IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **TYSON A.Z. ODAGIRI,** United States Air Force, *Appellant.*	)	No. ACM 40276
	)	24 June 2022

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

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

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

Respectfully submitted,

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 24 June 2022.

Respectfully submitted,

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

27 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TYSON A.Z. ODAGIRI, USAF, *Appellant.*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40276 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.

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
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 27 June 2022.

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **TYSON A.Z. ODAGIRI,** United States Air Force, *Appellant.*	)	No. ACM 40276
	)	22 August 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 September 2022**. The record of trial was docketed with this Court on 2 May 2022. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 5 January 2022, consistent with his pleas, a Military Judge sitting alone as a general court-martial, at Fort Meade, MD, convicted Appellant of one charge, six specifications of wrongfully viewing, possessing, and distributing child pornography and obscene visual images, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 125. The Military Judge sentenced Appellant to reprimanded, forfeit all pay and allowances, be reduced to the grade of E-1, to be confined for 54 months, and to be discharged from the service with a dishonorable service characterization. R. at 154. The convening authority took no action on the findings or the sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 28 January 2022.

The ROT consists of three volumes, four prosecution exhibits, zero defense exhibits, and seven appellate exhibits. The transcript is 155 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 22 August 2022.

Respectfully submitted,

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

23 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TYSON A.Z. ODAGIRI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40276 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.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
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 23 August 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **TYSON A.Z. ODAGIRI,** United States Air Force, *Appellant.*	)	No. ACM 40276
	)	12 September 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his 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 **29 October 2022**. The record of trial was docketed with this Court on 2 May 2022. From the date of docketing to the present date, 133 days have elapsed. On the date requested, 180 days will have elapsed.

On 5 January 2022, consistent with his pleas, a Military Judge sitting alone as a general court-martial, at Fort Meade, MD, convicted Appellant of one charge, six specifications of wrongfully viewing, possessing, and distributing child pornography and obscene visual images, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 125. The Military Judge sentenced Appellant to reprimanded, forfeit all pay and allowances, be reduced to the grade of E-1, to be confined for 54 months, and to be discharged from the service with a dishonorable service characterization. R. at 154. The convening authority took no action on the findings or the sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 28 January 2022.

The ROT consists of three volumes, four prosecution exhibits, zero defense exhibits, and seven appellate exhibits. The transcript is 155 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.[1] 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

[1] Since the last request for an EOT, undersigned counsel has filed the AOE for *United States v. Schauer* with this Court, drafted a CAAF Petition and Supplement, and has been preparing a CAAF Brief (*United States v. Lattin*) which the CAAF granted on 26 August 2022. Counsel is filing this EOT early because he has eight days of pre-planned leave without internet or email access.

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 12 September 2022.

Respectfully submitted,

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

14 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TYSON A.Z. ODAGIRI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40276 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.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
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 14 September 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **TYSON A.Z. ODAGIRI,** United States Air Force *Appellant*	)))))))))))	**APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL** Before Panel No. 2 Case No. ACM 40276 13 October 2022

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 sealed materials in Appellant's record of trial: Any sealed materials for Prosecution Exhibit 1. Specifically, Attachments 2, 3, and 4 which are discs that contain images and depictions of sexually explicit material and child pornography. Record (R.) at 126, 144; *see also* Prosecution Exhibit 1. The Military Judge did not issue an order to have the attachments sealed; rather she orally mandated that they would be sealed. *Id*. Prosecution Exhibit 1 is a stipulation of fact with attachments that Trial Counsel presented as evidence at trial, the Military Judge accepted into evidence, and the Military Judge subsequently sealed. R. at 16, 46. Defense Counsel and Appellant reviewed the Prosecution Exhibit 1 and its attachments. R. at 150.

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 images and videos therein meet the definition of child pornography and obscenity to which Appellant pled guilty.

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

Respectfully submitted,

ON, 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 was sent via email to the Court and served on the Government Trial and Appellate Division on 13 October 2022.

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TYSON A.Z. ODAGIRI, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS ACM 40276 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 Materials. The United States does not object to Appellant's counsel reviewing Prosecution Exhibit 1 and all its attachments – which were 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 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.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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 14 October 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **TYSON A.Z. ODAGIRI,** United States Air Force, *Appellant.*	)	No. ACM 40276
	)	21 October 2022

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 **28 November 2022**. The record of trial was docketed with this Court on 2 May 2022. From the date of docketing to the present date, 172 days have elapsed. On the date requested, 210 days will have elapsed.

On 5 January 2022, consistent with his pleas, a Military Judge sitting alone as a general court-martial, at Fort Meade, MD, convicted Appellant of one charge, six specifications of wrongfully viewing, possessing, and distributing child pornography and obscene visual images, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 125. The Military Judge sentenced Appellant to reprimanded, forfeit all pay and allowances, be reduced to the grade of E-1, to be confined for 54 months, and to be discharged from the service with a dishonorable service characterization. R. at 154. The convening authority took no action on the findings or the sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 28 January 2022. The ROT consists of three volumes, four prosecution exhibits, zero defense exhibits, and seven appellate exhibits. The transcript is 155 pages. The Appellant is confined.

Counsel is currently assigned 18 cases; nine cases are pending initial AOEs before this Court. Counsel has one case pending petition/supplement to the Court of Appeals for the Armed Forces and one pending Reply Brief. Through no fault of Appellant, undersigned counsel was working on other assigned matters prior to starting a review of this case. Counsel has reviewed the entirety of the unsealed case file and filed a Motion to Examine Sealed Materials on 13 October 2022. This Court has not yet issued a decision on that motion. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. No cases have priority over the current 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 21 October 2022.

Respectfully submitted,

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

24 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) TYSON A.Z. ODAGIRI, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40276 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.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
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 24 October 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40276**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tyson A.Z. ODAGIRI	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 13 October 2022, Appellant's counsel submitted a Motion to Examine Sealed Material, requesting to examine Attachments 2, 3, and 4 to Prosecution Exhibit 1.

Appellant's motion states the attachments were reviewed by trial and defense counsel and sealed by the Military Judge. Appellant's counsel avers that viewing the attachments is "reasonably necessary to fulfill appellate defense counsel's responsibilities in this case, since counsel cannot perform his duty of representation . . . without first reviewing the complete record of trial."

The Government responded to the motion on 14 October 2022. It does not object to Appellant's counsel reviewing materials that were released to both parties at trial—as long as the Government "can also review the sealed portions of the record as necessary to respond to any assignment of error that references 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 Appellant's counsel has made a colorable showing that review of the attachments is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 25th day of October, 2022,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Attachments 2, 3, and 4 to Prosecution Exhibit 1**, 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.

FOR THE COURT

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40276**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Tyson A.Z. ODAGIRI	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 20th day of March, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
CADOTTE, ERIC J., Colonel, Appellate Military Judge
GOODWIN, JAMES A., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MERITS BRIEF**
v.	)	Before Panel No. 2
Senior Airman (E-4), **TYSON A.Z. ODAGIRI,** United States Air Force, *Appellant.*	)	No. ACM 40276
	)	28 November 2022

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

Submission of Case Without Specific Assignments of Error

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

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

Respectfully submitted,

SPENCER R. NELSON, 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 28 November 2022.

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

APPENDIX A

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

I.

WHETHER THE CONVENING AUTHORITY WAS REQUIRED TO TAKE ACTION ON SRA ODAGIRI'S SENTENCE?

The Court of Appeals for the Armed Forces (CAAF) held that "where an accused is found guilty of at least one specification involving an offense that was committed before January 1, 2019, a convening authority errs if he fails to take one of the following post-trial actions: approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part." *United States v. Brubaker-Escobar*, 81 M.J. 471, 472 (C.A.A.F. 2021). SrA Odagiri was convicted of several offenses spanning from 1 November 2018 to on or about 7 January 2020. Record of Trial (ROT), Vol. 1. Entry of Judgement at 2. As such, the Convening Authority erred when he took "no action on the sentence in this case." ROT, Vol. 1, Convening Authority Decision Action, dated 28 January 2022.

WHEREFORE, SrA Odagiri respectfully requests that this Honorable Court remand his case for the Convening Authority to take appropriate action as required under the Rules for Court-Martial.

II.

WHETHER THE GOVERNMENT AND SRA ODAGIRI COULD STIPULATE TO VICTIM IMPACT STATEMENTS AS MATTERS IN AGGRAVATION IN ORDER TO SKIRT R.C.M. 1001(b)(4)?

The Government and SrA Odagiri stipulated as fact that two victim impact statements were "admissible purusant to R.C.M. 1001(b)(4) as proper evidence in aggravation..." Prosecution Exhibit (Pros. Ex.) 1, at 8. CAAF has held that "Evidence that otherwise would be inadmissible

under the Military Rules of Evidence *may* sometimes be admitted at trial through a stipulation, if the parties expressly agree, *if there is no overreaching on the part* of the Government in obtaining the agreement, and if the military judge finds no reason to reject the stipulation in the interest of justice." *United States v. Clark*, 53 M.J. 280, 281-82 (C.A.A.F. 2000) (internal quotations and citations omitted) (emphasis added). By presumably forcing an accused to stipulate to victim impact statements as matters in aggravation, the Government engaged in "overreaching" in "obtaining the agreement." *Id*. Additionally, the agreement is in violation of "public policy and fairness" as it is an end-run around the safeguards of R.C.M. 1001. *United States v. Tate*, 64 M.J. 269, 272 (C.A.A.F. 2007); *see also United States v. Barker*, 77 M.J. 377, 382 (C.A.A.F. 2018) ("[T]he introduction of statements under this rule is prohibited without, at a minimum, either the presence or request of the victim...").

WHEREFORE, SrA Odagiri respectfully requests that this Honorable Court strike the offending attachments from his stipulation of fact and reassess his sentence.

III.

WHETHER TRIAL COUNSEL ENGAGED IN IMPROPER ARGUMENT?

During senencting, Trial Counsel argued "The accused is *not going to be able to stop this behavior no matter how hard he tries*, and the only way to guarantee that he doesn't reoffend or act on his sexual desires is to adjudge the max confinement authorized." Record (R.) at 136 (emphasis added). Such argument was improper because 1) it was referencing an alleged fact that was not in evidence; and 2) it overstepped the "bounds of that propriety and fairness which should characterize the conduct of...an officer in the prosecution of a criminal offense." *United States v. Voorhees*, 79 M.J. 5, 10 (C.A.A.F. 2019); *see also United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014) (explaining that the term knowledge of the "ways of the world" does not include

"the recidivism rates of child molesters.").

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

IV.

WHETHER SRA ODAGIRI'S SENTENCE WAS UNDULY SEVERE?

During his unsworn statement, SrA Odagiri explained that the Department of Defense's slow adjudication of his security clearance, was "an alienating and isolating experience." R. at 132. He went to "Walter Reed and attended an out-patient mental health program, which actually only further alienated me from my coworkers and peers at the time. Overall, I had a relatively negative experience with the mental health program and which definitely affected my perspective of DoD mental health programs in general." *Id*. SrA Odagiri is another example of the Department of Defense failing to provide Airmen the mental health care they need and then not adequately taking their condition and treatment into account as a mitigating factor for sentencing.

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

15 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Senior Airman (E-4) **TYSON A.Z. ODAGIRI**, USAF, *Appellant.*	) **ANSWER TO ASSIGNMENTS**) **OF ERROR**))))) Before Panel 2)) No. ACM 40276))

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

ISSUES PRESENTED

I.

WHETHER THE CONVENING AUTHORITY WAS REQUIRED TO TAKE ACTION ON [APPELLANT'S] SENTENCE?[1]

II.

WHETHER THE GOVERNMENT AND [APPELLANT] COULD STIPULATE TO VICTIM IMPACT STATEMENTS AS MATTERS IN AGGRAVATION IN ORDER TO SKIRT R.C.M. 1001(b)(4)?

III.

WHETHER TRIAL COUNSEL ENGAGED IN IMPROPER ARGUMENT?

IV.

WHETHER [APPELLANT'S] SENTENCE WAS UNDULY SEVERE?

[1] Appellant has raised Issues I-IV under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF THE CASE

On 6 July 2021, Appellant's commander preferred one charge and seven specifications of wrongful possession, distribution, and viewing of child pornography and obscene visual images in violation of Article 134, Uniform Code of Military Justice (UCMJ). (*Charge Sheet*, dated 6 July 2021, ROT, Vol. 1.) The charges were referred on 6 October 2021. (*Charge Sheet*, dated 21 October 2021, ROT, Vol. 1.) On 5 January 2022, in accordance with his pleas, Appellant was found guilty of the charge and all specifications, except Specification 3 which was withdrawn and dismissed without prejudice in accordance with the plea agreement. (*Entry of Judgment*, dated 5 January 2022, ROT, Vol. 1, App. Ex. V.) Appellant was sentenced by military judge alone to 54 months of confinement, a dishonorable discharge, reduction to the grade of E-1, total forfeitures, and a reprimand. (*Entry of Judgment*, dated 5 January 2022, ROT, Vol. 1.)

STATEMENT OF FACTS

The investigation into Appellant began when the National Center for Missing and Exploited Children received a tip that suspected child pornography was uploaded to Appellant's Dropbox account. (Pros. Ex. 1.) When Appellant was interviewed by the Air Force Office of Special Investigations (AFOSI), he confessed to viewing, possessing, and distributing child pornography and obscene depictions of minors engaged in sexually explicit conduct, including bestiality. (Id.) In the stipulation of fact, Appellant explained that he "received sexual gratification when viewing child pornography and bestiality and masturbated while viewing it." (Id.)

Additional facts relevant to each assignment of error are included in the argument sections below.

ARGUMENT

I.

APPELLANT SUFFERED NO PREJUDICE FROM THE CONVENING AUTHORITY'S DECISION ON ACTION MEMEMORANDUM IN WHICH THE CONVENING AUTHORITY INTENDED TO DENY RELIEF.

Additional Facts

On 12 January 2022, Appellant, through counsel, requested clemency. (*Request for Clemency*, dated 12 January 2022, ROT, Vol. 2.) Appellant did not request any specified relief in clemency. (Id.)

On 28 January 2022, the convening authority issued his decision on action. (*Convening Authority Decision on Action*, dated 28 January 2022 ROT, Vol. 1.) The convening authority consulted with his staff judge advocate (SJA) and considered the matters submitted by Appellant. (Id.) He stated that he took "no action" on the findings and "no action" on the sentence. (Id.) He also explained that Appellant did not "request any deferments of confinement, forfeitures, or reduction in rank." (Id.) He ordered Appellant to take leave pending completion of appellate review. (Id.)

The entry of judgment was signed on 5 January 2022. (*Entry of Judgment*, dated 5 January 2022, ROT, Vol. 1.) Appellant did not file any post-trial motions challenging any error in the convening authority's action.

Standard of Review

When an appellant alleges error in an action and the appellant does not object in a post-trial motion, this Court reviews the alleged error for plain error. United States v. Brubaker-Escobar, 81 M.J. 471, 473 (C.A.A.F. 2021) (per curiam). When the alleged error is procedural error, this Court tests for material prejudice to a substantial right. Id. at 475; United States v.

Harrington, No. ACM 39825, 2021 CCA LEXIS 524, at *98 (A.F. Ct. Crim. App. 14 October 2021) (unpub. op.).

Law and Analysis

The convening authority reviewed the matters Appellant submitted and declined to grant Appellant relief by taking no action on the findings or sentence. (*Convening Authority Decision on Action*, dated 28 January 2022, ROT, Vol. 1.) Because Appellant committed Specifications 4 through 7 of Charge I before and after 2019, the convening authority should have applied the pre-2019 version of Article 60, UCMJ, which required the convening authority to take action on the sentence. So, the convening authority's decision on action memorandum stating that the convening authority takes "no action" constitutes procedural error. Brubaker-Escobar, 81 M.J. at 475; Harrington, unpub. op. at *98.

However, Appellant suffered no material prejudice to a substantial right because the convening authority clearly intended to provide no relief. Nor does Appellant allege that he was prejudiced in his brief. The convening authority reviewed the matters submitted by Appellant and consulted with the SJA who presumably advised the convening authority of his legal authority to grant the requested relief. *See* United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

In taking no action on the sentence, the convening authority clearly intended to deny the requested relief and approve the adjudged sentence. The decision on action memorandum reflected the Air Force guidance in effect at the time for when a convening authority intends to provide no relief. *See* Harrington, upub. op. at *96 (noting that Air Force Instruction 51-201

"equated 'taking action' with 'granting post-sentencing relief,' explaining '[a] decision to take action is tantamount to granting relief, whereas a decision to take no action is tantamount to granting no relief.'"). Additionally, not only had the convening authority *already* indicated what he considered to be an appropriate range of punishment through the plea agreement. *See* United States v. Barnaby, No. ACM 39866, 2021 CCA LEXIS 532 at 34-35 (A.F. Ct. Crim. App. 2021) (unpub. op.) (finding no material prejudice in part because "[t]he convening authority expressly stated that he considered Appellant's clemency request and consulted with his SJA before reaching a decision. The convening authority twice stated his intent to take no action on the sentence beyond that which was required of him by the pretrial agreement."). But the convening authority also could not have granted much relief because he did not have the authority to "set aside, disapprove, or take any other action on the findings of the court-martial" when Appellant's sentence included a dishonorable discharge and a term of confinement that was more than six months. R.C.M. 1109. Nor did Appellant make any specific requests regarding relief of his sentence in clemency. (*Request for Clemency*, dated 12 January 2022, ROT, Vol. 2.)

Based on the above, Appellant would have received the same sentence if the convening authority's action had been in proper form. Since the procedural error did not prejudice a substantial right of Appellant, this Court should decline to grant relief. Brubaker-Escobar, 81 M.J. at 475.

II.

APPELLANT STIPULATED TO THE VICTIM IMPACT STATEMENTS AS PROPER EVIDENCE IN AGGRAVATION UNDER R.C.M. 1001(b)(4).

Additional Facts

As part of his plea agreement, Appellant agreed to enter a reasonable stipulation of fact concerning the facts and circumstances surrounding all the offenses he was charged with. (App. Ex. V.) Appellant stipulated that two victim impact statements – Statement of "Lily" and Statement of "Sierra's" Mother" – were admissible under R.C.M. 1001(b)(4) as "proper evidence in aggravation for the offenses to which he has plead guilty." (Pros. Ex. 1 at 8.) Appellant possessed and viewed two images and one video of the female who goes by the pseudonym "Lily" and two images of the female who goes by the pseudonym "Sierra." (Id.) Both victim impact statements detailed that the females have suffered "significant financial, social, psychological, and medical impact as a result" of Appellant's offenses. (Id.) The two victim impact statements were attached to the stipulation of fact. (Id. at 21-27.)

During the military judge's colloquy with Appellant, he agreed the victim impact statements were admissible in both the fact finding and sentencing portions in his case. (R. at 42.) He also explained that he had the opportunity to discuss the victim impact statements with his counsel, he had the opportunity to review the statements, he knew how the court would use the statements, and he agreed to attach the statements to the stipulation of fact. (R. at 43-46.)

Finally, Appellant entered the stipulation of fact voluntarily. (Pros. Ex. 1 at 8.)

Standard of Review

"A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." United States v. Campos, 67 M.J. 330, 332

(C.A.A.F. 2009) (citing United States v. Cook, 406 F.3d 485, 487 (7th Cir. 2005). "While we review forfeited issues for plain error, we cannot review waived issues at all because valid waiver leaves no error for us to correct on appeal." Id. (citing United States v. Pappas, 409 F.3d 828, 830 (7th Cir. 2005). When determining whether a particular matter was waived or forfeited, this Court should consider whether the failure to "raise the objection at the trial level constituted an intentional relinquishment of a known right." Id.

Law and Analysis

There is no error for this Court to correct on appeal because Appellant waived this issue at trial. This is not a case where the victim impact statements came into evidence without any objection or comment from defense counsel. If that were the case, this Court would review for plain error. Campos, 67 M.J. at 332. Here, the statements at issue were attached to the stipulation of fact. Further, Appellant agreed that all attachments contained in the stipulation of fact were admissible pursuant to R.C.M. 1001(b)(4) as proper evidence in aggravation for the offenses to which he has plead guilty. (Pros. Ex. 1.) The military judge also conducted a colloquy with Appellant and asked if he agreed to attach the victim impact statements to his stipulation of fact and he confirmed he did. (R. at 45-46.) Finally, prior to admitting the stipulation of fact, the military judge asked if there were any objections, to which Appellant expressly indicated that he had none. (R. at 46.) This constituted an intentional relinquishment of a known right. Thus, Appellant waived any objection to the admittance of the victim impact statements, and there is no error for this Court to review.

However, assuming *arguendo*, this Court determines that Appellant merely forfeited this issue, this Court should still find that the military judge did not err when she admitted the victim impact statements as attachments to the stipulation of fact.

During sentencing proceedings, evidence of victim impact can be offered either by the Government as evidence in aggravation in accordance with R.C.M. 1001(b)(4) or by the victim pursuant to R.C.M. 1001A. United States v. Barker, 77 M.J. 377, 382 (C.A.A.F. 2018). If the victim impact is offered as evidence in aggravation pursuant to R.C.M. 1001(b)(4), the Military Rules of Evidence will apply. United States v. Hamilton, 77 M.J. 579, 586 (A.F. Ct. Crim. App. 2017), rev. granted, 77 M.J. 368 (C.A.A.F. 2018). Our Superior Court held that "[e]vidence that otherwise would be inadmissible under the Military Rules of Evidence may sometimes be admitted at trial through a stipulation, if the parties expressly agree, if there is no overreaching on the part of the Government in obtaining the agreement, and if the military judge finds no reason to reject the stipulation "in the interest of justice." United States v. Clark, 53 M.J. 280, 281-82 (C.A.A.F. 2000) (quoting United States v. Glazier, 26 M.J. 268, 270 (C.M.A. 1988).

Appellant does not specifically argue that the victim impact statements were wrongfully admitted as attachments or that they did not comply with R.C.M. 1001(b)(4). (App. Br. App. A at 1-2.) Instead, Appellant argues "by presumably forcing an accused to stipulate to victim impact statements as matters in aggravation, the Government engaged in "overreaching" in "obtaining the agreement." (Id. at 2.) However, not only does Appellant fail cite to anything in the record to demonstrate that the Government overreached, but he also fails to explain how the victim impact statements were inadmissible as matters in aggravation. Appellant's current position is contrary to both his position in the stipulation of fact and his colloquy with the military judge that the statements were admissible as matters in aggravation under R.C.M. 1001(b)(4). (R. at 37-38, Pros. Ex. 1 at 8.) Appellant's initial position was correct – the victim impact statements were properly admitted as matters in aggravation under R.C.M. 1001(b)(4). While the victim impact statements would have been inadmissible hearsay for the findings

portion of Appellant's trial, Appellant stipulated that "the following facts are true, accurate, and admissible for all relevant purposes and all stages" of his court-martial. (Pros. Ex. 1 at 1.)

Additionally, there is no evidence of Government overreach. Appellant had the opportunity to review and discuss the victim impact statements with his counsel and chose to voluntarily enter into the stipulation of fact. (R. at 43-46, Pros. Ex. 1 at 8.)

Appellant also argues that the agreement is in violation of public policy and fairness as "it is an end-run around the safeguards of R.C.M. 1001." (App. Br. App. A at 2.) Again, Appellant fails to explain how the agreement was in violation of public policy and fairness. Notably, both cases Appellant cites to in support of his position do not reference R.C.M. 1001(b)(4). United States v. Tate, 64 M.J. 269, 272 (C.A.A.F. 2007) analyzed whether Appellant's plea agreement denied him the post-trial right to seek clemency and parole. And the court in Barker expressly identified that the statements at issue were not admitted by the Government as aggravation evidence under R.C.M. 1001(b)(4) and, thus, the court did not address R.CM. 1001(b)(4) in their analysis. 77 M.J. at 382.

If this Court does find that there was plain error when the military judge admitted the victim impact statements as attachments to the stipulation of fact, this Court should find there was no material prejudice of a substantial right of Appellant. "When there is error in the admission of sentencing evidence . . . we test for prejudice by assessing whether the error substantially influenced the adjudged sentence and consider four facts: (1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." Barker, 77 M.J. at 384.

As highlighted by the stipulation of fact, Appellant confessed to viewing, possessing, and distributing child pornography and obscene depictions of minors engaged in sexually explicit

conduct, including bestiality. (Pros. Ex. 1.) In the stipulation of fact, Appellant explained that he "received sexual gratification when viewing child pornography and bestiality and masturbated while viewing it." (Id.) Appellant admitted to predominantly using his cellphone to view and distribute child pornography, but also admitted that there were photographs on his personal desktop. (Id.) Appellant viewed and possessed 82 images and 16 videos of child pornography, possessed and distributed 30 images and 4 videos of obscene depictions of minors engaged in sexually explicit conduct, and possessed and distributed 16 images and 2 pdf files of obscene depictions of minors engaged in graphic bestiality. (Id.) The Government's case was exceptionally strong. By comparison, Appellant's sentencing case – consisting of only a verbal unsworn statement by Appellant and no defense exhibits – was relatively weak. (R. at 130.)

When assessing the materiality and quality of the evidence, our Superior Court considers the factual circumstances of each case. United States v. Washington, 80 M.J. 106, 111 (C.A.A.F. 2020). Factual circumstances to consider include: the extent to which the evidence contributed to the government's case, see, e.g., United States v. Hursey, 55 M.J. 34, 36 (C.A.A.F. 2001) (concluding that an error was harmless in part because the record was "replete with admissible evidence" that was similar); the extent to which instructions to the panel may have mitigated the error, see, e.g., United States v. Baumann, 54 M.J. 100, 105 (C.A.A.F. 2000) (concluding that an error was harmless in part because he military judge gave "extensive instructions on the proper use" of the evidence); see also United States v. Eslinger, 70 M.J. 193, 196-97 (C.A.A.F. 2011); the extent to which the government referred to the evidence in argument, see, e.g., United States v. Brooks, 26 M.J. 28, 29 (C.M.A. 1988) (concluding that an error was harmless in part because the "trial counsel did not refer to the objectionable evidence in his argument"); and the extent to which the members could weigh the evidence using their own layperson knowledge, see, e.g.,

United States v. Walker, 42 M.J. 67, 74 (C.A.A.F. 1995) (concluding that an error was harmless in part because the Court was "confident that the members—using their common sense and everyday experiences—placed this evidence in a proper perspective and did not afford it substantial weight").

Weighing the relevant factual circumstances in this case, there is little evidence that Appellant was prejudiced by the admission of the victim impact statements. Appellant's sentencing case was before a military judge alone, who is presumed to know the law. United States v. Bridges, 66 M.J. 246, 248 (C.A.A.F. 2008). This Court can be confident that the military judge placed this evidence in a proper perspective and did not afford it undue importance. Further, trial counsel did not unduly exploit the victim impact statements during his sentencing arguments, but instead focused his arguments on the horrid nature of Appellant's crimes. (R. at 135-138.) And lastly, the evidence contributed little to the Government's case because there was much more compelling evidence than the victim impact statements. Appellant possessed 150 files of child pornography and obscene depictions of minors engaged in sexually explicit conduct, some of it containing small children performing sexual acts with animals. (R. at 137.) Appellant also distributed this material on . (Pros. Ex. 1.) Needless to say, this evidence greatly overshadows the admitted victim impact statements, which merely reflect common sense understandings of the impact that Appellant's crimes would have upon victims of child pornography and Appellant's other crimes. *See* Barker, 77 M.J. at 384 (stating that while "the theme of the letters was on constant revictimization, that devastating facet of child pornography is itself settled law, and why child pornography is both considered a continuing offense . . ."). Therefore, the materiality of these victim impact statements is

relatively low and if they were erroneously admitted, they did not substantially influence the adjudged sentence.

This Court should find that Appellant waived this issue; however, if this Court finds that Appellant merely forfeited this issue, there was no plain error by the military judge when she admitted the victim impact statements as attachments to the stipulation of fact. And Appellant has not demonstrated material prejudice from this alleged error. This assignment of error should be denied.

III.

TRIAL COUNSEL DID NOT ENGAGE IN IMPROPER ARGUMENT.

Additional Facts

During his interview with AFOSI, Appellant admitted that adult pornography was "no longer sexually exciting for him and he had a morbid curiosity and desire to view child pornography and bestiality." (Pros. Ex. 1.) In the stipulation of fact, Appellant also conceded that he could have deleted the images and videos he possessed if he wanted to and that he possessed the material because "it gave him sexual pleasure to do so." (Id.) During his verbal unsworn statement, Appellant explained to the military judge, "I am thankful for the Air Force for forcing me to confront this. I was not strong enough to be able to do it on my own." (R. at 132.)

During sentencing argument, trial counsel stated,

> [Appellant] is not going to be able to stop this behavior no matter how hard he tries, and the only way to guarantee that he doesn't reoffend or act on his sexual desires is to adjudge the max confinement authorized. Society is not safe given the accused's sexual activities, and the sentence in this case should protect children from future crimes and guarantee that he does not reoffend for at least five years.

(R. at 136.)

At no point did defense trial counsel object to trial counsel's argument. (R. at 141-46.)

Standard of Review

Prosecutorial misconduct and improper argument are reviewed under a de novo standard. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019). When there is no objection, this Court reviews for plain error. Id. The burden of proof under plain error is on the appellant, who must demonstrate: (1) that there is error; (2) the error is clear or obvious; and (3) the error results in material prejudice to a substantial right of the accused. Id. (*quoting* United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)).

Law and Analysis

Prosecutorial misconduct is behavior that oversteps "the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." Berger v. United States, 295 U.S. 78, 84 (1935). It is defined as an action or inaction taken by a trial counsel in violation of a legal norm or standard. United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996).

A trial counsel is charged "with being a zealous advocate for the government." United States v. Barrazamartinez, 58 M.J. 173, 176 (C.A.A.F. 2003). He may argue not only the evidence that is within the record, but also "all reasonable inferences fairly derived from such evidence." United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). In determining whether an argument is improper, the Court is to view it in its entire context. Id. at 239. The Court does not review a comment in isolation, but rather the entire argument "viewed in context." United States v. Young, 470 U.S. 1, 16 (1985).

On appeal, Appellant challenges trial counsel's argument on the basis that it referenced "an alleged fact that was not in evidence; and 2) it overstepped the 'bounds of that propriety and fairness which should characterize the conduct of . . . an officer in the prosecution of a criminal offense.'" (App. Br. App. A at 2.) Because Appellant's trial defense counsel failed to object to this argument that he now claims was improper, he has the burden to demonstrate clear or obvious error that resulted in material prejudice to a substantial right. Appellant has failed to meet that burden.

Trial counsel's statement was not improper.

Appellant argues that trial counsel improperly argued that Appellant was "not going to be able to stop this behavior no matter how hard he tries, and the only way to guarantee that he doesn't reoffend or act on his sexual desires is to adjudge the max confinement authorized." (App. Br. App. A at 2.) He specifically argues that this statement was improper because it was an alleged fact that was not in evidence. (Id.) However, Appellant, as was his right, put this information before the military judge when in his verbal unsworn statement he stated, "I am thankful for the Air Force for forcing me to confront this. I was not strong enough to be able to do it on my own." (R. at 132.) An appellant's unsworn statement is not evidence. United States v. Provost, 32 M.J. 98, 99 (C.M.A. 1991). However, this Court has held that trial counsel can comment on Appellant's unsworn statement "during the Government's sentencing argument." United States v. Green, No. ACM S32607, 2021 CCA LEXIS 230, at *9 (A.F. Ct. Crim. App. 13 May 2021) (unpub. op.) citing to United States v. Barrier, 61 M.J. 482, 484 (C.A.A.F. 2005*). See also* United States v. Tyler, 81 M.J. 108, 113 (C.A.A.F. 2021) (Stating that even though an accused's unsworn statement is not evidence, it is still subject to comment during the Government's closing argument.)

Here, Appellant expressed in his unsworn statement that if not for the Air Force's intervention, he would not have been able stop his misconduct on his own. (R. at 132.) Thus, trial counsel was not barred from commenting on this portion of Appellant's unsworn statement in his sentencing argument. This Court has cautioned that while trial counsel may comment on statements in an appellant's unsworn statement, "they may not attempt to mislead the court-martial by suggesting that those matters amount to or carry the same weight as admitted evidence." Green, unpub. op. at *10. Here, trial counsel did not overstate the comments Appellant made and only briefly commented on Appellant's admitted inability to stop the behavior on his own. This case is different from United States v. Frey, where the trial counsel, in his presentencing argument, asked the members, without any basis in the evidence, to "apply their knowledge of the 'ways of the world' to sentence Appellant based on a risk of recidivism through serial molestation." 73 M.J. 245, 249 (C.A.A.F. 2014). Here, trial counsel was not appealing to a vague risk of recidivism based on the judge's common knowledge of the ways of the world, instead he was commenting directly on Appellant's own words from his unsworn statement.

In sum, trial counsel's arguments did not amount to plain error.

Appellant has failed to demonstrate material prejudice to a substantial right

In assessing prejudice in a prosecutorial misconduct case, three factors are weighed: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). To determine the severity of the misconduct, the Court applies a five-factor test. United States v. Andrews, 77 M.J. 393, 402 (C.A.A.F. 2018). The five factors are: (1) the instances of misconduct as compared to the overall length of the argument; (2) whether the

misconduct was confined to rebuttal, or spread through findings; (3) the length of the trial; (4) the length of the panel's deliberations; and (5) whether the trial counsel abided by any rulings from the military judge. Id.

Assuming trial counsel's sentencing argument contained an improper comment, Appellant cannot demonstrate he was prejudiced by the comment, nor does he attempt to. The alleged prosecutorial misconduct was not so severe. First, the occurrence of the alleged improper comment as compared to the overall length of the argument was limited. The comment only constituted a very small portion of trial counsel's sentencing argument. Additionally, trial counsel focused his argument mostly on the facts and circumstances of Appellant's crimes, including the young ages of the children and the steps Appellant took to hide his misconduct. (R. at 135-137.) Second, the alleged misconduct was confined to only a small portion of trial counsel's sentencing argument – one statement. Appellant does not allege that trial counsel made any errors outside of his sentencing argument, and thus, the comment at issue was particularly confined to such a small portion of the sentencing hearing. In looking at the third, fourth, and fifth Andrews factors – the length of the trial, the length of the panel's deliberations, and whether the trial counsel abided by any rulings from the military judge – are not particularly relevant in this case because Appellant pled guilty before a judge-alone general court-martial. However, the fact that Appellant was sentenced by a military judge sitting alone weighs in favor of the Government because few measures would be needed to cure the misconduct. Appellant was sentenced by a military judge sitting alone. "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007). Our Superior Court has also acknowledged, "[a]s part of this presumption we further presume that the military judge is able to distinguish between proper and improper

sentencing arguments. Id. This Court has held that a military judge can filter out trial counsel's objectionable remarks. United States v. Jensen, No. ACM 39573, 2020 CCA LEXIS at *18 (A.F. Ct. Crim. App. 19 May 2020)

And lastly and most importantly, the weight of the evidence strongly supports the conviction. When improper argument happens during sentencing, the question is whether the court can be "confident that [the appellant] was sentenced on the basis of the evidence alone." United States v. Halpin, 71 M.J. 477, 480 (C.A.A.F. 2013). In this case, this Court can be confident that Appellant was sentenced on the basis of the evidence alone. Appellant possessed 150 files of child pornography and obscene depictions of minors engaged in sexually explicit conduct, some of it containing small children performing sexual acts with animals. (R. at 137.) Appellant then distributed these files to likeminded criminals on Wickr, Discord, and Kik. (Pros. Ex. 1.) Evidence of this was contained and attached to the stipulation of fact, in which Appellant agreed and stipulated to. The nature of Appellant's crimes was so egregious and the evidence of these crimes was so overwhelming that there is very little trial counsel could have argued that would have substantially influenced the sentence in front of the military judge. Thus, in considering the full context of the sentencing argument in this judge-alone trial, this Court can be confident that Appellant was sentenced on the basis of the evidence alone, and that Appellant was not materially prejudiced.

Furthermore, the lack of an objection by defense counsel is some measure of the minimal impact of trial counsel's argument. United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001) (*citing* United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)). Not only did trial defense counsel not object to the statement trial counsel made during sentencing, but trial defense counsel also declined to submit them as legal error to the convening authority in his clemency

submissions. (*Request for Clemency*, dated 12 January 2022, ROT, Vol. 2.) This demonstrates to this Court that, in the context of the trial as a whole, trial defense counsel did not see any prejudicial impact in trial counsel's arguments.

In conclusion, this Court should deny Appellant's requested relief.

IV.

APPELLANT'S SENTENCE WAS NOT INAPPROPRIATELY SEVERE.

Additional Facts

Appellant was sentenced by military judge alone to 54 months of confinement, a dishonorable discharge, reduction to the grade of E-1, total forfeitures, and a reprimand. (*Entry of Judgment*, dated 5 January 2022, ROT, Vol. 1.)

Standard of Review

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

Law and Analysis

Appellant's sentence is not inappropriately severe. Rather, it fits his actions and the findings of guilt in this case. The appropriateness of a sentence is assessed "by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). Unlike the act of bestowing mercy through clemency, which was delegated to other hands by Congress, Courts of Criminal Appeals are entrusted with the task of

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

Appellant's sentence of 54 months (or 4 and half years) of confinement, a dishonorable discharge, reduction to the grade of E-1, total forfeitures, and a reprimand is an appropriate punishment because Appellant viewed, possessed, and distributed child pornography and obscene depictions of minors engaged in sexually explicit conduct. (*Entry of Judgment*, dated 5 January 2022, ROT, Vol. 1.)

Even though Appellant agreed to the sentencing terms of his plea agreement, Appellant now argues his sentence was inappropriately severe. (App. Br. App. A at 3.) But as the Court of Military Appeals explained, "[a]bsent evidence to the contrary, an accused's own sentence proposal is a reasonable indication of its probable fairness to him." United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979). Yet, Appellant now impliedly argues that he should not be held to the terms he bargained for because, at some point in his five-year career, he was seen by mental health and the military judge did not take his condition and treatment into account as a mitigating factor for sentencing. (App. Br. App. A at 3.) Appellant does not point to anything in the record to demonstrate that the military judge did not consider the matters in mitigation he presented, nor does he argue that the plea agreement limitations were unfair. Indeed, that Appellant agreed to the sentencing terms demonstrates its fairness.

Instead, Appellant's argument focuses solely on the fact that he had previously received mental health treatment and that "the adjudication of his security clearance, was 'an alienating and isolating experience.'" (App. Br. App. A at 3.) But, importantly, Appellant ignores the severity and aggravating factors of his own crime and how his conduct affected the victims of his misconduct. His crime warranted 54 months of confinement, reduction in rank, total forfeitures,

a dishonorable discharge, and a reprimand. Appellant viewed, possessed, and distributed child pornography and obscene depictions of minors engaged in sexually explicit conduct. He possessed this "material because it gave him sexual pleasure to do so and because it was his intent to be part of a group or online community that traded" in these types of images and videos. (Pros. Ex. 1.) To support the fact that Appellant deserves the adjudged sentence, Appellant admitted that his conduct was "irreprehensible" and that "[n]o words [could] accurately make up the trauma" the victims went through and that he actively contributed to. (R. at 132.)

Despite Appellant knowing his actions were wrong, he was not dissuaded from continuing to view, possess, and distribute child pornography and obscene depictions of minors engaged in sexually explicit conduct. As a result, a more severe punishment was necessary to rehabilitate and deter Appellant from committing future offenses. For these reasons, Appellant's punishment "fit[s] the offender" and his convictions. United States v. Mack, 9 M.J. 300, 317 (C.M.A. 1980) (citation omitted).

The maximum confinement that could have been adjudged was 80 years of confinement. (R. at 107.) Appellant was ultimately sentenced to be confined for only fourteen percent of the maximum term of confinement allowed. The dishonorable discharge Appellant received is an appropriate punishment for an individual convicted of these crimes against children. It is not as if the sentence was wildly disproportionate to Appellant's actions. Thus, Appellant is entitled to no relief, and this Court should affirm the appropriate sentence returned by the military judge.

Therefore, the United States respectfully requests this Honorable Court deny Appellant's request to modify his sentence.

CONCLUSION

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

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Government Trial and Appellate Operations Division
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 15 December 2022 via electronic filing.

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