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

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| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (FIRST)** |
| v. | ) | Before Panel No. 1 |
| Senior Airman (E-4), **S'HUN R. MAYMI,** United States Air Force, *Appellant.* | ) | No. ACM 40332 |
| | ) | 24 October 2022 |

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **30 December 2022**. The record of trial was docketed with this Court on 1 September 2022. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

GRANTED
25 Oct 2022

**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 Division on 24 October 2022.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

24 October 2022

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Senior Airman (E-4)<br>S'HUN R. MAYMI, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40332<br><br>Panel No. 1 |

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

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

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

[redacted]

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 24 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**

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| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (SECOND)** |
| v. | ) | Before Panel No. 1 |
| Senior Airman (E-4), **S'HUN R. MAYMI,** United States Air Force, *Appellant.* | ) | No. ACM 40332 |
| | ) | 20 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 his second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 January 2023**. The record of trial was docketed with this Court on 1 September 2022. From the date of docketing to the present date, 110 days have elapsed. On the date requested, 150 days will have elapsed.

On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120 Uniform Code of Military Justice (UCMJ) and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority D ion, 5 May 2022. The Convening Authority deferred Appellant's reduction in g deferment of all automatic forfeitures, but granted a waiver of all automatic f e benefit of his family. *Id.*

GRANTED

20 DEC 2022

The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a 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]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 20 December 2022.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

20 December 2022

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Senior Airman (E-4)<br>S'HUN R. MAYMI, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40332<br><br>Panel No. 1 |

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

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

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

[redacted]

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 December 2022.

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

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

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|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (THIRD)** |
| v. | ) | Before Panel No. 1 |
| Senior Airman (E-4), **S'HUN R. MAYMI,** United States Air Force, *Appellant.* | ) | No. ACM 40332 |
| | ) | 20 January 2023 |

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 February 2023**. The record of trial was docketed with this Court on 1 September 2022. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120 Uniform Code of Military Justice (UCMJ) and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision, 5 May 2022. The Convening Authority deferred Appellant's reduction in grade, deferment of all automatic forfeitures, but granted a waiver of all automatic forfeitures for the benefit of his family. *Id.*

GRANTED

25 JAN 2023

The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a 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]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 20 January 2023.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

24 January 2023

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Senior Airman (E-4)<br>S'HUN R. MAYMI, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40332<br><br>Panel No. 1 |

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

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

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

[redacted]

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 24 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,* | ) | **MOTION FOR ENLARGEMENT OF TIME (FOURTH)** |
| v. | ) | Before Panel No. 1 |
| Senior Airman (E-4), **S'HUN R. MAYMI,** United States Air Force, *Appellant.* | ) | No. ACM 40332 |
| | ) | 16 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 his fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 March 2023**. The record of trial was docketed with this Court on 1 September 2022. From the date of docketing to the present date, 168 days have elapsed. On the date requested, 210 days will have elapsed.

On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120 Uniform Code of Military Justice (UCMJ) and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Acti[illegible] May 2022. The Convening Authority deferred Appellant's reduction in grade, denied a [illegible]l automatic forfeitures, but granted a waiver of all automatic forfeitures for the ben[illegible] family. *Id.*

GRANTED
22 FEB 2023

The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined.

Counsel is currently assigned 20 cases; nine cases are pending initial AOEs before this Court. Counsel has one Court of Appeals for the Armed Forces (CAAF) Reply Brief and oral argument preparation. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Four cases have priority over the present case:

1. *United States v. Fernandez*, ACM 40290 (f rev) – On 28 January 2022, contrary to his plea, a Military Judge sitting as a general court-martial, at Cannon AFB, NM, convicted Appellant of one charge of wrongfully distributing child pornography in violation of Article 134, UCMJ. R. at 441. The Military Judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, forfeit all pay and allowances, confined for six months, and discharged from the service with a bad conduct discharge. R. at 469. The Convening Authority took no action on the findings, took no action on the sentence, and did not approve Appellant's request to defer forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, 7 March 2022. The ROT consists of five volumes, 18 prosecution exhibits, 13 defense exhibits, and 49 appellate exhibits. The transcript is 471 pages. The Appellant is not confined. Counsel has finished reviewing the unsealed record of trial, motioned this Court to view sealed materials, and has started drafting the Assignment of Errors.

2. *United States v. Casillas*, ACM 40302 – On 18 March 2022, contrary to his plea, enlisted members in a General Court-Martial, at F.E. Warren AFB, WY, convicted Appellant of

one charge and one specification of sexual assault, in violation of Article 120, UCMJ[1]. R. at 687. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for two years, and to be dishonorably discharged from the service. R. at 724. The Convening Authority took no action on the findings, took no action on the sentence, and denied Appellant's request for deferment of reduction in grade and adjudged forfeitures. ROT, Vol. 1. Convening Authority Decision on Action, 1 April 2022. The ROT consists of five volumes, seven prosecution exhibits, six defense exhibits, and 33 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

3. *United States v. Jackson*, ACM 40310 – On 18 April 2022, consistent with her pleas, a Military Judge in a General Court-Martial, at Tinker AFB, OK, convicted Appellant of one charge, five specifications of wrongful distribution, manufacturing, and aiding in distribution, in violation of Article 112a, UCMJ; and one charge, one specification of failing to reject active participation in criminal gangs, in violation of Article 92, UCMJ. R. at 123. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 350 days, and to be discharged from the service with a bad conduct service characterization. R. at 182. The Convening Authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 April 2022. The ROT consists of two volumes, four prosecution exhibits, four defense exhibits, and three appellate exhibits. Appellant is not confined. Counsel has not started his review of this case.

4. *United States v. Snow*, ACM 40330 – On 10 May 2022, consistent with his pleas, a Military Judge sitting at a General Court-Martial, at MacDill AFB, Florida convicted Appellant

[1] Members acquitted Appellant of one specification of digital penetration, in violation of Article 120 UCMJ.

of one charge, two specifications of attempting to commit a lewd act upon a minor, in violation of Article 80, UCMJ and one charge, one specification of possessing child pornography, in violation of Article 134, UCMJ. R. at 82. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to be confined for 18 months, and to be dishonorably discharged from the service. R. at 113. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 10 June 2022. The ROT consists of three volumes, seven prosecution exhibits, one defense exhibit, and nine appellate exhibits. The transcript is 113 pages. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 16 February 2023.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

22 February 2023

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Senior Airman (E-4)<br>S'HUN R. MAYMI, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40332<br><br>Panel No. 1 |

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

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

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

[redacted]

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 22 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**

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| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (FIFTH)** |
| v. | ) | Before Panel No. 1 |
| Senior Airman (E-4), **S'HUN R. MAYMI,** United States Air Force, *Appellant.* | ) | No. ACM 40332 |
| | ) | 23 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 his fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 April 2023**. The record of trial was docketed with this Court on 1 September 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120 Uniform Code of Military Justice (UCMJ) and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 5 May 2022. The Convening Authority deferred Appellant's reduction in grade, denied a deferment of all automatic forfeitures, but granted a waiver of all automatic forfeitures for the benefit of his family. *Id*.

The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined.

Counsel is currently assigned 19 cases; eight cases are pending initial AOEs before this Court. Counsel has oral argument before the Court of Appeals for the Armed Forces (CAAF) on 29 March 2023. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Two cases have priority over the present case:

1. *United States v. Fernandez*, ACM 40290 (f rev) – On 28 January 2022, contrary to his plea, a Military Judge sitting as a general court-martial, at Cannon AFB, NM, convicted Appellant of one charge of wrongfully distributing child pornography in violation of Article 134, UCMJ. R. at 441. The Military Judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, forfeit all pay and allowances, confined for six months, and discharged from the service with a bad conduct discharge. R. at 469. The Convening Authority took no action on the findings, took no action on the sentence, and did not approve Appellant's request to defer forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, 7 March 2022. The ROT consists of five volumes, 18 prosecution exhibits, 13 defense exhibits, and 49 appellate exhibits. The transcript is 471 pages. The Appellant is not confined. Counsel has reviewed sealed and unsealed materials and is finalizing the AOE.

2. *United States v. Casillas*, ACM 40302 – On 18 March 2022, contrary to his plea, enlisted members in a General Court-Martial, at F.E. Warren AFB, WY, convicted Appellant of

one charge and one specification of sexual assault, in violation of Article 120, UCMJ[1]. R. at 687. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for two years, and to be dishonorably discharged from the service. R. at 724. The Convening Authority took no action on the findings, took no action on the sentence, and denied Appellant's request for deferment of reduction in grade and adjudged forfeitures. ROT, Vol. 1. Convening Authority Decision on Action, 1 April 2022. The ROT consists of five volumes, seven prosecution exhibits, six defense exhibits, and 33 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

[1] Members acquitted Appellant of one specification of digital penetration, in violation of Article 120 UCMJ.

**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 Division on 23 March 2023.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

23 March 2023

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Senior Airman (E-4)<br>S'HUN R. MAYMI, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40332<br><br>Panel No. 1 |

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

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

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

[redacted]

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 23 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 40332** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **S'hun R. MAYMI** | ) | |
| **Senior Airman (E-4)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 23 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 24th day of March, 2023,

**ORDERED:**

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant's brief will be due **29 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,* | ) | **MOTION FOR ENLARGEMENT OF TIME (SIXTH)** |
| v. | ) | Before Panel No. 1 |
| Senior Airman (E-4), **S'HUN R. MAYMI,** United States Air Force, *Appellant.* | ) | No. ACM 40332 |
| | ) | 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 his sixth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 May 2023**. The record of trial was docketed with this Court on 1 September 2022. From the date of docketing to the present date, 207 days have elapsed. On the date requested, 270 days will have elapsed.

On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120 Uniform Code of Military Justice (UCMJ) and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 22 April 2022. The Convening Authority deferred Appellant's reduction in grade, denied a defer[illegible]tomatic forfeitures, but granted a waiver of all automatic forfeitures for the benefit o[illegible]mily. *Id.*

GRANTED
28 MAR 2023

The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined.

Counsel is currently assigned 20 cases; nine cases are pending initial AOEs before this Court. Counsel has oral argument at the Court of Appeals for the Armed Forces (CAAF) on 29 March 2023 and one pending CAAF petition. Counsel also has approved leave from 4 - 26 April 2023. Counsel will be hiking in the Himalayas where there is no wi-fi access; therefore, he will not be taking a computer and he will not have access to email or case files. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Two cases have priority over the present case:

1. *United States v. Fernandez*, ACM 40290 (f rev) – On 28 January 2022, contrary to his plea, a Military Judge sitting as a general court-martial, at Cannon AFB, NM, convicted Appellant of one charge of wrongfully distributing child pornography in violation of Article 134, UCMJ. R. at 441. The Military Judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, forfeit all pay and allowances, confined for six months, and discharged from the service with a bad conduct discharge. R. at 469. The Convening Authority took no action on the findings, took no action on the sentence, and did not approve Appellant's request to defer forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, 7 March 2022. The ROT consists of five volumes, 18 prosecution exhibits, 13 defense exhibits, and 49 appellate exhibits. The transcript is 471 pages. The Appellant is not confined. Counsel has reviewed sealed and unsealed materials and is finalizing the AOE for submission.

2. *United States v. Casillas*, ACM 40302 – On 18 March 2022, contrary to his plea, enlisted members in a General Court-Martial, at F.E. Warren AFB, WY, convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, UCMJ[1]. R. at 687. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for two years, and to be dishonorably discharged from the service. R. at 724. The Convening Authority took no action on the findings, took no action on the sentence, and denied Appellant's request for deferment of reduction in grade and adjudged forfeitures. ROT, Vol. 1. Convening Authority Decision on Action, 1 April 2022. The ROT consists of five volumes, seven prosecution exhibits, six defense exhibits, and 33 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

[1] Members acquitted Appellant of one specification of digital penetration, in violation of Article 120 UCMJ.

**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 Division on 27 March 2023.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

28 March 2023

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Senior Airman (E-4)<br>S'HUN R. MAYMI, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br>ACM 40332<br><br>Panel No. 1 |

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

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

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

[redacted]

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 28 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**

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| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** |
| v. | ) | Before Panel No. 1 |
| Senior Airman (E-4), **S'HUN R. MAYMI,** United States Air Force, *Appellant.* | ) | No. ACM 40332 |
| | ) | 22 May 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 his seventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 June 2023**. The record of trial was docketed with this Court on 1 September 2022. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120 Uniform Code of Military Justice (UCMJ) and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 2022. The Convening Authority deferred Appellant's reduction in grade, denied a de automatic forfeitures, but granted a waiver of all automatic forfeitures for the benefit of his family. *Id.*

GRANTED

24 MAY 2023

The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined.

Counsel is currently assigned 20 cases; nine cases are pending initial AOEs before this Court. Counsel has two Supreme Court petitions for certiorari, one Answer in a certified CAAF case due at the end of May, and two cases pending petitions and supplements before CAAF. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. One Air Force Court case has priority over the present case:

1. *United States v. Casillas*, ACM 40302 – On 18 March 2022, contrary to his plea, enlisted members in a General Court-Martial, at F.E. Warren AFB, WY, convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, UCMJ[1]. R. at 687. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for two years, and to be dishonorably discharged from the service. R. at 724. The Convening Authority took no action on the findings, took no action on the sentence, and denied Appellant's request for deferment of reduction in grade and adjudged forfeitures. ROT, Vol. 1. Convening Authority Decision on Action, 1 April 2022. The ROT consists of five volumes, seven prosecution exhibits, six defense exhibits, and 33 appellate exhibits. Appellant is currently confined. Counsel has reviewed 520 pages of the 724-page transcript and the rest of the record of trial, except for the sealed matters (motion previously filed and granted).

[1] Members acquitted Appellant of one specification of digital penetration, in violation of Article 120 UCMJ.

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

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

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

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

23 May 2023

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Senior Airman (E-4)<br>S'HUN R. MAYMI, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br><br>ACM 40332<br><br>Panel No. 1 |

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

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

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

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

[redacted]
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 23 May 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**

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| **UNITED STATES,** *Appellee,* | ) | **MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** |
| v. | ) | Before Panel No. 1 |
| Senior Airman (E-4), **S'HUN R. MAYMI,** United States Air Force, *Appellant.* | ) | No. ACM 40332 |
| | ) | 21 June 2023 |

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 July 2023**. The record of trial was docketed with this Court on 1 September 2022. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120 Uniform Code of Military Justice (UCMJ) and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 5 May 2022. The Convening Authority deferred Appellant's reduction in grade, denied a deferment of all automatic forfeitures, but granted a waiver of all automatic forfeitures for the benefit of his family. *Id*.

The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined.

Counsel is currently assigned 24 cases; 13 cases are pending initial AOEs before this Court. Counsel has two Supreme Court petitions for certiorari. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Since the last extension of time, Counsel drafted and filed a 22-page Supplement with CAAF; drafted and filed a 65-page Answer with CAAF, worked on one petition for certiorari; and filed a motion to extend time with the Supreme Court. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. One Air Force Court case has priority over the present case:

1. *United States v. Casillas*, ACM 40302 – On 18 March 2022, contrary to his plea, enlisted members in a General Court-Martial, at F.E. Warren AFB, WY, convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, UCMJ[1]. R. at 687. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for two years, and to be dishonorably discharged from the service. R. at 724. The Convening Authority took no action on the findings, took no action on the sentence, and denied Appellant's request for deferment of reduction in grade and adjudged forfeitures. ROT, Vol. 1. Convening Authority Decision on Action, 1 April 2022. The ROT consists of five volumes, seven prosecution exhibits, six defense exhibits, and 33 appellate exhibits. Appellant is currently confined. Counsel has reviewed the entire record and is drafting the Assignment of Errors.

[1] Members acquitted Appellant of one specification of digital penetration, in violation of Article 120 UCMJ.

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

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 21 June 2023.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

21 June 2023

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Senior Airman (E-4)<br>S'HUN R. MAYMI, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME<br><br><br>ACM 40332<br><br>Panel No. 1 |

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

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

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

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

[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 21 June 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

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|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40332** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **S'hun R. MAYMI** | ) | |
| **Senior Airman** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | **Panel 1** |

On 21 June 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 22d day of June, 2023,

**ORDERED:**

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **28 July 2023**.

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

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

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

| | | |
|---|---|---|
| **UNITED STATES,** *Appellee,* | ) | **MERITS BRIEF** |
| v. | ) | Before Panel No. 1 |
| Senior Airman (E-4), **S'HUN R. MAYMI,** United States Air Force, *Appellant.* | ) | No. ACM 40332 |
| | ) | 19 July 2023 |

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

**Submission of Case Without Specific Assignments of Error**

The undersigned appellate defense counsel attests he has, on behalf of Senior Airman (SrA) S'Hun Maymi, Appellant, carefully examined the record of trial in this case. Appellant does not admit the findings and sentence are correct in law and fact, but submits the case to this Honorable Court on its merits with no specific assignments of error. Appellant has conformed this merits brief to the format in Appendix B of this Honorable Court's Rules of Practice and Procedure. Appellant understands this Court will exercise its independent "awesome, plenary, [and] *de novo* power" to review the entire record of this proceeding for factual and legal sufficiency, and for sentence propriety, and to "substitute its judgment" for that of the court below, as is provided for and required by Article 66(d), UCMJ, 10 U.S.C. §866(d) (2019). *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990); *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016).

However, through undersigned counsel, Appellant personally raises various issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) which are discussed in the attached Appendix A.

mitted,

[redacted]

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 19 July 2023.

Respectfully submitted,

[redacted]

S ELSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

## APPENDIX A

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

## I.

**WHETHER *UNITED STATES V. TYLER* ALLOWS DEFENSE COUNSEL TO ARGUE THAT SEX OFFENDER REGISTRATION IS A MITIGATING FACTOR THAT MILITARY JUDGE SHOULD CONSIDER?**

In his sentencing argument, Defense Counsel argued that the Military Judge should consider that SrA Maymi will have to register as a sex offender. R. at 583. The Government objected. *Id.* The Defense Counsel explained that the Court of Appeals for the Armed Forces held that counsel could comment on victim impact statements during sentencing arguments. *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021) ("If unsworn victim statements are part of the evidence of record, they can be commented on by counsel in presentencing argument."). The Defense Counsel further argued that "Where *Tyler* allows for proper comment on the victim statement, we have now created an equity issue as to what is proper comment on the accused's statement." R. at 585. Meaning, since SrA Maymi spoke about sex offender registration in his unsworn statement, his Defense Counsel should have been allowed to argue that fact to the Military Judge. The Military Judge sustained the Government's objection. *Id.*

## II.

**WHETHER SRA MAYMI'S SENTENCE WAS UNDULY SEVERE?**

The Military Judge sentenced SrA Maymi to be discharged dishonorably from the Air Force, to be confined for 15 months, to be reduced to the grade of E-1, and to forfeit all pay and allowances. Record of Trial (ROT), Vol. 1, Entry of Judgment, dated 9 May 2022. In assessing

sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (alteration in original) (citation omitted).

SrA Maymi explained that he had "illnesses" which he wished he could have recognized sooner. ROT, Vol. 2, Defense Exhibit B at 3. One of these illnesses was alcoholism which had put him a "dark place." *Id.* at 2. However, after his misconduct he received in-person treatment and he realized he was "lucky…to be alive." *Id.* Undoubtedly, his alcoholism could be linked to the stressful working environment that maintainers endure, especially in overseas and deployed environments. SrA Maymi's illness, and the reasons for it, should have mitigated his sentence more. This is especially true when one considers his character statements which describe him as "the kindest, hardest working, best wingman I have ever had the pleasure of meeting;" "one of the best people I have worked with in my Air Force career;" and "having the social maturity far exceeding any of the Airmen that I have rated on in the past, and even myself at times." ROT, Vol. 2, Defense Exhibit C at 1, 5, 10.

## III.

## WHETHER SRA MAYMI'S CONVICTION IS LEGALLY AND FACTUALLY SUFFICIENT?

The test for factual sufficiency is "whether after weighing the evidence in the record of trial, and making allowances for not having personally observed the witnesses, [the Court is] convinced of [Appellant's] guilt beyond a reasonable doubt." *United States v. Turner*, 27 M.J. 324, 325 (C.M.A. 1987). The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011).

There are two issues that call into question the legal and factual sufficiency of this case. First, A.T.'s credibility is questionable. As Defense Counsel pointed out multiple times, A.T. had lied to law enforcement previously. R. at 179. Given that she was the only witness to the misconduct, this is a fact that casts doubt on SrA Maymi's conviction.

Second, and related to the first point, A.T.'s version of what happened grew substantially with each telling. For example, when she first recounted what happened, she did not mention her underwear being pulled down or SrA Maymi touching her vagina. R. at 151. She failed to provide these details to another witness. R. at 159. Additionally, she did not tell her sister all of the details even though she represented to OSI that her sister "knows everything." R. at 164, 166. When she first reported the incident to Security Forces, it was substantially different from what she previously told others. R. at 168-72. Likewise, when she finally told the Office of Special Investigations about what happened, the story transformed again. R. at 172-77.

## IV.

## WHETHER THE THIRD AIR FORCE STAFF JUDGE ADVOCATE COMMITTED UNLAWFUL COMMAND INFLUENCE?

Staff Judge Advocates can commit unlawful command influence. *United States v. Barry*, 78 M.J. 70, 76 (C.A.A.F. 2018). At first, A.T. considered not participating in this court-martial. R. at 178. However, she met with the Convening Authority's Staff Judge Advocate before the case was referred to trial. *Id.* She received some degree of emotional support and encouragement to continue in the proceedings from the Staff Judge Advocate. R. at 178-79. After that meeting, she "took a minute" to think about the case and decided to participate. R. at 179. While it may not be unheard of for a prosecuting attorney to meet with an alleged victim, it is unusual that the

Convening Authority's attorney would meet with an alleged victim. This raises the specter of unlawful command influence.

**V.**

**WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN SRA MAYMI WAS NOT CHARGED WITH USING UNLAWFUL FORCE UNDER ARTICLE 120, UCMJ, AND WHETHER THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021)?**

The test for applying the Second Amendment is:

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

*Bruen*, 142 S. Ct. 2111 at 2129-30 (citation omitted).

In applying this test, the Fifth Circuit recently held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.' Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated." *United States v. Rahimi*, No. 21-11001, 2023 U.S. App. LEXIS 5114, at *31 (5th Cir. Mar. 2, 2023), *cert granted*, __ U.S.__, 2023 U.S. LEXIS 2830 (30 June 2023) (citation omitted). Notably, Rahimi was "involved in five shootings" and pled guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at *3-4. Rahimi agreed to this domestic violence restraining order. *Id.* at *10.

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

The Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at *6 (citation omitted). Therefore, the Government bears the burden of justifying its regulation.

Second, the Fifth Circuit recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at *7. The Fifth Circuit explained that "*Heller*'s reference to 'law-abiding, responsible' citizens meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* Here the issue is whether the Founders would have "presumptively" tolerated a citizen being stripped of his right to keep and bear arms when he was not charged under the unlawful use of force provision of the relevant criminal statute. *Id.*

Third, the Fifth Circuit held that "[t]he Government fails to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id*. at *30. If the Government failed to prove that our Nation's historical tradition of firearm regulation did not include a violent offender who pled guilty to possessing a firearm while under an agreed upon domestic violence restraining order, then it is questionable whether it can meet its burden for SrA Maymi's conviction when he was not charged with using unlawful force.

A further problem with the Statement of Trial Results and Entry of Judgment is that the Government did not indicate which specific subsection of § 922 it relied on to find that SrA Maymi fell under the firearm prohibition. Thus, SrA Maymi is unable to argue which specific subsection of § 922 is unconstitutional in his case, although he knows it would not be the domestic violence or drugs section given the facts of his case. Regardless, it appears that the Government may not be

able to meet its burden of proving a historical analog that barred offenders like SrA Maymi from possessing firearms.

In *United States v. Lepore*, citing to the 2016 edition of the Rules for Courts-Martial, this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021). Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760. However, this Court emphasized, "To be clear, we do not hold that this court lacks authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority." *Id.*

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*. In that decision, CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." 82 M.J. 263, at n.* (C.A.A.F. 2022) (unpub. op.). CAAF's direction that the Army Court of Criminal Appeals fix—or order the Government to fix—the promulgating order, is at odds with this Court's holding in *Lepore*.

CAAF's decision in *Lemire* reveals three things: First, the CAAF has the power to order the correction of administrative errors in promulgating orders—even via unpublished decisions regardless of whether the initial requirement was a collateral consequence. Second, CAAF believes that Courts of Criminal Appeals have the power to address collateral consequences under Article 66 since it "directed" the Army Court of Criminal Appeals to fix—or have fixed—the erroneous

requirement that Sergeant Lemire register as a sex offender. Third, if CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders even if the Court deems them to be a collateral consequence.

Additionally, *Lepore* is distinguishable from this case. In *Lepore*, this Court made clear that "[a]ll references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at n.1. This Court then emphasized "the mere fact that a firearms prohibition annotation, *not required by the Rules for Courts-Martial*, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." *Id.* at 763 (emphasis added). The new 2019 rules, however, contain language that both the Statement of Trial Results and the Entry of Judgment contain "[a]ny additional information…required under regulations prescribed by the Secretary concerned." R.C.M. 1101 (a)(6); 1111(b)(3)(F). DAFI 51-201, *Administration of Military Justice*, dated 8 April 2022, para 13.3 required the Statement of Trial results to include "whether the following criteria are met…firearm prohibitions." As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered. Even if this Court does not find this argument persuasive, it still should consider the issue under *Lepore* since this issue is not an administrative fixing of paperwork, but an issue of constitutional magnitude.

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

| | | |
|---|---|---|
| **UNITED STATES,**<br>*Appellee,* | ) | **UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)** |
| v. | ) | Before Panel No. 1 |
| Senior Airmen (E-4)<br>**S'HUN R. MAYMI**<br>United States Air Force<br>*Appellant.* | ) | No. ACM 40332<br><br>3 August 2023 |

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 15-day enlargement of time, to respond in the above captioned case. This case was docketed with the Court on 1 September 2022. Since docketing, Appellant has been granted eight enlargements of time. Appellant filed his brief with this Court on 19 July 2023. This is the United States' first request for an enlargement of time. As of the date of this request, 337 days have elapsed since docketing. The United States' response in this case is currently due on 18 August 2023. If the enlargement of time is granted the United States' response will be due on 2 September 2023, and 367 days will have elapsed since docketing.

There is good cause for the enlargement of time in this case. The undersigned counsel is newly assigned appellate government counsel and arrived on station on 24 July 2023. He then was out of the office for in-processing and receiving household goods. On 3 August 2023 undersigned counsel was assigned to this case. Undersigned counsel will also attend four days of training in the next month, the Joint Appellate Advocacy Training and JAJG Newcomer's Training. The trial transcript in this case is 591 pages, and Appellant has

GRANTED
4 Aug 2023

raised five assignments of error in a 10-page brief. As this is undersigned counsel's first brief, it will take him additional time to review the record and answer all five assignments of error.

There is no other appellate government counsel who would be able to file a brief sooner because they are also assigned extensive briefs. Out of four appellate government counsel, three are new to the position and arrived on station within the past week. Reservists are being engaged to help with the workload, but JAJG currently has 11 cases pending before this Court.

**WHEREFORE**, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

[redacted]

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

[redacted]

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

**CERTIFICATE OF FILING AND SERVICE**

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

TYLER L. WASHBURN, 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 GENERAL OPPOSITION TO EOT** |
| v. | ) | Before Panel No. 1 |
| Senior Airman (E-4), **S'HUN R. MAYMI,** United States Air Force, *Appellant.* | ) | No. ACM 40332 |
| | ) | 4 August 2023 |

**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, Appellant hereby enters his general opposition to the Government's Motion for Enlargement of Time (First), dated 3 August 2023.

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

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 4 August 2023.

Respectfully submitted,

[redacted]N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **No. ACM 40332** |
| ***Appellee*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **NOTICE OF PANEL CHANGE** |
| **S'hun R. MAYMI** | ) | |
| **Senior Airman (E-4)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellant*** | ) | |

It is by the court on this 8th day of August, 2023,

**ORDERED:**

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

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

20 September 2023

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,* | ) | MOTION TO FILE<br>AMENDED ANSWER |
| v. | ) | No. ACM 40332 |
| Senior Airman (E-4)<br>**S'HUN R. MAYMI**, USAF,<br>*Appellant.* | ) | Panel No. 3 |

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

Pursuant to Rules 23.3(n) and 23(d) of this Honorable Court's Rules of Practice and Procedure, the government hereby moves to file an amended Answer to Assignment of Error. The original Answer to Assignments of Error was timely filed on 30 August 2023. Amendment is necessary because since it was filed, the government became aware residual attorney-work product was inadvertently included in the original answer. On page five of the answer there is a comment bubble containing privileged communication from the government's review process. In the amended pleading, page five is adjusted to remove the comment containing privileged information. No substantive changes are made in the amended pleading which is included with this filing.

**WHEREFORE**, the government respectfully requests this Honorable Court grant its

e an amended Answer to Assignments of Error.

GRANTED
28 SEP 2023

Respectfully submitted,

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 20 September 2023 via electronic filing.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

20 September 2023

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee,*<br><br>v.<br><br>Senior Airman (E-4)<br>**S'HUN R. MAYMI**, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | AMENDED UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR<br><br>No. ACM 40332<br><br>Panel No. 3 |

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

The United States withdraws its previous answer to assignments of error, dated 30 August 2023, in the above captioned case. Attorney-work product was inadvertently included in the previous version. This version has removed the privileged material.

## ISSUES PRESENTED

**I.**[1]

**WHETHER UNITED STATES V. TYLER ALLOWS DEFENSE COUNSEL TO ARGUE THAT SEX OFFENDER REGISTRATION IS A MITIGATING FACTOR THAT MILITARY JUDGE SHOULD CONSIDER?**

**II.**[2]

**WHETHER SRA MAYMI'S SENTENCE WAS UNDULY SEVERE?**

**III.**[3]

**WHETHER SRA MAYMI'S CONVICTION IS LEGALLY AND FACTUALLY SUFFICIENT?**

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

**IV.**[4]

**WHETHER THE THIRD AIR FORCE STAFF JUDGE ADVOCATE COMMITTED UNLAWFUL COMMAND INFLUENCE?**

**V.**[5]

**WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN [APPELLANT] WAS CONVICTED OF A NON-VIOLENT OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION UNDER UNITED STATES V. LEMIRE, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR UNITED STATES V. LEPORE, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021)?**

## STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

## STATEMENT OF FACTS

Amn AT's first assignment on active duty was at RAF Mildenhall, UK. (R. at 73). She arrived there in the January-February 2020 timeframe and was assigned to the Logistics Readiness Squadron. (R. at 74).

On the evening of 26 November 2020, AT attended a "Friendsgiving" gathering in SrA AR's dorm room on RAF Lakenheath, UK. (Id. at 79, 129). In attendance were several friends and acquaintances, including SrA JJ (Id. at 82). During the gathering, the group ate the Thanksgiving dinner they had prepared and then began to drink alcohol and socialize. (Id. at 82-83). AT was initially hesitant to drink, but imbibed after SrA AR told her she could spend the night in AR's dorm room. (Id. at 85). As it got late, the gathering began to disperse, and AR left

[4] This issue is raised in the appendix pursuant to Grostefon.
[5] This issue is raised in the appendix pursuant to Grostefon.

to spend the night elsewhere so AT would have a room to herself. (Id. at 86). After AR left, AT remained with a couple friends who continued to socialize late into the evening. (Id. 86-87). At some point JJ invited Appellant to join them. (Id. at 87). AT had never met Appellant before that evening. (Id. at 79). Appellant arrived in the late hours of 26 November 2020 or early hours of 27 November 2020. (Id. at 88).

After Appellant's arrival, the group continued to socialize until JJ left between 0130 and 0200 hours on 27 November 2020. (Id. at 405.) After JJ left AT, Appellant, and SrA CT began to talk. (Id. at 407). Appellant, unsolicited, turned the conversation in a sexual direction and began discussing his past sexual activities. (Id.). Appellant then asked CT to leave he an AT alone for a while. (Id. at 409). Appellant asked AT if she wanted to "hook up" with CT, to which AT stated that they were only friends. (Id. at 94). CT returned to the room and expressed he was planning to leave for the evening. (Id. at 95). AT told CT that she was not comfortable with him leaving while Appellant was still present. (Id.). CT and Appellant left AR's room together around 0556 hours. (Id. at 95-96, Pros. Ex. 4, Camera 108, Ending in 438). Around 0559 , Appellant returned uninvited to AR's room, woke up AT, and told her he forgot some of his belongings. (R. at 99, Pros. Ex. 4, Camera 108, Ending in 430). AT allowed him inside to look for his belongings. (R. at 99). Appellant looked around the room for a while and eventually left without grabbing anything. (Id. at 100-101). AT returned to bed and fell asleep with her back facing the door of the dorm room. (Id. at 101).

After Appellant left the dorm room, CCTV footage showed he lit a cigarette and sought to tamper with the CCTV camera outside the room. (Pros. Ex. 4, Camera 108, Ending in 401). Appellant lingered outside the room and backed away when a vehicle entered the dorm parking lot. (Id.). Once the vehicle left the parking lot, Appellant approached the window outside the

room, forced it open, reached inside to unlock the door, and opened the door. (Id.). Appellant lingered in the threshold for approximately 22 seconds before entering. (Id.).

AT awoke to the sensation of someone touching her and felt a pain in her vaginal area. (R. at 102, 184). She noticed her pants had been lowered to her thigh area and she felt someone's fingers penetrating her vulva, going in and out repeatedly. (Id. at 103-104). Upon realizing what was happening, AT jumped out of bed and went to the other side of the room. (Id. at 104). She saw Appellant in the room with her and yelled at him to get out of the room. (Id. at 105-106). Appellant replied "[m]y bad," and asked if he could sleep on the floor. (Id. at 107-108). Eventually, Appellant left the room and the door closed behind him. (Id., Pros. Ex. 4, Camera 108, Ending in 357) AT noticed the window was cracked open and closed it, as she suspected Appellant had reached in the open window and let himself in. (Id. at 107-108). Appellant immediately made multiple attempts to reenter by jiggling the door handle and attempting to reopen the window. (Id. at 108-109, Pros. Ex. 4, Camera 108, Ending in 342). At some point, AT threatened to call police if Appellant didn't leave, and he eventually ran away. (R. at 110, Pros. Ex. 4, Camera 108, Ending in 342). Appellant did not have permission from either AT or AR to enter the room after he left the room after searching for his belongings earlier in the evening. (Id. at 109, 238).

Appellant was convicted of sexual assault in violation of Article 120, UCMJ, and the lesser included offense of unlawful entry, in violation of Article 129. (Entry of Judgment (EOJ), ROT, Vol. 1.)

## ARGUMENT

### I.

### SEX OFFENDER REGISTRATION IS A COLLATERAL CONSEQUENCE, AND DEFENSE COUNSEL ARE NOT PERMITTED TO ARGUE IT AS A MITIGATING FACTOR IN SENTENCING.[6]

#### *Additional Facts*

During sentencing argument, defense counsel sought to argue the collateral consequence of sex offender registration as a mitigating factor for the military judge to consider, drawing an objection from trial government counsel for improper argument. (R. at 583). Defense counsel cited to U.S. v. Tyler, 81 M.J. 108 (C.A.A.F. 2021), arguing the holding permitted defense counsel to argue collateral consequences as a matter of equity. (R. at 583-584). The trial judge sustained the objection, finding that Tyler only pertained to victim impact statements and did not encompass collateral consequences for the purpose of defense sentencing argument. (R. at 585).

#### *Standard of Review*

"Improper argument involves a question of law that this Court reviews de novo." United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014).

#### *Law and Analysis*

In his first assignment of error, Appellant essentially argues the military judge erred in sustaining government's objection to improper argument. Appellant again cites Tyler in support of his argument that defense counsel are now permitted to argue sex offender registration as a mitigating factor in sentencing proceedings. (App. Br., Appendix at 1.) The holding in Tyler does not stand for that proposition. In Tyler, the Court stated presentencing argument can

[6] This issue is raised in the appendix pursuant to Grostefon.

encompass unsworn victim impact statements. Tyler, 81 M.J. at 113. The Court in Tyler did not overrule prior precedent holding sex offender registration to be a collateral consequence. United States v. Talkington, 73 M.J. 212, 216-217 (C.A.A.F. 2014). Talkington further states it is permissible for a military judge to issue an instruction to a panel of members advising they should not consider such collateral consequences as part of their deliberations in arriving at a sentence. Id. at 218. In sentencing, a court-martial is to "concern themselves with the appropriateness of a particular sentence, without regard to the collateral administrative effects of the penalty under consideration." United States v. Quesinberry, 12 C.M.R. 609, 612 (U.S.C.M.A. 1962). The crux of Appellant's argument is that defense counsel should be able to argue the collateral consequence of sex offender registration as a mitigating factor to be considered in determining the appropriate sentence. However, if the sentencing authority cannot consider collateral consequences when determining an appropriate sentence, it would be error for counsel to argue that a sentencing authority should do so, because it would be a clear misstatement of the law. Appellant is thus unentitled to any relief, and this Court should deny this assignment of error.

## II.

## APPELLANT'S APPROVED SENTENCE IS APPROPRIATE.

### *Additional Facts*

The maximum punishment authorized for Appellant's sentences included 30 years and 6 months confinement and a dishonorable discharge. MCM, pt IV, 60.d.(2) (2019 ed.); MCM, pt IV, 80.d.(3) (2019 ed.).

Appellant was advised of his forum rights by the military judge and elected trial and sentencing by military judge alone. (R. at 65, App. Ex. XII). The military judge sentenced

Appellant to a reduction in grade to E-1; forfeiture of all pay and allowances; confinement for 15 months for Charge I and 1 month for Charge II, with the confinement to run concurrent with Charge I; and a dishonorable discharge. (R. 590). The convening authority approved the sentence in its entirety. (ROT VOL. 1, *Convening Authority Decision on Action Memo*, 5 May 2022).

During the sentencing phase of trial, Appellant provided four exhibits consisting of a written unsworn statement, seven character letters, an awards and decorations print out, and a photo array. (Def. Ex. B-E). Appellant provided some evidence of rehabilitative potential. (Def. Ex. C at 2-4, 6-7, 11).

***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 fact and determines, on the basis of the entire record, [it] should be approved." Article 66(d)(1), UCMJ.

***Law***

Sentence appropriateness is assessed "by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although this Court has great discretion to determine whether a sentence is appropriate, the Court has no authority to grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, CCAs are entrusted with the task of determining sentence

appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

***Analysis***

Appellant's sentence should be affirmed as entered on the Entry of Judgment, dated 9 May 2022, because Appellant received the punishment he deserved. This Court should find the reasons Appellant advanced as to why his sentence is inappropriately severe unpersuasive, distinctly and in the aggregate. Appellant advances two reasons why he should receive leniency: (1) Appellant suffered from alcoholism at the time of the misconduct and has since received in-person treatment; and (2) Appellant's character letters say positive things about him. (App. Br. Appendix at 2).

Despite the seriousness of his action towards AT on Thanksgiving 2020, Appellant is once again saying, "my bad." (R. at 107). For someone who is allegedly "the kindest, hardest working, best wingman I have ever had the pleasure of meeting"; and who possesses "the social maturity far exceeding any of the Airmen that I have rated on in the past," Appellant did not demonstrate those character traits on 26 November 2020, and he failed to demonstrate them at trial, since rather than take accountability for the impact of his actions, he made excuses. (Def. Ex. C at 1, 10).

Appellant has previously tried to use alcohol and subsequent treatment to mitigate his misconduct. Appellant received a Letter of Reprimand (LOR) on 19 February 2020 for Driving Under the Influence. (Pros. Ex. 11 at 1). In his response to the LOR, Appellant stated:

> Immediately following the incident I communicated that I was set on going to ADAPT to seek help. Having completed my treatment, my attitude towards drinking has changed to reflect either no drinking or drinking no more than 2-3 alcoholic drinks. In conjunction with the completion of ADAPT I also plan to volunteer for Airmen Against Drunk Driving. I wholeheartedly seek to help others who may be in a situation similar to mine. I hope my contribution can prevent the next individual from making a poor decision like mine. I know I cannot change the actions that I have displayed, however I do aim to learn from this moment in my career.

> This moment in my career, albeit a low one, has served as an experience from which I will grow provided the chance. I am aware of the standards I have failed to meet and I will not only meet, but surpass them moving forward.

(Pros. Ex. 11 at 3). Appellant failed to live up to his commitment to surpass the standards expected of him, and a little over nine months later, he committed far more serious misconduct and is once again using alcohol and subsequent treatment as a mitigating excuse. Appellant's past misconduct and his excuses for it being similar to the excuse he is making now, does not act to mitigate his culpability or the punishment he received; it supports it. It highlights the Appellant's lack of rehabilitative potential.

As stated below, Appellant's conduct is legally and factually sufficient to sustain his conviction for sexual assault and unlawful entry. His conduct was serious in nature. Through his purposeful actions, Appellant violated the trust of a "wingman," when he decided to slink through the night like a predator on the hunt. Appellant violated AT and violated a place that should be one of safety and security when he broke into an on-installation dormitory room in the dark of night, while AT slept. Appellant violated AT and violated a place of safety and security when he penetrated AT's vulva with his finger while she slept in a room where she should be safe. Each of these facts hammers home the seriousness of Appellant's offenses.

Appellant does not articulate what aspect of the sentence he believes should have been mitigated by his sentencing case. Regardless, Appellant's punitive exposure was well above the sentence he received. The offense of sexual assault alone comes with a potential period of confinement of 30 years and a mandatory dishonorable discharge. Considering the circumstances, an approved sentence of a dishonorable discharge and 15 months of confinement, is lenient but is legally supportable for Appellant's despicable acts. Evaluating the facts and circumstances in the record of Appellant's individual case, the seriousness of his offenses, his service record, his

particular character, his rehabilitative potential, and in consideration of the entire record, this Honorable Court should leave his sentence undisturbed and affirm his entire approved sentence.

## III.

## APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS LEGALLY AND FACTUALLY SUFFICIENT.[7]

### *Additional Facts*

In addition to the evidence laid out in the Facts section above, several individuals testified at trial that in the immediate aftermath of the events of 27 November 2020, AT told them she had woken up to Appellant in her room touching her while she was asleep. (R. at 242-243, 322-323. 325, 455). AT also sent a SnapChat message to Mr. N.G., who had attended the gathering the night before, in the early morning hours of 27 November 2020, stating: "[t]his weird as [sic] guy that him and [JJ] are friends with ! He was here I was sleeping I though everyone was gone, he was here and trying to feel on my when I was sleeping ! THANK THE LORD I WOKE UP !!!!!! I told him to get out and leave me alone he was y [sic] listening I was scared but he left finally." (Pros. Ex. 2). Several individuals who knew AT well also testified they believed AT had a reputation for truthfulness. (R. at 231, 295, 346).

At trial, defense counsel impeached AT by confronting her with the fact that she had previously lied to a law enforcement officer. (R. at 179). AT had explained on direct examination she had been stopped at a DUI checkpoint in January 2022 and lied to the officer about how much she had to drink that evening. (R. at 126). When asked if that was something she regretted, AT stated, "[y]es. I just felt, obviously, pressured and scared and I just got caught kind of red-handed." (Id.)

During trial, defense counsel confronted AT with the fact that she had not told any of the

[7] This issue is raised in the appendix pursuant to Grostefon.

outcry witnesses Appellant had digitally penetrated her. (R. at 157-169.). Defense counsel also confronted her with the fact that when she gave her initial statement to Security Forces, it was the first time she communicated to anyone she had been sexually assaulted. (R. at 168-169). During direct examination, trial counsel asked AT why she had not shared the full details of the events of 27 November 2020 with her friends. (R. at 123). AT stated that at the time she was embarrassed and didn't want them to worry. (Id.). "I was just scared, you know, that they would, I guess, freak out or, you know. Even though they were my friends, I just felt really on the spot at the time." (Id.).

***Standard of Review***

This Court reviews issues of legal and factual sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

***Law***

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). Applying this test, this Court draws every reasonable inference from the evidence in the record of trial in favor of the prosecution. United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993). When assessing legal sufficiency, "[t]he evidence necessary to support a verdict 'need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt.'" United States v. Wilson, 182 F.3d 737, 742 (10th Cir. 1999) quoting United States v. Parrish, 925 F.2d 1293, 1297 (10th Cir. 1991). A legally sufficient verdict may be based on circumstantial as well as direct evidence, and even "[i]f the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb the conviction." United States v.

McArthur, 573 F.3d 608, 614 (8th Cir. 2009) (citations omitted).

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court is "convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. Article 66(d)(1), UCMJ; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

In the performance of this review, "the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt." Washington, 57 M.J. at 399. While this Court must find that the evidence was sufficient beyond a reasonable doubt, it "does not mean that the evidence must be free of conflict." United States v. Galchick, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

***Sexual Assault***

The specification as charged under Article 120, UCMJ states that Appellant "did, at or near at or near Royal Air Force Lakenheath, on or about 26 November 2020, commit a sexual act upon [AT], by penetrating her vulva with his finger, with an intent to gratify his sexual desire, without her consent. (Charge Sheet, ROT, Volume I.)

A sexual act is "the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." MCM, pt IV, 60.b.(g)(1) (2019 ed.).

Consent means:

> A freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct

> means there is no consent. Lack of verbal or physical resistance does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

MCM, pt. IV, 60.b.(7)(A).

All the surrounding circumstances are to be considered in determining whether a person gave consent. MCM, pt. IV, 60.b.(7)(C).

***Unlawful Entry***

The elements of unlawful entry, the lesser included offense under Article 129 for which Appellant was ultimately convicted, are: (1) the accused entered the real property of another and (2) the entry was unlawful. MCM, pt. IV, 79.a(b).

Entry means the entry of any part of the body, even a finger. An entry is unlawful if made without the consent of any person authorized to consent to entry or without other lawful authority. MCM, pt. IV, 79.c(3).

***Analysis***

- **Sexual Assault**

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of Appellant's guilt beyond a reasonable doubt. Turner, 25 M.J. at 325. Appellant asserts two key arguments as to why he is not guilty, though each of them is fundamentally and factually flawed. Appellant asserts (1) AT's credibility is questionable because she had previously lied to law enforcement and (2) AT's version of what happened grew substantially with each telling. Appellant's conviction for sexual assault is both legally and factually sufficient. The government proved each element beyond a reasonable doubt at trial.

First, AT reliably testified Appellant engaged in a sexual act while she was asleep in her

bed, and without her consent. She explained in detail how she woke up to the sensation of being touched and felt pain in her vaginal area. She noticed her pants had been pulled down and she felt someone's fingers repeatedly penetrating her vulva. After realizing what was occurring, she jumped out of bed and was able to identify the Appellant as the person who had committed the sexual act. In the immediate aftermath of the events, she disclosed a significant amount of details about what had taken place that night, and while she did not share all of it with them, that was understandable. AT had just been sexually assaulted and was still processing everything that had occurred that evening. A reasonable trier of fact could have found that her explanation that she was embarrassed to discuss the specific details with individuals who were not law enforcement was an understandable reaction for a victim of sexual assault. Most importantly, the military judge who had the benefit of personally observing AT's testimony, including the cross-examination about prior lies to law enforcement, determined AT was credible. AT's testimony alone was sufficiently reliable to sustain a conviction for sexual assault.

Yet it was not merely AT's testimony alone that supported Appellant's conviction. AT's version of events was corroborated by the CCTV footage showing the Appellant forcing open the window to the dorm room, letting himself in the door, and remaining inside the room for about ten minutes before exiting. Further, the CCTV footage shows that he made multiple attempts to reenter the dorm room after AT had first kicked him out, until at some point when AT threatened to call the police, Appellant ran from the area, indicating at the very least, a consciousness of guilt. Moreover, Appellant's actions in trying to tamper with the CCTV camera outside the dorm, and his lingering in the doorway for an extended period before entering the dorm room, was evidence of his overall nefarious intent and his consciousness of guilt. A reasonable factfinder could have found that in light of all the corroborating evidence, Appellant's attacks on AT's credibility were

unpersuasive.

The government provided evidence in support of each element of the offense of sexual assault via direct and circumstantial evidence, both of which may be used to determine legal sufficiency. McArthur, 573 F.3d at 614. Viewing the evidence in the light most favorable to the government, a rational fact finder could have found each element of the crime of sexual assault beyond a reasonable doubt. Thus, the conviction is legally sufficient. King, 78 M.J. at 221. Likewise, this Court should be convinced beyond a reasonable doubt all the elements of sexual assault are met with the evidence presented in the record. Thus, the conviction is factually sufficient.

Appellant's conviction for sexual assault is legally and factually sufficient, and this Court should deny this assignment of error.

- **Unlawful Entry**

Appellant's conviction for unlawful entry is legally and factually sufficient. The government proved each element beyond a reasonable doubt at trial. The elements the Government needed to prove at trial for unlawful entry were: (1) the Appellant entered the real property of another; and (2) the entry was unlawful. An entry is unlawful if made without the consent of any person authorized to consent to entry or without other lawful authority. At trial, the CCTV footage showed Appellant return to the room AT was sleeping in without permission to enter. It also shows him forcing the window next to the door open, reaching in the window to unlock the door, and then ultimately entering the room. AT did not invite him in, nor did she open the door for him. AT had not left the door unlocked. It is again noteworthy that the CCTV footage depicted Appellant seeking to tamper with the camera that covered the doorway just before his unlawful entry. Also, before his unlawful entry while Appellant was lurking outside

the door, Appellant backed away from the door when a car turned into the parking lot. Only after that vehicle left, did Appellant ultimately force his way into the room occupied by AT. This is damning evidence that Appellant knew he was not invited and that his ultimate entry into the room was unlawful. Finally, both AT, who was spending the night in AR's room, and AR herself testified that neither of them gave Appellant permission to enter the dorm room after AT had left after searching For his belongings. Appellant did not have a key for the door, and no others with apparent authority gave Appellant permission to enter the room. Thus, Appellant's entry was unlawful.

The government provided evidence in support of each element of the offense of unlawful entry via direct and circumstantial evidence, both of which may be used to determine legal sufficiency. McArthur, 573 F.3d at 614. Viewing the evidence in the light most favorable to the government, a rational fact finder could have found each element of the crime of sexual assault beyond a reasonable doubt. Thus, the conviction is legally sufficient. King, 78 M.J. at 221. Likewise, this Court should be convinced beyond a reasonable doubt all the elements of unlawful entry are met with the evidence presented in the record. Thus, the conviction is factually sufficient.

Appellant's conviction for unlawful entry is legally and factually sufficient, and this Court should deny this Assignment of Error.

## IV.

## THE THIRD AIR FORCE STAFF JUDGE ADVOCATE DID NOT COMMIT UNLAWFUL COMMAND INFLUENCE[8]

### *Additional Facts*

During the government case on the merits, defense counsel cross-examined AT about a meeting between her and the Third Air Force (3 AF) Staff Judge Advocate (SJA). (R. at 178-

[8] This issue is raised in the appendix pursuant to Grostefon.

179). AT admitted to considering not participating in the court-martial. (Id. at 178). The defense asked AT what they discussed during the meeting and AT stated, "[h]e just asked if I was okay and that they're, you know, going to have my back no matter if I chose to go with the trial or if I didn't and that they would make sure that nothing like that would happen again at their base." (Id. at 178-179). AT later decided to participate in the court-martial. (Id. at 179).

At trial, defense counsel never asserted the meeting between AT and the 3 AF SJA constituted unlawful command influence. Instead, defense counsel argued the meeting with the 3 AF SJA constituted motivation for AT to participate in the court-martial and carry on with prior fabrication. (R. at 195).

***Standard of Review***

Allegations of UCI are reviewed de novo. United States v. Boyce, 76 M.J. 242, 249 n.7 (C.A.A.F. 2017) (citation omitted).

***Law***

Article 37(a)(2), UCMJ, states:

> No person subject to this chapter . . . may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts taken pursuant to this chapter . . . as prescribed by the President.

Under the traditional test, to determine if apparent unlawful command influence was present, the defense shoulders the initial burden of raising a claim of unlawful command influence. United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994). The defense must bring forth "some evidence" to suggest that: (a) the facts, if true, constitute unlawful command influence; and (b) this unlawful command influence placed an "intolerable strain" on the public's

perception of the military justice system because "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." United States v. Boyce, 76 M.J. 242, 249 (C.A.A.F. 2017).

Under the traditional test for apparent unlawful influence (which is of dubious application after amendments to Article 37, UCMJ (10 U.S.C. § 837 (2019) which requires a showing of prejudice to the Appellant to succeed on apparent unlawful command influence claims):

> If the accused presents "some evidence" of unlawful command influence, "the burden shifts to the government to prove beyond a reasonable doubt that either: (a) the 'predicate facts proffered by the appellant do not exist,' or (b) 'the facts as presented do not constitute unlawful command influence.'" . . . If the government fails to rebut the accused's factual showing, it may still prevail if it proves:
>
> [B]eyond a reasonable doubt that the unlawful command influence did not place an intolerable strain upon the public's perception of the military justice system and that an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.

United States v. Proctor, 81 M.J. 250, 256 (C.A.A.F. 2021) (internal citations omitted).

The test for actual unlawful command influence requires an Appellant to demonstrate (1) facts, which if true, constitute unlawful command influence; (2) the court-martial proceedings were unfair to the appellant; and (3) the unlawful command influence was the cause of that unfairness. Boyce, 76 M.J. at 248.

***Analysis***

Appellant asserts the 3 AF SJA's meeting with AT was "unusual" and raises the specter of unlawful command influence. (App. Br., Appendix at 3-4). It's unclear whether Appellant is specifically raised apparent or actual unlawful command influence, but under either test, Appellant's argument hold no merit. The Appellant bears the initial burden of raising a claim of unlawful command influence. The Appellant has failed to meet that burden.

Assuming the traditional test for apparently unlawful command influence still applies, the first prong requires Appellant must provide "some evidence" the facts, if true, constitute unlawful command influence. First, it seems apparent from the record trial defense counsel did not believe the facts elicited during their cross-examination constituted undue command influence, because they never raised the issue at trial. Second, the testimony at trial was the 3 AF SJA provided emotional support to AT and stated she would be supported whether or not she decided to participate in the court-martial or not. The prohibition against undue command influence prohibits any person subject to the UCMJ from attempting to coerce or, by any unauthorized means, attempt to influence the action of a court-martial. The act of offering emotional support to a victim in the lead up to a court-martial is neither coercive, nor is it an unauthorized means of interacting with a victim. It would not be inappropriate for government trial counsel to offer the same emotional support as was provided here. And during the meeting the 3 AF SJA emphasized that it was AT's decision whether to participate; nothing suggests he made a recommendation one way or another. The mere fact the 3 AF SJA works for the convening authority does not push the conduct into the realm of undue command influence. The 3 AF SJA did not apply any undue or coercive pressure to the victim to get her to participate, in fact, he did the opposite. The 3 AF SJA was clear that regardless of the victim's decision, it would be supported. Appellant has thus failed to meet his burden on the first prong.

Even assuming this Court found Appellant did meet his burden on the first prong, the Appellant also failed to meet his burden on the second prong of the apparently unlawful command influence test. The second prong requires the Appellant show the unlawful command influence placed an "intolerable strain" on the public's perception of the military justice system because "an objective, disinterested observer, fully informed of all the facts and circumstances,

would harbor a significant doubt about the fairness of the proceeding." Based on the facts presented, an objective, disinterested observer would not harbor any significant doubts about the fairness of the proceeding. In fact, the 3 AF SJA's actions of providing emotional support to a victim of a heinous sexual crime would likely be applauded by such an objective, disinterested observer. Were members of the public aware of the conduct in question, they would no doubt view the military justice system in a more positive light and would be encouraged by the support victims of sexual assault in the military are receiving.

Turning to actual unlawful command influence, as discussed above, Appellant has not met his burden of establishing any facts that if true, would constitute unlawful command influence. The 3 AF SJA did not order or coerce the victim into testifying. Nothing about the conduct of the meeting, or what was communicated during that meeting, attempted to influence the action of the court-martial. Therefore, Appellant has failed to establish the first required element for actual unlawful command influence.

Given Appellant failed to meet his burden to establish either actual or apparent undue command influence, he is not entitled to relief.

**V.**

**THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF THIS COURT DID POSSESS JURISDICTION TO REVIEW THIS ISSUE, THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT CORRECTLY ANNOTATED THAT APPELLANT'S CONVICTION REQUIRED THAT HE BE CRIMINALLY INDEXED PER THE FIREARM PROHIBITION UNDER 18 U.S.C. § 922.[9]**

[9] This issue is raised in the appendix pursuant to Grostefon.

### *Additional Facts*

The maximum punishment for sexual assault is "[f]orfeiture of all pay and allowances, and confinement for 30 years." MCM, pt. IV, ¶ 60.d.(2). The "mandatory minimum" for the offense for enlisted members is a dishonorable discharge. Id. The first indorsement to the Statement of Trial Results in Appellant's case contains the following statement: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (Statement of Trial Results, ROT, Vol 1.) The Entry of Judgment contained a similar endorsement. (Entry of Judgment (EOJ), ROT, Vol. 1.)

### *Law and Analysis*

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him because, in his opinion, he was convicted of an offense not alleging unlawful use of force. (App. Br., Appendix at 4.) Appellant asserts that any prohibitions on the possession of firearms imposed because of a non-violent offense runs afoul of the Second Amendment, U.S. CONST. amend. II, and the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (analyzing New York's concealed carry regime). Appellant's constitutional argument, like his other allegations of error, fails.

The Gun Control Act of 1968, 18 U.S.C. § 922, makes it unlawful for any person, *inter alia*, "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" and "who has been discharged from the Armed Forces under dishonorable conditions" to possess a firearm. Id. at § 922(g)(1), (g)(6). Appellant was found guilty of sexual assault, in violation of Article 120, UCMJ, which is a crime punishable by imprisonment for a

term far exceeding one year.[10] (*See* Entry of Judgment, ROT, Vol. 1.) In addition, Appellant received a mandatory minimum sentence of a dishonorable discharge for his conviction for sexual assault, which, when executed, qualifies as a discharge under "dishonorable conditions." (Id.)

**A. This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922, because that requirement is not part of the findings or sentence.**

This Court lacks jurisdiction under Article 66, UCMJ, to order the correction of the Statement of Trial Results or Entry of Judgment on the grounds requested by Appellant. In United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021), this Court held that it "lacks authority under Article 66, UCMJ, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition" in a court-martial order. Yet Appellant argues here that, because the Court of Appeals for the Armed Forces (CAAF) in United States v. Lemire, 82 M.J. 263, n.* (C.A.A.F. 9 March 2022) (decision without published opinion), ordered the Army to correct a promulgating order that annotated an appellant as a sex offender, this Court now has the authority to modify his Statement of Trial Results and Entry of Judgment. (App. Br., Appendix at 6-7). Appellant argues that CAAF's decision in Lemire reveals three things: (1) That CAAF has the authority to correct administrative errors in promulgating orders; (2) by extension, CAAF believes that the service courts of criminal appeal (CCAs) have power to correct administrative errors under Article 66, UCMJ; and (3) CAAF believes both appellate courts have the authority to address constitutional errors in promulgating orders even if they amount to collateral consequences of a conviction. (Id.)

[10] Persons *accused* of any offense punishable by imprisonment for a term exceeding one year, which has been referred to a general court-martial, also may not possess a firearm. *See* Department of the Air Force Instruction (DAFI) 51-201, dated 14 April 2022, para. 29.30.8 (citing 18 U.S.C. § 922(n)).

Appellant bases his argument solely on an (asterisk) footnote to a summary decision without a published opinion issued by CAAF that contained no analysis or reasoning why correction was a viable remedy in that case. *See* Lemire, 82 M.J. 263, n.*. This Court has previously declined to rely on such an incomplete analysis. In Lepore, 81 M.J. at 762, this Court even declined to rely on its own past opinion in United States v. Dawson, 65 M.J. 848 (A.F. Ct. Crim. App. 2007), because that opinion contained no jurisdictional analysis when the Court summarily ordered the correction of the promulgating order. Appellant asks this Court to follow a mere footnote in a decision without a published opinion, which contains no analysis of jurisdiction and no language indicating that correction of a Statement of Trial Results or Entry of Judgment is proper.

Rule 30.4(a) of this Court's Rules of Practice and Procedure states:

> Published opinions are those that call attention to a rule of law or procedure that appears to be overlooked or misinterpreted or those that make a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the Court's decision to the public, the parties, military practitioners, and judicial authorities.

Because the Lemire decision from CAAF does not call attention to a rule of law or procedure and does not provide any rationale, it does not qualify as "precedent" and should not be followed. In any event, Lemire involved sex offender registration, not firearms prohibitions. CAAF indeed ordered removal of the designation for sex offender registration from a promulgating order, but its decision did not adjudicate the constitutional question posed here, which is unrelated to the actual findings and sentence in the case. This Court should therefore not read Lemire as requiring an evaluation of the constitutionality of firearms prohibitions for convicted Airmen, or the propriety of the Air Force's regulations requiring indexing.

This Court's jurisdiction is defined entirely by Article 66, UCMJ, which specifically limits its authority to only act with "respect to the finding and sentence" of a court-martial "as approved by the convening authority." Lepore, 81 M.J. at 762 (citing 10 U.S.C. § 866(c)); *see generally* United States v. Arness, 74 M.J. 441 (C.A.A.F. 2015) (discussing that CCAs are courts of limited jurisdiction, defined entirely by statute). Article 66, UCMJ, provides no statutory authority for this Court to act on the collateral consequences of conviction. In Lepore, this Court noted the many times it has held that it lacked jurisdiction where appellants sought relief for "alleged deficiencies unrelated to the legality or appropriateness of the court-martial findings or sentence." 81 M.J. at 762 (citations omitted). This Court should reach the same conclusion here.

Although this Court has the authority to modify errors in an entry of judgment under R.C.M. 1111(c)(2), the authority is limited to modifying errors *in the performance of its duties and responsibilities*, so that authority does not extend to determining the constitutionality of a collateral consequence. Further, the question Appellant asks this Court to determine is fundamentally different from the situations in which our sister courts have corrected errors on promulgating orders. For example, in United States v. Pennington, the Army Court of Criminal Appeals ordered modification of the statement of trial results in that case to correct erroneous dates, the wording in charges, the reflection of pleas the appellant entered, and other such clerical corrections. *See* No. 20190605, 2021 CCA LEXIS 101, at *5 (A. Ct. Crim. App. 2 March 2021) (unpub. op.). The errors corrected in Pennington are the types of errors that R.C.M. 1111(c)(2) is in place to correct.

Moreover, both the Navy-Marine Corps and the Air Force CCAs have held that matters outside the UCMJ and MCM, such as Defense Incident-Based Reporting System (DIBRS) codes and indexing requirements under 18 U.S.C. § 922, are outside their authority under Article 66, UCMJ. *See* United States v. Baratta, 77 M.J. 691 (N-M. Corp. Ct. Crim. App. 2018); Lepore, 81

M.J. at 763. Both courts reasoned that they only possessed jurisdiction to act with respect to the findings and sentence as approved by the convening authority. Id. But here, even under the updates made to Article 66(d), UCMJ, this Court's jurisdiction is still limited to acting "with respect to the findings and sentence as entered into the record." 10 U.S.C. § 866(d). The annotation on the first indorsements to the Entry of Judgment and Statement of Trial Results is simply not a part of the finding or sentence entered into the record. Nor does R.C.M. 918 list the firearm prohibition requirements from 18 U.S.C. § 922(g) as part of a court-martial finding. Thus, 18 U.S.C. § 922(g)'s firearm prohibitions and the indexing requirements that follow that statute are well outside the scope of this Court's jurisdiction.

**B. The Statement of Trial Results and Entry of Judgment were prepared correctly in accordance with the applicable Air Force Instruction.**

Even if this Court has jurisdiction to review this issue, Appellant is not entitled to relief. The SJA followed the appropriate Air Force regulations in signing the first indorsement to the Statement of Trial Results and Entry of Judgment. Appellant received a conviction for a qualifying offense under 18 U.S.C. § 922(g)(1), and he received a mandatory minimum sentence (a dishonorable discharge) that also qualified under 18 U.S.C. § 922(g)(6). *See* DAFI 51-201, dated 14 April 2022, paragraph 29.32:

Furthermore, paragraph 29.30. to that DAFI, which applies in this case, shows the SJA correctly annotated the firearm prohibition on the first indorsement:

> If a service member is convicted at a GCM of a crime for which the maximum punishment exceeds a period of one year, this prohibition is triggered regardless of the term of confinement adjudged or approved.

Paragraph 29.30.1.1.

> Persons who have been discharged from the Armed Forces under dishonorable conditions . . . This condition is memorialized on the

> STR and EoJ, which must be distributed in accordance with the STR/EoJ Distribution List … This prohibition does not take effect until after the discharge is executed.

Paragraph 29.30.5.

Appellant's conviction and sentence qualified him for criminal indexing per 18 U.S.C. § 922(g)(1) and (g)(6), and the first indorsements to the Entry of Judgment and Statement of Trial Results properly annotated the prohibition in accordance with DAFI 51-201.[11] Thus, there is no error for this Court to correct.

**C. The Firearm Possession Prohibitions in the Gun Control Act of 1968 are Constitutional.**

In N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129-2130 (2022), the Supreme Court held that the standard for applying the Second Amendment is:

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

(citations omitted). In his concurrence, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008) (finding that the Second Amendment is an individual, not collective, right), and McDonald v. City of Chicago, 561 U.S. 742 (2010) (applying that right to the states), that the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2162 (Kavanaugh, J., concurring) (citations omitted). Accordingly, the proper interpretation of the Second Amendment allows for a "variety" of gun regulations. Id. (citing Heller, 554 U.S. at 636).

[11] While the Statement of Trial Results and Entry of Judgment Indorsements indeed annotate the firearm prohibition, they are not what legally mandates the indexing. DAFI 51-201 is the regulation that requires indexing and contains the detailed requirements that mandate notification to relevant law enforcement agencies. Appellant's challenge here is thus misplaced.

The majority opinions in Heller and McDonald also stand for the principle that the right secured by the Second Amendment is not unlimited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose …. *[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons* and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 573 (emphasis added).

Appellant acknowledges that both Bruen and Heller limit the application of the Second Amendment to "law abiding, responsible citizens." (App. Br., Appendix at 5.) Even so, Appellant nonetheless cites to United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), for the proposition that the Government cannot prove that Appellant's firearm prohibition for an offense not charged under the unlawful use of force provision of the relevant criminal statute is in keeping with the United States' historical tradition of firearm regulation. (App. Br., Appendix at 5.) But this is contrary to what the Fifth Circuit in Rahimi held. That court concluded that the term "law abiding, responsible citizens," was "shorthand in explaining that [Heller's] holding … should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]" Rahimi, 61 F.4th at 451 (citing Heller, 554 U.S. at 626-627). The Rahimi court went on to assert that Bruen's reference to "ordinary, law abiding" citizens was no different than Heller—it was meant to exclude "from the Court's discussion groups that have historically been stripped of their Second Amendment Rights[.]" Id. The Court determined that defendant Rahimi did not fall into that category of felons prohibited from owning a firearm at the time he was convicted of violating the firearm prohibition under 18 U.S.C. § 922(g)(8), since Rahimi was only subject to an

agreed-upon domestic violence restraining order at the time he was convicted. Id. at 452. Thus, he did not have a felony conviction at the time he was charged with illegal possession of a firearm. Id. The Fifth Circuit thus found that the Government had not shown that 18 U.S.C. § 922(g)(8)'s restriction of his Second Amendment rights "fit[] within our Nation's historical traditional of firearm regulation." Id. at 460.

The appellant in Rahimi was in a fundamentally different position than Appellant here. In this case, Appellant has been convicted of an offense punishable by well over a year of confinement (*i.e.*, a felony), in addition to being sentenced to a dishonorable discharge. He is thus prohibited from owning a firearm under both 18 U.S.C. § 922(g)(1) and (g)(6). Both the Supreme Court and the Fifth Circuit acknowledge that felony convictions are part of the United States' longstanding tradition on firearm prohibitions. Moreover, these cases do not distinguish between violent and non-violent felonies—prior to Bruen, the Fifth Circuit opined, "[i]rrespective of whether [an] offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens." United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004). The Court found that limiting a felon's ability to keep and possess firearms was not inconsistent with the "right of Americans generally to individually keep and bear their private arms as historically understood" in the United States. Id.; *accord* Folajtar v. AG of the United States, 980 F.3d 897 (3rd Cir. 2020) (upholding the constitutionality of 18 U.S.C. § 922(g)(1) as applied to felons—including nonviolent felons—based upon the Second Amendment's history and tradition). Thus, even if this Court considered Appellant's sex crime – which involved unlawfully forcing open a window to gain entry into AT's room and then causing

her pain by nonconsensually penetrating her vulva – to be "nonviolent," that still would not matter for purposes of restricting Appellant's ability to own a firearm.

Appellant's conviction for sexual assault, and his mandatory minimum sentence of a dishonorable discharge, proves that he falls squarely into the categories of individuals that should be prohibited from possessing a firearm. Thus, the Indorsements in the Entry of Judgment and Statement of Trial Results correctly annotated that Appellant is subject to 18 U.S.C. 922's prohibitions. Appellant is not entitled to relief.

## CONCLUSION

**WHEREFORE**, this Court should affirm the findings and sentence.

[redacted]
TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 20 September 2023 via electronic filing.

TYLER L. WASHBURN, Capt, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]