UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40354 (rem)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Leo J. NAVARRO AGUIRRE	)	**DOCKETING**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

The record of trial in the above-styled case was returned to this court by the Military Appellate Records Branch (JAJM).

Accordingly, it is by the court on this 19th day of September, 2025,

ORDERED:

That the Record of Trial in the above styled matter is referred to Panel 3.

Counsel may submit briefs addressing whether this court should reassess the sentence or order a rehearing on the sentence **not later than 20 October 2025.**

FOR THE COURT

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **Leo J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 3 No. ACM 40354 (rem) 20 October 2025

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

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ISSUE PRESENTED ON REMAND

I. Should this Court reassess the sentence or remand the case for a sentence rehearing?

STATEMENT OF STATUTORY JURISDICTION

Airman First Class (A1C) Leo J. Navarro Aguirre's approved sentence includes a bad-conduct discharge. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3).

STATEMENT OF THE CASE

A military judge sitting as a general court-martial convicted A1C Leo J. Navarro Aguirre, United States Air Force, pursuant to his pleas, of one specification of failure to obey a lawful order, one specification of wrongful use of oxycodone, and one specification of reckless driving in violation of Articles 92, 112a, and 113, UCMJ, 10 U.S.C. §§ 892, 912a, 913. Contrary to his pleas, a panel of members with enlisted representation convicted A1C Navarro Aguirre of one specification of wrongful use of Ambien, one specification of assault consummated by a battery, and one specification of aggravated assault in violation of Articles 112a and 128, UCMJ, 10 U.S.C. §§ 912a, 928. The military judge sentenced him to a reprimand, reduction to the grade of E-1, forfeiture of all pay and allowances, two years and two months of confinement, and a bad-conduct discharge.

The Convening Authority took no action on the findings but suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgment and ordered it to be remitted without further action, unless the suspension was previously vacated. The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. The Convening Authority also approved A1C Navarro Aguirre's request for waiver of all automatic forfeitures for a period of six months

and directed them to A1C Navarro Aguirre's spouse. The Convening Authority approved the remainder of the sentence.

This Court previously reviewed this case, affirming the findings and the sentence. *United States v. Navarro Aguirre*, No. ACM 40354, 2024 CCA LEXIS 103, at *35 (A.F. Ct. Crim. App. Mar. 11, 2024). The United States Court of Appeals for the Armed Forces (CAAF) then heard this case and held that A1C Navarro Aguirre's conviction for wrongful use of Ambien was legally insufficient. *United States v. Navarro Aguirre*, __ M.J. __, No. 24-0146/AF, 2025 CAAF Lexis 614, at *19 (C.A.A.F. July 24, 2025). The CAAF set aside the finding of guilty for that specification and dismissed it, returning the record of trial to the Judge Advocate General of the Air Force for remand to this Court for a sentence reassessment or rehearing. *Id.* at *27. This Court docketed the case following remand on 19 September 2025 and authorized the parties to submit briefs concerning whether the Court should reassess the sentence or order a sentence rehearing. Notice of Docketing, Sep. 19, 2025.

STATEMENT OF FACTS

A1C Navarro Aguirre was convicted of a total of six specifications. R. at 209, 849. The now-dismissed specification for wrongful use of Ambien and the reckless driving specification arose out of the same incident in October 2021. Entry of Judgment, May 12, 2022. The other specifications came from other incidents. The wrongful use of Oxycodone, to which A1C Navarro Aguirre pleaded guilty, occurred earlier in July 2021. *Id.* The specifications for assault consummated by a battery and aggravated assault arose from incidents in 2019 and 2020, respectively. *Id.* The assault consummated by a battery consisted of A1C Navarro Aguirre grabbing his spouse's arms and wrists with his hands, while the aggravated assault came from him pointing a loaded firearm at his spouse. *Id.*

A1C Navarro Aguirre faced a maximum of eighteen years of confinement, as well as a dishonorable discharge, total forfeitures, reduction to the grade of E-1, and a reprimand. R. at 881. The military judge sentenced him to segmented confinement sentences with some running concurrently and others running consecutively. R. at 895. He received two months of confinement for both wrongful use specifications and the reckless driving specification, all of which ran concurrently with each other. *Id.* He also received two months of confinement for failure to obey a lawful order, one month of confinement for assault consummated by a battery, and two years of confinement for aggravated assault. *Id.* Those three sentences also ran concurrently with each other. *Id.* The two concurrent groups of confinement sentences ran consecutively with each other, resulting in a total confinement sentence of two years and two months. R. at 895–96. A1C Navarro Aguirre also received a bad-conduct discharge, total forfeitures, reduction to the grade of E-1, and a reprimand. R. at 895.

SUMMARY OF ARGUMENT

The CAAF set aside the specification for unlawful use of Ambien as legally insufficient, necessitating a review of A1C Navarro Aguirre's sentence. In particular, this Court must determine whether it should reassess the sentence or remand the case for a sentence rehearing. The four *Winckelmann* factors favor reassessment of the sentence for the five remaining specifications. Therefore, this Court should reassess the sentence.

ARGUMENT

I. This Court should reassess the sentence.

A. Standard of review.

This Court has broad discretion to determine whether to reassess a sentence and to decide upon a reassessed sentence. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013).

B. The *Winckelmann* factors favor reassessment.

A new sentence can be determined by remanding for a rehearing on the sentence or reassessing the sentence. *Winckelmann* provides four illustrative, but not dispositive, factors to consider when determining whether to reassess a sentence:

> (1) Dramatic changes in the penalty landscape and exposure.
>
> (2) Whether an appellant chose sentencing by members or a military judge alone. As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members. This factor could become more relevant where charges address service custom, service discrediting conduct or conduct unbecoming.
>
> (3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses.
>
> (4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

73 M.J. at 15–16 (citations omitted). Here, the *Winckelmann* factors favor sentence reassessment.

First, there has not been a dramatic change in the penalty landscape or exposure. Dismissing the specification for wrongful use of Ambien reduces the maximum possible confinement time by two years, but the maximum confinement is still sixteen years. *See Manual for Courts-Martial*, United States (2019 ed.), App. 12 (detailing the maximum punishments for each specification). This is not a significant change from the eighteen years he faced at court-martial. Indeed, this two-year change in the punitive exposure is much less than the ten-year change that this Court found was not a dramatic change. *United States v. Casillas*, No. ACM 40551, 2025 CCA LEXIS 445, at *73 (A.F. Ct. Crim. App. Sep. 18, 2025). The other maximum punishments remain the same, including a dishonorable discharge. And the confinement sentence imposed for the now-dismissed specification—two months—ran concurrently with confinement

for other specifications, further reducing the impact of the change in the penalty landscape. R. at 895. This change is minor and favors reassessment.

Second, A1C Navarro Aguirre was sentenced by a military judge alone. R. at 851–52. Since "judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members," this factor also favors reassessment. *Winckelmann*, 73 M.J. at 15.

Third, the remaining offenses capture the gravamen of criminal conduct from the original offenses. Another specification for wrongful use of a controlled substance (oxycodone) remains, along with specifications for aggravated assault and assault consummated by a battery. In particular, the aggravated assault constituted the most serious aspect of the convicted offenses, as evidenced by the segmented confinement sentence that was twelve times greater than the sentence for any other single specification. R. at 895. Since this specification remains, the gravamen of criminal conduct largely remains.

Fourth, the remaining specifications are for types of offenses with which the judges of this Court have experience and familiarity. None of the remaining specifications—which include wrongful use of oxycodone, failure to obey a lawful order, reckless driving, assault consummated by a battery, and aggravated assault—can be considered rarities at this Court. Because the judges of this Court are likely to have familiarity with these offense, the Court can reliably determine what sentence would have been imposed at trial, favoring reassessment.

CONCLUSION

Since all four *Winckelmann* factors favor reassessment, this Court should reassess the sentence in light of the set aside of A1C Navarro Aguirre's legally insufficient conviction. A1C Navarro Aguirre does not suggest any particular outcome of this reassessment.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were electronically delivered to the Court and served on the Air Force Government Trial and Appellate Operations Division on 20 October 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' BRIEF IN SUPPORT OF SENTENCE REASSESSMENT
v.	)	
	)	Before Panel 3
Airman First Class (E-3) **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354 (rem) 20 October 2025

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

ISSUE PRESENTED

WHETHER THIS COURT SHOULD REASSESS APPELLANT'S SENTENCE OR ORDER A REHEARING ON THE SENTENCE.

STATEMENT OF CASE

Contrary to his pleas, a panel of officer and enlisted members found Appellant guilty of wrongful use of Ambien in violation of Article 112a, UCMJ, (Charge II, Specification 2); assault consummated by battery upon his spouse in violation of Article 128, UCMJ, (Charge VI, Specification 1); and assault with intent to inflict bodily harm upon his spouse with a loaded firearm also in violation of Article 128, UCMJ, (Charge VI, Specification 4.). (*Entry of Judgment*, 12 May 2022.) Appellant pleaded guilty to failure to obey a lawful order in violation of Article 92, UCMJ, (Charge I, Specification 2); wrongful use of oxycodone in violation of Article 112a, UCMJ, (Charge II, Specification 1); and reckless driving while under the influence Zolpidem (Ambien) in violation of Article 113, UCMJ, (Charge III). (Id.) The military judge adjudicated the following segmented sentences to confinement: two months for violating a no-contact order; two months for wrongful use of Oxycodone; 2 months for wrongful use of

Zolpidem; 2 months for reckless driving; one month for assault consummated by a battery, and 2 years for assault with a dangerous weapon. (Id.) The sentences to confinement of Charge II, Specification 1 (oxycodone); Charge II, Specification 2 (Zolpidem); and Charge III, Specification III ran concurrently (reckless driving). (R. at 895.) Sentences to confinement in Charge I, Specification 2 (no-contact order); Charge VI, Specification 1 (assault); and Charge VI, Specification VI (assault with a dangerous weapon) ran concurrently. (Id.) The concurrent sentences of Charge II, Specification 1; Charge II, Specification 2; and Charge III, Specification III and the concurrent sentences of Charge I, Specification 2; Charge VI, Specification 1; and Charge VI, Specification VI ran consecutively for a total of 26 months. (Id. at 896; *Entry of Judgment*, 12 May 2022.) Appellant was credited with a total of 114 days credit as a result of pretrial confinement. (Id.) The military judge adjudicated the following unitary sentence: a reprimand, reduction in grade to the grade of E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (R. at 895.)

On appeal, this Court affirmed the findings and sentence. United States v. Navarro Aguirre, No. ACM 40354, 2024 CCA LEXIS 103, at *2-3 (A.F. Ct. Crim. App. 11 March 2024) (unpub. op). Then Appellant appealed this Court's decision to the Court of Appeals for the Armed Forces (CAAF). CAAF granted the following issues:

> WHETHER APPELLANT'S CONVICTION FOR WRONGFUL AMBIEN USE IS LEGALLY SUFFICIENT WHEN: (1) HE HAD A VALID PRESCRIPTION FOR AMBIEN, AND (2) THE BASIS FOR HIS CONVICTION WAS A MEDICALLY-KNOWN SIDE EFFECT.
>
> WHETHER APPELLANT'S GUILTY PLEA FOR RECKLESS DRIVING WAS PROVIDENT WHEN HE TOOK HIS PRESCRIBED DOSE OF AMBIEN, FELL ASLEEP IN HIS BED, AND "THE NEXT THING [HE] REMEMBERED IS BEING BEHIND THE WHEEL OF [HIS] CAR."

United States v. Navarro Aguirre, 85 M.J. 200 (C.A.A.F. 2024).

CAAF reversed the decision of the Court of Criminal Appeals (CCA) as to Charge II, Specification 2 (wrongful use of Ambien) and its sentence. United States v. Navarro Aguirre, 2025 CAAF LEXIS 614, at *27 (C.A.A.F. 24 July 2025). And the finding of guilty as to Charge II, Specification 2 was set aside and dismissed. Id. CAAF affirmed the lower court as to all other findings of guilty. Id. CAAF returned the record of trial the Judge Advocate General of the Air Force for remand to the Court of Criminal Appeals for reassessment of the sentence or for a rehearing on the sentence. Id. at *27. As a result, this Court ordered briefing on whether it should reassess the sentence or order a rehearing no later than 20 October 2025. (*Notice of Docketing*, 19 September 2025.)

STATEMENT OF FACTS

Appellant unlawfully grabbed TN's wrists and arms (Charge VI, Specification 2)

In September 2019, while TN was cleaning a room where Appellant was playing video games, a game controller fell from the nightstand. (R. at 422.) Appellant got upset alleging that TN threw his game controller and grabbed TN's wrists and arms and said, "You're never going to throw my shit again. Do you hear me? You are never going to throw my shit again." (R. at 422-23.) TN tried to leave the room but Appellant got a hold of her, grabbed her shoulders, squeezed TN very hard, and told her, "You're never going to fucking walk away from me again." (R. at 422.) TN told Appellant to stop because he hurt her. (R. at 423.) Shortly afterwards, TN took pictures of the red marks on her arms. (R. at 424-26; Pros. Ex. 2.)

Assault with a deadly weapon (Charge VI, Specification 4)

In May 2020, after a night of drinking with friends, Appellant came home and TN noticed that Appellant was drunk, but "in good spirits and happy." (R. at 434-35.) But TN wanted to go to bed and told Appellant to "settle down." (R. at 435.) This comment angered Appellant. (Id.) Appellant was also upset about an abortion that TN got a year prior. (Id.) Appellant's anger escalated and he reached under the bed where he kept his gun box. (R. at 435.) Appellant said, "I am tired of this. Like I am not going to do this anymore. Like I can't deal with you" while he put his weapon together. (R. at 435-36.) TN explained what happened next:

> He was like loading bullets into his magazines, and loading the gun. And, you know, he cocked it, and the whole time I was like, "Leo, don't. Like what are you doing? Like, Leo, stop." And he was just like, "No. Like I am tired. Like I am in too much pain. Like this is -- no." And he held the gun up to his head and I like lunged to him. Like I don't know what I thought I was going to do, but I didn't want him to die. And when I lunged for him, he moved the gun from his head to mine, and he was like, "Don't." And I -- I was just crying, and I was just like, ["][Appellant], please don't. Like please stop." And he goes, "I don't -- I want it to be just me. If it has to be one of us, I want it to be just me. But if it has to be you, you know, then it has to be you."
>
> He was planning on shooting himself, and he didn't want to have to shoot me, but because I was intervening, he would shoot me instead. And this went on for a while just him holding the gun to his head with his finger on the trigger. My phone was next -- next to him on the bed, so I would try to get my phone to call 911. I would try to lunge at him, you know, every time I saw his finger going on the trigger, and I started screaming, because I realized there was nothing that I could do. So I just started screaming at the top of my lungs hoping that a neighbor would hear me or someone would hear and call the police.

(R. at 436.) During this incident, Appellant's sister was present and saw what was going on. (Id.) Appellant told his little sister to "get the hell out." (Id.) Appellant then locked himself in the bathroom with the gun, and TN was able to call 911.

Wrongful Use of Oxycodone (Charge II, Specification 1)

In June 2021, Appellant admitted that he wrongfully used oxycodone in the form of Percocet, a prescription medication Appellant received from his friend. (R. at 191.) Appellant crushed four to five pills and snorted them through his nose using a rolled-up dollar bill. (R. at 191.) After about five minutes, Appellant started to feel the effects of the drug. (R. at 292.) Appellant knew that the substance was oxycodone because his friend told Appellant that the pills were Percocet. (R. at 192.) Appellant admitted that he Googled what Percocet looked like and it looked like the pills he snorted. (Id.)

Reckless Driving (Charge III)

Appellant pleaded guilty to reckless driving while under the influence of Ambien on 1 October 2021. (R. at 209.) He took one dose of Ambien, which a medical provider lawfully prescribed on 30 September 2021. (R. at 197.) The next thing he remembered was being behind the wheel of his car. (R. at 198.) The vehicle was running and parked in the wrong parking spot. (Id.) And Appellant had his foot on the gas pedal "revving the engine" that caused this car to overheat. (Id.) A police car was behind Appellant, and he eventually spoke with the police officers. Appellant told the officers that he was not drunk, but that he had taken Ambien. (Id.)

Appellant did not remember driving his car recklessly, but he was convinced of his guilt after reviewing the statements of witnesses. (R. at 198.) One witness saw Appellant parked in the middle of the street blocking traffic. (R. at 202.) Another witness saw Appellant swerving on and off the road, switching lanes. (Id.) A police officer saw him hit a lamppost. (Id.)

Appellant admitted that he "did, in fact, drive [his] car in a reckless manner as the evidence [he] reviewed [said]." (Id.)

Appellant explained that even though he had no memory of driving, he was still in voluntary control of the vehicle because he had "to get to the point where [he] was, [he] had to put some kind of shoes on, get [his] car keys, get in [his] car, start [his] car. (R. at 866).

Failure to obey a lawful order (Charge I, Specification 2)

Appellant received a lawful order from his commander not to initiate any communication with TN. (R. at 184-85.) In October 2021, while Appellant was restricted to base, he knowingly reached out to TN on social media in violation of the no-contact order. (R. at 185.) Appellant knew it was wrong to contact TN because the no-contact order specifically prohibited him from contacting TN by any means, including social media. (Id.) Still on Tik Tok, Appellant commented on one of TN's videos about her depression and commented, "Nothing was ever good enough for you. I hate I can't even watch TV alone anymore." (R. at 185-86.) Appellant sent the comment believing and hoping that TN would see it even though Appellant also stated that he regretted what he had done because he knew it was wrong. (R. at 186.)

Pre-sentencing proceedings

The prosecution admitted Appellant's personal data sheet, enlisted performance reports, letters of reprimand and counseling. (R. at 826-30.) Notably, Appellant received a letter of reprimand for underage drinking (Pros. Ex. 9); a letter of reprimand for driving under the influence (Pros. Ex. 13); and a letter of reprimand for driving under the influence when he drove his vehicle into a river, and after this collision Appellant fled the scene of the accident on foot. (Pros. Ex. 14).

TN, through counsel, made a victim impact statement. TN explained that she stayed in a relationship with Appellant "much longer than was safe." (R. at 872.) When discussing why she did not report the abuse right away, TN said, "I lived through years of being too afraid to tell anyone. It took a life-threatening instance for someone else to tell me on my behalf for me to finally gain courage." (R. at 871-72.) TN discussed that she did not feel safe to report and that she still did not feel safe. (R. at 872.)

The defense called one character witness, and provided six character letters from military members, family members, and friends, as well as a photo collage – for the purpose of attempting to demonstrate Appellant's rehabilitative potential. (R. at 873; Def. Ex. I-O.) Appellant also provided the sentencing authority with a written unsworn statement, and he made a verbal unsworn statement. (R. at 879; Def. Ex. P.) In his verbal unsworn statement, Appellant apologized to the Air Force, his family, and friends. (R. at 879.) Regarding TN, Appellant stated that he regretted what happened between them every day. (Id.) Appellant said that he wanted to dedicate his life to be a better person. (R. at 870.) Appellant's written unsworn statement discussed how he wanted to move forward in his life and provide stability for his family. (Def. Ex. P.)

ARGUMENT

THIS COURT SHOULD REASSESS THE SENTENCE IN THIS CASE WITHOUT REMANDING FOR A REHEARING.

Standard of Review

If a CCA "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred[,]" then a sentencing rehearing is appropriate. United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986). If a CCA is "convinced that even if no error had

occurred at trial, the accused's sentence would have been at least of a certain magnitude[,]" then the Court may reassess the sentence. Id.

Law and Analysis

This Court should reassess Appellant's sentence to a bad-conduct discharge, confinement for a total of 26 months, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. A rehearing is not warranted in this case. The wrongful use of Ambien conviction that was set aside did not impact Appellant's sentence to confinement because the segmented sentence of two months for the Ambien use was served concurrently with other convictions upheld by our superior Court. Thus, there was no drastic change in the penalty landscape and punitive exposure. And Appellant remains convicted of the gravamen offenses included in the original charges. Thus, this Court can be certain that Appellant's sentence would be of a certain magnitude.

This Court is vested with the statutory authority to conduct a sentencing reassessment and should do so in this case. Article 66(d)(1)(A), UCMJ. In United States v. Winckelmann, CAAF listed "illustrative, but not dispositive, points for analysis" for when a CCA considers conducting a sentence reassessment or ordering a rehearing. 73 M.J. 11, 16 (C.A.A.F. 2013). The four factors this Court considers are: (1) "[d]ramatic changes in the penalty landscape and exposure;" (2) "[w]hether an appellant chose sentencing by members or a military judge alone;" (3) "[w]hether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses;" and (4) "[w]hether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial." Id. Here, the Winckelmann factors support sentencing reassessment because the penalty landscape and exposure have not

drastically changed; the findings of guilt capture the gravamen of Appellant's criminal misconduct; Appellant chose judge alone sentencing; and this Court has experience assessing sentences for the offenses upheld on appeal.

1. There was no dramatic change in the penalty landscape and exposure.

The set aside conviction did not drastically change the penalty landscape and penalty exposure. Given segmented sentencing, this Court can easily reassess Appellant's sentence to confinement. Appellant's segmented sentence for wrongful use of Ambien – two months confinement - was served concurrently with other segmented sentences to confinement, and the dismissal of this specification did not alter the total term of confinement the military judge adjudged – 26 months. Regarding Appellant's unitary sentence adjudged, the penalty landscape did was not dramatically changed, especially considering the maximum punishment for Appellant's most egregious crime – assault with a deadly weapon - authorized a dishonorable discharge, total forfeitures, and eight years of confinement. *See* Manual for Courts Martial, United States part IV, para. 77.d.(3)(a)(i) (2019 ed.) (MCM). Appellant remains convicted of the most serious offense against him as well as multiple other assault and drug-related offenses. In other words, this Court can be confident that Appellant's unitary sentence would be of a certain magnitude – namely that it would include a bad-conduct discharge, a reduction in rank, and total forfeitures – all of which were part of the sentence previously imposed by the military judge.

In many cases in which a CCA is determining whether to reassess a sentence versus ordering a rehearing, one or more offenses have been set aside, making this Winckelmann factor more influential. For instance, in United States v. Harris, an appellant was charged with dereliction of duty, maltreatment of a soldier, rape, and adultery, but the rape and maltreatment

offenses were set aside. 53 M.J. 86, 86 (C.A.A.F. 2000). "The elimination of the rape and maltreatment charges drastically changed the penalty landscape in this case, reducing the maximum confinement term from life imprisonment to 18 months." Id. at 88. Harris set aside the gravamen of offenses that could have also impacted the unitary sentence. *See* id. As a result, a sentencing rehearing was ordered in Harris. Id.

But as mentioned above, although there was a set aside conviction here, there was no dramatic change in the penalty landscape and exposure. Unlike Harris, the set aside conviction here did not minimize the penalty landscape as far as his unitary sentence, and the two-month confinement sentence Appellant received for the dismissed specification was served concurrently with other convictions upheld on appeal.

In sum, considering the concurrent confinement sentence imposed by the military judge, Appellant's confinement sentence does not change as a result of the dismissed specification. Additionally, this Court can be confident that Appellant's unitary sentence would be of a certain magnitude, such as a bad-conduct discharge, total forfeitures, and reduction to the grade of E-1, and a reprimand which this Court affirmed in its initial review of Appellant's case. Navarro Aguire, unpub. op. at 2-3. This factor favors reassessment.

2. Appellant chose military judge alone sentencing, and this decision tips the scales towards reassessment in this case because military judges are more predictable than members.

Appellant chose to be sentenced by a military judge alone, giving this Court more insight into what the sentence would have been at the trial level but for the set aside conviction. (R. at 851-52). "As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members." Winckelmann, 73 M.J. at 16. In this case, this Court can view the evidence through the lens of a military judge where Appellant was not convicted of wrongful use of Ambien. This factor favors reassessment.

3. The nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses.

Turning to the gravamen factor, Appellant remains guilty of the most serious offenses he was originally convicted of. Appellant assaulted his spouse by grabbing her arms when he was angry because his game controller fell while TN was cleaning. (R. at 422-23.) Moreover, Appellant assaulted his spouse with a loaded firearm. (R. at 434-36.) Appellant knowingly abused a powerful drug when he snorted five Percocet pills his friend gave him. (R. at 191.) Appellant also recklessly operated a vehicle while on the influence of Ambien. (R. at 33.) And he violated a no-contact order. (R. at 184-86.) These offenses were more egregious than Appellant wrongfully using Ambien that was lawfully prescribed. Thus, the nature of the remaining offenses capture the gravamen of the criminal conduct included in the original offenses. This Court can be confident that Appellant's unitary sentence adjudged at trial adjudicating a bad-conduct discharge and total forfeitures reflected the seriousness of these offenses, especially the assault with a loaded weapon. There is no doubt that Appellant's unitary sentence would have been a certain magnitude consisting of a punitive discharge, total forfeitures, reduction to the grade of E-1, and a reprimand. This factor favors reassessment.

4. This Court has the experience and familiarity with the crimes Appellant committed to reliably determine what sentence would have been imposed at trial.

Lastly, this Court can "determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity." Sales, 22 M.J. at 308. This court assesses the appropriateness of sentences as part of its statutory directive under Article 66(d)(1)(A), UCMJ. And this Court can easily determine an appropriate sentence after reviewing the admitted evidence at findings and sentencing evidence. This factor favors

reassessment because this Court is familiar with assaults, drug use, reckless driving, and violations of a lawful order.

This Court should find that Appellant would have received a bad-conduct discharge just based on Appellant's aggravated assault with a dangerous weapon – a loaded firearm. Although Appellant mentioned that he regretted putting TN through the assaults, he did not apologize to TN for his actions. Appellant only apologized to the Air Force and his family. (R. at 879; Def. Ex. P.) Appellant's lack of remorse did not demonstrate a strong will to rehabilitate. The government's sentencing case was strong and demonstrated Appellant's lack of rehabilitation given Appellant's repeated letter of reprimands and counseling for driving under the influence of alcohol especially in light of Appellant's convictions for substance abuse and recklessly operating a vehicle. A bad-conduct discharge "is designed as a punishment for bad-conduct." R.C.M. 1003(b)(8)(C). Appellant's convictions demonstrate his bad-conduct while serving in the military. At minimum a bad-conduct discharge is warranted given that Appellant held a loaded firearm TN's head – an event that TN described as life-threatening. (R. at 871.) Appellant's remaining unitary sentence adjudged at trial – total forfeitures, reduction in rank to the grade of E-1, and a reprimand reflected the egregiousness of Appellant's assault with a dangerous weapon, simple assault, drug use, reckless driving, and violation of a no-contact order.

With this said, this Court can reliably determine what sentence would have been imposed at trial after reviewing the record of trial. This Winckelmann factor weighs in favor of sentencing reassessment rather than a rehearing.

CONCLUSION

This Court has the requisite tools – the entire record of trial of Appellant's litigated court-martial – to reliably determine what sentence would have been imposed at trial but for the set aside conviction. Sales, 22 M.J. at 307. Based on the totality of the circumstances in this record, this Court should be convinced that a rehearing on the sentence is "unnecessary and that a reassessment of sentence will suffice." Id. at 308. This Court should reassess Appellant's sentence to a bad-conduct discharge, a total of 26 months confinement, total forfeitures, reduction to the grade of E-1, and a reprimand. In essence, this Court can affirm the military judge's adjudicated sentence.

For these reasons, the United States respectfully requests that this Honorable Court reassess Appellant's sentence without remanding for a rehearing.

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[redacted]
G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel
Government Trial and
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Military Justice and Discipline Directorate
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FOR

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 20 October 2025.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354
	)	2 December 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 **9 February 2023**. The record of trial was docketed with this Court on 12 October 2022. From the date of docketing to the present date, 51 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]

U.S. AIR FORCE COURT OF CRIMINAL APPEALS

GRANTED
2 DEC 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 2 December 2022.

Respectfully submitted,

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

2 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) LEO J. NAVARRO AGUIRRE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40354 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 December 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354
	)	1 February 2023

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

Pursuant to Rule 23.3(m)(3) and (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 **11 March 2023**. The record of trial was docketed with this Court on 12 October 2022. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using d substance, in violation of Article 113, UCMJ; and one charge, two specifications of iolation of Article 128, UCMJ.[1] Record (R.) at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances;

GRANTED
3 FEB 2023

[1] Appellant was charged, but acquitted of various specifications.

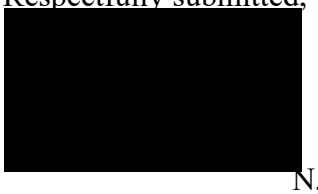
to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgement and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.*

The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is 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,



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


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 1 February 2023.

Respectfully submitted,

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

2 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) LEO J. NAVARRO AGUIRRE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40354 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354
	)	2 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 (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 **10 April 2023**. The record of trial was docketed with this Court on 12 October 2022. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using [illegible]led substance, in violation of Article 113, UCMJ; and one charge, two specifications of [illegible]violation of Article 128, UCMJ.[1] Record (R.) at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances;

GRANTED
3 MAR 2023

[1] Appellant was charged, but acquitted of various specifications.

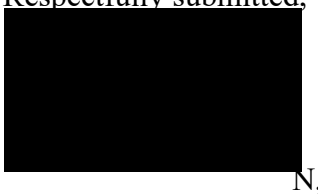
to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgement and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.*

The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is 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,



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


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 2 March 2023.

Respectfully submitted,

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

2 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) LEO J. NAVARRO AGUIRRE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40354 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354
	)	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 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 **10 May 2023**. The record of trial was docketed with this Court on 12 October 2022. From the date of docketing to the present date, 166 days have elapsed. On the date requested, 210 days will have elapsed.

On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using ubstance, in violation of Article 113, UCMJ; and one charge, two specifications of lation of Article 128, UCMJ.[1] Record (R.) at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances;

GRANTED
28 MAR 2023

[1] Appellant was charged, but acquitted of various specifications.

to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgement and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.*

The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is 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. 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, sealed materials, and is finalizing the Assignment of Errors 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[2]. 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. Maymi*, ACM 40332 – On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one

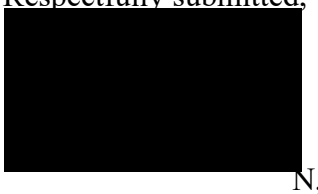
[2] Members acquitted Appellant of one specification of digital penetration, in violation of Article 120 UCMJ.

specification of sexual assault, in violation of Article 120, 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 has not yet started his review of this case.

4. *United States v. Saul*, ACM 40341 – On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, UCMJ; one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. R. at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022. The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined. Counsel has not yet started his review of Appellant's case.

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

Respectfully submitted,



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

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, *Appellee,* v. Airman First Class (E-3) LEO J. NAVARRO AGUIRRE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40354 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 March 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354
	)	3 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 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 **9 June 2023**. The record of trial was docketed with this Court on 12 October 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ.[1] Record (R.) at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances;

[1] Appellant was charged, but acquitted of various specifications.

to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgement and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.*

The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined.

Counsel is currently assigned 19 cases; eight cases are pending initial AOEs before this Court. Counsel has two Supreme Court petitions for certiorari, one Answer in a certified CAAF case, 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. Three Air Force Court cases have 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[2]. 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 50 pages of transcript and the rest of the record except for the sealed materials (motion previously filed and granted).

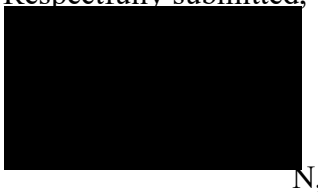
2. *United States v. Maymi*, ACM 40332 – On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120, UCMJ, and one charge, one specification of unlawful entry, in violation 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 has not yet started his review of this case.

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

3. *United States v. Saul*, ACM 40341 – On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, UCMJ; one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. R. at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022. The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined. Counsel has not yet started his review of Appellant's case.

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

Respectfully submitted,



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


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 3 May 2023.

Respectfully submitted,

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

4 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) LEO J. NAVARRO AGUIRRE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40354 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 May 2023.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40354**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Leo J. NAVARRO AGUIRRE	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 3 May 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 4th day of May, 2023,

ORDERED:

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

FLEMING E. KEEFE, Capt, 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. 2
Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354
	)	2 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 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 **9 July 2023**. The record of trial was docketed with this Court on 12 October 2022. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using led substance, in violation of Article 113, UCMJ; and one charge, two specifications of n violation of Article 128, UCMJ.[1] Record (R.) at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances;

GRANTED
6 JUN 2022

[1] Appellant was charged, but acquitted of various specifications.

to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgement and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.*

The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined.

Counsel is currently assigned 23 cases; 12 cases are pending initial AOEs before this Court. Counsel has two cases pending certiorari before the Supreme Court, one certified case at the Court of Appeals for the Armed Forces (CAAF), and one pending CAAF petition/supplement. 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. Three Air Force Court cases have 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[2]. 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 of trial except for the sealed matters (motion previously filed and granted).

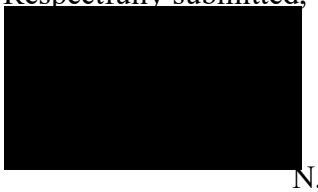
2. *United States v. Maymi*, ACM 40332 – On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120, UCMJ, and one charge, one specification of unlawful entry, in violation 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 has not yet started his review of this case.

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

3. *United States v. Saul*, ACM 40341 – On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, UCMJ; one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. R. at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022. The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined. Counsel has not yet started his review of Appellant's case.

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

Respectfully submitted,



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


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 2 June 2023.

Respectfully submitted,

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

5 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) LEO J. NAVARRO AGUIRRE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40354 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354
	)	29 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 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 **8 August 2023**. The record of trial was docketed with this Court on 12 October 2022. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using olled substance, in violation of Article 113, UCMJ; and one charge, two specifications of in violation of Article 128, UCMJ.[1] Record (R.) at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances;

GRANTED
30 JUN 2023

[1] Appellant was charged, but acquitted of various specifications.

to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgement and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.*

The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined.

Counsel is currently assigned 23 cases; 13 cases are pending initial AOEs before this Court. Counsel has two cases pending certiorari before the Supreme Court. 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. Three Air Force Court cases have 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[2]. R. at 687.

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

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 finished drafting the AOE and is finalizing *Grostefon* issues with the Appellant.

2. *United States v. Maymi*, ACM 40332 – 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, 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 has not yet started his review of this case.

3. *United States v. Saul*, ACM 40341 – On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of

Article 109, UCMJ; one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. R. at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022. The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined. Counsel has not yet started his review of Appellant's 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 29 June 2023.

Respectfully submitted,

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

29 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) LEO J. NAVARRO AGUIRRE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40354 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not 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 29 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]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354
	)	1 August 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 **7 September 2023**. The record of trial was docketed with this Court on 12 October 2022. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using lled substance, in violation of Article 113, UCMJ; and one charge, two specifications of n violation of Article 128, UCMJ.[1] Record (R.) at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances;

GRANTED
4 AUG 2023

[1] Appellant was charged, but acquitted of various specifications.

to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgement and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.*

The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined.

Counsel is currently assigned 25 cases; 13 cases are pending initial AOEs before this Court. Counsel has two cases pending certiorari before the Supreme Court. 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. Saul*, ACM 40341 – On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, UCMJ; one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty,

in violation of Article 90, UCMJ. R. at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022. The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined. Counsel has reviewed the entire record of trial and has started writing the AOE.

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 1 August 2023.

Respectfully submitted,

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

1 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) LEO J. NAVARRO AGUIRRE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40354 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 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]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 August 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354
	)	25 August 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 ninth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 October 2023**. The record of trial was docketed with this Court on 12 October 2022. From the date of docketing to the present date, 317 days have elapsed. On the date requested, 360 days will have elapsed.

On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ.[1] Record (R.) at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances;

[1] Appellant was charged, but acquitted of various specifications.

to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgement and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.*

The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined.

Counsel is currently assigned 26 cases; 13 cases are pending initial AOEs before this Court. Counsel has two cases pending certiorari before the Supreme Court, one pending CAAF supplement, and oral argument in at the CAAF in October. Counsel is also taking leave starting on Monday, 28 August and will not return until after the Labor Day holiday on Tuesday, 4 September 2023. Since his last EOT counsel has, *inter alia*, filed *United States v. Saul*, No. ACM 40341; filed a Reply Brief in *United States v. Casillas*, ACM No. 40302; led JAJA's two-day newcomers' training, and attended the two-day Joint Appellate Advocacy Training. Through no fault of Appellant, undersigned counsel had been working on other assigned matters before reaching Appellant's case. Counsel has started his initial review this case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. No Air Force Court case has priority over the present 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 25 August 2023.

Respectfully submitted,

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

28 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) LEO J. NAVARRO AGUIRRE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40354 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 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 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 August 2023.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40354**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Leo J. NAVARRO AGUIRRE	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 25 August 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) 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 30th day of August, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **7 October 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate a status conference.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO EXAMINE SEALED MATERIAL**
v.	)	Before Panel No. 2
Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354
	)	8 September 2023

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

Pursuant to Rules 3.1 and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully moves to examine the following sealed materials in Appellant's record of trial:

1. Appellate Exhibit XI, Defense Notice and Motion to Preadmit Evidence Under MRE 412, dated 21 February 2022, 13-page document (SEALED)[1]
    a. Presented or reviewed at trial: Record (R.) at 16
    b. Ordered sealed: R. at 16, 23, 175-76
2. Appellate Exhibit XII, Government Response to Defense Motion to Preadmit Evidence under MRE 412, dated 1 March 2022, eight-page document (SEALED)
    a. Presented or reviewed at trial: R. at 16
    b. Ordered sealed: R. at 16, 23, 175-76
3. Appellate Exhibit XIII, Victim's Counsel Response to Defense Notice and Motion to Preadmit Evidence under MRE 412, dated 2 March 2022, two-page document (SEALED)
    a. Presented or reviewed at trial: R. at 17
    b. Ordered sealed: R. at 16, 23, 175-76
4. Appellate Exhibit XIV, Ruling: Defense Motion to Admit Evidence Under Military Rule of Evidence 412, dated 15 March 2022, seven-page document (SEALED)
    a. Presented or reviewed at trial:
    b. Ordered sealed: R. at 23, 175-76
5. Appellate Exhibit XXVI: Defense Motion to Compel Production of Records Under MRE 513, dated 17 March 2022, 17-page document (SEALED)
    a. Presented or reviewed at trial: R. at 177
    b. Ordered sealed: R. at 178

[1] Undersigned Counsel copied the titles from the Exhibit Listing in Volume Two of the Record of Trial.

6. Appellate Exhibit XXVII, Government Response to Defense Motion to Compel Production of Records under MRE 513, dated 17 March 2022, six-page document (SEALED)
    a. Presented or reviewed at trial: R. at 177
    b. Ordered sealed: R. at 178
7. Appellate Exhibit XXVIII, VC (T.N.) Response to Defense Motion to Admit Evidence Under MRE 513, dated 20 March 2022, two-page document (SEALED)
    a. Presented or reviewed at trial: R. at 177-78
    b. Ordered sealed: R. at 178
8. Appellate Exhibit XXIX, E-Mail from Maj Gavin Johnson to Judge Brown, dated 20 March 2022, one-page document (SEALED)
    a. Presented or reviewed at trial: R. at 178
    b. Ordered sealed: R. at 178
9. Appellate Exhibit XXX, E-mail from Scott Lewis to Capt Michael Anderson, RE: Complaint Information, dated 17 March 2022, six-page document
    a. Presented or reviewed at trial: R. at 179
    b. Ordered sealed: R. at 179
10. Transcript pages:
    a. 18-22
    b. 30-58
    c. 87-96
    d. 104-106

The Military Judge did not issue an order sealing the relevant exhibits; rather, he ordered them to be sealed during the court-martial at the above noted record citations. Trial Counsel, Defense Counsel, and the Military Judge presented or reviewed these materials at trial at the above noted citations. *Id*.

Undersigned Counsel also gives notice to this Court that he has possession of the following sealed materials because the Government included them in his copy of the Record of Trial:

1. Appellate Exhibit XXVI: Defense Motion to Compel Production of Records Under MRE 513, dated 17 March 2022, 17-page document (SEALED)
    a. The Government did not seal or mark this motion as being sealed
    b. The Government placed the two discs mentioned on page 178 of the Record in a manilla envelope, but it did not mark the contents as being sealed
2. Appellate Exhibit XXVII, Government Response to Defense Motion to Compel Production of Records under MRE 513, dated 17 March 2022, six-page document (SEALED)

a. The Government did not seal or mark this motion as being sealed

3. Appellate Exhibit XXVIII, VC (T.N.) Response to Defense Motion to Admit Evidence Under MRE 513, dated 20 March 2022, two-page document (SEALED)
   a. The Government did not seal or mark this motion as being sealed
4. Appellate Exhibit XXIX, E-Mail from Maj Gavin Johnson to Judge Brown, dated 20 March 2022, one-page document (SEALED)
   a. The Government did not seal or mark this motion as being sealed
5. Appellate Exhibit XXX, E-mail from Scott Lewis to Capt Michael Anderson, RE: Complaint Information, dated 17 March 2022, six-page document
   a. The Government did not seal or mark this motion as being sealed
   b. The Government did not annotate on the Exhibit Listing that the Military Judge ordered the document to be sealed.
6. Transcript pages:
   a. 18-22
   b. 30-58
   c. 87-96
   d. 104-106
      i. The paper transcript of proceedings in the Record of Trial did not include the sealed pages; however, the electronic version on WebDocs included the sealed portions.

Undersigned Counsel has not reviewed the substance of any sealed materials; rather, Counsel only reviewed enough to verify that the pages were, in fact, sealed and then stopped reading. If this motion is granted, Defense Counsel requests to review the copies of the sealed materials he possesses in his office.

Pursuant to R.C.M. 1113(b)(3)(B)(i), "materials presented or reviewed at trial and sealed…may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities[.]" A review of the entire record is necessary because this Court is empowered by Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d), to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. §866, counsel must therefore examine "the entire record":

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does

> not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

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

The sealed material must be reviewed in order for counsel to provide "competent appellate representation." *Id*. Therefore, the examination of sealed materials is reasonably necessary to fulfill appellate defense counsel's responsibilities in this case, since counsel cannot perform his duty of representation under Article 70, UCMJ, 10 U.S.C. §870, without first reviewing the complete record of trial. Undersigned counsel needs to ensure the record of trial is complete and that the Defense Counsel's motions were handled correctly.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant motion.

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 8 September 2023.

Respectfully submitted,

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

11 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman First Class (E-3) LEO J. NAVARRO AGUIRRE, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40354 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Material. The United States does not object to Appellant's counsel reviewing the materials listed in Appellant's motion –which appear to have been available to all parties at trial – so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

The United States would not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this Court has first determined there is good cause for Appellant's counsel to do so under R.C.M. 1113.

WHEREFORE, the United States respectfully responds to Appellant's motion.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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 11 September 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40354**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Leo J. NAVARRO AGUIRRE	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 8 September 2023, Appellant's counsel submitted a Motion to Examine Sealed Material, requesting to examine Appellate Exhibits XI, XII, XIII, XIV, XXVI, XXVII, XXVIII, XXIX, XXX, and transcript pages 18–22, 30–58, 87–96, 104–106. Appellant's motion accurately states these appellate exhibits and transcript pages were ordered sealed by the military judge as reflected in the transcript, however, according to appellate defense counsel, Appellate Exhibits XXVI, XXVII, XXVIII, XXIX, and XXX, are not administratively sealed in Appellant's copy of the record of trial.

The same is true of the original record of trial. Appellate Exhibits XXVI, XXVII, XXVIII, XXIX, and XXX are also not sealed with the court in the original record of trial. We also note the beginning of page 106 of the transcript, which includes the end of a sealed Art 39a, UCMJ, hearing captured in pages 104–105 is also not sealed in the original record of trial. However, this page does not contain sensitive material. The Clerk of Court will ensure the exhibits are properly sealed.

Further, upon this court's review of the United States Air Force Judge Advocate General's Corps WebDocs knowledge management system, the court observes that all sealed transcript pages are not sealed and are available for anyone with access.

Appellant's counsel avers that viewing the sealed materials is reasonably necessary to fulfill his duty of representation, because counsel cannot perform his duty of representation without first reviewing the complete record of trial.

The Government responded to the motion on 11 September 2023. The Government does not object to Appellant's counsel reviewing materials that were released to both parties at trial, if the Government can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.).

The court finds appellate defense counsel has made a colorable showing that the sealed materials were reviewed by the parties at trial and review of the sealed appellate exhibits and sealed transcript pages is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 15th day of September, 2023,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Appellate Exhibits XI, XII, XIII, XIV, XXVI, XXVII, XXIII, XXIX, and XXX, and transcript pages 18–22, 30–58, 87–96, and 104–105**, subject to the following conditions: To view the sealed materials, counsel will coordinate with the court. No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.

It is further ordered:

The Government shall take all steps necessary to ensure all sealed exhibits are, in fact, sealed, and that any documents that were to be sealed in Appellant's case in the possession of any Government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.[*]

However, if appellate defense counsel and appellate government counsel currently possess Appellate Exhibits XXVI, XXVII, XXIII, XXIX, and XXX, counsel are authorized to retain copies of the materials in their possession until completion of our Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, review of Appellant's case, to include the period for reconsideration in accordance with Rule 31 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals. After this period, appellate defense and appellate government counsel shall destroy any retained copies in their possession.

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

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

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40354**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Leo J. NAVARRO AGUIRRE	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 15 September 2023, this court granted Appellant's Motion to Examine Sealed Material permitting counsel to view **Appellate Exhibits XI, XII, XIII, XIV, XXVI, XXVII, XXIII, XXIX, and XXX, and transcript pages 18–22, 30–58, 87–96, and 104–105.** It sealed Appellate Exhibits XXVI, XXVII, XXIII, XXIX, and XXX which were ordered sealed by the military judge at trial but not sealed in the record. It was then brought to the court's attention that references to Appellate Exhibit XXIII should have been Appellate Exhibit XXVIII; therefore, the court amends its order of 15 September 2023.

Accordingly, it is by the court on this 28th day of September, 2023,

ORDERED:

Counsel may view Appellant Exhibit XXVIII subject to the conditions in this court's earlier motion. If appellate defense counsel and appellate government counsel currently possess Appellate Exhibit XXVIII, counsel are authorized to retain copies of the material in their possession until completion of our Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, review of Appellant's case, to include the period for reconsideration in accordance with Rule 31 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals. After this period, appellate defense and appellate government counsel shall destroy any retained copies in their possession.

It is further ordered:

The Government shall take all steps necessary to ensure Appellant Exhibit XXVIII is, in fact, sealed, and that any documents that were to be sealed in Appellant's case in the possession of any Government office, Appellant, counsel

for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 2
Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354
	)	29 September 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 tenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 November 2023**. The record of trial was docketed with this Court on 12 October 2022. From the date of docketing to the present date, 352 days have elapsed. On the date requested, 390 days will have elapsed.

On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ.[1] Record (R.) at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances;

[1] Appellant was charged, but acquitted of various specifications.

to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgement and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.*

The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is not confined.

Counsel is currently assigned 26 cases; 14 cases are pending initial AOEs before this Court. Counsel has two cases pending certiorari before the Supreme Court, one pending CAAF supplement, and oral argument at the CAAF on 25 October 2023. Since his last EOT counsel took leave from Monday, 28 August through the Labor Day holiday until Tuesday, 4 September 2023; had four medical appointments; had five new-client phone calls; and drafted a 138-page Supreme Court Petition for a Writ of Certiorari.

Through no fault of Appellant, undersigned counsel had been working on other assigned matters before reaching Appellant's case. Counsel has reviewed Appellant's entire case file, including the transcript and the sealed materials. Has counsel has started to draft the AOE.

Appellant is aware of his right to speedy appellate review, extensions of time, consents to this extension of time. No Air Force Court case has priority over the present case.

On 30 August 2023, this Court granted Appellant's last request for an extension of time and stated that "any further requests for an enlargement of time may necessitate a status conference." If this Court orders a status conference, Counsel will tell the Court that he has the following deadlines that take precedent over, or must be completed in conjunction with, Appellant's case:

1. 3 October: CAAF Petition and Supplement to due CAAF in *United States v. Johnson*, No. ACM 40257, 2023 CCA LEXIS 330 (A.F. Ct. Crim. App. Aug. 9, 2023)

2. 4 October: Annual Fitness Assessment due

3. 5 October: Supreme Court Petition for Writ of Certiorari due in *United States v. Johnson*, No. 22-0280/AF, 2023 CAAF LEXIS 303 (C.A.A.F. May 8, 2023)

4. 6 October: Reply Brief due in *United States v. Saul*, ACM No. 40341

5. 12 October: Moot participation for *United States v. Driskill*, No. 23-0066/AF, 2023 CAAF LEXIS 284 (C.A.A.F. May 1, 2023)

6. 16 October: Moot for *United States v. Rocha*, No. 23-0134/AF, 2023 CAAF LEXIS 181 (C.A.A.F. Mar. 31, 2023)

7. 19 October: Supreme Court Petition for Writ of Certiorari due in *United States v. Cunningham*, __ M.J.__, No. 23-0027, 2023 CAAF LEXIS 520 (C.A.A.F. July 21, 2023), *Application for Extension of Time Filed*

8. 20 October: Moot for *United States v. Rocha*, No. 23-0134/AF, 2023 CAAF LEXIS 181 (C.A.A.F. Mar. 31, 2023) and moot participation for *United States v. Driskill*, No. 23-0066/AF, 2023 CAAF LEXIS 284 (C.A.A.F. May 1, 2023)

9. 25 October: CAAF oral argument for *United States v. Rocha*, No. 23-0134/AF, 2023 CAAF LEXIS 181 (C.A.A.F. Mar. 31, 2023)

10. 30 October: Moot participation for *United States v. Flores*, No. 23-0198/AF, 2023 CAAF LEXIS 518 (C.A.A.F. July 20, 2023)

11. Throughout the month of October, Counsel also has four medical appointments and 12 extensions of time to file with this Court

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 29 September 2023.

Respectfully submitted,

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

3 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) LEO J. NAVARRO AGUIRRE, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40354 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 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 5 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.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40354**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Leo J. NAVARRO AGUIRRE	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 29 September 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit his assignments of error, which would set a new deadline of **6 November 2023**, 390 days after Appellant's case was docketed with the court. On 3 October 2023, the Government entered an opposition to Appellant's motion, stating if "Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's nearly year-long delay practically ensures this [c]ourt will not be able to issue a decision that complies with our superior [c]ourt's appellate processing standards."

Appellant's case was docketed on 12 October 2022. The record of trial consists of 14 prosecution exhibits, 16 defense exhibits, 47 appellate exhibits, and 896 transcript pages. According to Appellant's motion, counsel for Appellant asserts "no Air Force Court [of Criminal Appeals] case has priority over the present case."

On 10 October 2023, the court held a status conference to discuss the progress of Appellant's case. Major Spencer R. Nelson, detailed appellate defense counsel in the above-captioned case, accompanied by Ms. Megan Marinos, Senior Counsel of the Appellate Defense Division, attended on behalf of the Appellant. Lieutenant Colonel James Ferrell, Director of the Appellate Government Counsel Division, attended on behalf of the Government. Appellate defense counsel clarified that he is the primary counsel of record in this case, as well as the primary advocate assigned to *United States v. Rocha*, which is set for oral argument before the United States Court of Appeals for the Armed Forces on 25 October 23. *See* No. 23-0134, __ M.J. __, 2023 CAAF LEXIS 181 (C.A.A.F. 31 Mar. 2023) (granting review). Appellate defense counsel further explained that he is in contact with Appellant, has Appellant's consent for this enlargement of time, is finalizing the assignments of error brief, and does not anticipate seeking another full 30-day enlargement of time, should this one be granted.

Accordingly, it is by the court on this 10th day of October 2023,

ORDERED:

Appellant's Motion for Enlargement of Time is **GRANTED**. Appellant shall file any assignments of error not later than **6 November 2023**. Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of his right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Airman First Class (E-3) **LEO J. NAVARRO AGUIRRE,** United States Air Force *Appellant*	)	No. ACM 40354 6 November 2023

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

ASSIGNMENTS OF ERROR

I.

WHETHER A1C NAVARRO AGUIRRE'S CONVICTION FOR WRONGFUL AMBIEN USE IS LEGALLY AND FACTUALLY SUFFICIENT WHEN: (1) HE HAD A VALID PRESCRIPTION FOR AMBIEN; (2) HE TOOK THE AMBIEN AS DIRECTED; (3) THE BASIS FOR HIS CONVICTION WAS A MEDICALLY-KNOWN SIDE EFFECT; AND (4) IT WAS THE FIRST TIME HE TOOK THE PRESCRIPTION.

II.

WHETHER A1C NAVARRO AGUIRRE'S GUILTY PLEA FOR RECKLESS DRIVING WAS PROVIDENT WHEN HE TOOK HIS PRESCRIBED DOSE OF AMBIEN, FELL ASLEEP IN HIS BED, AND "THE NEXT THING [HE] REMEMBER[ED] IS BEING BEHIND THE WHEEL OF [HIS] CAR."

III.

WHETHER A1C NAVARRO AGUIRRE WAS ENTITLED TO A UNANIMOUS VERDICT.

STATEMENT OF THE CASE

On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting at a general court-martial at Joint Base Lewis-McChord, Washington, convicted

Airman First Class (A1C) Navarro Aguirre of one charge, one specification of failure to obey a lawful order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ.[1] R. at 209, 849.

The Military Judge sentenced A1C Navarro Aguirre to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances; to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgment and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved A1C Navarro Aguirre's request for waiver of all automatic forfeitures for a period of six months and directed them to his spouse. *Id.*

STATEMENT OF FACTS

Care *Inquiry for Reckless Driving*

A1C Navarro Aguirre's Ambien use forms the basis for both his wrongful use charge under Article 112a, UCMJ, and his reckless driving charge under Article 113, UCMJ. R. at 407, 409. A1C Navarro Aguirre pled guilty to reckless driving except for the words "and aerosol inhalants."

[1] A1C Navarro Aguirre was charged with, but acquitted of, various specifications. R. at 849.

R. at 196-97. A1C Navarro Aguirre did *not* plead guilty to wrongful Ambien use. R. at 182.

Part of his explanation for driving recklessly was that a nurse practitioner "prescribed Ambien the day before . . . to help [him] sleep." *Id.* A1C Navarro Aguirre worked a standard shift the day he took the Ambien, which ended at between 1430 and 1630. R. at 198, 623. He took the "prescribed dose of one pill" because he "hadn't slept in almost two-days." R. at 198. A1C Navarro Aguirre fell asleep in his bed and the next thing he remembered was being in the driver's seat of his car with police officers talking to him. R. at 198. This occurred at approximately 1800-1830. R. at 547, 582. He remembered feeling "dazed, groggy, slow, and having a hard time understanding the police officers." R. at 205. The Military Judge initially accepted his plea of guilty, but reopened it after the Government's case-in-chief for additional inquiry. R. at 208, 860.

The Government and Defense Cases for Reckless Driving

Because A1C Navarro Aguirre did *not* plead guilty to the words "and aerosol inhalants," the Government called four witnesses to develop the facts surrounding A1C Navarro Aguirre's alleged reckless driving. R. at 574, 581, 595, 601. The officer who spoke with A1C Navarro Aguirre at the scene said that A1C Navarro Aguirre admitted, "Yeah I took me some Ambien." R. at 588. Nothing more was said about the Ambien to the police officer. *Id.* The paralegal who inventoried A1C Navarro Aguirre's car—75-days after the incident—found the prescription information sheet for the Ambien in the car. R. at 596-97, 599; Pros. Ex. 5. The Government did not find an Ambien bottle or Ambien pills in A1C Navarro Aguirre's car. *Id.*; *see also* R. at 661, 803.

The nurse practitioner who prescribed the Ambien to A1C Navarro Aguirre testified that A1C Navarro Aguirre had "a medical purpose" and an "authorization" to use the Ambien on the day in question. R. at 630. Typically Ambien should be used "30 minutes before bedtime," but

"some people have shift work, so sometimes it can be different times of day." R. at 632. The nurse practitioner also stated that if a person who has a prescription for Ambien takes it an hour or two before bedtime, the prescription would not be invalidated or make the use "illegal." R. at 633.

Argument on the R.C.M. 917 Motion

Under Rule for Courts-Martial (R.C.M.) 917, the Defense Counsel requested a finding of not guilty for A1C Navarro Aguirre's prescribed Ambien use. R. at 658. Defense Counsel argued that not only did the Government fail to show that A1C Navarro Aguirre's use of Ambien was wrongful, but "there is significant evidence to the contrary in the form of the prescription provided." *Id.* The Government conceded that A1C Navarro Aguirre had a valid prescription for Ambien. R. at 407, 658.

During the argument on the R.C.M. 917 motion, the Government made two broad points. First, A1C Navarro Aguirre's use was wrongful because he did not take the Ambien "right before bed." R. at 658. Defense Counsel countered by arguing that the nurse practitioner testified that as long as the correct dose was taken, the timing of the use would not "invalidate the [p]rescription or make the use illegal." R. at 659. The second point the Government made was that A1C Navarro Aguirre's actual prescription (the paper) was found in his car, he told the cop he took Ambien, and he was in his military uniform when pulled over. R. at 660. The Government conceded, "We don't have any eyewitnesses or any testimony or rather recorded statements from Airman Navarro himself saying 'I openly admit I am not using this for the correct purpose.'" *Id.* The Defense Counsel's response to the Government's second argument was:

> So is it the government's sole evidence of wrongful use that he had a sheet of paper saying he was authorized to have the medication in his car 75-days later? I don't believe that that meets the standard even in the light most favorable to the government. Now, as for the timing thing, right, it doesn't make it illegal [for] him to take it at whatever [time].

R. at 661. In denying the motion, the Military Judge said:

> The government provided the testimony of [M.D.], [M.C.], [E.P.], and [A.S.] to establish the manner in which the accused was allegedly driving, the time of day it was, what he was wearing, whether he was on shift work, statements allegedly made by the accused to [M.C.], and photographs of the accused's vehicle at a later time.

R. at 663.

The Military Judge instructed the members that "[u]se of a controlled substance is not wrongful if the controlled substance is prescribed by a doctor and the use of the substance is for the medical purpose prescribed." R. at 724. The members found A1C Navarro Aguirre not guilty of the words "and aerosol inhalants" for the reckless driving charge, but found him guilty of wrongful use of Ambien. R. at 849. After the members found A1C Navarro Aguirre guilty of wrongful Ambien use, the Defense Counsel moved the Court to reconsider its original R.C.M. 917 ruling. R. at 856-61. The Military Judge denied the defense's motion again because "the Court finds that the substance was prescribed to assist in sleeping, but it was for sleeping at night or at least for when sleep would be uninterrupted for several hours." R. at 862.

The Care *Inquiry Reopened*

Based on the "subject of the [R.C.M. 917 reconsideration] motion," the Military Judge reopened the *Care* inquiry. *Id.* The Military Judge recognized that there was "something of a defense of automatism, so if someone has sort of involuntary action, so if they have a seizure or an involuntary act, then there's no reason for the law to criminalize that." R. at 862. Defense Exhibit Alpha, the Food and Drug Administration (FDA) Ambien Information Sheet, specifically referred to "sleep-driving." R. at 863. The Military Judge was concerned that A1C Navarro Aguirre was sleeping while driving. *Id.*

A1C Navarro Aguirre stated that he believed he was in physical control of the vehicle, even though he was under the influence of Ambien. R. at 865-66. When the military judge asked him why, A1C Navarro Aguirre responded with three main points: First, he had to take certain actions to get into the car and then to drive the car (put shoes on, get car keys, start the car, etc.); second, from witness testimony he knew he was driving the car; and third, when his memory "kicks back in" it "didn't feel like waking up from sleep." R. at 866. He said all of this despite not "remember[ing] the facts." R. at 867. A1C Navarro Aguirre believed he was "aware" of certain voluntary actions like honking and music playing; he "believe[d] those [were] voluntary actions." R. 868. Based on A1C Navarro Aguirre's additional statements, the Military Judge accepted his plea as provident. *Id.*

ARGUMENT

I.

A1C NAVARRO AGUIRRE'S CONVICTION FOR WRONGFUL AMBIEN USE IS NOT LEGALLY AND FACTUALLY SUFFICIENT WHEN: (1) HE HAD A VALID PRESCRIPTION FOR AMBIEN; (2) HE TOOK THE AMBIEN AS DIRECTED; (3) THE BASIS FOR HIS CONVICTION WAS A MEDICALLY-KNOWN SIDE EFFECT; AND (4) IT WAS THE FIRST TIME HE TOOK THE PRESCRIPTION.

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 and Analysis

This Court may only affirm findings it determines are "correct in law and fact[.]" Article 66(d), UCMJ, 10 U.S.C. § 866(d). The elements for unlawful use of a controlled substance under Article 112a(b), UCMJ, 10 U.S.C. § 912a(b) are: (1) that the accused used a controlled substance;

and (2) the use was wrongful. "Wrongful" means that use is done "without legal justification or authorization." *Id.* at (c)(5).

I. Factual Sufficiency: A1C Navarro's Testimony and the Scientific Literature Cast Reasonable Doubt on the Conviction for Ambien Use

Factual sufficiency requires this Court to determine "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, *the members of [the Court] are themselves convinced of the appellant's guilt beyond a reasonable doubt*." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (emphasis in original). A review for factual sufficiency "involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *Washington*, 57 M.J. at 399. "In the military justice system, where servicemembers accused at court-martial are denied some rights provided to other citizens, [this Court's] unique factfinding authority is a vital safeguard designed to ensure that every conviction is supported by proof beyond a reasonable doubt." *United States v. Rivera*, No. ACM 38649, 2016 CCA LEXIS 92, at *8 (A.F. Ct. Crim. App. 18 Feb. 2016) (unpub. op.). This authority "provide[s] a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004).

a. This Court Should Consider A1C Navarro Aguirre's Care *Inquiries*

The Court of Appeals for the Armed Forces (CAAF) has stated that factual sufficiency is "is limited to the evidence presented at trial." *United States v. Dykes*, 38 M.J. 270, 272 (C.A.A.F. 1993). Unlike legal sufficiency, the decision to limit factual sufficiency review to evidence produced at trial does not come from Supreme Court precedent; rather, it comes from the Court of

Military Appeals' (CMA) analysis of Article 66, UCMJ, which stated that the review must be based on the "entire record." *United States v. Bethea*, 46 C.M.R. 223, 225 (U.S. C.M.A. 1973).[2]

In *Bethea*, the CMA held that a Court of Criminal Appeals could consider "a statement of the matters considered by the convening authority in his action on the sentence." *Id.* It also held that "evidence not presented at the trial cannot be used to support or reverse a conviction." *Id.* Its rationale was threefold: First, "the resort to matters not produced at trial served to benefit the appellant;" second, evidence should be "exposed to cross-examination or the right to cross-examine;" and third, Congress intended this result. *Id.* (citing *United States v. Lanford*, 20 C.M.R. 87, 97 (U.S. C.M.A. 1955)).

Given that the rule to limit evidence was intended to benefit an appellant, a military judge "should ordinarily defer informing the members of the offense to which the accused pleaded guilty until after the findings." R.C.M. 913(a). One exception is if the accused specifically requests that the members be informed. *Id.* at Discussion. In this case, A1C Navarro Aguirre informed the members before findings that he pled guilty to reckless driving. R. at 399.

In this Court's factual sufficiency review, it should consider the statements that A1C Aguirre Navarro made during his *Care* inquiry. Specifically, that he took the "prescribed dose of one pill" and "fell asleep in bed in [his] apartment." R. at 197-98. Not only was the Military Judge aware of the guilty plea, but so were the members. Additionally, A1C Navarro Aguirre

[2] The earliest offense for which A1C Navarro Aguirre was convicted was 9 May 2020. As such, this Court should conduct its factual and legal sufficiency review under the 2019 *Manual for Courts-Martial* version of Article 66, UCMJ. *See* William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021, Pub. L. 116-283, § 542(e)(2), 134 Stat. 3388, 3612–13 (2021) (setting the effective date of changes to Article 66, UCMJ, to require that every offense occur after the date of the law's enactment, which was 1 January 2021).

affirmatively consents to this Court reviewing his *Care* inquiry to determine whether his conviction for Ambien use is factually sufficient.

Apart from A1C Navarro Aguirre's consent, however, is the fact that a review of his *Care* inquiry would fall directly under Article 66(d)'s plain language that this Court only affirm "such findings of guilty . . . as the Court finds correct in law and fact . . . on the basis of *the entire record*." (emphasis added). The *Care* inquiry was also "evidence presented at trial" under *Bethea*. 46 C.M.R. at 225. Most importantly, however, is that A1C Navarro Aguirre's statements in the *Care* inquiry met the rationale of *Bethea*: they were subject to cross examination, the Government could challenge the admissibility of the statements, and the Government could test the trustworthiness of the statements. *Id.* Not only did the Government have these rights, but it also used them. First, the Government challenged A1C Navarro Aguirre's statements that he did not use aerosol inhalants and tried to prove up that language. Second, it was given the opportunity to ask A1C Navarro Aguirre questions during his *Care* inquiry via the Military Judge, but declined to do so. R. at 208, 868.

b. A1C Navarro Aguirre was "Sleep-Driving," not Wrongfully Using Drugs

This Court should not be convinced that A1C Navarro Aguirre wrongfully used Ambien because the entire record reveals what happened: He suffered from a side effect of Ambien known as "Sleep-driving." Def. Ex. A. The first full paragraph of the FDA Ambien Information sheet warned about "sleep-driving":

WARNING: COMPLEX SLEEP BEHAVIORS

See full prescribing information for complete boxed warning.

Complex sleep behaviors including sleep-walking, sleep-driving, and engaging in other activities while not fully awake may occur following use of AMBIEN. Some of these events may result in serious injuries, including death. Discontinue AMBIEN immediately if a patient experiences a complex sleep behavior. (4, 5.1)

Id. at 1 (emphasis added). This warning box is copied on page 3 of the FDA Ambien Information Sheet.

The FDA Ambien Information Sheet explains three items that are present in A1C Navarro Aguirre's case. First, "Complex Sleep Behaviors," such as "sleep-driving" can occur on the very *first* use of Ambien. *Id.* at 4. This was the first time A1C Navarro Aguirre used Ambien so he did not have prior knowledge that he would have this side-effect. This Court should not find evidence of wrongfulness given that he suffered an involuntary medical reaction—especially on the first time he used it.

Second, individuals who suffer from these side effects "usually do not remember these events" even though the events can "injure others" and "may result in a fatal outcome." *Id.* That is also true in A1C Navarro Aguirre's case. He stated that "after a little while, I fell asleep in bed in my apartment. The next thing I remember is being behind the wheel of my car . . . A police car was behind me. The police officers talked with me." R. at 198. This statement makes sense in the context of the science surrounding the side effects of Ambien. Specifically, that A1C Navarro Aguirre would not know what happened while he was driving, even though he caused damage with his vehicle. This Court should not infer wrongfulness based on actions that were a result of taking the drug in question.

Third, the FDA Ambien Information Sheet made clear that you "may get up out of bed *while not being fully awake* and do an activity that *you do not know you are doing*." Def. Ex. A at 24 (emphases added). The drug maker's explanation that an individual does not know what they are doing should be fatal to the Government's wrongfulness argument. This Court cannot find that A1C Navarro Aguirre's conviction is correct in law and fact when the drug maker has fully admitted that takers of its drug are not cognizant of their actions—criminal or otherwise. The nurse practitioner even explained that Ambien is a "hypnotic in addition to providing sleep." R. at 63. Even during his *Care*, A1C Navarro Aguirre admitted that he "was not in complete control of [his] faculties." R. at 204. Because the science indicates that A1C Navarro Aguirre was not fully awake and did not know what he was doing, this Court should not be convinced that he wrongfully used Ambien.

Finally, one of the Government's main arguments for wrongfulness should not convince this Court. It argued A1C Navarro Aguirre "was found high driving on the roads at 6:00 o'clock in the afternoon, an hour and a half later, in his military uniform not even at home yet." R. at 858. What seemed clear to the Government was that "the accused was getting high before ever even getting home." *Id.* This theory is unlikely because it only took approximately 15 minutes for A1C Navarro Aguirre to drive from Joint Base Lewis-McChord to his apartment. R. 192. *See also* Motion to Attach; Alternatively, Motion for Leave to File for Judicial Notice, dated 6 November 2023. The Government also oversold this theory because taking Ambien from a medical provider to remedy a sleep disorder is not "getting high." Thus, what is more likely to have happened is what he told the Military Judge during his *Care* inquiry: He drove home, was tired from not sleeping for two-days, took Ambien, and fell asleep on his bed after removing his blouse and boots.

R. at 197-98. A theory that A1C Navarro Aguirre drove around—recklessly—for at least two-hours before he was observed is a tortuous reading of the facts and strains common sense.

II. This Court Must Analyze Legal Sufficiency Reasonably, Fairly, and Rationally

In *Jackson v. Virginia*, this Court held that "the [*Thompson v. Louisville*, 362 U.S. 199 (1960)] 'no evidence' rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt." 443 U.S. 307, 320 (1979). In rejecting *Thompson*, the Court embraced *In re Winship*, 397 U.S. 358 (1970), noting that "the record in *Winship* was *not totally devoid of evidence of guilt*." *Id.* at 315 (emphasis added). Later, this Court explained that the Due Process Clause sets "a lower limit on an appellate court's definition of evidentiary sufficiency." *Tibbs*, 457 U.S. at 45. Thus, *Jackson* stands for the proposition that a conviction can be legally insufficient—even with some evidence presented—if it falls below the "lower limit" of evidentiary sufficiency.

Thus, for legal sufficiency, "the relevant question 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). Despite this deferential standard, the Supreme Court in *Jackson* repeatedly explained that the legal sufficiency test is not "simply a trial ritual." 443 U.S. at 316-17. For example:

- "A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will *rationally* apply that standard to the facts in evidence." *Id.* at 317 (emphasis added).
- "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt." *Id.* at 318 (emphasis added).
- "This familiar standard gives full play to the responsibility of the trier of fact *fairly* to resolve conflicts in the testimony, to weigh the evidence, and to draw *reasonable* inferences from basic facts to ultimate facts." *Id.* at 319 (emphases added).

In his concurrence, Justice Stevens was concerned that this new test could not only do constitutional harm, but that it could also just become a "meaningless shibboleth." *Id.* at 328.

There are four reasons why the Government's evidence did not meet the quantum necessary to have convinced "*any* rational trier of fact" of the element of wrongfulness. First, determining wrongfulness based on a drug's effect, is not reasonable, fair, or rational under *Jackson*. This is what the Military Judge did when he found wrongfulness because of "the manner in which the accused was allegedly driving." R. at 663, 861. If the Military Judge's logic governed in every case, then there would be no innocent ingestion cases such as cocaine being put in someone's drink. This is because the Government could then simply argue that an accused did not act normally when under the influence of the drug. An inverse example would also be true: If an accused put a date rape drug in an alleged victim's drink, a military judge would not allow the defense counsel to argue the effects of the drug to say that the alleged victim voluntarily consumed the date rape drug. Given that A1C Navarro Aguirre's defense was that he had a valid prescription for the Ambien—which the Government conceded—this Court should reject the Military Judge's reasoning because it is not rational given the circumstances of this case.

Second, considering the time of day to find wrongfulness is not fair under *Jackson*. The nurse practitioner stated that if a person who has a prescription for Ambien takes it an hour or two hours before bedtime, the prescription would not be invalidated or make the use "illegal." R. at 633. A1C Navarro Aguirre said that he had not slept "in almost two-days" so he went to bed after he got home from work. R. at 198. Despite this, the Military Judge denied the R.C.M. 917 motion based on "the time of day it was." R. at 663. This went directly against the testimony of the nurse practitioner. On reconsideration, the Military Judge denied the motion for the same reasons, but included "the Court finds that the substance was prescribed to assist in sleeping, *but it was for*

sleeping at night or at least sleeping for when sleep would be uninterrupted for several hours." R. at 862 (emphasis added). The Military Judge's conclusion was wrong. The nurse practitioner never stated that the prescription was for "sleeping at night" because she recognized that "some people have shift work, *so sometimes it can be different times of day*, but typically about 30 minutes before they go to bed." R. at 632 (emphasis added). Notably, A1C Navarro Aguirre's shift had ended for the day so he could have slept "uninterrupted for several hours." R. at 862.

Third, the rest of the Government's evidence and the Military Judge's rationale (what A1C Navarro Aguirre was wearing, statements he made to the police officer, and photographs of his car vehicle taken at a later time) do not even offer a foothold for a rational factfinder to find wrongfulness, even when viewed in a light most favorable to the Government. For example, A1C Navarro Aguirre only told the police officer, "Yeah I took me some Ambien." R. at 588. He did not say when or where he took it. The fact that A1C Navarro Aguirre was in his military t-shirt, likewise, does not prove wrongfulness given that he could have fallen asleep in it. Finally, the fact that the Government found the prescription label in the car 75-days after the offense does not "rationally" or "reasonably" support a finding of guilt beyond a reasonable under the *Jackson* standard. As the Defense Counsel argued:

> So is it the government's sole evidence of wrongful use that he had a sheet of paper saying he was *authorized* to have the medication in his car 75-days later? I don't believe that that meets the standard even in the light most favorable to the government.

R. at 661 (emphasis added).

Fourth, this Court has the FDA Ambien Information Sheet which states that sleep-driving is a real phenomenon. Def. Ex. A at 24. As such, to "*fairly* to resolve conflicts in the testimony, to weigh the evidence, and to draw *reasonable* inferences from basic facts to ultimate facts," means that this Court should find that A1C Navarro Aguirre's use was not wrongful. *Jackson*, 443 U.S.

at 319 (emphasis added). Rather, the fair and reasonable explanation, even in the light most favorable to the Government, is that A1C Navarro Aguirre was sleep-driving. So, in the words of the FDA Ambien Information Sheet, he did "not know [what he was] doing." Def. Ex. A at 24. A1C Navarro Aguirre "was not in complete control of [his] faculties." R. at 204. Stated differently, in the words of the Military Judge, "so if they have a seizure or an involuntary act, then there's no reason for the law to criminalize that." R. at 862.

WHEREFORE, A1C Navarro Aguirre requests that this Honorable Court set aside and dismiss his conviction for wrongful Ambien use.

II.

A1C NAVARRO AGUIRRE'S GUILTY PLEA FOR RECKLESS DRIVING WAS NOT PROVIDENT WHEN HE TOOK HIS PRESCRIBED DOSE OF AMBIEN, FELL ASLEEP IN HIS BED, AND "THE NEXT THING [HE] REMEMBER[ED] IS BEING BEHIND THE WHEEL OF [HIS] CAR."

Standard of Review

This Court reviews a military judge's decision to accept a guilty plea for an abuse of discretion; however, this Court reviews de novo the military judge's legal conclusion that an appellant's plea was provident. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A military judge abuses his discretion when there is a "substantial basis" in law and fact "for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.A.A.F. 1991).

Law and Analysis[3]

"The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts." *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *United States v. Care*, 40 C.M.R. 247, 250–51 (C.M.A. 1969)). This Court examines "the totality of the circumstances of the providence inquiry, including the stipulation of fact, as well as the relationship between the accused's responses to leading questions and the full range of the accused's responses during the plea inquiry." *United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009).

To find A1C Navarro Aguirre guilty of the reckless driving, the Military Judge had to be convinced beyond a reasonable doubt of the following elements:

(1) A1C Navarro Aguirre was in physical control of a vehicle; and

(2) A1C Navarro Aguirre's control of said vehicle was reckless.

R. at 196. "Reckless" means:

> [A] degree of carelessness greater than simple negligence . . . Recklessness, on the other hand, is a negligent act *combined with a culpable disregard* for the foreseeable consequences to others. Reckless means that your manner of operation or control of the vehicle was under all the circumstances of such a heedless nature that it actually or imminently made it dangerous to the occupant or occupants of the vehicle or to the rights or safety of others or of another.

R. at 196-97 (emphasis added).

I. The Military Judge's Basis in Law for Accepting the Guilty Plea was Erroneous

A conviction based on a legal standard that does not constitute an offense is legally insufficient. *United States v. Shavrnoch*, 49 M.J. 334, 338–39 (C.A.A.F. 1998). Here, the Military

[3] As the facts and legal considerations significantly overlap for both issues, A1C Navarro Aguirre respectfully requests that this Court consider the Arguments he made for factual and legal sufficiency in Issue I for Issue II as well.

Judge disregarded the definition of "recklessness" which is a "substantial basis" in law for this Court to question the guilty plea. *Prater*, 32 M.J. at 436. Specifically, "recklessness" requires a "culpable disregard" for the "foreseeable consequences to others." R. at 196-97. Here, A1C Navarro Aguirre: (1) had a medical side effect; (2) on the *first-time* he took a prescribed drug; and, as such, (3) was not "fully awake and [did] an activity that [he did] not know [he was] doing." Def. Ex. A at 24. He did not have a culpable disregard for the foreseeable consequences because he did not know he was susceptible to sleep-driving. Even the drug maker educates the public that an individual who has this side effect does "not know" what they "are doing." As such, A1C Navarro Aguirre was not "reckless."

Black's Law Dictionary defines "recklessness" slightly differently, but with the same result:

> *The state of mind accompanying an act*, which either pays no regard to its probably or possibly injurious consequences, or which, though forseeing such consequences, persists in spite of such knowledge. Recklessness is a stronger term than mere or ordinary negligence, and to be reckless, the conduct must be such as to evince disregard of or indifference to the consequences, under circumstances involving danger to life or safety of others, although no harm was intended.

Recklessness, BLACK'S LAW DICTIONARY (6th ed. 1990) (emphasis added). A1C Navarro Aguirre did not have the "state of mind" to "evince disregard of or indifference to the consequences" because this was an involuntary, medical side effect. *Id.* In the words of the Military Judge, "so if they have a seizure or an involuntary act, then there's no reason for the law to criminalize that." R. at 862.

It is dispositive that the Military Judge recognized the defense of automatism, but then ignored its definition. R. at 862. He never instructed on or asked A1C Navarro Aguirre about automatism. R. at 865-68. The Electronic Benchbook explains, "An accused may not be held criminally liable for his acts unless they are voluntary. An act is not voluntary if it is a reflex or

convulsion or a bodily movement *during unconsciousness or sleep*. Military Judge's Benchbook, Dept of the Army Pamphlet 2.24 at 5-21 (25 Oct 2023). Here, A1C Navarro Aguirre was asleep and unconscious; therefore, his actions align with automatism, not recklessness. The Military Judge's use of a recklessness *mens rea* vice automatism is incurable because "[a]n essential aspect of informing Appellant of the nature of the offense is a correct definition of legal concepts." *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004) (finding the plea improvident because the military judge used an incorrect definition of "obscene").

II. The Military Judge's Basis in Fact for Accepting the Guilty Plea was Erroneous

The factual basis for A1C Navarro Aguirre's guilty plea was that he: (1) had a valid, authorized prescription for Ambien; (2) it was the first time he used Ambien; (3) he did not have to report to work for over 8-hours as he just finished a shift; (4) he fell asleep in his bed after taking the Ambien; and (5) the scientific and medical consensus is that "sleep-driving" while taking Ambien is a real medical side effect. R. at 197-98, 629, 633; Def. Ex. A. Those facts do not criminalize A1C Navarro Aguirre's conduct.

Without belaboring the point, the biggest factual issue that the Military Judge considered, but did not adequately resolve, was why A1C Navarro Aguirre's actions were voluntary and not "sleep-driving" as the FDA Ambien Information Sheet said can occur. However, the Military Judge also made another mistake as it relates to the facts: He considered the FDA Ambien Information Sheet from the cases-in-chief to reopen the *Care* Inquiry, but failed to consider other important facts from the case-in-chief. For example, he did not consider the nurse practitioner's testimony from the case-in-chief that Ambien can be taken anytime during the day because "some people have shift work, so sometimes it can be different times of day." R. at 632. This would suggest that A1C Navarro Aguirre was not reckless from the outset of his conduct by taking

Ambien after his shift ended, but before what might be viewed as a traditional 2100 or 2200 bed-time—traditional at least for someone who had not been sleep-deprived for two straight days. Finally, as explained in the next section, the Military Judge ignored the explanations on the FDA Ambien Information Sheet that Ambien can cause "abnormal thinking." Def. Ex. A at 5.

III. The Military Judge Failed to Consider "How the Law Relates to [the] Facts"

"The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts." *Medina*, 66 M.J. at 26 (citing *Care*, 40 C.M.R. at 250–51). The Military Judge failed to realize that A1C Navarro Aguirre's recollection after he fell asleep was compromised because of the Ambien. As such, the Military Judge should have realized that relying solely on A1C Navarro Aguirre's testimony to find the plea provident was not a proper application of law to the facts. The Military Judge should have realized the law demands more when an accused's memory is compromised, when automatism is at issue, and when an expert can and should shed light on medical side effects. In other words when a charge may implicate legal conduct (taking prescribed Ambien), medical side effects that require medical explanation (sleep-driving), and criminal conduct (reckless driving), more is required under the reasonable doubt standard than speculative statements from an accused about his guilt.

The FDA Ambien Information Sheet stated, "abnormal thinking" had been reported in patients taking "sedative/hypnotics, including Ambien." Def. Ex. A at 5. Visual and auditory hallucinations can occur. *Id.* Equally troubling is that memory problems had been observed in some studies. *Id.* at 21. Patients had a "significant decrease" in the recall of information the next day for information that was presented to them during "peak drug effect (90 minutes post dose)." *Id.* The "significant decrease" was actually "anterograde amnesia." *Id.* Thus, it is not a surprise

that A1C Navarro Aguirre stated that after he fell asleep, the "next thing" he remembered was "being behind the wheel of [his] car" with a police car parked behind him. R. at 198.

Because the Military Judge read the FDA Ambien Information Sheet, it is troubling that he would reopen the *Care* inquiry, and still find the plea provident, when he knew that Ambien users may experience "anterograde amnesia." Def. Ex. A at 21. Equally troubling is that A1C Navarro Aguirre already told the Military Judge that he did not have "any memory" between sleeping and talking to the police officers. R. at 199. Regardless, this Court should question whether A1C Navarro Aguirre's answers during the reopened *Care* inquiry were even reliable given the scientific information stating that memory can be compromised.

A1C Navarro Aguirre's answers to the Military Judge's questions indicated that he was not sure what happened, but was speculating. For example, when the Military Judge asked him why the thought he was in control of the vehicle, A1C Navarro Aguirre stated that he remembered taking his shoes off before getting into bed, so he "would have had to" put on his shoes before he started driving. By using the third conditional grammar tense ("would have had to") A1C Navarro Aguirre was implicitly stating that he had no actual memory of what happened. He was guessing. To continue answering the question, he relied on the phrase "from witness testimony" twice. R. at 866. In response to another question, he stated, "so it's possible that I went out and drive [*sic*] voluntarily" and "I think that was my motive." R. at 866. Given A1C Navarro Aguirre's equivocal answers, this Court has a substantial basis for questioning the providence of the plea.

Finally, A1C Navarro Aguirre was not qualified to make certain conclusions and the Military Judge should have ignored them. For example, A1C Navarro Aguirre stated, in regard to memory and sleep, "[I]t feels more like I just wasn't storing what was going on. Kind of feels like

a blackout." R. at 866. He also said, "[U]pon coming to, it didn't feel like I was asleep. Just felt more like my memory just kind of kicks back in for a period." R. at 867. While A1C Navarro Aguirre was free to express his feelings as he remembered them, he was not qualified to opine on whether he was sleeping and how his memory was functioning under Ambien. Those are questions for expert witnesses, such as a medical doctor and a forensic toxicologist. The Military Judge should have realized this when he was considering "how the law relates to those facts." *Medina*, 66 M.J. at 26 (citing *Care*, 40 C.M.R. at 250–51).

WHEREFORE, A1C Navarro Aguirre requests that this Honorable Court find his guilty plea for reckless driving to be improvident.

III.

A1C NAVARRO AGUIRRE WAS ENTITLED TO A UNANIMOUS VERDICT.

Additional Facts

On 15 February 2022, A1C Navarro Aguirre moved for a unanimous verdict. App. Ex. VIII. Specifically, his Counsel requested that the Military Judge "require that the members return a unanimous verdict and to modify the member instructions accordingly." *Id.* at 1. On 17 March 2022, the Military Judge denied A1C Navarro Aguirre's motion. App. Ex. X. A1C Navarro Aguirre chose to be tried by officer and enlisted members. R. at 181.

Standard of Review

This Court tests instructional errors with constitutional dimensions for prejudice under the standard of harmless beyond a reasonable doubt. *United States v. Upshaw*, 81 M.J. 71, 74 (C.A.A.F. 2021) (citation omitted). This standard is met "where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." *Id*. (quotations and citations omitted).

Law and Analysis

In *Ramos*, the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1551 (2021). Instead, *Ramos* held that the Due Process Clause of the Fourteenth Amendment required applying the same jury-unanimity rule to state convictions for criminal offenses that already applied to federal (civilian) convictions under the Jury Trial Clause of the Sixth Amendment. 140 S. Ct. at 1397. As the Supreme Court reiterated, in so holding, *Ramos* unequivocally broke "momentous and consequential" new ground. *See Edwards*, 141 S. Ct. at 1559; *see also id*. at 1555–56 (noting that "[t]he jury-unanimity requirement announced in *Ramos* was not dictated by precedent or apparent to all reasonable jurists" beforehand). Indeed, the *Edwards* majority recognized that *Ramos* was on par with other "landmark" cases of criminal procedure "like *Mapp*, *Miranda*, *Duncan*, *Batson*, [and] *Crawford* . . . ." *Id*. at 1559. Although the CAAF held that unanimous verdicts were not required in *United States v. Anderson*, 82 M.J. 440, No. 22-1093/AF, 2022 CAAF LEXIS 529 (C.A.A.F. 25 Jul. 2022), *petition for cert filed*, No. 23-437, (Oct. 26, 2023), two Petitions for a Writ of Certiorari have been filed asking the Supreme Court to review the decision. *United States v. Martinez*, No. 22-0165/AF, 2023 CAAF LEXIS 494 (C.A.A.F. July 18, 2023), *petition for cert. filed*, No. 23-242, (Sept. 8, 2023).

WHEREFORE, A1C Navarro Aguirre requests that this Court set aside the findings and sentence of the court-martial.

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 6 November 2023.

Respectfully submitted,

[redacted]

S N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO ATTACH; ALTERNATIVELY, MOTION FOR LEAVE TO FILE FOR JUDICIAL NOTICE**
v.	)	Before Panel No. 2
Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE,** United States Air Force, *Appellant.*	)	No. ACM 40354
	)	6 November 2023

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

Pursuant to Rules 6(b)(2), 17.1(e), 17.2(c)(D), 23(b), and 23(d) of this Honorable Court's Rules of Practice and Procedure, the Appellant, Airman First Class (A1C) Leo Navarro Aguirre, respectfully moves to attach the following document to the Record of Trial: Appendix A, Google Maps Drive Time, dated 2 November 2023.

The Government charged and convicted A1C Navarro Aguirre of wrongful use of Ambien, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), and reckless driving, in violation of Article 113, UCMJ. R. at 209, 849. Appendix A is relevant and necessary to resolve Assignments of Error I and II, which pertain to the aforementioned charges.

First, Appendix A is relevant because the Government argued at trial that A1C Navarro Aguirre's use of Ambien was wrongful because he took the Ambien around 1630 at Joint Base Lewis-McChord and then drove home. R. at 858. As such, the Government argued, A1C Navarro Aguirre "was found high driving on the roads at 6:00 o'clock in the afternoon, an hour later, in his military uniform not even at home yet." R. at 858. Thus, his commute and how long it took is relevant to the Government's argument and whether A1C Navarro Aguirre's use of Ambien was wrongful.

DENIED
20 NOV 2023

Second, Appendix A is necessary for this Court to assess the sufficiency of the specification in question. It is also necessary so that undersigned counsel can rebut the argument that the Government made at trial. A1C Navarro Aguirre said he left Joint Base Lewis-McChord at 1430 and that he lived 15 minutes from the base. R. at 192, 198. In his *Care* inquiry, A1C Navarro Aguirre said he was tired from not sleeping for two-days, took Ambien, and fell asleep on his bed after removing his blouse and boots. R. at 197-98. The "next thing" he remembered was "being behind the wheel of [his] car" with a police car parked behind him. R. at 198. Thus, knowing—with certainty—the length of A1C Navarro Aguirre's drive home is necessary for undersigned counsel to effectively argue that his use of Ambien was not wrongful. The length of the drive will also assist this Court in determining whether the specification is legally and factually sufficient.

The authenticity of the document is readily apparent as it is a screenshot taken from Google Maps. Appendix A contains the date and time in the lower right-hand corner of when the screenshot was taken. Additionally, the date and time of departure from Joint Base Lewis-McChord is visible and was input to approximate the date and time of the actual event. The information input into Google Maps is authentic and readily apparent as well: A1C Navarro Aguirre's home address as he stated it in open court. R. at 192. Because his home address is personally identifiable information, Appendix A is found in a separate filing marked SENSITIVE.

Appendix A may be attached consistent with *United States v. Jessie*, because its consideration is necessary to "resolv[e] issues raised by materials in the record." 79 M.J. 437, 444 (C.A.A.F. 2020); *accord United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) ("In addition to permitting consideration of any materials contained in the 'entire record,' our precedents also

authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record."). Appendix A is one-page and contains matters already raised in the record itself.

Assuming, *arguendo*, this Court denies A1C Navarro Aguirre's motion to attach, he requests that this Court take judicial notice that the drive to his home takes approximately 15-30 minutes, depending on traffic. This is a "fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Rule for Courts-Martial 201(b)-(2). This is also not a fact "necessary to establish an element of the offense," but it is "important to the resolution of an appellate issue." *United States v. Paul*, 73 M.J. 274, 280 (C.A.A.F. 2014) (reversing this Court's decision to take judicial notice that "ecstasy is a Schedule I controlled substance"). While the Government or this Court may question the reliability of A1C Navarro Aguirre's statement that he lived "about ten or 15 minutes" from base, Google Maps is a source that is "not subject to reasonable dispute" given its accuracy and reliability. This Court has previously taken judicial notice of the location of an Air Force Base and the location of where specific events occurred in relation thereto. *United States v. Mar*, ACM 39708 (f rev), 2022 CCA LEXIS 388, at n. 19 (A.F. Ct. Crim. App. June 29, 2022).

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion.

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 6 November 2023.

Respectfully submitted,

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3), **LEO J. NAVARRO AGUIRRE** United States Air Force *Appellant.*	))))))))))	OPPOSITION TO MOTION TO ATTACH, ALTERNATIVELY MOTION FOR LEAVE TO FILE FOR JUDICIAL NOTICE Before Panel No. 2 No. ACM 40354 14 November 2023

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

Under Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, the United States opposes Appellant's motion to attach Appendix A, and alternatively the motion for leave to file for judicial notice.

A panel of members found Appellant guilty of wrongfully using Ambien, a schedule IV substance in violation of Article 112a, UCMJ, the specification challenged in Assignment of Error I. (R. at 849.) Appellant pleaded guilty to reckless driving while under the influence of Ambien in violation of Article 113, UCMJ, the specification challenged in Assignment of Error II. (R. at 209.) Appellant moves this Court to attach Appendix A, a Google Maps Drive Time, dated 2 November 2023. Appellant argues that Appendix A is relevant because it explains how far away Appellant lived from the military installation, his place of duty, and therefore necessary to resolve Assignments of Error I and II. According to Appellant, the purpose of Appendix A or the judicial notice – how long his commute home took – is relevant to prove that when he took Ambien, he was home and therefore took it lawfully and not while he was on duty. (App. Mot. at 1.)

This Court should deny Appellant's motion to attach, and alternatively the motion to file for judicial notice because this Court is limited to the facts presented at the trial level when conducting a factual and legal sufficiency review, as well as reviewing the providency of an appellant's guilty plea. Courts of Criminal Appeals (CCAs) are allowed to supplement the record when deciding issues raised by the materials in the record; and in those cases, the CCAs have accepted affidavits or ordered hearings to determine additional facts. United States v. Jessie, 79 M.J. 437, 442 (C.A.A.F. 2020). But factual and legal sufficiency review is limited to the evidence produced at trial. United States v. Rodela, 82 M.J. 521, 525 (A.F. Crim. App. 2021) (citing United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)). Thus, to determine the factual and legal sufficiency challenged in Assignment of Error I, this Court cannot consider Appendix A. *See* id.

Moreover, to determine whether Appellant's plea is provident, as challenged in Assignment of Error II, this Court is also limited to what was presented at trial. "In determining the providence of a guilty plea, the scope of review is limited to the record of trial." United States v. Roane, 43 M.J. 93, 99 (C.A.A.F. 1995.); *see also* United States v. Clagett, ARMY 20070082, 2009 CCA LEXIS 362, at *24 (Army Ct. Crim App. May 21, 2009) (unpub. op.) (rejecting appellant's contention that matters outside the record may be used to contradict a guilty plea). "In evaluating the providence of that plea on appeal, appellate courts will not consider evidence from outside the record as the 'providence of a tendered plea of guilty is a matter to be established one way or the other at trial.'" United States v. Cohen, ACM 34872, 2015 CCA LEXIS 167, at *11 (A.F. Ct. Crim. App. 30 Apr. 2015.) (unpub. op.) (quoting United States v. Holt, 58 M.J. 227, 232 (C.A.A.F. 2003)). In determining whether a guilty plea is

provident, military judges may consider the facts in the stipulation of fact and the Care[1] inquiry in the record. United States v. Jones, 69 M.J. 294, 299 (C.A.A.F. 2011). Appendix A, or any type of map showing Appellant's commute home, was not admitted at trial. Appendix A was not attached to the stipulation of fact or referenced in Appellant's Care inquiry. This Court, when reviewing whether there is a substantial question regarding the appellant's guilty plea, is limited to review what is in the record of trial. *See* Roane, 43 M.J. at 99. Thus, this Court should not grant Appellant's motion to attach Appendix A when reviewing Assignment of Error II.

Alternatively, Appellant requests that this Court take judicial notice that his commute home takes 15-30 minutes, depending on traffic. (App. Mot. at 3.) Again, this Court is limited to review what was presented at trial both for factual and legal sufficiency review and determining whether Appellant's plea was provident. As a result, this Court should not take judicial notice that Appellant's drive home was 15-30 minutes. Appellant relies on United States v. Mar, ACM 39708 (f rev), 2022 CCA LEXIS 388, at *54, n.19 (A.F. Ct. Crim. App. June 29, 2022) (unpub. op.) for the proposition that this Court took "judicial notice of a location of an Air Force Base and the location of where specific events occurred in relation thereto." (App. Mot. At 3.) In Mar, this Court took judicial notice that Nellis Air Force Base, where the crime occurred, is in Clark County, Nevada presumably to explain why Appellant was subject to obeying Nevada law. Mar, unpub. op. at *54, n.19. But in Mar, the appellant had already admitted in his stipulation of fact that he had a duty to obey Nevada law, so the judicial notice was not necessary to establish that fact. Id. at *50-51. Here, Appellant is asking this Court to do something completely different – to take judicial notice of a fact and use it to overturn his guilty plea. As shown above, the law does not allow this.

[1] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

This Court should not take judicial notice of how far Appellate lived from base, this Court can only consider what was presented at trial for its factual and legal sufficiency review and when determining whether Appellant's plea was provident. For these reasons, this Court should not take judicial notice of Appellant's commute home.

WHEREFORE, the United States respectfully requests this Court deny Appellant's motion to attach Appendix A, and alternatively deny Appellant's motion to file for judicial notice.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 14 November 2023.

VANESSA BAIROS, Capt, USAF
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United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 2
Airman First Class (E-3) **LEO J. NAVARRO AGUIRRE** United States Air Force *Appellant.*	)	No. ACM 40354
	)	6 December 2023

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

ISSUES PRESENTED

I.

WHETHER A1C NAVARRO AGUIRRE'S CONVICTION FOR WRONGFUL AMBIEN USE IS LEGALLY AND FACTUALLY SUFFICIENT WHEN: (1) HE HAD A VALID PRESCRIPTION FOR AMBIEN; (2) HE TOOK THE AMBIEN AS DIRECTED; (3) THE BASIS FOR HIS CONVICTION WAS A MEDICALLY-KNOWN SIDE EFFECT; AND (4) IT WAS THE FIRST TIME HE TOOK THE PRESCRIPTION.

II.

WHETHER A1C NAVARRO AGUIRRE'S GUILTY PLEA FOR RECKLESS DRIVING WAS PROVIDENT WHEN HE TOOK HIS PRESCRIBED DOSE OF AMBIEN, FELL ASLEEP IN HIS BED, AND "THE NEXT THING [HE] REMEMBER[ED] IS BEING BEHIND THE WHEEL OF [HIS] CAR."

III.

WHETHER A1C NAVARRO AGUIRRE WAS ENTITLED TO A UNANIMOUS VERDICT.

STATEMENT OF CASE

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

STATEMENT OF FACTS

Wrongful Use of Ambien

A panel of members found Appellant guilty of wrongful use of Ambien, a controlled substance in violation of Article 112a, UCMJ. (R. at 849.) Specialist MD testified that on his way home from work on 1 October 2021, he saw Appellant sitting in his vehicle at a green light. (R. at 574.) Drivers started honking out of frustration. (Id.) As Specialist MD continued to drive, Appellant's vehicle started to move and "swerve in and out." (R. at 574-75.) Specialist MD saw Appellant's vehicle swerve in and out of lanes. (R. at 575.) Appellant would slow down, speed up and then slow down and speed up again. (Id.) When Specialist MD was turning into his lane to drive to his apartment, he noticed Appellant's vehicle "just stopped." (R. at 587.) At this time, out of concern for the safety of others, Specialist MD went to see what was going on. Specialist MD notice Appellant in his military uniform and wanted to make sure Appellant was okay. (Id.) When he approached Appellant's vehicle, Specialist MD saw Appellant rocking back and forth in the driver's seat. (Id.) Specialist MD stated that Appellant was probably high. (Id.) Specialist MD also mentioned that Appellant wore his OCPs but no OCP blouse. (Id.)

Officer MC, from Pierce Country Washinton also testified. (R. at 581.) At 1800, Officer MC responded to a traffic complaint, a possible DUI. (R. at 582.) Officer MC spoke to Appellant, and Appellant told officers that he took Ambien. (R. at 583-84). Appellant also told officers he was huffing Dust Off. (R. at 584.)

Airman MS also testified. She took pictures of Appellant's vehicle to gather evidence. (R. at 597.) When Airman MS looked through the car window, she saw a prescription label in Appellant's name. (R. at 597; Pros. Ex. 5.) The prescription in Appellant's car was his Ambien medication. (Pros. Ex. 5 pg. 9.)

Dr. CS, an expert witness in criminalistics and toxicology testified on behalf of the prosecution. (R. at 601.) A prescription for Ambien, as Dr. CS explained, would have instructed the patient to take the medication just before "one desires to go to sleep." (R. at 618.) Dr. CS also testified to the following facts. Ambien is a medication that assists a person in getting a full night's rest, rather than sleep for a short time. (R. at 619.) Ambien is also a medication that puts the user to sleep and helps him stay asleep. (Id.) Ambien can be misused and abused outside of its normal use when the user takes more Ambien than prescribed or if it is used with other intoxicants. (Id.) It is possible to overdose on Ambien. (Id.) Ambien is a senses suppressant, which can turn "off pieces of your body that are quite important. (Id.) One can take Ambien "at a time when they are not trying to go to sleep, but rather trying to have some other effect." (R. at 634.)

BW, a nurse practitioner, testified on behalf of defense. Nure BW testified to the following facts. Appellant was prescribed Ambien on 30 September 2021. (R. at 629.) She would generally instruct patients that Ambien should be taken 30 minutes before bedtime and about seven to eight hours before they planned to wake up. (R. at 632-33.) Nurse BW explained that there is a whole list of different effects that people might experience after taking Ambien, but they are not common. (R. at 631.) Complex sleep behaviors, including "sleep-driving," while not fully awake may occur following the use of Ambien. (Def. Ex. A)

First Sergeant, MSgt EP testified that, on 1 October 2021, Appellant worked a normal schedule. He was not on swings or night shift. (R. at 623.) His duty day ranged from 0630 until 1630. (Id.)

The military judge instructed the members on wrongful use of a controlled substance. (R. at 724-25.) Controlled use of a substance is not wrongful if prescribed by a doctor. (R. at 724.)

But "if a prescribed substance is used for a purpose other than that for which it is prescribed, it is wrongful." (Id.)

Trial defense counsel requested a finding of not guilty under R.C.M. 917. (R. at 658.) The military judge denied trial defense's motion. (R. at 663.) After findings, trial defense counsel requested that the trial court reconsider its denial of its R.C.M. 917 motion. (R. at 857.) Trial defense counsel argued that there was significant evidence to the contrary that Appellant's use of Ambien was wrongful. (Id.) The military judge found that "Ambien should be taken exactly as prescribed, should be taken at night right before bedtime and not to take Ambien if you are not able to stay in bed for a full night, seven to eight hours before you must be active again." (R. at 682.) Thus, the military judge found that this evidence could reasonably tend to establish the element of wrongfulness. (R. at 862.) The military judge explained that the testimony of Specialist MD, Officer MC, MSgt EP, and Airman MS established "evidence regarding manner in which the accused was driving, the time of day it was, what he was wearing, whether he was on shift work, statements of the accused to [Officer MC], and photographs of the accused's car at a later time."

Reckless Driving Guilty Plea

Appellant pleaded guilty to reckless driving while under the influence of Ambien in violation of Article 113, UCMJ. (R. at 209.) Appellant was charged with the following:

> Did within the state of Washington, on or about 1 October 2021, physically control a vehicle to wit: a passenger car, in a reckless manner by causing the vehicle to block traffic and swerve on public roadways and by driving the vehicle after using Zolpidem (a Schedule IV controlled substance commonly referred to as Ambien) and aerosol inhalants.[1]

[1] Appellant pleaded guilty to the specifications except the words "aerosol inhalants."

The military judge explained the elements and these definitions of the offense: specifically, the military judge defined "vehicle," "physically controlling, reckless," "simple negligence," and "recklessness." (R. at 196-97.) Appellant understood the elements of the offense and had no questions about any of them. (R. at 197.) Appellant admitted the elements of the offense and acknowledged that the elements and definitions taken together correctly described what he did. (Id.) Appellant admitted that on 1 October 2021 he drove his passenger car in a reckless manner after using Ambien. (Id.) He took one dose of Ambien, which a medical provider lawfully prescribed on 30 September 2021. (Id.) According to Appellant, he decided to take Ambien after work around 1430 and went to sleep. (R. at 198.) The next thing he remembered was being behind the wheel of his car. (Id.) The vehicle was running and parked in the wrong parking spot. (Id.) And Appellant had his foot on the gas pedal "revving the engine" that caused this car to overheat. (Id.) A police car was behind Appellant, and he eventually spoke with the police officers. Appellant told the officers that he was not drunk, but that he had taken Ambien. (Id.)

Appellant did not remember driving his car, but he remembered reviewing the statements of witnesses and the police. (R. at 198.) Appellant stated that one witness saw Appellant parked in the middle of the street, blocking traffic, for so long that the witness got out of his vehicle to check on Appellant. (R. at 202.) Appellant also knew from witness statements that he swerved on and off the road, switching lanes. (Id.) Appellant eventually drove into the sidewalk and hit a lamppost. (Id.) Appellant acknowledged he was the only one with keys to his vehicle. (Id.) Appellant additionally recognized that a police officer saw him hit a lamppost. (Id.) After reviewing the statements of witnesses and police, Appellant knew that his car was seen recklessly weaving and blocking traffic. (R. at 198.) Appellant explained that when he woke up,

his car was in a different parking spot than where he had left it when he got home. (R. at 198.) Thus, Appellant believed that he "did, in fact, drive [his] car in a reckless manner as the evidence [he] reviewed [said]." (Id.) Appellant confirmed that he was in physical control of his vehicle, sitting on the driver's seat. (R. at 199).

Appellant admitted that he drove recklessly after taking Ambien. (R. at 201.) Appellant "believe[d] it was after arriving home from work" when he took Ambien. (R. at 203.) The military judge confirmed that Appellant pleaded guilty voluntarily and of his own free will. (R. at 207.) The military judge accepted Appellant's plea of guilty but advised him that he could have requested to withdraw his guilty plea at any time before sentences was announced. (R. at 207.) Trial defense counsel requested that the military judge inform the panel members of Appellant's plea and findings of guilty before the presentation of evidence. (R. at 209.)

The military judge reopened Appellant's Care[2] inquiry after findings, but before presentencing proceedings commenced. (R. at 865.) Since evidence about Ambien and its effects came out during the trial, the military judge was concerned that Ambien could have affected whether Appellant voluntarily took control of the vehicle. (Id.) In turn, the military judge specifically asked Appellant why he believed that he was in control of a vehicle and whether it was voluntary. (Id.) Appellant mentioned that he was in physical control of a vehicle. (Id.) Appellant said that when he was in control of the vehicle, he was under the influence of the drug Ambien. (R. 866-87.) Appellant kept explaining that even though he had no memory of driving, he was still in control of the vehicle because he had "to get to the point where [he] was, [he] had to put some kind of shoes on, get [his] car keys, get in [his] car, start [his] car. (R. at

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

866). Again, Appellant explained that his review of witness testimony indicated that he was the one in control of the vehicle and parking in a different parking spot. (Id.) Moreover, Appellant admitted that Ambien is "potent stuff," but he took Ambien voluntarily. (R. at 866-87.) After further inquiry, the military judge found that Appellant's plea of guilty was "made voluntarily, with full knowledge of its meaning and effect," and found his plea of guilty provident. (R. at 868.)

ARGUMENT

I.

APPELLANT'S USE OF AMBIEN WAS NOT INTENDED FOR HIM TO SLEEP THROUGHOUT THE NIGHT. THEREFORE, HIS CONVICTION FOR WRONGFUL USE OF AMBIEN IS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

Issues of legal and factual sufficiency are reviewed de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

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, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [the court] take[s] "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilty" to "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." United States v. Chisum, 75 M.J. 943, 952 (A.F. Ct. Crim. App. 2016) (citing Washington, 57 M.J. at 399). This Court's

"assessment of appellant's guilt or innocence for legal and factual sufficiency is limited to the evidence presented at trial." United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but whether any rational factfinder could. United States v. Acevedo, 77 M.J. 185, 187 (2018). In applying this test, this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001) (internal citations omitted). Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221 (internal citations and quotations omitted).

"In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, [this Court is] mindful that the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." Id. The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011).

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).

Wrongful use of a controlled substances in violation of Article 112a, UCMJ requires two elements: 1) that the accused used a controlled substance; and 2) that the use by the accused was wrongful. Manual for Courts-Martial, United States (MCM), part. IV, para. 50.b.(2)(a)-(b) (2019 ed.).

> Possession, use, distribution, introduction, or manufacture of a controlled substance is wrongful if it is without legal justification or authorization. Possession, distribution, introduction, or manufacture of a controlled substance is not wrongful if such act or acts are: (A) done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession); (B) done by authorized personnel in the performance of medical duties; or (C) without knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine). Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary.

MCM, pt. IV, 50.c.(5).

Analysis

A. <u>This Court should only consider the evidence presented at trial and not Appellant's Care inquiry.</u>

This Court should not consider Appellant's Care inquiry in its factual and legal sufficiency review. Review of findings is limited to the evidence presented at *trial*. United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citing United States v. Duffy, 11 C.M.R. 20, 23 (C.M.A. 1953) (emphasis added). In this case, this Court should only consider the evidence and testimony presented during the findings portion of trial, and not the Care inquiry, because that is the evidence relied on by the members to reach its guilty verdict. *See* id.

Defense relies on United States v. Bethea, 46 C.M.R. 223, 225 (C.M.A. 1973) for the proposition that this Court should consider the statements Appellant made in his Care inquiry. (App. Br. at 8.) In Bethea, CAAF recognized that the entire record for sentence appropriateness review was limited to the evidence admitted at trial and matters considered by the convening authority in his action on the sentence. Id. at 225. Bethea is not persuasive in this context, because this is a case about factual sufficiency, not sentence appropriateness. Beatty controls and is binding precedent directing this Court to only consider the evidence and testimony presented at the trial phrase in the defense and government's case-in-chief.

Appellant should not get the chance on appeal to introduce new evidence, such as the Care inquiry, to challenge the wrongful use of Ambien. The Government had no opportunity at trial to respond to such arguments that Appellant's use was not wrongful and that he took Ambien at home versus while at work. If Appellant wanted this information in front of members, he could have taken the stand and testified that he took Ambien at home. He chose not to testify, as was his constitutional right to do so. But on appeal, Appellant does not get a second bite at the apple to challenge a conviction relying on evidence not considered by the factfinder. It is not fair to the Government on appeal for this Court to address Appellant's arguments that his Care inquiry is relevant in his factual and legal sufficiency review, when the trial counsel was not able to address these factual disputes.

Relying on Bethea, Appellant seems to also suggest that a Care inquiry is equivalent to a cross-examination and that the Government could have also challenge the admissibility and trustworthiness of the Appellant's admissions in his Care inquiry. (App. Br. at 8-9.) Appellant then states that the Government challenged Appellant's statements and tried to prove that he used inhalants. (Id. at 9.) While the Government tried to prove that Appellant was using inhalant's

while recklessly driving, this was done during the trial on the merits before members and not during the guilty plea proceedings. Appellant then states that the Government had a chance to ask Appellant questions in his Care inquiry via the military judge, but declined to do so. (Id.) Asking an accused questions during a Care inquiry is not akin to cross-examination in a contested trial. The military judge asked the parties if he believed any further inquiry was required. (R. at 868.) This request from the military judge does not invite trial counsel to cross-examine the accused, but asked if further clarification is warranted on the record to show that a plea is provident. If Appellant wanted to get his side of the story out across to the factfinder for the contested specifications, he needed to testify and be subject to cross-examination by the Government.

The evidence in the Care was not presented at trial and the members did not consider Appellant's admissions during their deliberations and findings. The Appellant could have testified to ensure the members considered that he took Ambien at home. He chose not to. Thus, this Court should not consider Appellant's Care inquiry.

B. Appellant's conviction is factually sufficient.

After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court should be convinced of Appellant's guilt beyond a reasonable doubt. *See* Turner, 25 M.J. at 325. Appellant's conviction for wrongful use of Ambien in violation of Article 112a, UCMJ, is factually sufficient because many witnesses testified to circumstantial evidence that proved that Appellant wrongfully used Ambien.

After an impartial view of the evidence, this Court should conclude that the evidence presented at trial constituted proof of each required element beyond a reasonable doubt.

Whether Appellant used Ambien is not in dispute. He was prescribed that medication. What was in dispute was whether Appellant's use of Ambien was wrongful.

Multiple witnesses testified about Appellant's wrongful use of Ambien. First, expert witnesses on toxicology explained that Ambien is used before bed and not before a short nap. (R. at 632-33.) Ambien is supposed to be taken 7-8 hours before one is expected to wake up. (Id.) There were also pictures of the Ambien prescription in Appellant's car.[3] (Prox. Ex. 5 pg. 9.) When he was approached by law enforcement around 1800, Appellant admitted to law enforcement that he took Ambien. (R. at 583-84.) Witnesses found Appellant in his military uniform, after the duty day. (R. at 578.) Appellant did not work a swing or mid shift. He worked a typical duty day. (R. at 623.) So there was no excuse for him to take Ambien in the afternoon right after work. And there was no evidence presented at trial that Appellant went home before taking Ambien. The evidence instead indicated that Appellant used Ambien on his way home from work.

Appellant's use of Ambien was without legal justification or authorization because it was not before he planned to sleep for the night. See MCM, pt. IV, 50.c.(5). The purpose of Ambien is to take it 7-8 hours before waking up. The record demonstrated that Appellant admitted that he used Ambien when he was found in his vehicle around 1800 in his military uniform. (R. 583-84.) Evidence also showed that Appellant was found in his vehicle surrounded by Dust Off and other inhalants. Appellant admitted to law enforcement that he was huffing Dust Off. (R. at 584.) It was the Government's theory of the case that Appellant was abusing Ambien and other substances to get high. While Appellant was found not guilty of using an aerosol inhalant with the intent to

[3] Defense counsel stated that this picture was taken months after the incident, Appellant was restricted to base after the incidents.

alter his mood or function, these facts are relevant to the charge of wrongful use of Ambien. Having aerosols around while also consuming Ambien suggests using medication for a purpose other than prescribed and therefore that the use was wrongful in the middle of the afternoon. *See* MCM, pt. IV, ¶50.c.(5). There was not legal justification for Appellant's Ambien use. It was reasonable for a fact-finder to conclude that Appellant used Ambien wrongfully. Side effects of "sleep-driving" are not common, and Appellant physically appeared as if he were not ready to go to bed. A person would not normally remain in his duty uniform if he planned to sleep for 7-8 hours. This indicates Appellant used Ambien other than its intended purposes.

Appellant also suggests that his use was not wrongful because the warning label on the Ambien medication casts doubt on the conviction because Ambien may cause "sleep-driving." (App. Br. at 10.) But these side effects are not common. (R. 631.) Other than pointing to a warning label suggesting that "sleep-driving" is a side effect, Appellant has articulated no reasoning why he suffered an involuntary medical reaction. There was evidence in the record that supports the contrary. A nurse practitioner explained that the side effects listed on the prescription label are uncommon. (R. at 631.) There was no expert testimony that Appellant's behavior on the day in question was consistent with someone who was "sleep-driving." Appellant now argues on appeal that the fact he remembers nothing is also another indication that he suffered from the side effects of Ambien. But the more reasonable explanation is that Appellant wrongfully used Ambien after work while driving. The evidence here supports this assertion given that witnesses saw Appellant operate a vehicle during their commute home, and Appellant was still in his military uniform.

1. This Court should not consider Appellant's commute home.

Appellant disputes the Government's main argument that Appellant was getting high before ever getting. (App. Br. at 11.) Appellant argues that this theory is unlikely because it only took "approximately 15 minutes" for Appellant to drive home from Joint Base Lewis-McChord, and therefore he took Ambien when he got home. (Id.) This Court should not give any weight to this argument because this Court denied Appellant's motion to attach Attachment A, a Google Maps document showing Appellant's drive home. This Court also denied taking judicial notice of this fact. (*Order*, dated 20 November 2023.) This other information should not be considered. In fact, evidence admitted at Court showed the opposite of what Appellant wants this Court to believe. When Appellant was found behind the wheel, he did not physically appear as if he were ready to sleep for the night. He was found in his utility uniform operating a vehicle, driving dangerously on the road. (R. at 574-75.)

After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court should be convinced of Appellant's guilt beyond a reasonable doubt. *See* Turner, 25 M.J. at 325. Witnesses saw Appellant driving dangerously on the road, he looked high, and wore his uniform – not clothes typically worn to sleep – while under the influence of a drug that is meant to be used for long-term sleep. The evidence showed that Appellant took Ambien not to fall asleep, but took Ambien when he was driving his car home from work. Thus, Appellant's conviction for wrongful use of Ambien is factually sufficient.

C. Appellant's Conviction is legally sufficient.

1. This Court is bound by every reasonable inference in the record.

The evidence presented at trial is also enough for this Court to determine that the evidence is legally sufficient to support a rational trier of fact-finding the essential elements of wrongful use of Ambien beyond a reasonable doubt. *See* King, 78 M.J. at 221. In viewing the evidence in the light most favorable to the prosecution, the evidence established the element of wrongfulness. *See* id. While there is no direct evidence of Appellant's wrongful use of Ambien, the circumstantial evidence, discussed above, proved that Appellant's use was wrongful. *See* United States v. McArthur, 573 F.3d 608, 614 (8th Cir. 2009) (explaining that a legally sufficient verdict may be based on circumstantial evidence). The test for legal sufficiency is very low and a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. King, 78 M.J. at 221. This Court is bound by every reasonable inference in the record. Barner, 56 M.J. at 134.

2. Appellant's conviction is reasonable, fair, and rational.

Appellant argues that this Court must analyze legal sufficiency reasonably, fairly, and rationally and that the Government's evidence did not meet the quantum necessary to have convinced "any rational trier of fact" of the elements of wrongfulness. (App. Br. at 12-13.) Appellant relies on Jackson v. Virginia, 443 U.S. 307, 320 (1979) for the proposition that a conviction "can be legally insufficient-even with some evidence presented-if it falls below the 'lower limit' of evidentiary sufficiency." (App. Br. at 12.) Appellant argues that there are four reasons the evidence did not meet the legal sufficiency standard. (App. Br. at 13.) This Court should reject all four arguments.

First, Appellant argues that the military judge erroneously found wrongfulness in assessing an R.C.M. 907 motion because of the "manner in which the accused was allegedly driving." (Id.) This takes the military judge's comment out of context. The military judge stated that the manner in which the Appellant drove, in addition to "the time of day it was, what he was wearing, whether he was on shift work, statements allegedly made by the accused…, and photographs of the accused's vehicle at a later time" established that the Government "has introduce some evidence which together will all the reasonable inferences and applicable assumptions, could tend to establish the elements of wrongfulness." (R. at 663.) In short, the wrongfulness of Appellant's use was based on multiple factors.

Second, Appellant argues that using the time of day to find wrongfulness is not fair under Jackson. (App. Br. at 13.) Appellant asserts that taking a prescription an hour or two before bedtime would not make the use illegal. (App. Br. at 13.) But Appellant ignores that he took Ambien more than one or two hours before bedtime. Every reasonable inference drawn in favor of the prosecution proves that Appellant used Ambien in the afternoon and not before going to sleep for the night. First, he was found swerving on the roads at a time of day when people were coming home from work. Specialist MD saw Appellant driving his vehicle, swerving on the road, on his way home from work. (R. 574-75.) Appellant appeared high. (R. at 578.) Appellant was still in his uniform. (Id.) Evidence supports that he took Ambien well before bedtime. Had Appellant used Ambien for its intended purposes, he would not have tried to fall asleep in his uniform, but properly would have properly gotten ready for bed. Appellant did not have to go to work until the next morning around 0630. So according to the expert and nurse practitioner testimony, Appellant should have taken Ambien around 2130 to get 7-8 hours of sleep, assuming he would wake up around 0530 to get ready for work. It was entirely

appropriate for the finder of fact to consider the time of day of the offense and make reasonable inferences therefrom in determining whether Appellant's use of Ambien was wrongful. The fact that Appellant took Ambien in the middle of the day tends to show he was not using the drug to sleep through the night, but for other wrongful purposes.

Third, Appellant argues that the Governments and military judge's reliance on what he was wearing, statements he made to the police officer, and photographs taken of his vehicle at a later time "do not even offer a foothold for a rational factfinder to find wrongfulness, even when viewed in light most favorable to the Government." (App. Br. at 14.) This is incorrect. It was a reasonable inference to conclude that Appellant took Ambien not with the intention of sleeping 7-8 hours through the night. A normal person intending to sleep for so long would change into sleeping clothes. But the evidence reveals that Appellant was still in his military uniform.

Appellant asserts that even though he admitted that he took Ambien to law enforcement, he did not state where and when he took it. (App. Br. at 14.) The fact that Appellant was found on the road, that commuters from the military installation use to go home and appeared high in his military uniform allowed a reasonable factfinder conclude that Appellant used Ambien on his way home from work.

It was also logical to conclude that when Airman MS took pictures of the vehicle it was in the same state as the day of the incident. Appellant also argues that the prescription label that was found in Appellant's car 75-days after the offense does not support a finding of guilt beyond a reasonable doubt. (App. Br. at 14.) The prescription label in his car was circumstantial evidence that Appellant took Ambien in the vehicle on his way home from work. It was not unreasonable for a panel of members to make this conclusion. The First Sergeant testified that Appellant was restricted to base after the offense on 1 October 2021. (R. at 624.) Appellant

could not drive his vehicle, and therefore the fact that Airman MS took the photo 75 days after the incident is unpersuasive. On 2 October 2021, Appellant was restricted to base, and his vehicle was no longer in use. (Id.) Thus when, Ariman MS took the photographs of Appellant's vehicle it was in the same condition as on the day of Appellant's crime. This supports the evidence in the car was probative on the issue of what Appellant had been doing immediately prior to his arrest.

Lastly, Appellant argues that the FDA Ambien information fact sheet lists "sleep-driving" as a side effect and therefore this Court should find Appellant's use not wrongful. (App. Br. at 14.) There is no expert testimony in the record explaining that Appellant's behavior was consistent with "sleep-driving." The members were aware that "sleep-driving" could have been a side effect, but they also knew that such side effects were rare. It was therefore reasonable to find Appellant guilty under the facts of the case.

As discussed throughout this analysis, there were multiple reasonable inferences presented at trial to prove Appellant's Ambien use was wrongful. And this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *See* Barner, 56 M.K at 134. After viewing the facts most favorable to the prosecution, this Court should find Appellant's conviction legally sufficient. Since Appellant's conviction was both legally and factually sufficient, this Court should deny this assignment of error.

II.

APPELLANT'S GUILTY PLEA WAS PROVIDENT.

Standard of Review

This Court reviews a military judge's decision to accept a plea of guilty for abuse of discretion. *See* United States v. Forbes, 78 M.J. 279, 281 (C.A.A.F. 2019) (citation omitted). In reviewing the providence of a plea, a military judge abuses his discretion only when there is "a substantial basis in law and fact for questioning the guilty plea." United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (internal quotation marks and citation omitted). "[T]he military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo." Id. at 321.

Law

"[A]ppellant bears the burden of establishing that the military judge abused that discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." United States v. Phillips, 74 M.J. 20, 21-22 (C.A.A.F. 2015) (citation omitted). "However, even if the military judge did not abuse his discretion in accepting the plea, [this Court] may still set aside the plea if [this Court] find[s] a substantial conflict between the plea and the accused's other statements or other evidence in the record." United States v. Rothenberg, 53 M.J. 661, 662 (A.F. Ct. Crim. App. 2000) (citing United States v. Garcia, 44 M.J. 496, 498 (C.A.A.F. 1996)).

If an accused, after entering a guilty plea, sets up a matter inconsistent with the plea, the court shall proceed as though he pleaded not guilty. Article 45(a), UCMJ. A providence inquiry into a guilty plea must establish that the accused himself believes he is guilty and "the factual circumstances as revealed by the accused himself objectively support that plea." United States v. Higgins, 40 M.J. 67, 68 (C.M.A. 1994) (citation omitted). "Mere conclusions of law recited by

an accused are insufficient to provide a factual basis for a guilty plea." United States v. Outhier, 45 M.J. 326, 331 (C.A.A.F. 1996) (citing United States v. Terry, 21 C.M.A. 442, 45 C.M.R. 216 (C.M.A. 1972)).

In deciding whether a plea is rendered improvident by statements inconsistent with the plea, the sole question is whether the statement was inconsistent, not whether it was credible or plausible. United States v. Lee, 16 M.J. 278, 281 (C.M.A. 1983).

The elements of reckless driving a vehicle are: 1) the accused was operating or in physical control of a vehicle; and 2) that while operating or in physical of a vehicle the accused did so in a reckless manner. MCM, pt. IV, ¶51.b.(1)-(2)(A).

Analysis

Appellant's guilty plea to reckless driving, under the influence of Ambien, was provident. The military judge conducted two Care inquiries to ensure that Appellant's plea was provident. The military judge exercised due care in ensuring Appellant's guilty plea was provident and did not abuse his discretion. Appellant voluntarily pleaded guilty and told the military judge multiple times that he was in fact in physical control of the vehicle and voluntarily took control of the vehicle. For this Court to find Appellant's plea improvident, Appellant bears the burden of "establishing that the military judge abused that discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." *See* Phillips, 74 M.J. at 21-22. Appellant has not met his burden in this case.

The military judge did not abuse his discretion when finding Appellant's guilty plea provident. Based on the law and facts, Appellant's plea is provident. Appellant argues that the military judge disregarded the definition of "recklessness" because Appellant experienced a medical side effect, it was the first time he took Ambien, and he was not fully awake and did not

know he was driving." (App. Br. at 16-17.) But the military judge elicited facts from Appellant showing that he was not asleep while driving. When the military judge questioned Appellant with why he believed he was responsible for his actions Appellant replied with the following:

> Your Honor, um, previously before coming to, I do remember that my car was running low on gas, and I had been thinking about getting gas, so it's possible that I went out and drive voluntarily to prepare for the night to get gas. I think that was my motive behind driving voluntarily. I just don't remember the facts. And upon coming to, it didn't feel like I was asleep. Just felt more like my memory just kind of kicks back in for a period.

(R. at 867.) The military judge continued to press the Appellant that although he did not have any memory, Appellant was aware of what he was doing. (Id.) Appellant then explained that he was aware of where he was at the stoplights, he was aware of the honking, and he was able to get back home, he knew the music was playing. (R. at 868.) This is why Appellant believed that these were voluntary actions. (Id.)

The evidence the military judge elicited during the reopened Care inquiry showed that Appellant was not "sleep-driving." Appellant said that it did not feel like he was asleep and that he was aware of his surroundings and sounds and generally what was going on. Someone with that level of awareness while driving was not asleep. Moreover, based on the entire record, the military judge had evidence before him that demonstrated that "sleep-driving" is extremely rare. There was no evidence – such as expert testimony – before the military judge that Appellant was in fact "sleep-driving." Appellant reiterated many times that his actions were voluntary and therefore drove his car in a reckless manner. Under these circumstances, the military judge correctly determined that the Ambien fact sheet mentioning "sleep-driving" that had no other connection to Appellant did not constitute a substantial basis for undermining Appellant's guilty

plea. Thus, the military judge did not abuse his discretion when accepting Appellant's plea of guilty.

Appellant did not meet its burden in proving that the military judge abused his discretion and that the record showed a substantial basis in law or fact to question the plea. For these reasons, this Court should find Appellant's plea of guilty to reckless driving under the influence of Ambien in violation of Article 113, UCMJ, provident.

III.

APPELLANT WAS NOT ENTITLED TO A UNANIMOUS VERDICT.

Appellant asserts that he was entitled to a unanimous verdict. Recently, in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023), CAAF held that military members are not entitled to a unanimous verdict. Appellant recognizes CAAF's most recent holding but is still asking this Court to grant relief simply because there are two cases that petitioned for a Writ of Certiorari before the United States Supreme Court.[4] Appellant provides no justification why this Court should grant relief when CAAF held that military members are not entitled to a unanimous verdict under the Fifth and Sixth Amendments. *See* id. at 294. Given recent precedent, Appellant was not entitled to a unanimous verdict.

[4] Cases cited by Appellant are still pending before the Supreme Court.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 6 December 2023.

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