]

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