UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40651**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Brennen J. PATTERSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 20 September 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposed the motion.

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

Accordingly, it is by the court on this 24th day of September 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **30 November 2024**.

Each request for an enlargement of time will be considered on its merits. Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON,** United States Air Force *Appellant*	)	No. ACM 40651 20 September 2024

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **30 November 2024**. The record of trial was docketed with this Court on 2 August 2024. From the date of docketing to the present date, 49 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]

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 20 September 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
[redacted]

24 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRENNEN J. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40651 Panel No. 1

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

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

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

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 September 2024.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON,** United States Air Force *Appellant*	)	No. ACM 40651 21 November 2024

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **30 December 2024**. The record of trial was docketed with this Court on 2 August 2024. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 2 May 2024, at a general court-martial convened at Joint San Antonio – Fort Sam Houston, Texas, Appellant was found guilty, consistent with his pleas, of one specification of Article 134, Uniform Code of Military Justice (UCMJ). *Entry of Judgment*. The military judge sentenced Appellant to a reduction to E-1, total forfeitures, 3 months' confinement, and a bad-conduct discharge. *Id.* The convening authority took no action on the findings but waived all automatic forfeitures for a period of two months to be paid to the legal guardian of Appellant's dependent. *Convening Authority Decision on Action*.

The trial transcript is 119 pages long and the record of trial contains three volumes comprised of five prosecution exhibits, five defense exhibits, nine appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, the request for this enlargement of time, and wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 21 November 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
[redacted]

22 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRENNEN J. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40651 Panel No. 1

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

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

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

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 November 2024.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON,** United States Air Force *Appellant*	)	No. ACM 40651 19 December 2024

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **29 January 2025**. The record of trial was docketed with this Court on 2 August 2024. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

On 2 May 2024, at a general court-martial convened at Joint San Antonio – Fort Sam Houston, Texas, Appellant was found guilty, consistent with his pleas, of one specification of Article 134, Uniform Code of Military Justice (UCMJ). *Entry of Judgment*. The military judge sentenced Appellant to a reduction to E-1, total forfeitures, 3 months' confinement, and a bad-conduct discharge. *Id.* The convening authority took no action on the findings but waived all automatic forfeitures for a period of two months to be paid to the legal guardian of Appellant's dependent. *Convening Authority Decision on Action*.

The trial transcript is 119 pages long and the record of trial contains three volumes comprised of five prosecution exhibits, five defense exhibits, nine appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, the request for this enlargement of time, and wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 19 December 2024.

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
[redacted]

20 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRENNEN J. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40651 Panel No. 1

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 December 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON,** United States Air Force *Appellant*	)	No. ACM 40651 16 January 2025

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 February 2025**. The record of trial was docketed with this Court on 2 August 2024. From the date of docketing to the present date, 167 days have elapsed. On the date requested, 210 days will have elapsed.

On 2 May 2024, at a general court-martial convened at Joint San Antonio – Fort Sam Houston, Texas, Appellant was found guilty, consistent with his pleas, of one specification of Article 134, Uniform Code of Military Justice (UCMJ). *Entry of Judgment*. The military judge sentenced Appellant to a reduction to E-1, total forfeitures, 3 months' confinement, and a bad-conduct discharge. *Id.* The convening authority took no action on the findings but waived all automatic forfeitures for a period of two months to be paid to the legal guardian of Appellant's dependent. *Convening Authority Decision on Action*.

The trial transcript is 119 pages long and the record of trial contains three volumes comprised of five prosecution exhibits, five defense exhibits, nine appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 14 cases, with 5 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 3 in this case, undersigned counsel filed the Reply Brief in *United States v. Arroyo* (ACM 40321 (f rev), USCA Dkt. No. 24-0212/AF) with the Court of Appeals for the Armed Forces (CAAF); delivered the Petition for Writ of Certiorari in *United States v. Guihama* (ACM 40039, USCA Dkt. No. 23-0085/AF) to the Supreme Court of the United States (SCOTUS); filed an Answer to the Government's motion to reconsider in *United States v. Hennessy* (ACM 40439) with this Court; filed a motion to strike portion of amicus curiae brief of LP and an opposition to amicus motion for oral argument in *Arroyo* with the CAAF; and filed the Brief on Behalf of Appellant in *United States v. Arizpe* (ACM 40507) with this Court.

Of note, the Court and undersigned counsel's office were closed 24-26 December 2024 due to the President's Executive Order, a federal holiday, and a family day; closed 1-2 January 2025 due to a federal holiday and family day; and closed 9 January 2025 due to the President's Executive Order. Undersigned counsel took leave 13-15 January 2025. Since filing EOT 3 in this case, undersigned counsel prepared for and participated as a moot judge in five moot arguments (equaling approximately 12 hours) and completed three peer reviews (equaling approximately 17 hours). Undersigned counsel has also been working on the planning and preparations for a *DuBay*[1] hearing ordered in *United States v. Sherman,* (ACM 40486) by this Court, which is currently scheduled for the week of 27 January 2025. Undersigned counsel will

[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

also file the Supplement to the Petition for Grant of Review in *United States v. Martell* (ACM 40501) with the CAAF by 21 January 2025. Additionally, undersigned counsel will have Reply Briefs due in *United States v. Clark* (ACM 40540) (estimated 3 February 2025) and *Arizpe* (estimated 20 February 2025) and Oral Argument at the CAAF in *Arroyo* (scheduled 25 February 2025).

This case is currently undersigned counsel's fifth priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Soloshenko* (ACM 40581): The electronic record of trial is 1,173 pages long comprised of seven prosecution exhibits, two defense exhibits, 27 appellate exhibits, and one court exhibit. Undersigned counsel scanned and transmitted, pursuant to this Court's Order, the sealed material to civilian appellate defense counsel. This case has moved up in priority given civilian counsel's availability.
2. *United States v. Cooley* (ACM 40376): The unsealed portion of the verbatim transcript is 1,587 pages long and the record of trial is comprised of 10 volumes containing 29 prosecution exhibits, 16 defense exhibits, 109 appellate exhibits, and two court exhibits. The sealed transcript is 69 pages long; there is one sealed exhibit that is a document and one sealed exhibit that is a video lasting approximately eight hours. Undersigned counsel has viewed the sealed evidence in this case.
3. *United States v. Echaluse* (ACM 24027): The electronic record of trial is 1,094 pages long containing three prosecution exhibits, 34 defense exhibit, 16 appellate exhibits, and zero court exhibits.

4. *United States v. Kindred* (ACM 40607): The trial transcript is 1,191 pages long comprised of 36 prosecution exhibits, three defense exhibits, 43 appellate exhibits, and two court exhibits.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, the request for this enlargement of time, and wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 16 January 2025.

Respectfully submitted,

[redacted]
HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
[redacted]

21 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRENNEN J. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40651 Panel No. 1

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 January 2025.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
	)	No. ACM 40651
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*	)	18 February 2025

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

Under Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, and Rules 23 and 24 of The Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant hereby moves for a fifth enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of thirty days, which would end on **30 March 2025**.

This case was docketed 200 days ago, on 2 August 2024. On the date requested, 240 days will have elapsed. Appellant is not currently confined.

Appellant was tried by a military judge sitting as a general court-martial at Joint Base San Antonio – Fort Sam Houston, on 19 March 2024 and 2 May 2024. R. at 1, 13-14, 20-22, 119. Consistent with his pleas, Appellant was convicted of one charge containing one specification of the assimilated offense of transporting an illegal alien, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 134. R. at 22, 60. The military judge sentenced Appellant to a bad-conduct discharge, confinement for three months, forfeiture of all pay and allowances, and reduction to the pay grade of E-1. R. at 118. The convening authority took no action with respect to the findings but waived all automatic forfeitures until the soonest of a

period of two months, Appellant's expiration of term of service, or Appellant's release from confinement, with the funds to be paid to the legal guardian of Appellant's dependent. Convening Authority Decision on Action.

The record of trial is three volumes. It contains a 119-page transcript, five prosecution exhibits, five defense exhibits, and nine appellate exhibits.

Undersigned counsel has completed review of the documentary portions of the record but not the digital media contained on discs. Undersigned counsel will be leading completion of Appellant's Assignments of Error.

Major Heather Bruha remains assigned as Appellant's counsel and has not filed a motion to withdraw, but also has not reviewed the record in this case and would not otherwise have an opportunity to do so for multiple months. Major Bruha's caseload consists of thirteen cases overall, two other cases pending initial briefing before this Court, and two cases pending initial briefing presently prioritized over Appellant's, in addition to oral argument before the United States Court of Appeals for the Armed Forces scheduled for 25 February 2025 in *United States v. Arroyo*, No. ACM 40321 (f rev), USCA Dkt. No. 24-0212. Major Bruha also has briefing anticipated in the near future following the *DuBay* hearing ordered by this Court in *United States v. Sherman*, No. ACM 40485. Major Bruha's cases pending briefing are set out below and, due to undersigned counsel undertaking Appellant's case, will not delay the review or briefing of Appellant's case:

1) *United States v. Cooley*, No. ACM 40376: The unsealed portion of the verbatim transcript is 1,587 pages long and the record of trial is composed of 10 volumes containing twenty-nine prosecution exhibits, sixteen defense exhibits, 109 appellate exhibits, and two court exhibits. The sealed transcript is sixty-nine pages and, according to Major Bruha,

contains one sealed exhibit that is a document and one sealed exhibit that is a video lasting approximately eight hours. Major Bruha is in the midst of reviewing the record.

2) *United States v. Echaluse*, No. ACM 24027: The electronic record of trial is 1,094 pages long containing three prosecution exhibits, thirty-four defense exhibits, sixteen appellate exhibits, and zero court exhibits. Major Bruha has not completed review of the record in this case.

This is undersigned counsel's only case pending initial briefing before any court. This is undersigned counsel's top-priority case. Undersigned counsel has identified multiple potential issues that require further research and discussion with Appellant.

As Deputy Chief of the Appellate Defense Division, undersigned counsel is also assigned to carry out a variety of duties that have impacted the ability to work on Appellant's case in the previous thirty days and will impact the same over the duration of the requested enlargement beyond his own docket. During the last thirty days, those duties included: (1) drafting a legislative proposal to amend the Uniform Code of Military Justice, (2) supervisory review of twelve briefs spanning 238 pages and analyzing thirty issues filed or to be filed with this Court, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States, (3) approximately four-and-a-half hours spent reviewing court filings in order to then assist Division counsel with four hour-long moot arguments to prepare counsel for four scheduled oral arguments before the Court of Appeals for the Armed Forces scheduled for 25 and 26 February 2025, (4) leading the Judge Advocate General's Corps' coordination with communications units at seven different installations across the Department of the Air Force in order to evaluate new legal research and writing software designed to accelerate and improve litigators' capabilities, (5) two one-hour meetings related facilitating development of the Department of the Air Force's new appellate case management system, (6) overseeing the Appellate Defense Division's twelve

end-of-year award package submissions, each requiring an average of one hour of work, (7) sitting second chair at one oral argument before the Court of Appeals for the Armed Forces, (8) expending approximately four hours to twice update slides for a briefing for The Judge Advocate General about the state of the Appellate Defense Division, to include analysis of the most recent fiscal year's report under Article 146a, UCMJ, (9) training the Appellate Defense Division on relevant takeaways from the most recent Article 146a, UCMJ, report, (10) compiling data to inform the annual performance evaluation of the prior Chief of the Appellate Defense Division, (11) a short-notice one-day tasker related to a policy concerning appearing to direct the return of the Division's eight assigned Reserve Appellate Defense Counsel to in-office performance of duty, and subsequently investing substantial time in the last two weeks to manage Reserve personnel assigned to the Appellate Defense Division and ensure continued support to cases while those counsel effectively lack authorization to perform their duties under recent Department of Defense and Department of the Air Force policies, (12) two meetings spanning at least thirty minutes each regarding production of podcasts in conjunction with the Air Force's Trial Defense Division regarding legal developments, to include appellate updates, and best practices for trial practitioners, and (13) drafting end-of-tour decorations for two personnel scheduled to depart the Appellate Defense Division on 1 April 2025. Undersigned counsel also had one-and-a-half duty days affected by unexpected childcare needs and one-and-a-half duty days limited by the effects of winter weather. Over the next thirty days, undersigned counsel's duties include: (1) during the parental leave of the Appellate Defense Division's senior civilian counsel, continued primary responsibility for supervisory review of all briefs to be filed with this Court, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States, (2) nine hour-long moot arguments to prepare counsel for four scheduled oral arguments before

the Court of Appeals for the Armed Forces scheduled for 25 and 26 February 2025 and one oral argument before this Court scheduled for 5 March 2025, (3) leading the Judge Advocate General's Corps' coordination with communications units at seven different installations across the Department of the Air Force in order to evaluate new legal research and writing software designed to accelerate and improve litigators' capabilities, (4) four one-hour meetings related facilitating development of the Department of the Air Force's new appellate case management system, (5) two meetings spanning at least thirty minutes each regarding production of podcasts in conjunction with the Air Force's Trial Defense Division regarding legal developments, to include appellate updates, and best practices for trial practitioners, (6) sitting second chair at three oral arguments before the Court of Appeals for the Armed Forces, (7) expending at least one hour updating slides for a rescheduled briefing for The Judge Advocate General about the state of the Appellate Defense Division, (8) synthesizing the Division's recommended changes to the more-than-250-page draft circulated for review of Department of the Air Force Instruction 51-201, *Administration of Military Justice*, and (9) oversight of production of eight award packages for The Judge Advocate Genera's annual awards program. Undersigned counsel is also scheduled for two duty days of training on 19 and 20 February 2025. Through no fault of Appellant, the requested time is needed to finish reviewing the digital media contained in the record, further consult with Appellant, research identified issues, and complete drafting of any Assignments of Error. Additional motions seeking further enlargements of time may be requested.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, and the request for this enlargement of time, and wherein he consented to the request for this

enlargement of time.

WHEREFORE, this Court should grant the requested enlargement of time.

Respectfully Submitted

[redacted]

ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 18 February 2025.

[redacted]
ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

18 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) BRENNEN J. PATTERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40651 Panel No. 1

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

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

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
[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 18 February 2025.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
	)	No. ACM 40651
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*	)	21 March 2025

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

Under Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, and Rules 23 and 24 of The Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant hereby moves for a sixth enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of thirty days, which would end on **29 April 2025**.

This case was docketed 231 days ago, on 2 August 2024. On the date requested, 270 days will have elapsed. Appellant is not currently confined.

Appellant was tried by a military judge sitting as a general court-martial at Joint Base San Antonio – Fort Sam Houston, on 19 March 2024 and 2 May 2024. R. at 1, 13-14, 20-22, 119. Consistent with his pleas, Appellant was convicted of one charge containing one specification of the assimilated offense of transporting an illegal alien, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 134. R. at 22, 60. The military judge sentenced Appellant to a bad-conduct discharge, confinement for three months, forfeiture of all pay and allowances, and reduction to the pay grade of E-1. R. at 118. The convening authority took no action with respect to the findings but waived all automatic forfeitures until the soonest of a

period of two months, Appellant's expiration of term of service, or Appellant's release from confinement, with the funds to be paid to the legal guardian of Appellant's dependent. Convening Authority Decision on Action.

The record of trial is three volumes. It contains a 119-page transcript, five prosecution exhibits, five defense exhibits, and nine appellate exhibits.

Undersigned counsel has completed review of the record. Undersigned counsel will be leading completion of Appellant's Assignments of Error.

Major Heather Bruha remains assigned as Appellant's counsel and has not filed a motion to withdraw, but also has not reviewed the record in this case and would not otherwise have an opportunity to do so for multiple months. Major Bruha's caseload consists of twelve cases overall, with two other cases pending initial briefing before this Court, and those two cases are presently prioritized over Appellant's. Major Bruha's cases pending briefing are set out below and, due to undersigned counsel undertaking Appellant's case, will not delay the review or briefing of Appellant's case:

1) *United States v. Cooley*, No. ACM 40376: The unsealed portion of the verbatim transcript is 1,587 pages long and the record of trial is composed of 10 volumes containing twenty-nine prosecution exhibits, sixteen defense exhibits, 109 appellate exhibits, and two court exhibits. The sealed transcript is sixty-nine pages and, according to Major Bruha, contains one sealed exhibit that is a document and one sealed exhibit that is a video lasting approximately eight hours. Major Bruha is completing briefing for submission by this Court's 21 March 2025 deadline.
2) *United States v. Sherman*, No. ACM 40485: The trial transcript is 469 pages long and the record of trial is composed of five volumes containing seventeen prosecution

exhibits, twelve defense exhibits, twenty-five appellate exhibits, and one court exhibit. Additional briefing is ongoing following the recent receipt of the volume stemming from the *DuBay* hearing ordered by this Court.

3) *United States v. Echaluse*, No. ACM 24027: The electronic record of trial is 1,094 pages long containing three prosecution exhibits, thirty-four defense exhibits, sixteen appellate exhibits, and zero court exhibits. Major Bruha has not completed review of the record in this case.

This is undersigned counsel's only case pending initial briefing before any court. This is undersigned counsel's top-priority case. Undersigned counsel has identified multiple potential issues that require further research, discussion with Appellant, and briefing.

As Deputy Chief of the Appellate Defense Division, undersigned counsel is also assigned to carry out a variety of duties that have impacted the ability to work on Appellant's case in the previous thirty days and will impact the same over the duration of the requested enlargement beyond his own docket. During the last thirty days, those duties included: (1) coordinating with counterparts in the Department of the Navy regarding the Appellate Defense Division's draft a legislative proposal to amend the Uniform Code of Military Justice, (2) supervisory review of twenty-four pleadings spanning 396 pages and analyzing forty-six issues filed or to be filed with this Court and the Court of Appeals for the Armed Forces, (3) approximately three hours spent reviewing court filings in order to then assist Division counsel with eight hour-long moot arguments to prepare counsel for six scheduled oral arguments before the Court of Appeals for the Armed Forces and this Court scheduled for 25 and 26 February 2025, 5 March 2025, and 19 March 2025, (4) leading the Judge Advocate General's Corps' coordination with communications units at seven different installations across the Department of the Air Force in

order to evaluate new legal research and writing software designed to accelerate and improve litigators' capabilities, (5) two one-hour meetings related facilitating development of the Department of the Air Force's new appellate case management system, (6) overseeing the Appellate Defense Division's five quarterly award package submissions, eight end-of-year Judge Advocate General's Corps award package submissions, and two Department of the Air Force award packages, each requiring an average of one hour of work, (7) sitting second chair at four oral arguments before the Court of Appeals for the Armed Forces, (8) expending approximately one hour to update slides for a briefing for the individual performing the duties of The Judge Advocate General about the state of the Appellate Defense Division, (9) reviewing a recent Department of Defense report for approximately one hour to train the Appellate Defense Division, (10) approximately an hour-and-a-half of labor disposing of the Appellate Defense Division's old records of trial, (11) drafting an evaluation on behalf of an Appellate Defense Division member selected to promote to colonel, (12) reviewing and compiling the Appellate Defense Division's 228 comments identifying corrections in regulation governing the Department of the Air Force's administration of military justice, (13) two meetings spanning at least thirty minutes each regarding production of podcasts in conjunction with the Air Force's Trial Defense Division regarding legal developments, to include appellate updates, and best practices for trial practitioners, (13) completing a virtual two-day training course regarding requirements and best practices for judge advocates serving as Preliminary Hearing Officers in headings held under Article 32, UCMJ, 10 U.S.C. § 832, and Legal Advisors in discharge proceedings, (14) conducting sixteen uniform inspections, (15) investing approximately three hours of work to consult with a trial defense team in preparation for a case-dispositive motion in a high visibility court-martial, (16) a short-notice task to re-work the Appellate Defense

Division's funding over the remainder of the fiscal year, along with analysis and prioritization of projected Military Personnel Appropriation Tours over the remainder of the fiscal year, and (17) coordination to arrange transportation and funding events administered by the Court of Appeals for the Armed Forces in March and May 2025, respectively. Nearly an entire duty day was also lost due to a building evacuation. Over the next thirty days, undersigned counsel's duties include: (1) during the parental leave of the Appellate Defense Division's senior civilian counsel, continued primary responsibility for supervisory review of all briefs to be filed with this Court, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States, (2) five hour-long moot arguments to prepare counsel for two scheduled oral arguments before the Court of Appeals for the Armed Forces scheduled for 9 and 29 April 2025, (3) leading the Judge Advocate General's Corps' coordination with communications units at seven different installations across the Department of the Air Force in order to evaluate new legal research and writing software designed to accelerate and improve litigators' capabilities, (4) three one-hour meetings related facilitating development of the Department of the Air Force's new appellate case management system, (5) two meetings spanning at least thirty minutes each regarding production of podcasts in conjunction with the Air Force's Trial Defense Division regarding legal developments, to include appellate updates, and best practices for trial practitioners, (6) sitting second chair at one oral argument before the Court of Appeals for the Armed Forces, (7) expending at least one hour updating slides for a rescheduled briefing for the individual performing the duties of The Judge Advocate General about the state of the Appellate Defense Division, (8) oversight of production of the eighteen detail-intensive worksheets in furtherance of the Judge Advocate General's Corps' Career Litigation Development Program, and (9) oversight of preparation of fourteen annual evaluations. Undersigned counsel is also scheduled

for eight calendar days of leave for a long-scheduled family vacation between 28 March 2025 and 4 April 2025, as well as an attendance at a ceremony in support of the seventy-fifth anniversary of the UCMJ administered by the Court of Appeals for the Armed Forces scheduled for 24 March 2025. Through no fault of Appellant, the requested time is needed to further consult with Appellant, complete research of the identified issues, and complete drafting of any Assignments of Error. Additional motions seeking further enlargements of time may be requested.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, and the request for this enlargement of time. Appellant has assented generally to counsel's requests for enlargements of time but has not provided his position specific to this request.

WHEREFORE, this Court should grant the requested enlargement of time.

Respectfully Submitted,

[redacted]

ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 21 March 2025.

[redacted]
ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON,** United States Air Force, *Appellant.*	)	No. ACM 40651
	)	24 March 2025

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 Assignments of Error in this case.

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

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 March 2025.

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
	)	No. ACM 40651
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*	)	21 April 2025

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

Under Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, and Rules 23 and 24 of The Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant hereby moves for a sixth enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of thirty days, which would end on **29 May 2025**.

This case was docketed 262 days ago, on 2 August 2024. On the date requested, 300 days will have elapsed. Appellant is not currently confined.

Appellant was tried by a military judge sitting as a general court-martial at Joint Base San Antonio – Fort Sam Houston, on 19 March 2024 and 2 May 2024. R. at 1, 13-14, 20-22, 119. Consistent with his pleas, Appellant was convicted of one charge containing one specification of the assimilated offense of transporting an illegal alien, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 134. R. at 22, 60. The military judge sentenced Appellant to a bad-conduct discharge, confinement for three months, forfeiture of all pay and allowances, and reduction to the pay grade of E-1. R. at 118. The convening authority took no action with respect to the findings but waived all automatic forfeitures until the soonest of a

period of two months, Appellant's expiration of term of service, or Appellant's release from confinement, with the funds to be paid to the legal guardian of Appellant's dependent. Convening Authority Decision on Action.

The record of trial is three volumes. It contains a 119-page transcript, five prosecution exhibits, five defense exhibits, and nine appellate exhibits.

Undersigned counsel has completed review of the record. Undersigned counsel will be leading completion of Appellant's Assignments of Error.

Major Heather Bruha remains assigned as Appellant's counsel and has not filed a motion to withdraw, but also has not reviewed the record in this case and would not otherwise have an opportunity to do so until subsequent to undersigned counsel. Major Bruha's caseload consists of twelve cases overall, with one other case pending initial briefing before this Court and prioritized over Appellant's. During the requested extension, Major Bruha is also scheduled to provide training on 2 May 2025 at the Defense Orientation Course for the Air Force's newest trial defense counsel and paralegals, as well as travel to receive requisite training from 5 May 2025 through 9 May 2025 at the Senior Defense Counsel Qualification Course in preparation for her next assignment. Major Bruha's cases pending projected briefing during the requested extension are set out below and, due to undersigned counsel undertaking Appellant's case, will not delay the review or briefing of Appellant's case:

1) *United States v. Echaluse*, No. ACM 24027: The electronic record of trial is 1,094 pages long containing three prosecution exhibits, thirty-four defense exhibits, sixteen appellate exhibits, and zero court exhibits. Major Bruha's review and briefing are ongoing.

2) *United States v. Cooley*, No. ACM 40376: The unsealed portion of the verbatim transcript is 1,587 pages long and the record of trial is composed of 10 volumes containing twenty-nine prosecution exhibits, sixteen defense exhibits, 109 appellate exhibits, and two court exhibits. The sealed transcript is sixty-nine pages and, according to Major Bruha, contains one sealed exhibit that is a document and one sealed exhibit that is a video lasting approximately eight hours. A reply brief is projected in response to the Government's Answer during the requested enlargement.

3) *United States v. Arizpe*, No. ACM 40507: The unsealed portion of the verbatim transcript is 1,040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. A petition to the Court of Appeals for the Armed Forces and accompanying supplement must presently be submitted no later than 18 May 2025.

4) *United States v. Martell*, No. ACM 40501, USCA Dkt. No. 25-0052/AF: The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, thirty-two defense exhibits, forty-eight appellate exhibits, and one court exhibit. A petition for writ of certiorari is due to the Supreme Court of the United States during the requested enlargement in order to be timely under current deadlines.

5) *United States v. Hennessy*, No. ACM 40439, USCA Dkt. No. 25-0112/AF: The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, eleven defense exhibits, fifty-four appellate exhibits, and three court exhibits. An Answer brief in response to the Government's appeal is due by 8 May 2025.

This is undersigned counsel's only case pending initial briefing before any court. This is undersigned counsel's top-priority case. Undersigned counsel has identified multiple potential issues that require further research, discussion with Appellant, and briefing.

As Deputy Chief of the Appellate Defense Division, undersigned counsel is also assigned to carry out a variety of duties that have impacted the ability to work on Appellant's case in the previous thirty days and will impact the same over the duration of the requested enlargement beyond his own docket. During the last thirty days, those duties included: (1) supervisory review of nine pleadings spanning 132 pages and analyzing fourteen issues filed or to be filed with this Court and the Court of Appeals for the Armed Forces, (2) approximately two hours spent reviewing court filings in order to then assist Division counsel with three hour-long moot arguments to prepare counsel for one scheduled oral argument before the Court of Appeals for the Armed Forces and one scheduled before this Court, (3) leading the Judge Advocate General's Corps' coordination with communications units at seven different installations across the Department of the Air Force in order to evaluate new legal research and writing software designed to accelerate and improve litigators' capabilities, (4) attendance on behalf of the Division at a ceremony conducted by the Court of Appeals of the Armed Forces at the Tomb of the Uknown Soldier, (5) oversight of the Appellate Defense Division's draft evaluations for its fourteen majors and lieutenant colonels, each of which requires approximately ninety minutes of work, (6) sitting second chair at one oral argument before the Court of Appeals for the Armed Forces, (7) expending approximately one hour to update slides for a briefing for the individual performing the duties of The Judge Advocate General about the state of the Appellate Defense Division, followed by a forty-minute pre-briefing meeting with Director of the Military Justice and Discipline Directorate and the briefing itself, (8) reviewing a recent Department of the Air

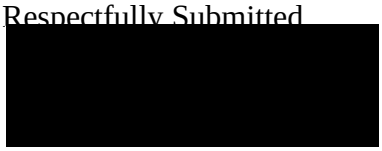
Force draft training spanning 270 pages over the course of a day-and-a-half to identify legal errors in proposed education on sexual assault prevention and response, (9) approximately six hours editing the Appellate Defense Division's nomination forms for the Career Litigation Development Program, (10) approximately four hours reviewing the Air Force's draft revisions to DAFI 51-101, *The Air Force Judge Advocate General's (JAG) Corps Operations, Accessions, and Professional Development*, resulting in over 125 proposed edits, and (11) two meetings spanning at least thirty minutes each regarding production of podcasts in conjunction with the Air Force's Trial Defense Division regarding legal developments, to include appellate updates, and best practices for trial practitioners. Undersigned counsel was also on long-scheduled leave 28 March-4 April 2025 and on 18 April 2025. Over the next thirty days, undersigned counsel's duties include: (1) during the parental leave of the Appellate Defense Division's senior civilian counsel, continued primary responsibility for supervisory review of all briefs to be filed with this Court, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States, (2) one hour-long moot arguments to prepare counsel for a scheduled argument before this Court, (3) leading the Judge Advocate General's Corps' coordination with communications units at seven different installations across the Department of the Air Force in order to evaluate new legal research and writing software designed to accelerate and improve litigators' capabilities, (4) three one-hour meetings related facilitating development of the Department of the Air Force's new appellate case management system, (5) two meetings spanning at least thirty minutes each regarding production of podcasts in conjunction with the Air Force's Trial Defense Division regarding legal developments, to include appellate updates, and best practices for trial practitioners, (6) sitting second chair at one oral argument before this Court, (7) completion of fourteen annual evaluations. Through no fault of Appellant, the requested time is needed to

further consult with Appellant, complete research of the identified issues, and complete drafting of any Assignments of Error. Although undersigned counsel anticipates sufficient time during the requested extension to complete briefing Appellant's case, unexpected mission needs may arise and additional motions seeking further enlargements of time may therefore be requested.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, and the request for this enlargement of time. Appellant has assented generally to counsel's requests for enlargements of time and specifically assented to this request.

WHEREFORE, this Court should grant the requested enlargement of time.

Respectfully Submitted



ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 21 April 2025.

[redacted]
ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON**, United States Air Force. *Appellant*	)	No. ACM 40651
	)	23 April 2025

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 to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over 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 10 month delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process

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

[redacted]

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 April 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMT OF TIME (EIGHTH)**
v.	)	Before Panel No. 1
	)	No. ACM 40651
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*	)	21 May 2025

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

Under Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, and Rules 23 and 24 of The Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant hereby moves for a sixth enlargement of time to file Assignments of Error. Appellant requests an enlargement for a period of seven days, which would end on **5 June 2025**.

This case was docketed 292 days ago, on 2 August 2024. On the date requested, 307 days will have elapsed. Appellant is not currently confined.

Appellant was tried by a military judge sitting as a general court-martial at Joint Base San Antonio – Fort Sam Houston, on 19 March 2024 and 2 May 2024. R. at 1, 13-14, 20-22, 119. Consistent with his pleas, Appellant was convicted of one charge containing one specification of the assimilated offense of transporting an illegal alien, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 134. R. at 22, 60. The military judge sentenced Appellant to a bad-conduct discharge, confinement for three months, forfeiture of all pay and allowances, and reduction to the pay grade of E-1. R. at 118. The convening authority took no action with respect to the findings but waived all automatic forfeitures until the soonest of a

period of two months, Appellant's expiration of term of service, or Appellant's release from confinement, with the funds to be paid to the legal guardian of Appellant's dependent. Convening Authority Decision on Action.

The record of trial is three volumes. It contains a 119-page transcript, five prosecution exhibits, five defense exhibits, and nine appellate exhibits.

Undersigned counsel has completed review of the record. Undersigned counsel is leading completion of Appellant's Assignments of Error and anticipates completing drafting around 23 May 2025.

Major Heather Bruha remains assigned as Appellant's counsel and has not filed a motion to withdraw, but also has not reviewed the record in this case and would not otherwise have an opportunity to do so until subsequent to undersigned counsel. Major Bruha's caseload consists of twelve cases overall. Undersigned counsel's understanding of Major Bruha's cases pending projected briefing during the requested extension are set out below and, due to undersigned counsel undertaking Appellant's case, will not delay the review or briefing of Appellant's case:

1) *United States v. Cooley*, No. ACM 40376: The unsealed portion of the verbatim transcript is 1,587 pages long and the record of trial is composed of 10 volumes containing twenty-nine prosecution exhibits, sixteen defense exhibits, 109 appellate exhibits, and two court exhibits. The sealed transcript is sixty-nine pages and, according to Major Bruha, contains one sealed exhibit that is a document and one sealed exhibit that is a video lasting approximately eight hours. A reply brief is projected in response to the Government's Answer during the requested enlargement.
2) *United States v. Martell*, No. ACM 40501, USCA Dkt. No. 25-0052/AF: The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes

containing nine prosecution exhibits, thirty-two defense exhibits, forty-eight appellate exhibits, and one court exhibit. Maj Bruha anticipates requesting an extension to file a petition for writ of certiorari to the Supreme Court of the United States and working on that petition.

This is undersigned counsel's only case pending initial briefing before any court. This is undersigned counsel's top-priority case. Undersigned counsel has identified multiple potential issues that require briefing and anticipates completing drafting this week. Due to this being later than initially projected and the overlap with the Memorial Day holiday, which is a four-day weekend in the undersigned counsel's unit, undersigned counsel does not anticipate sufficient time to comply with Appellate Defense Division requirements for review by an Appellate Defense Counsel and another member of the Division's leadership team, as well as corresponding editing, in time to submit by the current deadline.

As Deputy Chief of the Appellate Defense Division, undersigned counsel is also assigned to carry out a variety of duties that have impacted the ability to work on Appellant's case in the previous thirty days and will impact the same over the duration of the requested enlargement beyond his own docket. During the last thirty days, those duties included: (1) supervisory review of twenty-one pleadings spanning 301 pages and analyzing twenty-nine issues filed or to be filed with this Court, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States, (2) approximately three hours spent reviewing court filings in order to then assist counsel with three hour-long moot arguments to prepare counsel for two oral argument before the Court of Appeals for the Armed Forces, (3) leading the Judge Advocate General's Corps' coordination with communications units at seven different installations across the Department of the Air Force in order to evaluate new legal research and writing software designed to accelerate and improve

litigators' capabilities, to include assessment of feedback from evaluators and briefing multiple stakeholders on outcomes and potential next steps, (4) oversight of the Appellate Defense Division's draft of decoration to recognize four members, each of which requires approximately ninety minutes of work, (5) sitting second chair at one oral argument before the Court of Appeals for the Armed Forces, (6) two meetings spanning at least thirty minutes each regarding production of podcasts in conjunction with the Air Force's Trial Defense Division regarding legal developments, to include appellate updates, and best practices for trial practitioners, (7) finalization of the Division's fifteen evaluations for majors and lieutenant colonels, and (8) supervision of two documents providing inputs on the Government's request for certification of two cases for review by the Court of Appeals for the Armed Forces. Undersigned counsel was also limited in performing duties due to illness 13-16 May 2025.

Appellant has provided limited consent to disclose confidential communications with counsel wherein he was advised of his right to a timely appeal, counsel's progress on the case, and the request for this enlargement of time. Appellant has assented generally to counsel's requests for enlargements of time and specifically assented to this request.

WHEREFORE, this Court should grant the requested enlargement of time.

[redacted]
ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 21 May 2025.

[redacted]
ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON**, United States Air Force. *Appellant*	)	No. ACM 40651
	)	21 May 2025

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 to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over 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 307 days in length. Appellant's 10-month 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.

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

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 May 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES
Appellee

v.

BRENNEN J. PATTERSON
Senior Airman (E-4)
United States Air Force
Appellant

No. ACM 40651

BRIEF ON BEHALF OF APPELLANT

Allen S. Abrams, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
	)	No. ACM 40651
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*	)	3 June 2025

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

Assignments of Error

I.

WHETHER THE TRIAL COURT LACKED SUBJECT-MATTER JURISDICTION.

II.

WHETHER THE SPECIFICATION TO WHICH APPELLANT PLEADED GUITLY FAILED TO STATE AN OFFENSE.

III.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION IN ACCEPTING APPELLANT'S PLEA OF GUILTY TO A KNOWING MENS REA.

IV.

WHETHER APPELLANT'S PLEA OF GUILTY WAS IMPROVIDENT AS A WHOLE.

V.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE IN ADVISING ON THE MAXIMUM PUNISHMENT.

VI.

WHETHER THE APPLICATION OF 18 U.S.C. § 922 TO APPELLANT WARRANTS APPROPRIATE RELIEF.

VII.[1]

WHETHER APPELLANT'S SANITY BOARD WAS INCORRECTLY CONDUCTED.

Statement of the Case

Appellant, Senior Airman Brennen Patterson, was tried by a military judge sitting as a general court-martial at Joint Base San Antonio – Fort Sam Houston, on 19 March 2024 and 2 May 2024. Trial Tr. at 1, 13-14, 20-22, 119. Consistent with his pleas, Appellant was convicted of one charge containing one specification of the incorporated offense of transporting an illegal alien, a Mexican national, within the United States, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[2] Trial Tr. at 22, 60. Two other related offenses were withdrawn and dismissed with prejudice to attach upon completion of appellate review: conspiracy to commit the same offense, in violation of Article 81, UCMJ, 10 U.S.C. § 881, and carrying a handgun while engaged in criminal activity in violation of the Texas Penal Code, as incorporated under Article 134, UCMJ. Trial Tr. at 47, 118-19. The military judge sentenced Appellant to a bad-conduct discharge, confinement for three months, forfeiture of all pay and

[1] Appellant personally raises this one issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix.

[2] The version of the UCMJ in effect at the time of the alleged offense was that reprinted in Appendix 2 of the *Manual for Courts-Martial, United States* [hereinafter *MCM*] (2019 ed.), as amended by the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019); the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (2021); the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021); and the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022). None of those statutes amended Article 134, nor has that article been amended since.

allowances, and reduction to the pay grade of E-1. Trial Tr. at 118. The convening authority took no action with respect to the findings but waived all automatic forfeitures until the soonest of a period of two months, Appellant's expiration of term of service, or Appellant's release from confinement, with the funds to be paid to the legal guardian of Appellant's dependent. Convening Authority Decision on Action.

Statement of Facts

1. Appellant "[S]piraling"

After a series of extensions since joining the Air Force on 24 March 2015, Appellant was finally reaching the end of his first enlistment in June of 2023. Trial Tr. at 32-34. Plagued by "unresolved issues that became aggravated during [his] career in the Air Force," Appellant developed "sleep issues, including insomnia and sleep apnea" that "impacted [his] anxiety and depression," as well as post-traumatic stress disorder, "making day-to-day life very difficult." Trial Tr. at 98. After his supervisor lined up mental health treatment, medical providers determined that Appellant's conditions would not improve and initiated his separation from the military for medical reasons. Trial Tr. at 99.

That would ultimately lead to Appellant receiving approval on 25 June 2023 for separation from the Air Force with a disability rating of ninety percent, or $2,172.39 per month. Prosecution Ex. 1 at 1, 16-17. But this coda after more than eight years of military service was still unwritten two weeks earlier at the time of the charged conduct. *See* Prosecution Ex. 1 at 2. Nor was it the only significant unsettled change in Appellant's life at the time of the charged conduct, with an ongoing divorce and custody disagreement concerning his daughter, who was less than three years old at the time. Trial Tr. at 98-99.

The weight of all of this led Appellant to a bar where he met MV, who "did not seem suspicious or criminal in any way." Trial Tr. at 99, Prosecution Ex. 1 at 1-2. Following a short conversation, MV "asked if [Appellant] could pick up two or three friends at some point in the future and he said he would pay [Appellant] for it." Trial Tr. at 99; Prosecution Ex. 1 at 2. The two exchanged contact information and "went [their] separate ways." Trial Tr. at 100; Prosecution Ex. 1 at 2.

Approximately a week later, Appellant was "spiraling so badly and hadn't slept for nearly 2 days." Trial Tr. at 100. "The fear and uncertainty regarding the future had reached a tipping point," and Appellant was not on his medication. *Id.* Afraid he "would not get a good percentage" of disability pay from his medical separation from the military, Appellant was "terrified [he] would end up on the streets and lose [his] daughter." *Id.* Though claiming to be "aware of [his] actions," Appellant agreed to pick up MV's so-called friends "without asking a single question." *Id.* MV's friends were not who Appellant expected as he traveled to collect them. *See* Trial Tr. at 38-39.

2. Journey to Zavala County

Appellant traveled from San Antonio, Texas, to Zavala County, Texas, where he picked up the Mexican national named in the specification, among others. Trial Tr. at 38. The plan was to arrive at a pick-up location "in the middle of nowhere." Trial Tr. at 39. As Appellant "arrived at" the pick-up location, he then "became suspicious that [he] had gotten wrapped into something illegal" and "started to highly suspect" that the Mexican national he picked up "was an undocumented immigrant." Trial Tr. at 38-39. Appellant did not know the person he picked up was an alien who had entered the United States illegally, Trial Tr. at 38, but "should have done a better job of asking questions and shouldn't have started driving" him. Trial Tr. at 101.

Appellant honked his horn, and the named Mexican national along with "many people with him" then "came out of the bushes." *Id.*; *see also* Prosecution Ex. 1 at 2 (describing eight people awaiting transportation and entering Appellant's vehicle).

As Appellant later recounted in his unsworn statement, "[I]n that moment, everything changed. Multiple people ran up to my car and got inside. They didn't speak English but just told me to drive. Their clothes were dusty and disheveled and they looked like they came from Mexico." Trial Tr. at 100. "Feel[ing] panicked," Appellant then "just focused on following the instructions [provided via electronic message by MV] to end the situation," which involved heading towards a drop-off location further from the southern border, in Austin, Texas. Trial Tr. at 39-40, 100; *see also* Prosecution Ex. 1 at 2, 9-12 (describing those instructions).

3. The Charging Scheme

Following these events, the prosecution charged Appellant with, among other offenses, what purported to be an incorporated offense under Article 134: that Appellant transported a person "within the United States by means of passenger vehicle, with knowledge of, or in reckless disregard of the fact that [the Mexican national] was an alien who entered the United States in violation of law," specifically 8 U.S.C. § 1324. Charge Sheet at 1.

The specification did not delineate which provision of 8 U.S.C. § 1324 was violated, nor did it allege Appellant's conduct was "in furtherance of" the alien's illegal entry into the United States or for financial gain. *Compare* Charge Sheet at 1, *with* 8 U.S.C. § 1324(a)(1)(A)(ii) *and* 8 U.S.C. § 1324(a)(1)(B)(i)-(ii).

4. The Guilty Plea

The elements pertinent to Appellant's guilty plea were subject to pre-trial dialogue amongst the parties and the military judge. Trial Tr. at 30-31; Appellate Ex. VI. Trial defense counsel agreed with the military judge's proposal regarding the elements. Trial Tr. at 31.

But despite this sensitivity to the importance of getting the elements right during Appellant's providence inquiry, the military judge still advised Appellant of an element that differed from the one charged. The specification to which Appellant pleaded guilty alleged that Appellant transported the Mexican national "within the United States." Charge Sheet at 1. When advising Appellant of the elements, the military judge included the same. Trial Tr. at 36. But the military judge added as an element that Appellant also "transported the [Mexican national] *into* the United States intending to help them [*sic*] in the United States illegally in furtherance of the [Mexican national]'s violation of law."[3] *Id.* (emphasis added). During follow-up questioning, Appellant specifically agreed that the transportation he committed was within the United States. Trial Tr. at 42. The military judge did not ask any questions specific to Appellant bringing the Mexican national "into" the United States. *See* Trial Tr. at 37-42.

Nor did the military judge engage in any further inquiry with Appellant after his unsworn statement. *See* Trial Tr. 102. In that statement, Appellant detailed his "spiraling" mental health struggles leading up to the charged conduct. Trial Tr. at 98-100. This included "declining" mental health and a cessation of Appellant's medication, though Appellant also stated he was aware of his actions. Trial Tr. at 100. Before this point, the military judge was familiar with part of Appellant's mental health history thanks to a one-page report from a sanity board conducted

[3] The military judge asking Appellant about the wrong element for transporting *into* the United States in this one instance is not alleged as prejudicial error but does illustrate the military judge's challenges in marrying the purportedly incorporated offense with the requirements predicate to establishing a provident plea discussed in this brief.

pursuant to Rule for Courts-Martial (R.C.M.) 706,[4] which identified Appellant's clinical psychiatric diagnosis as post-traumatic stress disorder but denied that this constituted a severe mental disease or defect at the time of the offense or that Appellant was unable to appreciate the wrongfulness of the charged conduct. Trial Tr. at 9, 27; Appellate Ex.'s III-IV.

Despite that narrow focus on a single diagnosis in the sanity board, Appellant's medical discharge from the military was also predicated on related diagnoses of major depressive disorder and anxiety disorder, neither of which were resolved through psychotherapy, intensive outpatient care, and partial hospitalization. Prosecution Ex. 1 at 14; *see also* Defense Ex. C at 10 (summarizing the Department of Veterans Affairs' determination of the relationship between the major depressive disorder and anxiety disorders in relation to post-traumatic stress disorder). The post-traumatic stress disorder impaired Appellant's ability to sleep, adapt to stressful circumstances, and control his impulses. Defense Ex. C at 12. At the start of trial, both trial defense counsel and the prosecution disclaimed any concern about Appellant's capacity to appreciate the nature of his offense. Trial Tr. at 27.

5. Maximum Punishment versus the Charge Sheet

In explaining the elements of the offense to which Appellant was pleading guilty, the military judge advised that "as a matter of law the maximum punishment" for violating 8 U.S.C. § 1324(a)(1)(A)(ii) was ten years of confinement. *See* Trial Tr. at 37;[5] *but see* 8 U.S.C. § 1324(a)(1)(B) (setting out punishments for violations of 8 U.S.C. § 1324(a)(1)(A) of

[4] The version of the Rules for Courts-Martial applicable to Appellant's trial is that in the 2019 edition of the *MCM* as amended by Exec. Order No. 14062 of 26 January 2022, 87 Fed. Reg. 4763 (Jan. 31, 2022), and Annexes 1 and 2 to Exec. Order No. 14103 of 28 July 2023, 88 Fed. Reg. 50535 (Aug. 2, 2023).

[5] The audio is erroneously transcribed as "A1 and A2." Trial Tr. at 37. The audio recording constituting the record, *see* R.C.M. 1112(b)(1), with the media file with "20240502-1316" in the title, at 11:51-12:01, reflects the military judge stated, "1324(a)(1)(A)(ii)."

confinement for five years, ten years, twenty years, or life for violations of 8 U.S.C. § 1324(a)(1)(A)(ii)). The prosecution echoed the military judge's assessment of the maximum period of confinement. Trial Tr. at 43.

The military judge explained that she based her determination on Appellant's offense being committed for financial gain, a purpose to which Appellant agreed in his providence inquiry. Trial Tr. at 41-43. The military judge acknowledged that her maximum confinement determination looked beyond the four corners of the charge sheet because "th[e] specification as written on the charge sheet does not include that the conduct in this case was done for financial gain." Trial Tr. at 43. But "counsel for both sides indicated that the accused was aware based on the evidence presented to him by the government and the facts of this case that the conduct was done for financial gain and that the maximum confinement of 10 years was appropriate in this case." *Id.*

Trial defense counsel confirmed the military judge's recitation: "[W]e agree and concur that at all points in time the defense was on notice, and it was our understanding that 10 years was the maximum of confinement range for this offense. We concur." Trial Tr. at 44.

By the terms of Appellant's plea agreement, a bad-conduct discharge was required, and confinement was limited to a minimum of two months and a maximum of six months. Trial Tr. at 53; Appellate Ex. VII at 2. The military judge sentenced Appellant to three months of confinement. Trial Tr. at 119; Entry of Judgment at 2-3.

Additional facts related to the assignments of error are incorporated in the Argument section below.

Argument

I.

THE TRIAL COURT LACKED SUBJECT-MATTER JURISDICTION.

Standard of Review

Whether there was jurisdiction is a question of law reviewed de novo. *United States v. Begani*, 81 MJ. 273, 276 (C.A.A.F. 2021).

Law and Analysis

"Jurisdiction is the power of a court to try and determine a case and to render a valid judgment." *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006). A court-martial is a court of limited jurisdiction and cannot try an accused unless it has jurisdiction. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955); *Solorio v. United States*, 483 U.S. 435, 439 (1987). Jurisdiction can be challenged at any time, and such a challenge results in the government bearing the burden to prove jurisdiction by a preponderance of the evidence. R.C.M. 905(c)(2)(B), 907(b)(1); *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002).

Court-martial jurisdiction exists if there is jurisdiction over the offense, personal jurisdiction over the accused, and a properly convened and composed court-martial. *Harmon*, 63 M.J. at 101; *see also* R.C.M. 201(b). The bounds of jurisdiction are confined to the statutory bases set by Congress. *See United States v. Morita*, 74 M.J. 116, 122 (C.A.A.F. 2015). But "[t]he military has a hierarchical scheme as to rights, duties, and obligations," and "additional or greater rights" may be afforded by what would otherwise be a subordinate source of law. *United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997).

Such greater protections are afforded related to the purportedly incorporated offense in this case in two respects:

First, the subject-matter of courts-martial is limited to "any offense under the UCMJ and, in the case of general courts-martial, the law of war." R.C.M. 203. In determining the offense charged, "[t]here is no dispute that the government controls the charge sheet." *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017). When the prosecution exercises that control through charging an offense under Article 134, the government's choices must accord with a "self-contained statute that both defines criminal offenses and promulgates the procedures by which those offenses are to be prosecuted and adjudicated." *United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018). One pathway within those bounds is through, in relevant part, "Article 134, [UCMJ, 10 U.S.C. § 934,] Clause 3, commonly referred to as the Crimes and Offenses Not Capital Clause, [which] incorporates by reference, all federal criminal statutes." *United States v. Robbins*, 48 M.J. 745, 748 (A.F. Ct. Crim. App. 1998).

Second, through the President's authority under Article 36, UCMJ, 10 U.S.C. § 836, the President has heightened the prosecution's requirements for properly charging an incorporated offense. Specifically, the President directed that "each element of the federal statute . . . must be alleged expressly or by necessary implication." *MCM*, Part IV, ¶ 91.c.(6)(b). The President also advised that "any applicable statutes should be identified in the specification." *Id.*

The problems in this case can be traced, in part, to the fact that the prosecution only took part of that last admonition to heart. Instead of specifically identifying the alleged violation that the prosecution sought to incorporate, it only broadly referenced 8 U.S.C. § 1324. *Compare* Charge Sheet at 1, *with* 8 U.S.C. § 1324(a)(1)(A)-(B). Much greater specificity was not only possible under the statute but would have been common practice in federal district court. On its own, subsection (a)(1)(A) of 8 U.S.C. § 1324 enumerates five means of violating the law. In federal district court prosecutions, indictments seeking enhanced punishment based

on financial gain associated with illegal acts involving aliens also specifically cite to a provision of 8 U.S.C. § 1324(a)(1)(B) and are subject to an additional element. *See, e.g.*, *United States v. Compton*, 295 Fed. App'x 674, 674-75 (5th Cir. 2008); *Yu Tian Li v. United States*, 648 F.3d 524, 528 (7th Cir. 2011); *United States v. Sineneng-Smith*, 982 F.3d 766, 776 (9th Cir. 2020); *United States v. Lopez*, 230 Fed. App'x 853, 855 (10th Cir. 2007). None of that was done here.

And while the President has not required specificity in pinpointing the incorporated provision an accused has allegedly offended, the President has mandated that every element of the offense be alleged, either expressly or by necessary implication. *MCM*, Part IV, ¶ 91.c.(6)(b). Given the relevant specification's reference to transportation of the Mexican national within the United States, the parties seem to have correctly identified the relevant statutory provision—separate from any maximum punishment issues—as 8 U.S.C. § 1324(a)(1)(A)(ii). *See* Charge Sheet at 1; Appellate Ex. VI. That provision has an element found nowhere on the charge sheet: that the transportation was in furtherance of the Mexican national's illegal entry or continued presence in the United States. *See* 8 U.S.C. § 1324(a)(1)(A)(ii). This element is unique to that subsection of the statute. *Compare* 8 U.S.C. § 1324(a)(1)(A)(ii), *with* 8 U.S.C. §§ 1324(a)(1)(A)(i), 1324(a)(1)(A) (iii)-(iv).

In the absence of this required element, a UCMJ offense was not properly charged and therefore jurisdiction is lacking. *See* R.C.M. 203 (requiring charging of an offense under the UCMJ). As such, because the "in furtherance of" element of 8 U.S.C. § 1324(a)(1)(A)(ii) was not expressly charged, Charge Sheet at 1, the only thing the *Manual for Courts-Martial* would seem to permit to establish jurisdiction over the offense is if that required element is established by necessary implication. *MCM*, Part IV, ¶ 91.c.(6)(b).

In the context of challenges for failure to state an offense, specifications alleged to be missing required elements are assessed with "maximum liberality" when, as is the case here, the allegation is challenged for the first time on appeal. *United States v. Shafran*, ___ M.J. ___, No. 24-0134, 2025 CAAF LEXIS 376, at *5 (C.A.A.F. May 12, 2025) (citing *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020)). In *Shafran*, the United States Court of Appeals for the Armed Forces recently found that, where "*one* reasonable interpretation" of the specification at issue was that the missing text was implied, the specification properly stated an offense. *Id.* at *11 (emphasis in original).

But jurisdiction is a different question than whether a specification states an offense, and one that calls for a different analysis. Court-martial jurisdiction is construed narrowly. *See United States v. Brown*, 81 M.J. 1, 3 (C.A.A.F. 2021). Indeed, "there is a presumption against federal subject-matter jurisdiction." *United States v. Jacobsen*, 77 M.J. 81, 85 (C.A.A.F. 2017) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). And whereas the analysis for failure to state an offense authorizes unearthing a missing element by necessary implication, *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (citation omitted), such an approach would seem to be at odds with ordinary assessments of jurisdiction because "[j]urisdiction is neither 'granted nor assumed by implication.'" *Jacobsen*, 77 M.J. at 85 (citing *Loving v. United States*, 62 M.J. 235, 244 n.60 (C.A.A.F. 2005) (cleaned up and further citation omitted)).

In light of the strict principles attendant to jurisdiction, this leads to two conceivable analyses for the specification at issue, both of which result in a lack of jurisdiction here. One is that the permissibility of finding a missing element by necessary implication is altogether inapt for establishing jurisdiction. This approach would circumscribe the *MCM*'s guidance on

establishing jurisdiction for incorporated offenses under Article 134 through the superior authorities mandating strict requirements to establish jurisdiction. *See Romano*, 46 M.J. at 274. A second approach would endeavor to harmonize these two principles, permitting establishment of elements through necessary implication for Clause 3 offenses but strictly constraining the analysis to what is obvious from the specification itself. *Cf. Turner*, 79 M.J. at 403 (considering "only the language contained in the specification" in the context of failure to state an offense when challenged at trial).

Under either approach—and even the broader "maximum liberality" methodology from the context of failure to state an offense, though such breadth cannot accord with the narrow determination of jurisdiction—the missing element is not in play here. As written, the specification broadly captures any instance of transportation. And while the reference to 8 U.S.C. § 1324 might appear to narrow the allegation, it is not so clarifying as it might appear on its face. True, comparison of the specification with 8 U.S.C. § 1324, through process of elimination, would seem to align with 8 U.S.C. § 1324(a)(1)(A)(ii) and its requirement that transportation be in furtherance of illegal immigration. But the difference between transporting in furtherance of a foreign national's continued illegal presence in the United States and transporting generally is the difference between criminality and a lack thereof. The prosecution's failure to provide the specificity encouraged by the President, *MCM*, Part IV, ¶ 91.c.(6)(b), turns such a determination into pin-the-tail-on-the-statute, a pursuit that played out at trial with regard to the maximum punishment, discussed in Issues IV and V below, and which this Court should find falls short of the requirements needed to establish jurisdiction over the offense.

WHEREFORE, in the absence of jurisdiction, this Court should set aside the findings and the sentence.

II.

THE SPECIFICATION TO WHICH APPELLANT PLEADED GUITLY FAILED TO STATE AN OFFENSE.

Standard of Review

Whether a specification states an offense is a question of law reviewed de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). But failure to raise a challenge for failure to state an offense forfeits it. R.C.M. 905(e)(2). Forfeited issues are evaluated for plain error. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018). Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *United States v. King*, 83 M.J. 115, 120-21 (C.A.A.F. 2023).

Law and Analysis

Both the Fifth and Sixth Amendments to the United States Constitution require proper notice to an accused. *Turner*, 79 M.J. at 404 (citing U.S. CONST. amends. V, VI). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in trial of the issues raised . . . are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) (citations omitted).

To state an offense, a specification must allege every element either expressly or by implication. *Turner*, 79 M.J. at 404. The three-prong test for whether a specification states an offense requires: (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy. *United States v. Dear*, 40 M.J. 196, 197 (C.A.A.F. 1994). The protection against double jeopardy "protect[s] an individual from being subjected to the

hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957); *see also United States v. Leak*, 61 M.J. 234, 242 (C.A.A.F. 2005).

Even if this Court finds jurisdiction, for the reasons set out in Issue I above, the specification to which Appellant pleaded guilty failed to state an offense.

WHEREFORE, this Court should set aside the findings and the sentence.

III.

THE MILITARY JUDGE ABUSED HER DISCRETION IN ACCEPTING APPELLANT'S PLEA OF GUILTY TO A KNOWING MENS REA.

Standard of Review

Where an appellant entered a guilty plea and admitted guilt to the charged offense, the standard of review is whether the military judge abused her discretion in accepting the appellant's guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citing *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). Questions of law arising from the guilty plea are reviewed de novo. *United States v. Byunggu Kim*, 83 M.J. 235, 238 (C.A.A.F. 2023) (citing *Inabinette*, 66 M.J. at 322). A military judge abuses her 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.M.A. 1991).

Law and Analysis

"[I]n reviewing a military judge's acceptance of a plea for abuse of discretion appellate courts apply a substantial basis test: Does the record as a whole show a 'substantial basis' in law and fact for questioning the guilty plea." *Inabinette*, 66 M.J. at 322 (citing *Prater*, 32 M.J. at 436); *see also* Article 45(a), UCMJ, 10 U.S.C. § 845(a) ("If an accused . . . makes an irregular pleading . . . or . . . entered the plea of guilty

improvidently or through lack of understanding of its meaning and effect . . . a plea of not guilty shall be entered in the record . . . ."); R.C.M. 910(e) ("The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea.").

In assessing the providence of a guilty plea, the trial judge must: (1) establish that the accused believes and admits that he was guilty of the charged offenses; and (2) provide a set of factual circumstances admitted by the accused that supports the guilty plea. *United States v. Simmons*, 63 M.J. 89, 92 (C.A.A.F. 2006); R.C.M. 910(e). A military judge may rely upon a stipulation of fact in conjunction with the colloquy with the accused, but there must also be sufficient evidence that the accused is "convinced of, and able to describe[,] all the facts necessary to establish guilt." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting R.C.M. 910(e), Discussion, *MCM* (1995 ed.))[6]; *see also United States v. Sweet*, 42 M.J. 183, 185-86 (C.A.A.F. 1995) (discussing how the requirements of *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969), have been codified in R.C.M. 910).

In making this determination, the military judge "must elicit actual facts from an accused and not merely legal conclusions." *United States v. Price*, 76 M.J. 136, 138 (C.A.A.F. 2017) (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). Yet in this case, mere conclusions were all the military judge had before her to establish Appellant's purported "knowledge of" the transported Mexican national's illegal entry into the United States. As such, that part of the finding of guilt regarding such knowledge should be rejected by this Court.

[6] This particular language has not changed to date.

Appellant never claimed knowledge anywhere in his guilty plea except in the most conclusory form. "Knowledge" requires actual awareness of something. *Intel. Corp. Inv. Policy Comm. v. Sulyma*, 578 U.S. 178, 185 (2020) (citing various layman's and legal dictionaries). But no facts described Appellant's actual awareness of the transported alien's illegal entry in the stipulation of fact—only base concurrence with the charged specification itself. Prosecution Ex. 1 at 1-3. The same pattern repeated itself in Appellant's providence inquiry. There, Appellant pleaded guilty to the elements, which the military judge indicated included knowledge as one potential mens rea. Trial Tr. at 36-37. But nothing in the discourse that followed established actual knowledge.

To the contrary, but for this initial adoption of the charged elements, the entirety of Appellant's guilty plea focused on Appellant being reckless rather than having actual knowledge. Trial Tr. at 36-42. At the outset of the providence inquiry, the military judge defined recklessness but not knowledge. Trial Tr. at 36-37. In recapping Appellant's admissions at the end of the inquiry, the military judge asked only whether Appellant admitted that he "recklessly disregarded" the alien's illegal entry into the United States. Trial Tr. at 42. She did not ask about knowledge. *See id*. In between those bookends, Appellant explicitly claimed to "not *know*" the Mexican national "entered the United States in violation of the law," instead reflecting that he "did not fully understand what it all meant." Trial Tr. at 38-39 (emphasis added). Consistent with these affirmative denials of knowledge, Appellant echoed the military judge's correct instruction regarding recklessness, "agree[ing] that a reasonable person would have known" of the charged Mexican national's illegal entry into the United States and "a reasonable person would

have done more to determine" that individual status. *Compare* Trial Tr. at 36-37, *with* Trial Tr. at 39.

Despite narrowing her inquiry with Appellant to recklessness, the military judge nonetheless accepted Appellant's guilty plea for knowledge. To a degree, this could be traced back to other parties' choices to charge and entertain pleas to the offense as written. Though perhaps not creating a "tangled morass," *United States v. Honea*, 77 M.J. 181, 184 (C.A.A.F. 2018), the specification was riddled with problems. As noted in Issues I and II above, it was missing important language and specificity with regard to the applicable statutory provision. As discussed in Issues IV and V below, it misled everyone involved in this case with regard to the maximum punishment. And, specific to the problem complained of in this instance, the offense was written in the long-disfavored disjunctive, looking for knowledge "or" recklessness.[7] Charge Sheet at 1; *see Descamps v. United States*, 570 U.S. 254, 272 (2013)(citing *The Confiscation Cases*, 87 U.S. (20 Wall.) 92, 104 (1874)).

But when it came to the findings, the decision to tolerate the obvious deficiency in proof related to knowledge rests with the military judge and violated Article 45(a). Because this impacted only one aspect of the mens rea element, *see United States v. Brasby*, 61 F.4th 127, 135 (3d Cir. 2023), this Court should correct that mistake through exceptions and leave in place only the recklessness to which Appellant provided a provident plea. *See, e.g.*, *United States v. Kroop*, 34 M.J. 628, 636 (A.F.C.M.R. 1992) (excepting words to which the appellant improvidently pleaded guilty).

[7] This affinity for disjunctive pleading similarly infected both of the withdrawn and dismissed offenses. Charge Sheet at 1, 3.

WHEREFORE, if the Court otherwise deems Appellant's guilty plea provident, this Court should except the words "with knowledge of, or" and set aside the excepted words.

IV.

APPELLANT'S PLEA OF GUILTY WAS IMPROVIDENT AS A WHOLE.

Standard of Review

Where an appellant entered a guilty plea and admitted guilt of the charged offense, the standard of review is whether the military judge abused her discretion in accepting the appellant's guilty plea. *Inabinette*, 66 M.J. at 322 (citing *Eberle*, 44 M.J. at 375). Questions of law arising from the guilty plea are reviewed de novo. *Byunggu Kim*, 83 M.J. at 238 (citing *Inabinette*, 66 M.J. at 322). A military judge abuses her discretion when there is a "substantial basis" in law and fact "for questioning the guilty plea." *Prater*, 32 M.J. at 436

Law and Analysis

In addition to the unsupported guilty plea to part of the mens rea described above under Issue III, the entirety of Appellant's guilty plea was deficient for two reasons. First, the military judge failed to address inconsistencies with Appellant's guilty plea raised during presentencing proceedings. Second, Appellant's guilty plea could not be provident because he was mis-advised as to the maximum punishment.

1. Inconsistent Matters

If an accused sets up a "matter inconsistent with" an earlier guilty plea, the governing statute requires the military judge to resolve the inconsistency or reject the guilty plea. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (citing 10 U.S.C. § 845(a); R.C.M. 910(e), 910(h)(2)). This mandate is triggered by a possible defense, but

not the "mere possibility" of a defense. *United States v. Hayes*, 70 M.J. 454, 458 (C.A.A.F. 2012). The distinction between a possibility and "mere possibility" can be "amorphous," *id.*, so "[e]ven if an accused does not volunteer all the facts necessary to establish a defense, if he sets up matter raising a possible defense, then the military judge is obliged to make further inquiry to resolve any apparent ambiguity or inconsistency." *United States v. Phillippe*, 63 M.J. 307, 310 (C.A.A.F. 2006) (citing *Prater*, 32 M.J. 436).

One such defense is a lack of mental responsibility, something of which the military judge here was certainly aware in light of the sanity board. Article 50a(a), UCMJ, 10 U.S.C. § 850a(a); Trial Tr. at 27. Military judges are cautioned to "take particular care to make sure that considerations of mental health do not put the providence of the plea at issue." *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007). But despite this well-settled warning, and despite being presented in presentencing proceedings with multiple exhibits and an unsworn statement focusing on Appellant's mental health and its impact on his decision-making abilities in relation to the charged offense, the military judge's only follow-up questions in this case were "Defense Counsel, additional evidence?" "Trial Counsel, do you have any rebuttal evidence to offer?" and "Trial Counsel, are you prepared to present argument?" Prosecution Ex. 1 at 14; Defense Ex. C at 10, 12; Trial Tr. at 98-102. The military judge asked Appellant zero questions about anything related to his mental health and elicited zero additional facts. Tr. at 102.

This inaction by the military judge constituted an abuse of discretion because the possibility of a defense was abundantly raised on these facts. Not at the outset, with the sanity board finding nothing problematic, Trial Tr. at 9, Appellate Ex. IV, and

Appellant's defense counsel seeing no problem. Trial Tr. at 27. But facts went in a different direction after findings were entered during presentencing proceedings.

In his unsworn statement, though Appellant claimed in one breath to have been "aware of [his] actions," Trial Tr. at 100, the other side of that very clause posed that Appellant "was not in a healthy mental state." *Id.* Perhaps a one-line either-or like this would suggest only the "mere possibility" of a defense, but the mental responsibility alarm bells should have been blaring to the military judge in light of the other matters presented. A substantial portion of Appellant's unsworn statement was dedicated to Appellant's mental health struggles, reciting Appellant's treatment history, hospitalization, medication failures, lack of medication at the time of the offense, lack of sleep at the time of the offense, and "spiraling" mental health symptoms at the time of the offense. Trial Tr. at 99-100. And far from "rest[ing] entirely on [Appellant's] unsworn statement" and thus failing to trigger the need for further inquiry, *Shaw*, 64 M.J. at 462, there was ample "factual record developed," *id.*, to raise questions concerning Appellant's mental health diagnoses—so significant that he was being discharged from military service because of them—and how they impacted Appellant specifically. Prosecution Ex. 1 at 14; Defense Ex. C at 10, 12.

There were plenty of ways the military judge might have ensured a provident plea by Appellant. *See United States v. Riddle*, 67 M.J. 335, 340-41 (C.A.A.F. 2009) (Effron, J., dissenting) (citations omitted) (detailing the military judge's options with the accused, based on case law, to inquire further and/or explain the defense to the accused). The military judge took none of these options and instead did nothing. Because the military judge failed in her "duty to inquire further to resolve the apparent inconsistency,"

Phillippe, 63 M.J. at 310-11, she failed to ensure Appellant's plea was provident and abused her discretion. Appellant's guilty plea should be deemed improvident.

2. Erroneous Maximum Punishment

Appellant's guilty plea was predicated on a misapprehension—based on what he was told by his defense counsel "at all points in time," Trial Tr. at 44, and the military judge, Trial Tr. at 43—that the maximum confinement to which he could be sentenced was double that authorized by the statutory provision charged. A guilty plea may be improvident when it is based on a substantial misunderstanding as to the maximum punishment. *United States v. Mincey*, 42 M.J. 376, 378 (C.A.A.F. 1995) (citations omitted). In the context of this case, this raises two questions: First, what was the maximum punishment? Second, did that result in a substantial misunderstanding on Appellant's part? Both of these should resolve in Appellant's favor and lead this Court to find Appellant's guilty plea improvident.

Whatever the counsel and the military judge believed to be the maximum punishment, Trial Tr. at 41-43, the actual maximum punishment authorized for an offense is a question of law reviewed de novo, *United States v. St. Blanc*, 70 M.J. 424, 428 (C.A.A.F. 2012) (citations omitted), and should lead this Court to a different determination. Under R.C.M. 1003(c)(1)(B)(ii), the maximum punishment for offenses not listed or closely related to those found in the Part IV of the *MCM* is, in relevant part, "as authorized by the United States Code." That provision applied to the purportedly incorporated offense here, so the next stop is the purportedly incorporated offense itself.

As noted in Issue I above, the offense among many in 8 U.S.C. § 1324 that the prosecution seems to have charged is a violation of 8 U.S.C. § 1324(a)(1)(A)(ii). *See*

Charge Sheet at 1; Appellate Ex. VI. That provision is subject to possible maximum periods of confinement of five years, ten years, twenty years, or life. 8 U.S.C. § 1324(a)(1)(B)(i)-(iv). The precondition to escalate beyond a five-year maximum depends on whether an accused sought commercial or private financial gain, 8 U.S.C. § 1324(a)(1)(B)(i), caused serious bodily injury or put life in jeopardy, 8 U.S.C. § 1324(a)(1)(B)(iii), or caused a death, 8 U.S.C. § 1324(a)(1)(B)(iv).

The resulting analysis should have been simple because, as the military judge acknowledged, none of those conditions were charged. Trial Tr. at 43; Charge Sheet at 1. Nor did the charge sheet invoke 8 U.S.C. § 1324(a)(1)(B)(i). Charge Sheet at 1. If it had, it would have constituted an additional element. *See, e.g.*, *Compton*, 295 Fed. App'x at 674-75; *Yu Tian Li*, 648 F.3d at 528; *Sineneng-Smith*, 982 F.3d at 776; *Lopez*, 230 Fed. App'x at 855. In the absence of any enhancement based on the charge sheet, the proper authorized maximum was found in 8 U.S.C. § 1324(a)(1)(B)(ii): five years.

But that was not what happened at trial, where the expedition to determine which of 8 U.S.C. § 1324's myriad provisions should have illuminated the maximum punishment went in the wrong direction. The military judge and counsel looked beyond the charge sheet to the "facts of this case." Trial Tr. at 43-44. Indeed, the military judge's decision to use the facts of the case to discern the maximum punishment led her to flat-out—and erroneously—ignore the comprehensive punishment scheme laid out in 8 U.S.C. § 1324(a)(1)(B) and declare that the only maximum confinement "as a matter of law" for a violation of 8 U.S.C. § 1324(a)(1)(A)(ii) was ten years, rather than any of the three applicable provisions also explicitly listing a violation of 8 U.S.C. §

1324(a)(1)(A)(ii) as a grounds for punishment. *Compare* Trial Tr. at 37, *with* 8 U.S.C. § 1324(a)(1)(B).

The central problem with the military judge's approach is that "[i]t is well settled that it is the language of the specification that governs the maximum punishment, and that an accused can neither be convicted of nor punished for an offense with which he is not charged." *United States v. Beaty*, 70 M.J. 39, 44 n.8 (C.A.A.F. 2011). As such, because the prosecution only charged what appears to parallel the baseline offense under 8 U.S.C. § 1324(a)(1)(A)(ii), without any of the enhancing conditions, the only maximum period of confinement that could have applied was five years. 8 U.S.C. § 1324(a)(1)(B)(ii).

Because of the obvious error in determining the maximum punishment, the follow-on question is whether it caused a substantial misunderstanding that warrants disturbing the guilty plea. There is no rigid mathematical formula that can answer this. *Mincey*, 42 M.J. at 378 (citations omitted). Instead, it rests on all of the facts of the case. *Id.* It might be tempting to focus on the fact that Appellant entered into a plea agreement that did away with two specifications and limited his confinement to no more than six months while requiring a bad-conduct discharge. Appellate Ex. VII. But the weighty impact of this doubled maximum confinement should not so readily be discounted. At the time of entering that plea agreement, the erroneously doubled maximum confinement, as advised by Appellant's trial defense counsel, Trial Tr. at 44, would have similarly been perceived to extend to the charged conspiracy offense. *See MCM*, Part IV, ¶ 5.d(1). So whereas Appellant should have been assessing his options with the understanding of a maximum of ten total years of confinement for those two offenses, his perception would

have been twenty—the difference being having an opportunity to see part of his beloved daughter's remaining childhood versus missing it altogether. Trial Tr. at 98-99. That is also an especially long potential time locked behind bars for an individual whose mental health rendered him unfit, in the eyes of the Air Force, to continue to perform duties that largely consisted of guarding things from the other side of such a fence. *Compare* Prosecution Ex. 3, *with* Prosecution Ex. 1 at 14-15. In that context, on the information presented to Appellant at the time, the choice to enter the plea agreement was little choice at all—so much so that he was willing to sacrifice his medical retirement through a mandatory bad-conduct discharge to avoid it. *See* Prosecution Ex. 1 at 16 (indicating separation for reasons other than medical separation will void the entitlement to benefits); Appellate Ex. VII at 2.

WHEREFORE, this Court should find Appellant's guilty plea improvident, set aside the findings and the sentence, and authorize a rehearing.

V.

TRIAL DEFENSE COUNSEL WERE INEFFECTIVE IN ADVISING ON THE MAXIMUM PUNISHMENT.

Standard of Review

Allegations of ineffective assistance are reviewed de novo. *United States v. Cueto*, 82 M.J. 323, 327 (C.A.A.F. 2022) (citations omitted).

Law and Analysis

In the alternative to the alleged improvidence of Appellant's guilty plea based on the maximum punishment discussed in Issue IV above, Appellant's trial defense counsel were ineffective in advising him.

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)). To establish ineffective assistance of counsel, the burden is on the appellant to demonstrate both deficient performance and prejudice. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted).

"The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993) (quoting *Nix v. Whiteside*, 475 U.S. 157, 175 (1986)). "[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

When evaluating deficient performance, the starting point is a presumption of counsel's competence. *See Gilley*, 56 M.J. at 124 (internal citation omitted). "Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." *Datavs*, 71 M.J. at 424 (citations omitted).

"[A] challenger must demonstrate a reasonable probability that, but for counsel's deficient performance the result of the proceeding would have been different." *Cueto*, 82 M.J. at 327 (citing *Strickland*, 466 U.S. at 689, 694) (internal quotation marks omitted). The Supreme Court has defined the prejudice element of an ineffective assistance of counsel claim as "focus[ing] on the question whether counsel's performance renders the result of the trial unreliable or the proceedings fundamentally unfair." *Lockhart*, 506 U.S. at 372 (citations omitted).

In this case, the ineffectiveness arises from the erroneous doubling of the maximum confinement to which Appellant was exposed. "[W]here the accused has been grossly misled by a miscalculation or erroneous sentence estimation by defense counsel, such conduct may constitute ineffective assistance of counsel." *St. Blanc*, 70 M.J. at 428-29 (citations omitted). The risk of confinement was erroneously doubled for the reasons described in Issue IV above. All the defense counsel had to do was look to the offenses alleged on the charge sheet itself. *Beaty*, 70 M.J. at 44 n.8. Instead they looked beyond that and erroneously found double the jail time.

Just as importantly, there is no question as to the trial defense counsel's position: "at all points in time" they understood the maximum confinement to be ten years. Trial Tr. at 44.[8] While this would seem to ordinarily not be of consequence as it relates to an appellant's forum choice, *see St. Blanc*, 70 M.J. at 429, the forum choice here—as well as the decisions to enter into the plea agreement, plead guilty, and bargain for a minimum and maximum punishment—were all predicated on the false premise that, if Appellant risked trial on the merits, he risked up to ten years in jail for the offense to which he pleaded guilty, with double that initially on the table in light of the originally charged conspiracy. That renders what happened at trial unreliable and warrants correction.

[8] Understanding that "[a]n appellant's assertion that his counsel were ineffective waives the attorney-client privilege 'as to matters reasonably related to that' assertion," *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995), the categorial recitation on the record spanning "all" the time trial defense counsel were advising Appellant leaves little, if anything, further to uncover as it relates to trial defense counsel's advice. Trial Tr. at 44. Should this Court later be asked to order declarations or affidavits, *see United States v. Melson*, 66 M.J. 346, 349-51 (C.A.A.F. 2008) (reviewing case law governing such post-trial affidavits responsive to ineffective assistance of counsel claims), any order granting such a request should specify with particularity those matters the Court deems reasonably related for which responsive information is needed to resolve the claim.

WHEREFORE, this Court should set aside the findings and the sentence, and authorize a rehearing.

VI.

THE APPLICATION OF 18 U.S.C. § 922 TO APPELLANT WARRANTS APPROPRIATE RELIEF.

Additional Facts

The first indorsements to both the entry of judgment (EOJ) and statement of trial results (STR) state that Appellant is subject to a "Firearm Prohibition Triggered Under 18 U.S.C. § 922." EOJ at 4; STR at 4. As a result of the firearms prohibition, Appellant has faced limited opportunities for employment as a security guard—the duties the Air Force trained him to do, *see* Prosecution Ex. 3—and his work as a security guard has limited earning potential. Decl. of Appellant at 1-2.

Standard of Review

Whether post-trial processing was properly completed is reviewed de novo. *United States v. Zegarrundo*, 77 M.J. 612, 613-14 (A.F. Ct. Crim. App. 2018) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021).

Law and Analysis

1. Section 922 is unconstitutional as applied to Appellant.

The test for applying the Second Amendment is as follows:

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

command."

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022) (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)).

Although the annotation that Section 922 applies to this case is non-specific, EOJ at 4, the government presumably intended to apply Section 922(g)(1), which bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, subsection (g)(1) cannot constitutionally apply to Appellant, who stands convicted of offenses that have historically not merited firearms restrictions. To prevail, the government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter the convicted offense, as long as the punishment could exceed one year of confinement. Regardless of the type or severity of an offense, all would be painted with the same brush. This the government cannot show.

The historical tradition took a narrower view of firearms regulation for criminal acts than that reflected in Section 922:

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

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 Harv. J.L. & Pub. Pol'y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not 'own or have in his possession or under his control, a pistol or revolver.'" *Id*. at 701, 704 (quoting 1926 Uniform Firearms Act §§ 1, 4). A "crime of violence" meant "committing or attempting to commit 'murder, manslaughter, rape, mayhem, assault to do great bodily harm,

robbery, [larceny], burglary, and housebreaking.'" *Id.* at 701 (quoting 1926 Uniform Firearms Act § 1). The offense of which Appellant was convicted falls short of these. It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit adopted this logic to conclude that Section 922(g)(1) is unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years' imprisonment—the same as the maximum confinement for the actual offense to which Appellant pleaded guilty. *Range v. AG United States*, 124 F.4th 218, 232 (3d Cir. 2024); Issues IV-V, *supra*. Evaluating Section 922(g)(1) in light of *Bruen* and *United States v. Rahimi*, 602 U.S. 680 (2024), the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals." *Range*, 124 F.4th at 229. It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 228-32. The real question, then, is whether Appellant's conviction meets the historical tradition of regulating firearms based on a limited framing of "violent."

In addition to the distinction based on violence, a felony conviction today is vastly different from what constituted a felony prior to the twentieth century, let alone at the time of this country's founding. This is problematic because categorizing crimes as felonies has not only increased, but done so in a manner inconsistent with the traditional understanding of a felony:

> The need [for historical research] is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in

> persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.

Marshall, 32 Harv. J.L. & Pub. Pol'y at 697. Notably, the "federal 'felon' disability—barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm—is less than [64] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the government has not proven that such a ban is consistent with this country's history and tradition.

All of the arguments above demonstrate that violation of the prohibition on unlawfully transporting an alien within the United States does not qualify for a lifetime ban on firearms. The *Rahimi* case does not change the analysis. 602 U.S. at 680. In *Rahimi*, the Supreme Court addressed the validity of Section 922(g)(8)(C)(i), which applies once a court has found that a defendant "represents a credible threat to the physical safety of another" and issued a restraining order. *Id.* at 699. The Court concluded that the historical analysis supported the proposition that when "an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 698.

But the historical analogue breaks down when applied here. In *Rahimi*, the Court noted that the "surety" and "going armed laws" which supported a restriction involved "whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* at 699. The Court also noted that surety bonds were of limited duration, and that Section 922(g)(8) only applied while a restraining order was in place. *Id.* By contrast, this case did not involve a threat with a weapon, and the firearms ban will last forever. Ultimately, the Supreme Court itself noted the limited nature of its holding. As the Supreme Court stated, "We conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be

temporarily disarmed consistent with the Second Amendment." *Id.* at 702. Such a narrow holding cannot support the broad restriction encompassed here.

2. This Court may take appropriate corrective action

In *United States v. Williams*, the Court of Appeals for the Armed Forces considered whether the Army Court of Criminal Appeals (Army Court) had the authority to alter the military judge's correction to the STR, which is incorporated into the judgment of the court signed by the military judge. 85 M.J. 121, 122-23 (C.A.A.F. 2024). In *Williams*, the military judge had erroneously marked on the STR that the appellant's conviction triggered the Lautenberg Amendment, 18 U.S.C. § 922(g), after advising the appellant of the opposite during his guilty plea. *Id*. Later, in promulgating the judgment, the military judge incorporated and amended the original STR to correct the firearms ban so that 18 U.S.C. § 922(g) was not triggered. *Id*. at 124. On appeal, the Army Court changed the firearm bar on the STR *back*, to reindicate the appellant was barred from possessing a firearm. *Id*.

The Court of Appeals for the Armed Forces determined that changing the STR back was an ultra vires act by the Army Court because "the STR is not part of the findings or sentence," but rather "other information" required by R.C.M. 1101(a)(6). *Id*. at 126. Therefore, the Army Court did not have authority to act pursuant to Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018),[9] in this way. *Id*.

The Court of Appeals for the Armed Forces then analyzed whether the Army Court had the authority to change the firearm ban under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2), as an "error . . . in the processing of the court-martial after the judgment was entered into the record." *Id*. at 126-27. The Court of Appeals for the Armed Forces concluded that Article

[9] The language at issue in Article 66 is not substantively different between the 2018 version analyzed in *Williams* and the version applicable to Appellant's appeal.

66(d)(2) did not apply for three reasons related to the unique facts of that case. *Id*. First, there was no "error" because the military judge corrected any erroneous notation on the STR before signing the judgment. *Id*. at 126. Thus, by the plain language of the statute, there was no error to consider after the EOJ. Second, assuming error, the burden of raising such error was on the accused. *Id*. As the appellant in *Williams* agreed with the military judge's action in correcting the firearm notation, no error was raised. *Id*. Therefore, the Army Court's "correction authority" had not been "triggered," as the appellant never raised the firearm notation as an error. Third, assuming error and assuming the error had been raised, the timing of the military judge's erroneous notation preceded the EOJ; it was on the STR. *Id*. at 127. Therefore, based on the plain language of Article 66(d)(2), it was not an error occurring *after* the EOJ. *Id.*

The Court of Appeals for the Armed Forces did not foreclose properly raising an erroneous firearm notation to the service courts of appeal under Article 66(d)(2), UCMJ, when the error raised occurs *after* the EOJ, as in Appellant's case.[10] Unlike the appellant in *Williams*, Appellant meets the factual predicate to trigger this Court's review under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2), for three reasons.

First, Appellant has "demonstrated error" in his case—that he was erroneously and unconstitutionally deprived of his right to bear arms. In demonstrating this error, Appellant seeks appropriate relief, to include correction of the First Indorsement to the EOJ with the erroneous firearm bar.

[10] The statutory authority for this Court to act may differ from the authority of the Court of Appeals for the Armed Forces to address this issue under Article 67, 10 U.S.C. § 867, a question which may be resolved in *United States v. Johnson*, 84 M.J. 343 (C.A.A.F. 2024), *vacated and review of other issues granted*, 85 M.J. 147 (C.A.A.F. 2024) (the Court granted review of this case and later vacated its initial order and granted review of different issues). The military judge's inclusion of the STR and its First Indorsement—and the firearms prohibition therein—into the EOJ is a "decision, judgment, or order" that was "incorrect in law."

This requested remedy is in line with *Williams*. While this Court cannot correct the erroneous firearms bar associated with the STR, it *can* correct the erroneous firearm notation on the First Indorsement attached to the EOJ, which was completed *after* the EOJ during post-trial processing. *Williams*, 85 M.J. at 126-27. Unlike the appellant in *Williams*, there is an error raised and demonstrated by Appellant for this Court to consider under Article 66(d)(2), UCMJ.

Second, the error on the First Indorsement depriving Appellant of his constitutional right to a firearm was an error in the "processing of the court-martial after the judgment was entered into the record under section 860(c) . . . (article 60c)." 10 U.S.C. § 866(d)(2). Under the applicable Air Force regulation, "*[a]fter* the EOJ is signed by the military judge and returned to the servicing legal office, the [Staff Judge Advocate] signs and attaches to the [EOJ] a first indorsement, indicating whether . . . firearm prohibitions are triggered." Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, ¶ 20.41 (Jan. 24, 2024) (emphasis added). The firearm denotation on the first indorsement to the EOJ explicitly happens *after* the EOJ is signed by the military judge pursuant to Article 60c. *Id*. Additionally, as this first indorsement is the most recent notification to law enforcement entities about the applicability of 18 U.S.C. § 922 to Appellant, it makes sense that this is the document the Court should review for post-trial processing error. *See id*. at ¶¶ 20.42, 29.6, 29.32, 29.33 (dictating when notifications are made through distribution of the EOJ with its first indorsement). Therefore, unlike the issue addressed in *Williams*, the error here occurred after the EOJ, in accordance with the last triggering criterion under Article 66(d)(2), UCMJ.

Third, this Court's authority to review the erroneous firearm ban under Article 66(d)(2) is not foreclosed by this Court's published opinion in *United States v. Vanzant*, 84 M.J. 671 (A.F. Ct. Crim. App. 2024), *rev. granted*, 85 M.J. 198 (C.A.A.F. 2024). In *Vanzant*, this Court

determined it did not have authority to act on collateral consequences not a part of the findings or sentence specifically under Article 66(d)(1). *Id*. at 680 ("Article 66(d), UCMJ, provides that a [Court of Criminal Appeals] 'may act only with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c].'"); *but see, e.g., United States v. Lawson*, No. ACM 23034, 2024 CCA LEXIS 431, at *2 (A.F. Ct. Crim. App. Oct. 17, 2024) (per curiam) (broadly summarizing *Vanzant* as standing for the proposition that "the 18 U.S.C. § 922 firearm prohibition notation included in the staff judge advocate's indorsement to the [EOJ] is beyond a Court of Criminal Appeals' statutory authority to review"), *rev. granted*, ___ M.J. ___, 2025 CAAF LEXIS 155 (C.A.A.F. Feb. 28, 2025). The Court of Appeals for the Armed Forces later agreed with this Court's interpretation of Article 66(d)(1). *Williams*, 85 M.J. at 125-26. However, Appellant is asking this Court to review an error in post-trial processing under Article 66(d)(2) which this Court did not analyze in *Vanzant*. *See* 84 M.J.at 680 (quoting the language of Article 66(d)(1), not (d)(2)). To effectuate the most commensurate remedy—correction of the Firsts Indorsement to the EOJ—this Court should use its power under R.C.M. 1112(d)(2), which permits this Court to send a defective record back to the military judge for correction, as, ultimately, the First Indorsement is a required component of the EOJ, albeit not part of the "findings" and "sentence," and the error materially affects Appellant's constitutional rights. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9); DAFI 51-201, at ¶ 20.41.

Even if this Court is disinclined to take up the requested correction of the First Indorsement to the EOJ, or if the Court of Appeals for the Armed Forces finds correction of the First Indorsement to the EOJ non-justiciable in *Johnson*, this Court may and should still provide other appropriate relief consistent with *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *16-19 (A.F. Ct. Crim. App. Jun. 7, 2024), *aff'd*, ___ M.J. ___,

No. 24-0208/AF, 2025 CAAF LEXIS 248 (C.A.A.F. Mar. 31, 2025). In *Valentin-Andino*, the Court of Appeals for the Armed Forces determined that Article 66(d)(2) exclusively governs "post-trial delay." 2025 CAAF LEXIS 248, at *9 n.4. Though narrowly addressing the remedy for gross indifference and institutional neglect in post-trial processing resulting in "post-trial delay," *see* 2024 CCA LEXIS 223, at *16-19, this conclusion leaves little reason to think the same authority would not also apply to a post-trial "error" in processing like the EOJ's unconstitutional application of 18 U.S.C. § 922. And in affirming this Court's decision, *Valentin-Andino* reinforces the breadth of considerations and remedies available to this Court in fashioning relief under Article 66(d)(2).

As such, even if this Court declines to correct Appellant's EOJ directly, *Valentin-Andino* bolsters this Court's authority to provide relief not just for the injury specific to Appellant, but also to tailor that remedy in light of its place in the broader fabric of what is, in actuality, an institutionalized and systematic violation of servicemembers' rights under the Second Amendment. *See* U.S. CONST. amend. II. At least thirty-seven cases[11] have challenged the Air

[11] Of these cases, the twenty-five cited in-text are just those that have been granted review by the Court of Appeals for the Armed Forces. Appellant has moved to attach each of the EOJs available on the Air Force's public website, *see* Article 140a, UCMJ, 10 U.S.C. § 140a, the face of which render possible the analysis of the general propriety of the Department of the Air Force's widespread firearms prohibition. The remainder include: *United States v. Ramirez*, No. ACM 40373, 2024 CCA LEXIS 203 (A.F. Ct. Crim. App. May 9, 2024); *United States v. Douglas*, No. ACM 40324 (f rev), 2024 CCA LEXIS 254 (A.F. Ct. Crim. App. Jun. 27, 2024); *United States v. Williams*, No. ACM 40410, 2024 CCA LEXIS 317 (A.F. Ct. Crim. App. Jul. 31, 2024); *United States v. Jackson*, No. ACM S32757, 2024 CCA LEXIS 330 (A.F. Ct. Crim. App. Aug. 9, 2024) (per curiam); *United States v. Clark*, No. ACM 23017, 2024 CCA LEXIS 378 (A.F. Ct. Crim. App. Sep. 6, 2024); *United States v. Goodwater*, No. ACM 40304 (f rev), 2024 CCA LEXIS 493 (A.F. Ct. Crim. App. Nov. 22, 2024); *United States v. Moore*, No. ACM 40600, 2024 CCA LEXIS 527 (A.F. Ct. Crim. App. Dec. 18, 2024); *United States v. Johnson*, No. ACM S32782, 2025 CCA LEXIS 12 (A.F. Ct. Crim. App. Jan. 16, 2025) (per curiam); *United States v. Covitz*, No. ACM 40193 (reh), 2025 CCA LEXIS 105 (A.F. Ct. Crim. App. Mar. 19, 2025); *United States v. Boren*, No. ACM 40296 (f rev), 2025 CCA LEXIS 103 (A.F. Ct. Crim. App. Mar. 19, 2025); *United States v. Lara*, No. ACM 40247 (reh), 2025 CCA LEXIS 97

Force's systemic and institutionalized practice of codifying the disarming of its members, DAFI 51-201, at ¶ 20.41, as violative of the Constitution:

1. *Vanzant*, 84 M.J. 671;
2. *United States v. Maymi*, No. ACM 40332, 2023 CCA LEXIS 491 (A.F. Ct. Crim. App. Oct. 5, 2023), *rev. granted*, 84 M.J. 308 (C.A.A.F. 2024);
3. *United States v. Casillas*, No. ACM 40302, 2023 CCA LEXIS 527 (A.F. Ct. Crim. App. Dec. 15, 2023), *rev. granted*, 84 M.J. 477 (C.A.A.F. 2024);
4. *United States v. Saul*, No. ACM 40341, 2023 CCA LEXIS 546 (A.F. Ct. Crim. App. Dec. 29, 2023), *rev. granted*, 84 M.J. 312 (C.A.A.F. 2024);
5. *United States v. Fernandez*, No. ACM 40290 (f rev), 2024 CCA LEXIS 7 (A. F. Ct. Crim. App. Jan. 9, 2024), *rev. granted*, 84 M.J. 418 (C.A.A.F. 2024);
6. *United States v. Jackson*, No. ACM 40310, 2024 CCA LEXIS 9 (A.F. Ct. Crim. App. Jan. 11, 2024), *rev. granted*, 85 M.J. 91 (C.A.A.F. 2024);
7. *United States v. Denney*, No. ACM 40360, 2024 CCA LEXIS 101 (A.F. Ct. Crim. App. Mar. 8, 2024) (per curiam), *rev. granted*, 84 M.J. 342 (C.A.A.F. 2024);
8. *United States v. Dominguez-Garcia*, No. ACM S32694 (f rev), 2024 CCA LEXIS 218 (A.F. Ct. Crim. App. May 31, 2024) (per curiam), *rev. granted*, 85 M.J. 186 (C.A.A.F. 2024);
9. *United States v. George*, No. ACM 40397, 2024 CCA LEXIS 224 (A.F. Ct. Crim. App. Jun. 7, 2024), *rev. granted*, 85 M.J. 133 (C.A.A.F. 2024);

(A.F. Ct. Crim. App. Mar. 17, 2025); *United States v. Hagen*, No. ACM 40561, 2025 CAAF LEXIS 234 (A.F. Ct. Crim. App. May 28, 2025).

10. *United States v. Donley*, No. ACM 40350 (f rev), 2024 CCA LEXIS 228 (A.F. Ct. Crim. App. Jun. 11, 2024), *rev. granted*, 85 M.J. 211 (C.A.A.F. 2024);
11. *United States v. Gubicza*, No. ACM 40464, 2024 CCA LEXIS 266 (A.F. Ct. Crim. App. Jul. 2, 2024) (per curiam), *rev. granted*, 85 M.J. 186 (C.A.A.F. 2024);
12. *United States v. Van Velson*, No. ACM 40401, 2024 CCA LEXIS 283 (A.F. Ct. Crim. App. Jul. 12, 2024), *rev. granted*, ___ M.J. ___, No. 24-0225/AF, 2024 CAAF LEXIS 730 (C.A.A.F. Nov. 21, 2024);
13. *United States v. Schneider*, No. ACM 40403, 2024 CCA LEXIS 288 (A.F. Ct. Crim. App. Jul. 16, 2024), *rev. granted*, ___ M.J. ___, No. 24-0228/AF, 2024 CAAF LEXIS 793 (C.A.A.F. Dec. 10, 2024);
14. *United States v. Conway*, No. ACM 40372 (f rev), 2024 CCA LEXIS 290 (A.F. Ct. Crim. App. Jul. 19, 2024), *rev. granted*, 85 M.J. 141 (C.A.A.F. 2024);
15. *United States v. Hollenback*, No. ACM 40481, 2024 CCA LEXIS 323 (A.F. Ct. Crim. App. Aug. 2, 2024) (per curiam), *rev. granted*, ___ M.J. ___, No. 24-0235/AF, 2025 CAAF LEXIS 24 (C.A.A.F. Jan. 28, 2025);
16. *United States v. Bates*, No. ACM S32752, 2024 CCA LEXIS 333 (A.F. Ct. Crim. App. Aug. 13, 2024), *rev. granted*, ___ M.J. ___, No. 25-0006/AF, 2025 CAAF LEXIS 61 (C.A.A.F. Jan. 27, 2025);
17. *United States v. Wood*, No. ACM 40429, 2024 CCA LEXIS 334 (A.F. Ct. Crim. App. Aug. 13, 2024) (per curiam), *rev. granted*, ___ M.J. ___, No. 25-0005/AF, 2024 CAAF LEXIS 753 (C.A.A.F. Nov. 26, 2024);

18. *United States v. Zhong*, No. ACM 40441, 2024 CCA LEXIS 344 (A.F. Ct. Crim. App. Aug. 21, 2024), *rev. granted*, ___ M.J. ___, No. 25-0011/AF, 2024 CAAF LEXIS 812 (C.A.A.F. Dec. 16, 2024);
19. *United States v. Folts*, No. ACM 40322, 2024 CCA LEXIS 353 (A.F. Ct. Crim. App. Aug. 26, 2024), *rev. granted*, ___ M.J. ___, No. 25-0043/AF, 2025 CAAF LEXIS 170 (C.A.A.F. Mar. 5, 2025);
20. *United States v. Block*, No. ACM 40466, 2024 CCA LEXIS 371 (A.F. Ct. Crim. App. Aug. 29, 2024) (per curiam), *rev. granted*, ___ M.J. ___, No. 25-0030/AF, 2025 CAAF LEXIS 63 (C.A.A.F. Jan. 28, 2025);
21. *Lawson*, No. ACM 23034, 2024 CCA LEXIS 431 (A.F. Ct. Crim. App. Oct. 17, 2024) (per curiam), *rev. granted*, ___ M.J. ___, No. 25-0074/AF, 2025 CAAF LEXIS 155 (C.A.A.F. Feb. 28, 2025);
22. *United States v. Pulley*, No. ACM 40438 (f rev), 2024 CCA LEXIS 442 (A.F. Ct. Crim. App. Oct. 24, 2024), *rev. granted*, ___ M.J. ___, No. 25-0063/AF; 2025 CAAF LEXIS 138 (C.A.A.F. Feb. 20, 2025), *recon. denied*, __ M.J. __, No. 25-0063/AF, 2025 CAAF LEXIS 242 (C.A.A.F. Mar. 31, 2025);
23. *United States v. Scott*, No. ACM 40369, 2024 CCA LEXIS 484 (A.F. Ct. Crim. App. Nov. 12, 2024), *rev. granted*, ___ M.J. ___, No. 25-0071/AF, 2025 CAAF LEXIS 107 (C.A.A.F. Feb. 12, 2025);
24. *United States v. Arizpe*, No. ACM 40507, 2025 CCA LEXIS 104 (A. F. Ct. Crim. App. Mar. 19, 2025), *rev. granted*, No. 25-0159/AF (May 30, 2025); and

25. *United States v. Kershaw*, No. ACM 40455 (f rev), 2025 CCA LEXIS 205 (A.F. Ct. Crim. App. Mar. 27, 2025), *certified for rev.*, ___ M.J. ___, No. 25-0177/AF, 2025 CAAF LEXIS 408 (C.A.A.F. May 27, 2025).

As a point of comparison to these thirty-seven cases, the number of unpublished and published decisions by this Court, excluding those cases involving writs, totaled fewer than 100 in 2023.[12] These cases show that the error of unconstitutional application of 18 U.S.C. § 922 is widespread and institutionalized, and merits relief in light of the prejudice to Appellant's constitutional right to possess firearms and, in turn, provide for himself. Given the unique circumstances of Appellant's case, the real lifelong cost of the bad-conduct discharge, and the parallel lifelong cost to Appellant by virtue of the unconstitutional firearms prohibition, Decl. at 1-2, the appropriate remedy is to set aside Appellant's bad-conduct discharge.

WHEREFORE, this Court should order correction of the First Indorsement to the EOJ or, in the alternative, grant appropriate sentence relief by setting aside the bad-conduct discharge.

[redacted]
A[redacted]lant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

[12] The source of this illustrative calculation is this Court's online listing of opinions and orders for 2023. United States Air Force Court of Criminal Appeals, https://afcca.law.af.mil/opinions_cnm_2023.html (last visited May 27, 2025). A similar count for 2024 would reflect ninety-seven unpublished and published decisions (by undersigned counsel's count), *see* United States Air Force Court of Criminal Appeals, https://afcca.law.af.mil/opinions_cat_2024.html (last visited May 27, 2025), meaning that servicemembers' claims of unconstitutional firearm prohibitions spanned approximately twenty-nine percent of this Court's decisions in 2024.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 June 2025.

[redacted]
ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

APPENDIX

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

VII.

APPELLANT'S SANITY BOARD WAS INCORRECTLY CONDUCTED.

Argument

Standard of Review

A military judge's decision related to a sanity board is assessed for an abuse of discretion. *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008). Failure to raise a challenge forfeits it. R.C.M. 905(e)(2). Forfeited issues are evaluated for plain error. *Andrews*, 77 M.J. at 398. Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *King*, 83 M.J. at 120-21.

Law and Analysis

"The text of R.C.M. 706 outlines the procedures and requirements for a sanity board." *Mackie*, 66 M.J. at 199 (citing *United States v. English*, 47 M.J. 215, 219 (C.A.A.F. 1997)). Those requirements include the constitution of the board and the questions the board must address. R.C.M. 706(c)(1)-(2). Appellant personally asserts that the board asked questions irrelevant to his state of mind at the time of the charged offense and thereby reached conclusions unhelpful to assessing his mental responsibility as to the charged offense. *But see* Appellate Ex. IV.

WHEREFORE Appellant personally requests this Court order a new sanity board.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40651**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Brennen J. PATTERSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 3 June 2025, Appellant's counsel submitted a Motion to Attach Documents, requesting the court attach Appendix A, a declaration of Appellant, dated 2 June 2025, and Appendices B–AE, 30 entries of judgment (EoJs) from other Air Force servicemembers. The Government opposes the motion, and instead requests the court deny attaching all the appendices, to include Appellant's declaration.

According to Appellant's motion, the attached declaration and EoJs are "relevant and necessary to the disposition of Appellant's sixth [a]ssignment of [e]rror." Specifically, Appellant's declaration claims to "establish[ ] the personal and concrete injury to Appellant arising from the prohibition under 18 U.S.C. § 922 set out in the first indorsement to the [EoJ], affecting both his employment opportunities and income within those opportunities." Appellant further claims the EoJs are "relevant and necessary to this Court's resolution of whether the Department of the Air Force's widespread application of 18 U.S.C. § 922 is both systemic and wrong as alleged."

We grant only the request to attach Appellant's declaration (Appendix A), dated 2 June 2025; however, we specifically defer consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law, to this attachment until we complete our Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's entire case.

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 11th day of June, 2025,

ORDERED:

Appellant's Motion to Attach is **GRANTED IN PART**.

Appellant's motion to attach Appendix A, his declaration of 2 June 2025, is **GRANTED.**

Appellant's motion to attach Appendices B–AE, 30 entries of judgment, is **DENIED**.

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 TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*	)	Case No. ACM 40651 3 June 2025

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

Pursuant to Rules 17.2(b) and 23.3(b) of this Court's Rules of Practice and Procedure, Appellant hereby moves to attach the following appendices to the Record of Trial:

(A) Declaration of the Appellant;

(B) Entry of Judgment, *Vanzant*, 84 M.J. 671;

(C) Entry of Judgment, *United States v. Fernandez*, No. ACM 40290 (f rev), 2024 CCA LEXIS 7 (A. F. Ct. Crim. App. Jan. 9, 2024), *rev. granted*, 84 M.J. 418 (C.A.A.F. 2024);

(D) Entry of Judgment, *United States v. Gubicza*, No. ACM 40464, 2024 CCA LEXIS 266 (A.F. Ct. Crim. App. Jul. 2, 2024) (per curiam), *rev. granted*, 85 M.J. 186 (C.A.A.F. 2024);

(E) Entry of Judgment, *United States v. Jackson*, No. ACM 40310, 2024 CCA LEXIS 9 (A.F. Ct. Crim. App. Jan. 11, 2024), *rev. granted*, 85 M.J. 91 (C.A.A.F. 2024);

(F) Entry of Judgment, *United States v. George*, No. ACM 40397, 2024 CCA LEXIS 224 (A.F. Ct. Crim. App. Jun. 7, 2024), *rev. granted*, 85 M.J. 133 (C.A.A.F. 2024);

(G) Entry of Judgment, *United States v. Denney*, No. ACM 40360, 2024 CCA LEXIS 101 (A.F. Ct. Crim. App. Mar. 8, 2024) (per curiam), *rev. granted*, 84 M.J. 342 (C.A.A.F. 2024);

(H) Entry of Judgment, *United States v. Saul*, No. ACM 40341, 2023 CCA LEXIS 546 (A.F. Ct. Crim. App. Dec. 29, 2023), *rev. granted*, 84 M.J. 312 (C.A.A.F. 2024);

(I) Entry of Judgment, *United States v. Maymi*, No. ACM 40332, 2023 CCA LEXIS 491 (A.F. Ct. Crim. App. Oct. 5, 2023), *rev. granted*, 84 M.J. 308 (C.A.A.F. 2024);

(J) Entry of Judgment, *United States v. Conway*, No. ACM 40372 (f rev), 2024 CCA LEXIS 290 (A.F. Ct. Crim. App. Jul. 19, 2024), *rev. granted*, 85 M.J. 141 (C.A.A.F. 2024);

(K) Entry of Judgment, *United States v. Casillas*, No. ACM 40302, 2023 CCA LEXIS 527 (A.F. Ct. Crim. App. Dec. 15, 2023), *rev. granted*, 84 M.J. 477 (C.A.A.F. 2024);

(L) Entry of Judgment, *United States v. Folts*, No. ACM 40322, 2024 CCA LEXIS 353 (A.F. Ct. Crim. App. Aug. 26, 2024), *rev. granted*, ___ M.J. ___, No. 25-0043/AF, 2025 CAAF LEXIS 170 (C.A.A.F. Mar. 5, 2025);

(M) Entry of Judgment, *United States v. Donley*, No. ACM 40350 (f rev), 2024 CCA LEXIS 228 (A.F. Ct. Crim. App. Jun. 11, 2024), *rev. granted*, 85 M.J. 211 (C.A.A.F. 2024);

(N) Entry of Judgment, *United States v. Van Velson*, No. ACM 40401, 2024 CCA LEXIS 283 (A.F. Ct. Crim. App. Jul. 12, 2024), *rev. granted*, ___ M.J. ___, No. 24-0225/AF, 2024 CAAF LEXIS 730 (C.A.A.F. Nov. 21, 2024);

(O) Entry of Judgment, *United States v. Bates*, No. ACM S32752, 2024 CCA LEXIS 333 (A.F. Ct. Crim. App. Aug. 13, 2024), *rev. granted*, ___ M.J. ___, No. 25-0006/AF, 2025 CAAF LEXIS 61 (C.A.A.F. Jan. 27, 2025);

(P) Entry of Judgment, *United States v. Block*, No. ACM 40466, 2024 CCA LEXIS 371 (A.F. Ct. Crim. App. Aug. 29, 2024) (per curiam), *rev. granted*, ___ M.J. ___, No. 25-0030/AF, 2025 CAAF LEXIS 63 (C.A.A.F. Jan. 28, 2025);

(Q) Entry of Judgment, *United States v. Hollenback*, No. ACM 40481, 2024 CCA LEXIS 323 (A.F. Ct. Crim. App. Aug. 2, 2024) (per curiam), *rev. granted*, ___ M.J. ___, No. 24-0235/AF, 2025 CAAF LEXIS 24 (C.A.A.F. Jan. 28, 2025);

(R) Entry of Judgment, *United States v. Zhong*, No. ACM 40441, 2024 CCA LEXIS 344 (A.F. Ct. Crim. App. Aug. 21, 2024), *rev. granted*, ___ M.J. ___, No. 25-0011/AF, 2024 CAAF LEXIS 812 (C.A.A.F. Dec. 16, 2024);

(S) Entry of Judgment, *United States v. Schneider*, No. ACM 40403, 2024 CCA LEXIS 288 (A.F. Ct. Crim. App. Jul. 16, 2024), *rev. granted*, ___ M.J. ___, No. 24-0228/AF, 2024 CAAF LEXIS 793 (C.A.A.F. Dec. 10, 2024);[1]

(T) Entry of Judgment, *United States v. Wood*, No. ACM 40429, 2024 CCA LEXIS 334 (A.F. Ct. Crim. App. Aug. 13, 2024) (per curiam), *rev. granted*, ___ M.J. ___, No. 25-0005/AF, 2024 CAAF LEXIS 753 (C.A.A.F. Nov. 26, 2024);

[1] The First Indorsement indicating the applicability of 18 U.S.C. § 922 is not included in the publicly available version of this document; however, information concerning the convicted offenses and sentence is included.

(U) Entry of Judgment, *United States v. Lawson*, No. ACM 23034, 2024 CCA LEXIS 431 (A.F. Ct. Crim. App. Oct. 17, 2024) (per curiam), *rev. granted*, ___ M.J. ___, No. 25-0074/AF, 2025 CAAF LEXIS 155 (C.A.A.F. Feb. 28, 2025);

(V) Entry of Judgment, *United States v. Pulley*, No. ACM 40438 (f rev), 2024 CCA LEXIS 442 (A.F. Ct. Crim. App. Oct. 24, 2024), *rev. granted*, ___ M.J. ___, No. 25-0063/AF; 2025 CAAF LEXIS 138 (C.A.A.F. Feb. 20, 2025), *recon. denied*, __ M.J. __, No. 25-0063/AF, 2025 CAAF LEXIS 242 (C.A.A.F. Mar. 31, 2025);

(W) Entry of Judgment, *United States v. Scott*, No. ACM 40369, 2024 CCA LEXIS 484 (A.F. Ct. Crim. App. Nov. 12, 2024), *rev. granted*, ___ M.J. ___, No. 25-0071/AF, 2025 CAAF LEXIS 107 (C.A.A.F. Feb. 12, 2025);

(X) Entry of Judgment, *United States v. Clark*, No. ACM 23017, 2024 CCA LEXIS 378 (A.F. Ct. Crim. App. Sep. 6, 2024);

(Y) Entry of Judgment, *United States v. Douglas*, No. ACM 40324 (f rev), 2024 CCA LEXIS 254 (A.F. Ct. Crim. App. Jun. 27, 2024);

(Z) Entry of Judgment, *United States v. Jackson*, No. ACM S32757, 2024 CCA LEXIS 330 (A.F. Ct. Crim. App. Aug. 9, 2024) (per curiam);

(AA) Entry of Judgment, *United States v. Kershaw*, No. ACM 40455 (f rev), 2025 CCA LEXIS 205 (A.F. Ct. Crim. App. Mar. 27, 2025), *certified for rev.*, ___ M.J. ___, No. 25-0177/AF, 2025 CAAF LEXIS 408 (C.A.A.F. May 27, 2025);

(AB) Entry of Judgment, *United States v. Williams*, No. ACM 40410, 2024 CCA LEXIS 317 (A.F. Ct. Crim. App. Jul. 31, 2024);

(AC) Entry of Judgment, *United States v. Lara*, No. ACM 40247 (reh), 2025 CCA LEXIS 97 (A.F. Ct. Crim. App. Mar. 17, 2025);

(AD) Entry of Judgment, *United States v. Moore*, No. ACM 40600, 2024 CCA LEXIS 527 (A.F. Ct. Crim. App. Dec. 18, 2024); and

(AE) Entry of Judgment, *United States v. Goodwater*, No. ACM 40304 (f rev), 2024 CCA LEXIS 493 (A.F. Ct. Crim. App. Nov. 22, 2024).

Each document is relevant and necessary to the disposition of Appellant's sixth Assignment of Error. None of these documents are found in the record because the post-trial processing issue identified in Appellant's brief stems from but arose after the entry of judgment in the record. *See* Entry of Judgment at 1-4.

Appellant's Declaration establishes the personal and concrete injury to Appellant arising from the prohibition under 18 U.S.C. § 922 set out in the first indorsement to the Entry of Judgment, affecting both his employment opportunities and income within those opportunities. In *United States v. Johnson*, the United States Court of Appeals for the Armed Forces specified review of a predicate issues related to the same firearms prohibition here. ___M.J. ___, 2024 CAAF LEXIS 561 (C.A.A.F. Sept. 24, 2024). One of the specified issues, which remains pending resolution, concerns whether review of the 18 U.S.C. § 922 prohibition on the Staff Judge Advocate's indorsement to the entry of judgment satisfies that Court's cases or controversies doctrine. *Id*. Addressing this boils down to a traditional assessment of standing: whether an injury in fact occurred, its causation, and its redressability. *B.M. v. United States*, 84 M.J. 314, 317 (C.A.A.F. 2024). Given the parallel issues between Appellant's case and *Johnson*, the same question of standing would seem to apply to Appellant's case. *Compare* 2024 CAAF LEXIS 561 (where Issue III addresses the as-applied challenge to the firearms prohibition), *with* Appellant's Br. at 28-40 (setting out generally the same issue).

Appellant's declaration is relevant and necessary to addressing that question, as it provides this Court what would otherwise be unresolved material facts affecting the Court's resolution of the case. The party invoking federal jurisdiction bears the burden of establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To the extent standing is an open question before this Court, the record of trial does not answer it because it provides a general categorization devoid of any specific impact on Appellant. Appellant's declaration provides the necessary answer by providing that information.

The Entries of Judgment in the other appendices, which are submitted as posted by the Air Force on its public website, *see* Article 140a, UCMJ, 10 U.S.C. §940a, with additional redactions to remove names other than the respective appellant's, are relevant and necessary to this Court's resolution of whether the Department of the Air Force's widespread application of 18 U.S.C. § 922 is both systemic and wrong as alleged. It is one thing for such an error to be alleged in the cases cited in Appellant's brief. It is another thing for this Court to have the information before it in order to assess whether the regular application of that statute to convicted servicemembers runs afoul of the test set out in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022). Unlike post-trial delays that might be gleaned from referencing earlier decisions of this Court recounting the pertinent facts, *see, e.g.*, *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, *16-19 (A.F. Ct. Crim. App. Jun. 7, 2024), *aff'd*, __ M.J. __, No. 24-0208/AF, 2025 CAAF LEXIS 248 (C.A.A.F. Mar. 31, 2025), the propriety of the application of 18 U.S.C. § 922 requires squaring the Air Force's practice with the convicted offenses and the Nation's history and tradition. *See Bruen*, 597 at 24. The Entries of Judgment readily provide that information and should be considered for that purpose.

WHEREFORE, this Court should grant this motion to attach documents.

Respectfully Submitted,

ALLEN S. ABRAMS, Lt Col, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were delivered by e-mail to the Court and served on the Government Trial and Appellate Operations Division on 3 June 2025. The Appendices were delivered to the same via DoD SAFE on 3 June 2025.

[redacted]
ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO ATTACH**
v.	)	
	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force	)	No. ACM 40651
Appellant.	)	10 June 2025

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 Appendices A through AE.

Appellant was found guilty, pursuant to his plea agreement, of one charge and one specification of violating 8 U.S.C. § 1324 as assimilated through Article 134, UCMJ.

Appellant asserts that 18 U.S.C. § 922 (firearms prohibition) is unconstitutional as applied to him and warrants correction and sentence relief. (App Br. at 36). The crux of his argument is that this court has jurisdiction to invalidate the collateral consequence of the firearms prohibition through Article 66(d)(2), UCMJ. He claims that the collateral consequence is an "error … in the processing of the court-martial after the EOJ" based on the timing of the signing of the first indorsement and the alleged unconstitutionality of the prohibition. (App. Br. at 32). (citing Article 66(d)(2), UCMJ). He also claims that this Court should rely on its post-trial processing delay caselaw to provide "other appropriate relief" in the form of disapproving his bad-conduct discharge by finding an "institutionalized and systematic violation of servicemembers' rights under the Second Amendment." (App. Br. at 36).

The record of trial contains the entry of judgement (EOJ) and all the facts supporting

Appellant's finding of guilt for transporting, within the United States, an alien unlawfully in the United States in violation of 8 U.S.C. § 1324, an offense not capital, in violation of Article 134, UCMJ, in both the stipulation of fact and plea colloquy. (ROT Vol. 1, *EOJ; First Indorsement to EOJ*; Pros. Ex. 1, *Stipulation of Fact;* R. at 43-101).

ANALYSIS

This Court should deny Appellant's motion to attach Appendices A through AE because neither the information in Appellant's declaration nor the entries of judgment from other cases are "necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020).

Whether this Court has jurisdiction to invalidate the firearms prohibition collateral consequence, and whether the firearms prohibition is constitutional as applied to Appellant are "fully resolvable by the materials in the record." Jessie, 79 M.J. at 443. This Court need only to look to the law, the EOJ, stipulation of fact and transcript to evaluate the issues of jurisdiction and constitutionality of the firearms prohibition. What job Appellant may be able to get if he could possess a firearm is irrelevant to whether this Court has jurisdiction to review the firearms annotation under Article 66(d)(2), UCMJ. Additionally, entries of judgment from other courts-martial are neither relevant nor necessary for resolving Appellant's case.

Appellant's argument that this Court needs to consider the entries of judgment from other cases to determine whether there has been a systemic misapplication of 18 U.S.C. § 922 is unpersuasive for three reasons. (Mot. at 6). First, the question of applying the firearms prohibition to Appellant starts and ends with this Court's statutory jurisdiction. This Court has determined that the collateral consequence of a firearms prohibition noted on the EOJ is beyond this Court's statutory authority to review. United States v. Vanzant, 84 M.J. 671 (A.F. Ct. Crim.

App. 2024). A claim of repeated error, even if it were true, does not expand this Court's statutory jurisdiction. So the inclusion of entries of judgment from other cases to show alleged systemic misapplication of the firearms prohibition is neither relevant nor necessary for resolving Appellant's assignment of error.

Second, the entries of judgment from other cases do not inform this Court about whether the application of 18 U.S.C. § 922 to Appellant was wrong. Finally, even if this Court could get beyond jurisdiction, the consideration of other cases in determining an appropriate remedy under Article 66(d)(2), UCMJ, has not been applied when this Court has not previously identified the action as error. Appellant's argument for relevance and necessity relies on United States v. Valentin-Andino, 2024 CCA LEXIS 223 (A.F. Ct. Crim. App. 7 June 2024). (App. Br. at 35-40, Mot. at 6). But it is unpersuasive because the court in Valentin-Andino only found institutional neglect *after* the court had repeatedly identified the Government's post-trial delay to be improper. Id. at *18-19. This Court has never opined on whether the Government's application of 18 U.S.C. § 922 is error – because it is beyond this Court's statutory authority to do so. There cannot be systemic institutional neglect where the Government has no direction its actions are improper. Therefore, even if the entries of judgement showed repeated error, they would be irrelevant for determining whether a harsher remedy is appropriate.

The application of 18 U.S.C. § 922 to Appellant is a matter fully resolvable by the record. The collateral consequence is beyond this Court's statutory authority. Even if it were repeated error, as Appellant alleges, that does not expand this Court's jurisdiction. Therefore, this Court should decline to find the entries of judgment relevant or necessary for resolving the issue of the application of 18 U.S.C. § 922 to Appellant.

WHEREFORE, the United States respectfully requests this Court deny Appellant's motion to attach Appendices A through AE.

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 10 June 2025.

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40651**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Brennan J. PATTERSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 3 June 2025, Appellant, through counsel, submitted an assignments of error brief. In the brief, Appellant alleges, *inter alia*, that trial defense counsel were ineffective in advising Appellant on the maximum punishment statutorily authorized in that they believed the maximum punishment "'at all points in time' was understood to be a maximum confinement of ten years."

On 12 June 2025, the Government filed a Motion to Compel Declarations and contemporaneously filed a Motion for Enlargement of Time (First). The Government requests this court compel Appellant's trial defense counsel, Major Matthew V. Leal and Captain Joshua L. Lopes, to provide affidavits or declarations in response to the claimed ineffective assistance of counsel. According to the Government, Appellant's trial defense counsel indicated they would only provide a declaration upon order by this court. In the motion for enlargement of time, the Government requests 14 days after the court's receipt of declarations or affidavits to submit its answer.

Appellant opposes any due dates more than 30 days to compel declarations and 14 days for the Government's subsequent briefing; we accept this request. Further, Appellant requests this court to "provide appropriate guardrails" to "ensure any submission is, in fact, responsive to the questions this [c]ourt must answer" by requesting this court order trial defense counsel to "provide interrogatories" or limit their responses in the declarations to six specific questions provided in Appellant's response to the Government's motion to compel declarations. We decline to do either; however, trial defense counsel are permitted to answer the questions presented by Appellant if they find those questions would assist this court in resolving Appellant's claims that trial defense counsel were ineffective.

The court has examined the claimed deficiencies and finds good cause to compel a response. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and trial defense

counsel. Moreover, in light of the court's order, it finds the Government's requested enlargement of time is appropriate.

Accordingly, after considering the Government's motions and the deficiencies alleged by Appellant, it is by the court on this 18th day of June, 2024,

ORDERED:

The Government's Motion to Compel Declarations is **GRANTED**. Major Matthew V. Leal and Captain Joshua L. Lopes are each ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claims that they were ineffective in advising Appellant on the maximum punishment, as described above.

A responsive declaration by each counsel will be provided to the court **not later than 18 July 2025.** The Government shall deliver a copy of the responsive affidavits or declarations to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time (First) is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed **not later than 1 August 2025**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)
v.	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant.*	)	No. ACM 40651 12 June 2025

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests that it be given 14 days after this Court's receipt of a declaration or affidavit from trial defense counsel to submit its answer so that it may incorporate statements provided by Appellant's trial defense counsel in response to the specified ineffective assistance of counsel issue.[1]

This case was docketed with the Court on 2 August 2024. Since docketing, Appellant has been granted eight enlargements of time. Appellant filed his brief with this Court on 3 June 2025. This is the United States' first request for an enlargement of time. As of the date of this request, 312 days have elapsed since docketing.

There is good cause for the enlargement of time. Appellant has raised one substantial area which he claims his trial defense counsel were ineffective – their advice to Appellant regarding the maximum punishment authorized. (App. Br. at 25). The United States cannot prepare its answer to the allegation of ineffective assistance of counsel without a statement from the trial defense counsel. An enlargement of time is necessary to ensure trial defense counsel has

[1] The United States is filing a motion to compel a declaration or affidavit from Appellant's trial defense counsel contemporaneously with this motion.

time to review the allegation before they draft and submit a statement to the Court, and to give the United States sufficient time to incorporate trial defense counsel's statement into its answer. Moreover, additional time is needed for drafting and supervisory review before the United Staes files its answer. The United States respectfully requests that, to avoid confusion, any order from this Court identify the specific due dates for both the declarations and brief.

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

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 12 June 2025.

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S RESPONSE TO UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
	)	No. ACM 40651
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*	)	13 June 2025

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

In accordance with Rule 23.2 of this Court's Rules of Practice and Procedure, Appellant submits this response to the United States' motion for a first enlargement of time.

If this Court grants the Government's motion to compel declarations, Appellant does not oppose the requested delay and agrees that this Court should specify due dates for any declarations and subsequent briefing in order to ensure timely appellate review of Appellant's case. Appellant asserts his right to speedy appellate review and opposes any due dates in excess of the thirty days requested to compel declarations and fourteen days requested for the Government's subsequent briefing.

Because the requested declarations and the resulting impact on briefing are the only bases cited for the requested delay, this Court should treat the Government's motion for an enlargement as moot if this Court declines the Government's motion to compel declarations.

Respectfully Submitted,

[redacted]

ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division

[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 13 June 2025.

[redacted]

ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO COMPEL DECLARATIONS
v.	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant.*	)	No. ACM 40651 12 June 2025

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

Pursuant to Rule 23.3(e) of this Court's Rules of Practice and Procedure, the United States hereby requests this Court order Appellant's trial defense counsel, Maj M.L. and Capt C.L., to each provide a declaration in response to Appellant's allegations that they provided ineffective assistance of counsel. The United States has requested a declaration from each counsel to address the alleged ineffective assistance of counsel, and they stated they would not do so without an order from this Court.

Maj M.L. and Capt C.L. represented Appellant at his trial. Appellant filed his Assignments of Error with this Court on 3 June 2025, alleging in Issue V that his trial defense counsel were ineffective when they calculated the maximum punishment statutorily authorized. Specifically, Appellant claims the forum choice as well as "the decisions to enter into the plea agreement, plead guilty, and bargain for a minimum and maximum punishment – were all predicated on the false premise that, if Appellant risked trial on the merits, he risked up to ten years in jail for the offenses to which he pleaded guilty…" (App. Br. at 27).

The United States requires a declaration from Maj M.L. and Capt J.L. to respond adequately to Appellant's brief and his ineffective assistance of counsel claim. *See* United States

v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining a declaration from trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

Declarations are necessary in this case, because the allegation of ineffective assistance of counsel involve a strategic decision to offer to plead guilty and strategic considerations in calculating the maximum punishment.

Only Appellant's trial defense counsel can explain the strategic weighing of factors that occurred when Appellant was deciding to plead guilty. In determining whether Appellant's plea of guilty was provident, this Court must know whether consideration of the maximum punishment resulted in a "substantial misunderstanding." United States v. Poole, 26 M.J. 272, 274 (C.M.A. 1988). This is determined by considering all the circumstances of the case to determine whether the appellant's misapprehension affected his guilty plea or whether that misapprehension was insubstantial to his decision to plead guilty. Id. at 274. It is therefore critical for this Court to be aware of how much weight was given to the maximum punishment advice when Appellant was deciding whether to plead guilty because it informs the Court about whether Appellant would have offered to plead guilty under the same terms had the maximum punishment that he was advised on been lower.

Additionally, trial defense counsel's statement that "at all points in time" they understood the maximum confinement to be 10 years requires clarification. (App. Br. at 27). To determine whether trial defense counsel were deficient in their performance, the Court must know whether there was a strategic decision in agreeing to the maximum punishment calculation that included the sentence enhancement that was not included in the charge.

Accordingly, the United States respectfully requests this Court order Maj M.L. and Capt J.L. each to provide a declaration with specific, factual responses to Appellant's claim of ineffective assistance of counsel within 30 days of the Court's order.

WHEREFORE, the United States requests this Court grant this Motion to Compel Declarations.

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 12 June 2025.

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S RESPONSE TO UNITED STATES' MOTION TO COMPEL DECLARATIONS**
v.	)	Before Panel No. 1
	)	No. ACM 40651
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*	)	13 June 2025

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

In accordance with Rule 23.2 of this Court's Rules of Practice and Procedure, Appellant opposes in part the United States' motion to compel declarations.

Appellant opposes any order to compel declarations absent an initial determination by this Court that Appellant's allegation, if unrebutted, would overcome the presumption of competence. *United States v. Melson*, 66 M.J. 346, 350 (C.A.A.F. 20008) (citing *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995)). Appellant otherwise acknowledges that responsive declarations, affidavits, or interrogatories "must" be compelled once that showing has been made. *Id.* (citations omitted); *Lewis*, 42 M.J. at 6 (discussing the option of interrogatories). There appears to be no dispute that Appellant's allegation, if unrebutted, would overcome the presumption of competence. As such, this aspect of Appellant's partial opposition to the Government's motion is not intended to suggest a deficiency in the merits of Appellant's assignment of error, Br. on Behalf of Appellant (hereinafter Appellant's Br.) at 25-27, but only to ensure compliance with the correct process in addressing that claim.

Assuming this Court does find the allegation would overcome the presumption of competence, Appellant opposes any order related to a "Capt[ain] C.L."[1] Appellant was represented at trial by Major ML and Captain JL. Trial Tr. at 2, 5-6, 18. Any order compelling a response from trial defense counsel should be limited to the two counsel that represented Appellant.

As noted in Appellant's brief, Appellant's Br. at 27 n.8, any order by this Court should also specify with particularity those matters this Court deems reasonably related to the claim and for which responsive information is needed to resolve the alleged ineffective performance. The imperative for such specificity is illustrated by one of the instances in the Government's motion where specificity is lacking.

According to the Government's motion, United States' Mot. at 2, declarations are necessary to shed further light on a categorical statement by trial defense counsel: "[W]e agree and concur that at all points in time the defense was on notice, and it was our understanding that 10 years was the maximum of confinement range for this offense." Trial Tr. at 44. Somewhere in the five words "at all points in time," the Government sees ambiguity that "requires clarification." United States' Mot. at 2. Where that lack of clarity is, the Government does not say. *See id.*

[1] While the two references to "Capt[ain] C.L." appear to be typographical errors, United States' Mot. to Compel Decls. (hereinafter United States Mot.) at 1, there are two other deficiencies of a similar nature in the Government's motion that warrant clarification but do not affect the merits of the motion itself. First, though the Government asserts "Appellant's allegations" of ineffective assistance of counsel as multiple bases for granting the motion, Appellant only raised one such claim. *Compare* United States Mot. at 1, *with* Appellant's Br. at 25-27. Second, the Government's motion misquotes Appellant's brief to suggest Appellant pleaded guilty to multiple "offenses" and that the error alleged concerns all of those "offenses." *Compare* United States' Mot. at 1 ("he risked up to ten years in jail for the offenses . . .") (citing Appellant's Br. at 27), *with* Appellant's Br. at 27 (identifying the single "offense" to which Appellant pleaded guilty).

Presumably the Government is suggesting some hidden carve-out lurking in the meaning of "all," perhaps because the Government's motion minimizes the issue alleged to having to do with "*agreeing* to the maximum punishment calculation." United States' Mot. at 2 (emphasis added). But the heart of the alleged deficiency is not about trial defense counsel acceding to the military judge at trial, as the Government's motion suggests. If this Court finds Appellant's pleas provident, it is about Appellant being "grossly misled by a miscalculation or erroneous sentence estimation by defense counsel," *United States v. St. Blanc*, 70 M.J. 424, 428-29 (C.A.A.F. 2012), something that arose prior to entering the courtroom throughout counsel's advice to Appellant, according to trial defense counsel's own account to the military judge. Trial Tr. at 44. Indeed, there is no mystery about the duration of trial defense counsel's advice because "all" has a universally accepted definition: "All means all, not some or most." *United States ex. rel. Cairns v. D.S. Med. LLC*, 42 F.4th 828, 834 (8th Cir. 2022) (citing multiple dictionaries for the definition of "all"); *see also City of Jacksonville v. Jacksonville Hosp. Holdings, L.P.*, 82 F.4th 1031, 1038 (11th Cir. 2023) ("[A]ll means all."); *Allen v. Env't Restoration, LLC*, 32 F.4th 1239, 1243 (10th Cir. 2022) ("'All' means all."); *Continental Cablevision v. Poll*, 124 F.3d 1044, 1049 (9th Cir. 1997) (defining "all" similarly to *Cairns*).

This Court should similarly decline the Government's invitation to inquire into "strategic considerations in calculating the maximum punishment." United States' Mot. at 2. Looking into those considerations might make sense in a case where the military judge suggests the maximum punishment is one thing, trial defense counsel disagree, and a back-and-forth ensues wherein the defense counsel ultimately come around to agreeing with the military judge. That is not this case. Here, trial defense counsel's interpretation of the maximum punishment was "at all points in time." Trial Tr. at 44. And there is no reason—nor is one suggested in the Government's

motion—a defense counsel would find some strategic benefit with a going-in position that a client is subject to extra, let alone double, confinement.

The point here is that any order by this Court should not merely direct trial defense counsel to broadly go forth and respond to the issue alleged, but rather should provide appropriate guardrails to ensure any submission is, in fact, responsive to the questions this Court must answer. To do so, the order should either provide interrogatories or limit trial defense counsel's responses in a declaration or affidavit to specified questions. As the discussion above demonstrates, no further inquiry is needed in order to resolve what the trial defense counsel calculated the maximum punishment to be and the timing of that assessment. What remains based on the facts of this case should be limited to the following:

(1) What discussion(s), if any, did trial defense counsel have with Appellant about the maximum possible sentence to confinement for the charged conspiracy offense?

(2) How, if at all, did trial defense counsel's assessment of the maximum possible sentence to confinement affect what trial defense counsel recommended to Appellant regarding his choices of pleas, of forum, and to enter into a plea agreement?

(3) What did Appellant communicate about how, if at all, the maximum possible sentence to confinement affected Appellant's decisions on pleas, on forum, and to enter into a plea agreement?

(4) In negotiating the plea agreement, which party requested the term requiring a bad-conduct discharge?

(5) How, if at all, did trial defense counsel's assessment of the maximum possible sentence to confinement affect the defense's approach to plea negotiations?

(6) How, if at all, were plea agreement negotiations with the Government affected by either party's assessment of the maximum possible sentence to confinement?

WHEREFORE, if this Court determines that Appellant's allegation, without rebuttal, would overcome the presumption of competence, this Court should grant the motion insofar as it requests a responsive submission by each trial defense counsel and specify with particularly the matters to be addressed consistent with the six questions set out above.

Respectfully Submitted,

[redacted]

ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 13 June 2025.

[redacted]

ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION TO CITE SUPPLEMENTAL AUTHORITY**
v.	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*	)	Case No. ACM 40651 25 June 2025

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

Pursuant to Rule 23.3(d) of this Court's Rules of Practice and Procedure, Appellant moves to cite as supplemental authority the decision by the United States Court of Appeals for the Armed Forces in *United States v. Johnson*, __ M.J. __, USCA Dkt. No. 24-0004/SF (C.A.A.F. June 24, 2025).

The decision in *Johnson* is relevant to the resolution of Issue VI because the Court of Appeals for the Armed Forces determined a Court of Criminal Appeals lacks the authority to act on the issue presented under Article 66(d)(2), Uniform Code of Military Justice, 10 U.S.C. § 866(d)(2). *Johnson*, slip op. at 11. Specifically, the Court of Appeals for the Armed Forces ruled that the firearms prohibition set out, per a Department of the Air Force regulation relying on Rule for Courts-Martial 1111, on the 1st Indorsement to the Entry of Judgment was part of—rather than after—the Entry of Judgment, thereby depriving this Court of the authority to correct the alleged error in that firearms prohibition under the authority claimed by Appellant, Article 66(d)(2). *Id.*, slip op. at 9-11.

Appellant does not waive this issue.

WHEREFORE, this Court should grant this motion.

Respectfully Submitted,

[redacted]

ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were delivered by e-mail to the Court and served on the Government Trial and Appellate Operations Division on 25 June 2025.

[redacted]
ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO ATTACH
v.	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant.*	)	No. ACM 40651 17 July 2025

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

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

- Appendix A – Major Matthew V. Leal Declaration, dated 20 June 2025 (9 pages)
- Appendix B – Captain Joshua L. Lopes Declaration, dated 1 July 2025 (6 pages)

The attached declarations are responsive to this Court's order directing Major Matthew Leal and Captain Joshua Lopes to provide declarations responsive to Appellant's assignment of error concerning whether he received ineffective assistance of counsel. (*Court Order*, dated 18 June 2025).

Our superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Accordingly, the attached documents are relevant and necessary to address this Court's order and Appellant's assignment of error.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach.

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

FOR [redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 17 July 2025.

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S RESPONSE TO UNITED STATES' MOTION TO ATTACH**
v.	)	Before Panel No. 1
	)	No. ACM 40651
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*	)	17 July 2025

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

In accordance with Rule 23.2 of this Court's Rules of Practice and Procedure, Appellant responds to the United States' motion to attach and does not oppose the motion. In light of this Court's earlier order on 18 June 2025, the Government's motion to attach the two declarations, along with their attachments, should be granted.

Respectfully Submitted,

[redacted]

ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 17 July 2025.

[redacted]
ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*.	)))))))))	**ANSWER TO ASSIGNMENTS OF ERROR** Before Panel No. 1 No. ACM 40651 1 August 2025

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

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

MARY ELLEN PAYNE
Associate Chief
[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant.*	)	No. ACM 40651 1 August 2025

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

ISSUES PRESENTED

I.

WHETHER THE TRIAL COURT LACKED SUBJECT-MATTER JURISDICTION.

II.

WHETHER THE SPECIFICATION TO WHICH APPELLANT PLEADED GUILTY FAILED TO STATE AN OFFENSE.

III.

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION IN ACCEPTING APPELLANT'S PLEA OF GUILTY TO A KNOWING MENS REA.

IV.

WHETHER APPELLANT'S PLEA OF GUILTY WAS IMPROVIDENT AS A WHOLE.

V.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE IN ADVISING ON THE MAXIMUM PUNISHMENT.

VI.

WHETHER THE APPLICATION OF 18 U.S.C. § 922 TO APPELLANT WARRANTS APPROPRIATE RELIEF.

VII.[1]

WHETHER APPELLANT'S SANITY BOARD WAS INCORRECTLY CONDUCTED.

STATEMENT OF CASE

Consistent with his pleas, Appellant was convicted of one charge containing one specification of the incorporated offense of 8 U.S.C. § 1324, transporting an illegal alien, a Mexican national[2], within the United States, in violation of Article 134, UCMJ. (ROT Vol. 1, *Entry of Judgment* (EOJ)). Pursuant to Appellant's negotiated plea agreement, two other offenses were withdrawn and dismissed with prejudice to attach upon completion of appellate review: conspiracy to commit the charged violation of 8 U.S.C. § 1324 in violation of Article 81, UCMJ, and carrying a handgun while engaged in criminal activity in violation of the Texas Penal Code, as incorporated under Article 134, UCMJ. (R. at 47, 118-19; *EOJ*).

Appellant's plea agreement required the military judge to impose a bad-conduct discharge and authorized a range of confinement between two and six months. (App. Ex. VII). The military judge sentenced Appellant to a bad-conduct discharge, confinement for three months, forfeiture of all pay and allowances, and a reduction to the grade of E-1. (R. at 118).

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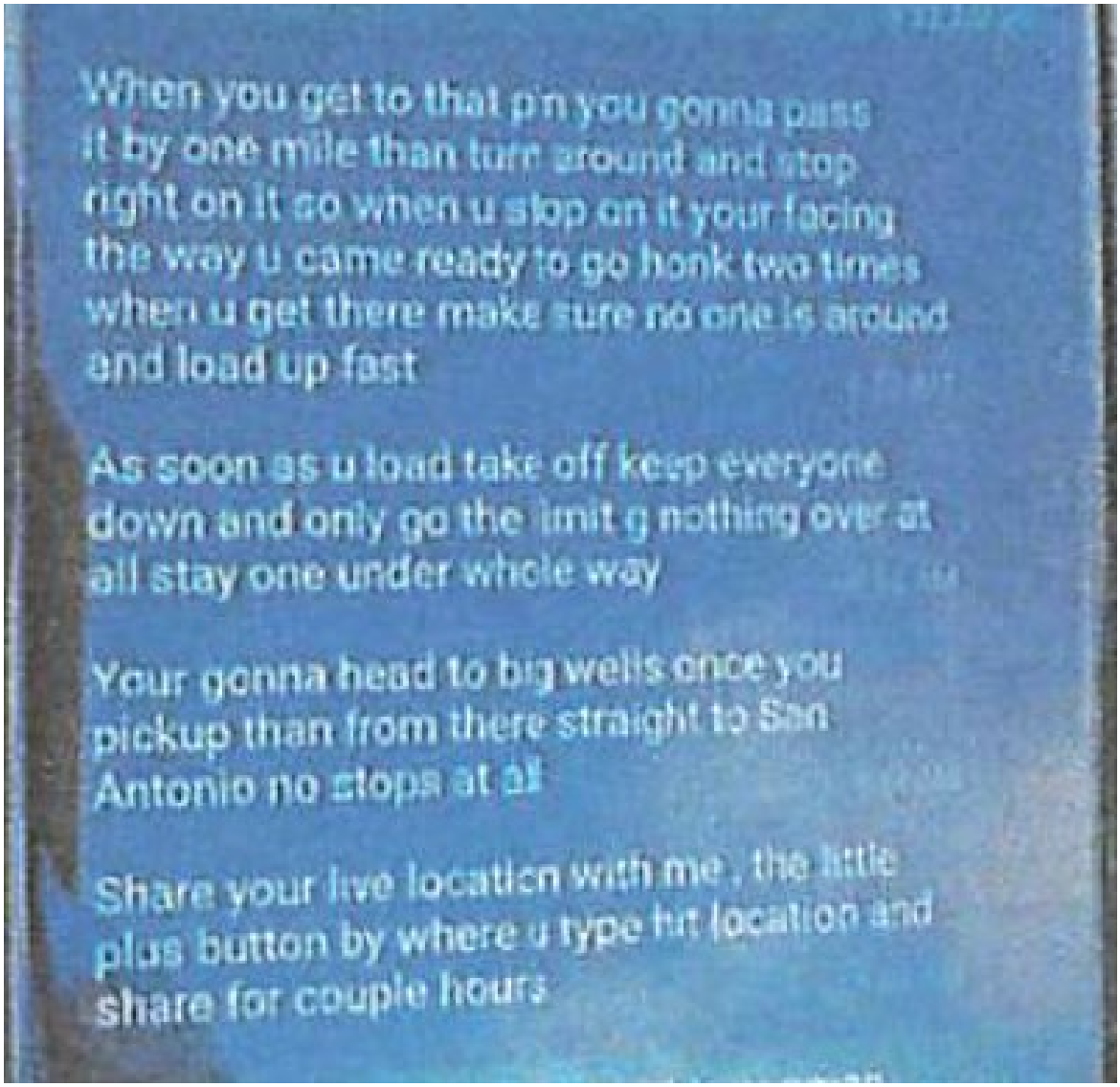
[1] Appellant personally raised this issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

[2] The Mexican national is named in the specification but referred to only as a Mexican national in this brief out of respect for his privacy because his name is not relevant to the assignments of error.

STATEMENT OF FACTS

As his medical discharge from the military was pending, Appellant met a man at a bar called "Unicorn" who offered to pay him to pick up two to three people. (Pros. Ex. 1). Appellant was directed to drive to a general location to pick them up but, once he started driving, "Unicorn" provided him with the specific location by sending him pinned coordinates. (Pros. Ex. 1, pg. 10). This pin was for a location near the Mexico border. (R. at 38; Pros. Ex. 1, pg. 10). "Unicorn" gave Appellant explicit instructions for what to do at the pickup location saying,



Pros. Ex. 1, pg. 12, upper right photograph.

Appellant was communicating with "Unicorn" via text message throughout the entire operation. (Pros Ex. 11). Appellant suspected something illegal was going on but "chose to not ask any questions." (R. at 39). Appellant did as he was directed and honked his horn twice when he arrived. When he did, eight people emerged and got in Appellant's small car. (Pros. Ex. 1, Pg. 11 upper left photograph; Attachment 5 at 1:19). "Unicorn" told Appellant via text message to put two or three people in his trunk, but Appellant could not because his trunk was full. (Pros. Ex. 1, pg 11, upper left photograph). "Unicorn" repeatedly reminded Appellant to "keep everyone down" so no one would see them. (Id. at upper two photographs). Appellant responded, "I'm trying." (Id.) When Appellant was pulled over, the eight people Appellant was transporting exited the car. Seven ran away but one Mexican national was apprehended. (Pros. Ex. 1, pg. 13; Attachment 5 at 1:15-1:20).

ARGUMENT

I.

THE TRIAL COURT HAD SUBJECT-MATTER JURISDICTION.

Standard of Review

Appellate courts review questions of jurisdiction de novo. United States v. Hale, 78 M.J. 268, 270 (C.A.A.F. 2019).

Law and Analysis

Jurisdiction is the court's statutory or constitutional power to adjudicate a case. United States v. Cotton, 535 U.S. 625, 630 (2002) (citation omitted). It is distinct from – and not dependent on – the sufficiency of the charge sheet. Appellant attempts to blur this distinction by arguing that the specification he pleaded guilty to failed to state an offense – due to a missing element – and so there was a jurisdictional defect. But the Supreme Court soundly rejected this

approach in Cotton, explaining that "[d]efects in an indictment do not deprive the court of its power to adjudicate a case." Cotton, 535 U.S. 625, 630. Instead a defect in an indictment, or specification, "goes only to the merits." Cotton, 535 at 630 (quoting Lamar v. United States, 240 U.S. 60, 64 (1916).

Appellant correctly identifies that jurisdiction is different than whether a specification states an offense. (App. Br. at 20). It is because of this difference that Appellant's argument fails. Appellant fails to not only acknowledge this precedent but also to distinguish it. Neither the statutory nature of military jurisdiction, the President's explanation on charging, or the general presumption against subject-matter jurisdiction remove Appellant's case from the reach of Cotton. (App. Br. at 11-13).

A. The statutory nature of military jurisdiction does not exempt military courts from the holding of Cotton.

Both military and federal criminal courts are bound by their ability to adjudicate articulated crimes. Federal criminal courts may only adjudicate "crimes against the United States" and military courts may only adjudicate crimes under the UCMJ. This boundary does not morph a merits question into a jurisdictional one. The Supreme Court has rejected the argument that because an indictment fails to allege a "crime against the United States" due to missing an element that it lacks jurisdiction. Cotton, 535 U.S. at 630 (quoting Lamar, 240 U.S. at 64-65). In both jurisdictional frameworks, the lack of an element is always, as Appellant points out, the difference between criminality and not. (App. Br. at 13). Because the both military and federal courts are similarly restrained to adjudicating only articulated crimes, the analysis from the Supreme Court in Cotton applies with the same force to the military and so a missing element does not deprive the court of jurisdiction.

Our superior Court has applied Cotton's holding to the military. In United States v. Ballan, 71 M.J. 28, 34 (C.A.A.F. 2012), our superior Court applied Cotton's holding that defects in an indictment are nonjurisdictional and subject to plain error review. In line with the Supreme Court and our superior Court precedent, this Court should unequivocally hold that a defect in a charge or specification does not deprive a military court of jurisdiction over an offense but goes only to the merits of the case.

B. The President's explanation on how to draft an Article 134 specification did not create a heightened standard for charging or finding jurisdiction.

Appellant's claim that the President created a heightened standard for charging an incorporated offense under Article 134, UCMJ, is incorrect. (App. Br. at 10). The President's explanation on drafting a specification under Article 134, clause 3, is merely restating the constitutional requirement that applies to *all* charging – that the charging document must include the elements of the crime charged. Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998); *See also* Hamling v. United States, 418 U.S. 87, 117-118 (1974) (an indictment must contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend). The explanation of what is required for all charges likely was included in Article 134 because it is the only specification without a sample specification to guide counsel through these requirements. Including the guidance to charge all elements does not increase the charging standard nor does it create a jurisdictional issue out of a claim of failure to state an offense.

C. Subject matter jurisdiction is not being assumed.

Appellant's reliance on the general presumption against federal subject-matter jurisdiction is misplaced. (App. Br. at 12). His argument incorrectly presumes that a missing element deprives the court of jurisdiction which, as explained above, it does not. Jurisdiction is

not being assumed. Subject matter jurisdiction was established the moment a violation of an Article under the UCMJ was alleged in the charging document, and the court could proceed to a determination on the merits. "Where a federal court has power, as here, to proceed to a determination on the merits, that is jurisdiction of the proceedings." United States v. Williams, 341 U.S. 58, 68 (1951). A determination of whether a specification states an offense is a determination on the merits. Cotton, 535 U.S. at 630. Therefore, absent any other defect, jurisdiction is established at the time the court can make a determination on a claim of failure to state an offense, and jurisdiction is not being assumed.

The Supreme Court's holding that whether the indictment states an offense does not deprive the Court of jurisdiction but goes "only to the merits of the case" controls. Cotton, 535 U.S. at 630 (quoting Lamar, 240 U.S. at 65). As a result, Appellant's claim must fail. The court-martial had jurisdiction over Appellant, and this Court should deny this assignment of error.

II.

APPELLANT WAIVED THE ISSUE OF WHETHER THE SPECIFICATION PROPERLY STATED AN OFFENSE WHEN AGREED TO WAIVE ALL WAIVABLE MOTIONS.

Additional Facts

Appellant pleaded guilty to violating Article 134, UCMJ, as described in Charge II, Specification 1 pursuant to his negotiated plea agreement. (App. Ex. VII). Charge II, Specification 1 reads,

> In that SENIOR AIRMAN BRENNAN J. PATTERSON, United States Air Force, did, within the State of Texas, on or about 12 June 2023, transport [a Mexican national] within the United States by means of passenger vehicle, with knowledge of, or in reckless disregard of the fact that said [Mexican national] was an alien who entered the United States in violation of law, in violation of 8 United States Code Section 1324, an offense not capital.

(*Charge Sheet*). The specification does not explicitly include the fact that Appellant transported the Mexican national in furtherance of the Mexican national's violation of law.

Appellant's offer for plea agreement included a provision that he waived all waivable motions. (App. Ex. VII at para. 3.f.). Trial defense counsel initiated the waiver of motions provision. (R. at 51). During the plea colloquy, the military judge advised Appellant that certain motions are waived if they are not made before entering a plea. (R. at 50). Appellant confirmed that he understood the provisions of his plea agreement, that no one forced him to enter this term, and he freely and voluntarily agreed to waive all waivable motions to receive what he believed to be a beneficial agreement. (R. at 50-52).

Before trial, the military judge ensured all parties agreed on the elements of the specification. (App. Ex. VI). She provided counsel for both sides with the 9th Circuit's instructions, via a link to a website, on 8 U.S.C. § 1324(a)(1)(A)(ii) and asked if counsel were using different instructions. (Id. at pg. 5). This included four elements of 8 U.S.C. § 1324(a)(1)(A)(ii):

> First, [name of alien] was an alien;
>
> Second, [name of alien] was not lawfully in the United States;
>
> Third, the defendant [knew] [acted in reckless disregard of the fact] that [name of alien] was not lawfully in the United States; [and]
>
> Fourth, the defendant knowingly [[transported or moved] [attempted to transport or move]] [name of alien] to help [him] [her] remain in the United States illegally[.]

United States Courts for the Ninth Circuit, *Manual of Model Criminal Jury Instructions, 7.2 Alien—Illegal Transportation or Attempted Transportation (8 U.S.C. §1324(a)(1)(A)(ii))*, https://www.ce9.uscourts.gov/jury-instructions/node/912 (brackets in original).

Trial defense counsel proposed using the 10th Circuit's model instruction. Trial defense counsel's proposal broke 8 U.S.C. §1324(a)(1)(A)(ii) into three elements rather than four, but still included the element that Appellant "[transported or moved] . . . the alien within the United Staes intending to help [him/her] remain in the United States illegally *in furtherance of the alien's violation of law*." (App. Ex. VI, pg. 4) (brackets in original) (emphasis added). Trial defense counsel stated that Appellant specifically agreed to plead guilty to the fact that "he transported the alien within the US intending to help him remain in the US illegally in furtherance of the alien's violation of law." (App. Ex. VI, pg. 3).[3]

At trial, the military judge informed Appellant of all of the elements of the offense of 8 U.S.C. § 1324(a)(1)(A)(ii) during the plea colloquy. (R. at 30-32, 36-36). When explaining why he was guilty, Appellant explicitly identified each element, including the element missing from the specification, before providing the facts supporting his plea. (R. at 38-39).

Trial defense counsel did not raise an objection to the specification for failure to state an offense due to a missing element. When determining what motions to file, trial defense counsel made a strategic decision to not raise any issue that would warrant the charges being withdrawn, corrected, and re-preferred. (Appendix B, Declaration of Captain Joshua Lopes at para. 7). This is because the one specification limited Appellant's punitive exposure by only charging him with transporting one individual rather than eight. (Id.)

Standard of Review

Whether an appellant has waived an issue is a legal question that an appellate court reviews de novo. United States v. Haynes, 79 M.J. 17, 19 (C.A.A.F. 2019). Appellant's offense occurred after 1 January 2021 and so the new Article 66, UCMJ, standard of review applies.

[3] Trial defense counsel eventually conceded that the 9th Circuit's elements and definitions were appropriate. (App Ex. VI).

Under the new standard, courts of criminal appeals "no longer have the ability to pierce waiver with regard to findings to address what would otherwise be prejudicial error." United States v. George, 2024 CCA LEXIS 224, *2-3 (A.F. Ct. Crim. App. 7 June 2024) (citing United States v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016)).

If not affirmatively waived, the issue of whether a specification states an offense is forfeited if not raised before adjournment. R.C.M. 905(e)(2); 907(b)(2)(E). Forfeited issues are reviewed for plain error. United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018). Under plain error review, the appellant bears the burden to prove (1) error occurred that is (2) clear or obvious and (3) results in material prejudice to his substantial rights. United States v. Brooks, 64 M.J. 325, 328 (C.A.A.F. 2007) .

Law and Analysis

A. Appellant waived the issue.

Appellant waived – both through intentional relinquishment and by operation of law – the issue of whether the specification he pleaded guilty to properly stated an offense through his unconditional guilty plea.

An accused intentionally relinquishes a waivable objection in a plea agreement by including a clause waiving all waivable motions. United States v. Day, 83 M.J. 53, 56 (C.A.A.F. 2022) (citation omitted). "A challenge to a specification for failure to state an offense is a waivable motion and one that must be raised before adjournment of the court-martial[.]" United States v. Kennedy, 2021 CCA LEXIS 575, *4 (A.F. Ct. Crim. App. 1 November 2021) (unpub. op); R.C.M. 907(b)(2)(E); Cotton, 535 U.S. at 60.[4]

[4] Although before 2016, failure to state an offense was considered not waivable under R.C.M. 907(b)(1)(B), MCM (2012), the President modified R.C.M. 907(b) to provide that failure to state an offense is waivable. United States v. Day, 83 M.J. 53, 56, n.2 (C.A.A.F. 2022) (citing United

Appellant entered a guilty plea pursuant to a negotiated agreement that explicitly waived all waivable motions. (App. Ex. VII). The military judge confirmed that Appellant understood this term, entered it voluntarily, and believed it was beneficial. (R. at 50-52). Therefore, he intentionally relinquished the non-jurisdictional issue of whether his specification stated an offense and there is "no error [for this Court] to correct on appeal." United States v. King, 83 M.J. 115, 120 (C.A.A.F. 2023) (citation omitted).

The declaration of Appellant's trial defense counsel reinforces that Appellant intended to waive the issue in pleading guilty. Appellant identified each element by number and provided a factual basis for each element of 8 U.S.C. § 1324(a)(1)(A)(ii) during his plea colloquy. (R. at 38-40). This was intentional. Trial defense counsel sought to ensure Appellant obtained the highly favorable deal – by providently pleading to 8 U.S.C. § 1324(a)(1)(A)(ii) – without the Government correcting the charge to reflect the full scope of his criminality. (Appendix B, Declaration of Captain Joshua Lopes).

This strategic decision, coupled with his detailed plea to even the missing element, denied the Government the opportunity to correct the omission. This Court should summarily reject such actions by finding Appellant waived the issue. As this Court has previously highlighted, "Securing a favorable pretrial agreement via a guilty plea, and then on appeal attacking the facial legality of one of the specifications, is inconsistent with the fair and efficient administration of justice." United States v. Kennedy, 2021 CCA LEXIS 575, at *7-8 (A.F. Ct. Crim. App. Nov. 1, 2021) (quoting United States v. Sanchez, 81 M.J. 501, 506 (A. Ct. Crim. App. 2021)).

States v. Sanchez, 81 M.J. 501, 503-507 (A. Ct. Crim. App. 2021). That modification has remained in effect and applies to Appellant's crime.

Additionally, waiver by operation of law results from an unconditional guilty plea because "an unconditional guilty plea waives all non-jurisdictional defects at earlier stages of the proceedings." United States v. Hardy, 77 M.J. 438, 442 (C.A.A.F. 2018) (quotation and citation omitted). Therefore, Appellant's unconditional guilty plea and waiver of all waivable motions provision in his plea agreement waived any challenge to whether the specification stated an offense and this Court should deny Appellant's requested relief.[5]

B. Even if Appellant did not waive the issue, there was no plain error.

Even if Appellant forfeited, rather than waived the issue, there was no plain error, and so his claim must fail. To prevail, Appellant must show both a clear or obvious error and prejudice to a substantial right. King, 83 M.J. at 120. Here, neither requirement is satisfied because the

[5] This aligns with the majority of the federal circuit's treatment of an unconditional guilty plea and a claim of failure to state an offense. *See, e.g.*, United States v. Urbina-Robles, 817 F.3d 838, 842 (1st Cir. 2016) (the appellant waived his right to bring this non-jurisdictional challenge that the indictment failed to state an offense when he pled guilty to the crime) (citing, inter alia, Cotton, 535 U.S. at 630); United States v. Munoz Miranda, 780 F.3d 1185, 1188, 414 U.S. App. D.C. 305 (D.C. Cir. 2015) (appellants waived all challenges amenable to waiver by entering an unconditional guilty plea) (citation omitted); United States v. Rubin, 743 F.3d 31, 39 (2d Cir. 2014) (in pleading guilty unconditionally, [appellant]waived his challenge that the indictment failed to state an offense); United States v. Jaimes-Bustos, 360 Fed. Appx. 481, 482 (4th Cir. 2010) (by pleading guilty the appellant waived the non-jurisdictional challenge that the indictment failed to allege an essential element of the crime); United States v. Cothran, 302 F.3d 279 (5th Cir. 2002) (finding Cotton, 535 U.S. at 630, shows standard waiver principles apply to defects in the indictment and so the appellant waived his claim of failure to state an offense); United States v. George, 403 F.3d 470, 472 (7th Cir. 2005) (holding that guilty plea waived failure to state an offense claim, and explaining that by pleading guilty a defendant normally surrenders an opportunity to contest the merits, waiving (not just forfeiting) all arguments that could have been raised earlier);United States v. Todd, 521 F.3d 891, 895 (8th Cir. 2008) (guilty plea waived failure to state offense claim, because guilty pleas waive all defects except those that are jurisdictional, and a defective indictment does not deprive a court of jurisdiction) (citing Cotton, 535 U.S. at 632); United States v. DeVaughn, 694 F.3d 1141, 1149 (10th Cir. 2012) (indictment defects are non-jurisdictional, and therefore waivable, including claims that the indictment fails to state an offense) (citing Cotton, 535 U.S. at 629-31).

fourth element of 8 U.S.C. § 1324(A)(1)(a)(ii) is implied, and Appellant cannot demonstrate prejudice to a substantial right from its omission.

1. The fourth element was implied.

8 U.S.C. § 1324(a)(1)(A)(ii) has four elements: (1) that the accused transported a person within the United States (2) that the person transported is an alien who entered the United States in violation of law (3) that the accused knew or recklessly disregarded the fact that the person transported was an alien who entered the United States in violation of law and (4) that the transporting was in furtherance of the alien's violation of law.

When an objection to a specification is not raised at trial, this Court must assess its sufficiency with "maximum liberality." United States v. Shafran, ___ M.J. ___, 2025 CAAF LEXIS 376 (C.A.A.F. 2025) (quoting United States v. Turner, 79 M.J. 401, 403 (C.A.A.F. 2020)). If one reasonable interpretation of the specification at issue is that the missing element is implied, then the specification properly states an offense. Id. at *11.

The specification at issue charged Appellant with transporting the Mexican national "within the United States . . . who entered the United States in violation of law." (*Charge Sheet*). That language necessarily implies that the transportation was "in furtherance of" the alien's unlawful presence. This is because transporting an illegal alien anywhere except to immigration enforcement or back across the border advances the alien's unlawful presence in the United States. As in Shafran, and Turner, the specification alleges no facts suggesting context in which his transportation would have not been in furtherance of the Mexican national's unlawful presence. Id. Because this is one reasonable interpretation of the specification at issue, this Court should find the specification properly states an offense.

In viewing the specification with maximum liberality because Appellant failed to raise this issue before he pleaded guilty, this Court should find that the fourth element was necessarily

implied and so the specification did not fail to state an offense. Because there was no error, Appellant has failed to establish plain error and this Court should deny Appellant's requested relief.

2. There was no prejudice to Appellant's substantial rights.

Appellant cannot demonstrate prejudice to a substantial right. The Fifth Amendment and Sixth Amendment ensure the right of an accused to receive fair notice of what he is being charged with. United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011) (citations omitted). Courts will not find prejudice and disturb a guilty plea, where the providence inquiry delineates each element of the offense and shows that the appellant understood to what offense and under what legal theory he was pleading guilty. United States v. Ballan, 71 M.J. 28, 34 (C.A.A.F. 2012) (citation and quotations omitted).

"In the context of a defective specification, the prejudice analysis demand[s] close review of the trial record." United States v. Goings, 72 M.J. 202, 208 (C.A.A.F. 2013) (citing United States v. Humphries, 71 M.J. 209, 215 (C.A.A.F. 2012)). This Court looks to the record to determine "whether notice of the missing element is somewhere extant in the trial record, or whether the element is essentially uncontroverted." Humphries, 71 M.J. at 216-217 (quoting Cotton, 535 U.S. at 633 (2002), and Johnson v. United States, 520 U.S. 461, 470 (1997)). In Appellant's case, evidence of notice of the missing element is both within the record of trial and the missing element is essentially uncontroverted.

Appellant's providence inquiry established that he understood what offense he was pleading guilty to and under what legal theory. Therefore, this Court should not find prejudice. All parties knew Appellant was charged with violating 8 U.S.C. § 1324(a)(1)(A)(ii). (*See* Appendix A, Declaration of Major Matthew Leal; Appendix B, Declaration of Captain Joshua Lopes; App. Ex. VI; R. at 30-32, 35-36). Because the parties knew of all the elements of the

charged offense, this Court should find that notice of the fourth element was contained within the record of trial, and so Appellant's rights were not prejudiced.

Additionally, the fourth element of 8 U.S.C. § 1324(a)(1)(A)(ii) was uncontroverted as shown by the military judge's discussions with the parties and Appellant's meticulous plea of guilty to *all* the elements of 8 U.S.C. § 1324(a)(1)(A)(ii). Humphries, 71 M.J. at 216-217. Before trial, the military judge ensured all parties agreed about the appropriate elements. (R. at 31; App. Ex. VI). During the plea colloquy, the military judge advised Appellant about all the elements of the offense of transporting an alien in violation of 8 U.S.C. § 1324(a)(1)(A)(ii), including that it was done in furtherance of the Mexican national's violation of the law. (R. at 36). Appellant then specifically identified the missing element in his plea colloquy when he said, "As to element four," and then described how his actions furthered the Mexican national's presence in the United States in violation of the law. (R. at 39). As in Ballan, 71 M.J. at 35, this Court should "have no doubt that Appellant understood both what he was being charged with and why his conduct was prohibited."

"Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Johnson v. United States, 520 U.S. 461, 470 (1997) (quoting R. Traynor, The Riddle of Harmless Error 50 (1970)). When the element is so clearly uncontroverted by Appellant's own words, this Court should find there was no error or prejudice and deny Appellant's requested relief.

III.

THE MILITARY JUDGE DID NOT ABUSE HER DISCRETION IN ACCEPTING APPELLANT'S PLEA OF GUILTY TO A KNOWING OR RECKLESS MENS REA.

Additional Facts

Charge II, Specification 1, which Appellant pleaded guilty to, alleged that Appellant did

> [T]ransport [the Mexican national], within the United States by means of passenger vehicle, *with knowledge of, or in reckless disregard* of the fact that the [Mexican national] was an alien who entered the United States in violation of law[.]

(*EOJ*) (emphasis added).

During his plea colloquy, Appellant said that he did not know the Mexican national was an alien who entered the United Staes in violation of the law before picking him up. (R. at 38). But as he approached the pickup location he became suspicious that he had "gotten wrapped up in something illegal." (Id.) He highly suspected that the Mexican national was an undocumented immigrant based on what he saw. (Id.) Appellant explained what informed his suspicion. This included the fact that the Mexican national only spoke Spanish, his clothes were dirty, he was Latino, they were near the Mexican border, the pickup location was in the middle of nowhere, he was told to honk his horn, and the people came out of the bushes. (R. at 38-39). Appellant was also told over text that he needed to hurry to get all the people in his car and drive away quickly, was reminded to tell the passengers to stay low, and was advised to put people in his trunk. (R. at 39; Pros. Ex. 1). All the circumstances "seemed not right" to Appellant. (R. at 39). Yet Appellant "chose not to ask questions and just do what [he] was instructed to do." (Id.)

Standard of Review

A military judge's decision to accept a plea of guilty is reviewed for an abuse of discretion. United States v. Inabinette, 66 M.J. 320, 321 (C.A.A.F. 2008).

Law

A military judge abuses her discretion if she accepts a guilty plea without an adequate factual basis to support the plea. Id. Additionally, any ruling based on an erroneous view of the law also constitutes an abuse of discretion. Id. at 322 (citations omitted).

This Court will only reject the providence of a guilty plea where the record of trial shows a substantial basis in law or fact for questioning the plea. United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991). Put another way, "an appellate court will not reverse [a] finding [of guilt] and reject the plea unless it finds a substantial conflict between the plea and the accused's statements or other evidence of record." United States v. Garcia, 44 M.J. 496, 498 (C.A.A.F. 1996).

When knowledge is an essential element, specific knowledge is not always necessary. Instead, purposeful ignorance, also known as deliberate avoidance, may suffice. United States v. Adams, 63 M.J. 223, 225 (C.A.A.F. 2006) (citation omitted). In Adams, our superior Court upheld the service court's application of deliberate avoidance to a guilty plea. Id. [6]

"[F]or the government to raise deliberate avoidance, it must show some evidence from which this Court may infer that the defendant was subjectively aware of a high probability of the

[6] While Adams, 36 M.J. at n.3, explained that the court was applying deliberate avoidance to Article 86 offenses, the Court did not constrain deliberate avoidance to violations of Article 86, UCMJ. There have been other instances where deliberate avoidance has been applied to other offenses under the UCMJ. *See* United States v. McDonald, 57 M.J. 18, 22 (C.A.A.F. 2002) (noting that the evidence, taken as a whole, reflects a high probability that appellant must have known the goods were stolen supporting Appellant's violation of Article 134 and that any ignorance this appellant may have had as to the facts was because of his deliberate avoidance).

existence of illegal conduct; and the defendant purposefully contrived to avoid learning of the illegal conduct." Id. (internal quotations omitted) (citing United States v. Brown, 50 M.J. 262, 266 (C.A.A.F. 1999)).

Alternative theories of liability are simply different ways to commit the same offense. Schad v. Arizona, 501 U.S. 624, 631 (1991). While military courts "may disfavor charging in the disjunctive, […] there is no outright prohibition on doing so." United States v. Eichelberger, 2014 CCA LEXIS 551, *13 (A.F. Ct. Crim. App. 1 Aug 2014)(unpub. op).

Analysis

There is not a substantial basis in law or fact for questioning Appellant's plea. While disfavored, the disjunctive charging was not per se improper but merely alleged alternate theories of liability. Eichelberger, 2014 CCA LEXIS at *13. Appellant entered a plea of guilty to the specification as written. (R. at 23).[7] So long as there was an adequate factual basis to support Appellant's plea as to either theory of liability, the judge did not abuse her discretion in accepting his plea to the specification as written.

Appellant asks this Court to overturn part of his guilty plea by excepting out the words "with knowledge of, or" by claiming that there is an "obvious deficiency in proof related to knowledge" – this is incorrect. (App. Br. at 18). Even if it were proper for this Court to except out one theory of liability when an accused pleads guilty to a specification charged in the disjunctive, the Court does not need to do so in this case, because Appellant's plea satisfied both mens reas.

[7] The plea agreement required Appellant to plead guilty to the specification as written. (App. Ex. VII). Appellant does not claim his trial defense counsel were ineffective for entering the plea of guilty without excepting the knowledge mens rea from the specification or for failing to negotiate a plea agreement under which that language could be excepted.

Appellant's statements established that he deliberately avoided learning of the unlawful status of his transportees despite his awareness of the high probability of the existence of illegal conduct. Therefore, the knowledge element was satisfied, and there is no deficiency in proof. Adams, 63 M.J. at 225.

Appellant was "aware of a high probability of the existence of illegal conduct." Id. He said that when he pulled up to the pickup location he was suspicious that he had "gotten wrapped up into something illegal." (R. at 39). He "highly suspected" that the Mexican national was an undocumented immigrant based on all the circumstances. (Id). Appellant described coming to this suspicion based on the Mexican national's dirty clothes, ethnicity, and language as well as the pickup location being in the middle of nowhere near the Mexican border, the transportees coming out of the bushes after he honked his horn and being told that the needed to quickly get everyone in his car and drive away quickly. (R. at 40). This sufficiently established some evidence from which this Court may infer that the defendant was subjectively aware of a high probability of the existence of illegal conduct – the first prong of deliberate avoidance. Adams, 63 M.J. at 225.

Despite this awareness, Appellant deliberately "contrived to avoid learning of the illegal conduct." Id. He said, "I *chose* not to ask questions and just do what I was instructed to do. I knew in that moment I had gotten myself involved in something illegal." (R. at 40) (emphasis added). As in Adams, 63 M.J. at 225, where the appellant chose to avoid learning of his place of duty, Appellant's choice to not ask questions to learn whether his suspicions were true establishes the second prong of deliberate avoidance.[8]

[8] The application of deliberate avoidance to the knowledge element of 8 U.S.C. § 1324 aligns with federal court of appeals application of the same. *See* United States v. Yusuf, 57 F. 4th 440, 445-446 (5th Cir. 2023) (citing United States v. Mata, 839 Fed. Appx. 862, 870 (5th Cir. 2020) (per curiam) applying deliberate avoidance, termed deliberate ignorance, to the knowledge

With both prongs of deliberate avoidance satisfied, the Government sufficiently proved the knowledge element of 8 U.S.C. § 1324(a)(1)(A)(ii). Because there is not a substantial basis in law or fact for questioning Appellant's plea of guilty, the military judge did not abuse her discretion in accepting Appellant's plea of guilty to the knowing mens rea. This Court should deny Appellant's request to except the knowledge mens rea from the specification.[9]

IV.

APPELLANT'S GUILTY PLEA WAS PROVIDENT.

Additional Facts

Appellant's Mental Health

Appellant was diagnosed with "Major Depressive Disorder (MDD) and Anxiety Disorder; DVA Rated as Post Traumatic Stress Disorder (PTSD)" before his court-martial. (ROT Vol. 1, *Stipulation of Fact* at Attachment 2). Based on this diagnosis, it was determined that Appellant had a "moderate impairment for military service" and would require "ongoing mental health treatment, significant duty restrictions, and worldwide qualification constraints." (Id.) Appellant's diagnosis was found to "impose unreasonable requirements on the Air Force to maintain or protect [his] health" as well as to be "incompatible with the rigors of military service and unfitting." (Id.)

Months before Appellant offered to plead guilty, trial defense counsel requested an inquiry into Appellant's mental health under R.C.M. 706. (App. Ex. II). An inquiry was conducted and found Appellant suffered from PTSD that was pre-existing to his military service.

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element where the defendant failed to ask questions when the involvement was so overwhelmingly suspicious.)

[9] The sufficiency of Appellant's plea to recklessness is not at issue as Appellant does not allege that he did not establish an adequate factual basis as to that mens rea and the record establishes that there is not a substantial basis in law or fact to contest the plea as to recklessness.

(App. Ex. IV). Even with this diagnosis, the doctor found that Appellant was not suffering from a severe mental disease or defect at the time of the criminal conduct and that he could appreciate the nature and quality or wrongfulness of his conduct. (Id.)

At trial, the military judge asked the defense if they had any concerns about the mental capacity of Appellant given the prior R.C.M. 706 inquiry. Trial defense counsel affirmed they had "no concerns at this time." (R. at 9). While discussing the stipulation of fact, the military judge acknowledged that Appellant had been receiving mental health care since 2021 and asked the trial defense counsel again if they had any concern about Appellant's mental capacity regarding the nature of the offense. (R. at 27). Trial defense counsel confirmed for a second time that they did not. (Id.)

Appellant made an unsworn statement during sentencing. He explained that at the time of the crime his "mental health had been declining" and that he wasn't taking his medication or sleeping well. (R. at 101). But he confirmed that despite his mental health, he "was aware of [his] actions." (Id.)

Maximum Punishment Authorized

The specification did not explicitly include the fact that Appellant transported the Mexican national for personal financial gain. (*Charge Sheet*). Trial defense counsel advised Appellant that the maximum term of confinement authorized by statute was 10 years. (Appendix A, Declaration of Major Matthew Leal; Appendix B, Declaration of Captain Joshua Lopes). Trial defense counsel knew that the maximum confinement sought by the Government was one year – "significantly lower than either a 5-year or 10-year maximum." (Appendix A, Declaration of Major Matthew Leal). Trial defense counsel informed Appellant that the range of confinement sought by the Government did not exceed one year. (Appendix B, Declaration of Captain Joshua Lopes).

Appellant wanted to be away from his child as little as possible – he consistently expressed a desire to reduce the likelihood and duration of confinement. (Appendix A, Declaration of Major Matthew Leal). He did not express a desire to litigate the case, in part because doing so would have increased his punitive exposure. (Id.) Based on the strength of the Government's case, Appellant's desire to avoid confinement, and the available evidence, trial defense counsel determined it was in Appellant's best interest to plead guilty and seek a negotiated limit on his punitive exposure. (Id.) "Appellant's decisions on plea, forum, and agreement were driven by his priority of minimizing jail time, rather than by the statutory maximum." (Id.)

Trial defense counsel's strategy in negotiating the plea agreement would have been the same whether the maximum confinement was five years or ten years. (Id.) During plea negotiations, trial defense counsel sought to reduce the lower limit ("floor") of the confinement range. Trial counsel indicated that the convening authority would not approve a lower limit without other concessions. (Id.) Trial defense counsel determined that it was likely that the military judge would impose a bad-conduct discharge even if one were not included in the agreement. (Id.) Appellant agreed with this assessment and prioritized reducing confinement further over avoiding a punitive discharge. Based on this, trial defense counsel proposed including the mandatory bad-conduct discharge provision in the plea agreement. (Id.)

Standard of Review

This Court reviews a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. Inabinette, 66 M.J. at 322.

Law and Analysis

"Pleas of guilty should not be set aside on appeal unless there is a substantial basis in law and fact for questioning the guilty plea." United States v. Shaw, 64 M.J. 460, 462 (C.A.A.F.

2007) (internal citations and quotations omitted). Once the military judge has accepted a plea as provident and has entered findings, an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the accused's statements or other evidence of record. United States v. Riddle, 67 M.J. 335, 338 (C.A.A.F. 2009) (citing Shaw, 64 M.J. at 462). More than a mere possibility of a conflict is required. Id. "Instead, this Court must find something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." Id. (citing Inabinette, 66 M.J. 322).

A. Appellant's mental health did not render his plea improvident.

When an accused's statements implicate mental diseases or defects, the military judge must determine whether the information presents a conflict with the plea or only the "mere possibility" of a defense. Riddle, 67 M.J.at 338-339. This is a contextual determination made by the military judge. Id. While it is prudent for the military judge to conduct additional inquiry where serious mental health issues are raised, our superior Court has emphasized such additional inquiry is not required where the statements raise only a mere possibility of a conflict. Riddle, 67 M.J. at 338-39.

"Not every mitigating statement or word requires further inquiry." United States v. Hayes, 70 M.J. 454, 458 (C.A.A.F. 2012). Using mental health conditions as a matter in mitigation does not necessarily create a conflict with a guilty plea that obliges a military judge to inquire into the defense of lack of mental responsibility. *See* United States v. Glenn, 66 M.J. 64, 66 (C.A.A.F. 2008) (finding mental health matters raised in mitigation did not create a substantial basis in law or fact for questioning a plea where there was no evidence suggesting the disorder affected the appellant's mental responsibility at the time of the offense).

Here, both counsel and Appellant repeatedly disavowed any concern with Appellant's mental responsibility, and the R.C.M. 706 inquiry foreclosed any possible mental-responsibility

defense. So, Appellant's comments during his unsworn statement did not raise a conflict with his plea requiring additional inquiry by the military judge.

1. Appellant and his counsel disavowed any concern with his mental responsibility.

In citing United States v. Phillippe's requirement that a military judge is "obliged to make further inquiry" when mental health issues are raised, Appellant ignores the pivotal qualifier that this duty only exists in the "absence of any prior disavowals." 63 M.J. 307, 310-311 (C.A.A.F. 2006) (emphasis added). When there are prior disavowals of the defense of lack of mental responsibility there is no duty for the military judge to inquire further because there is no ambiguity or inconsistency in the plea. Appellant disavowed the potential defense three times – twice through trial defense counsel and once during his unsworn statement. (R. at 10, 27, 101). The military judge had no duty to so inquire further and therefore did not abuse her discretion by not inquiring into the mere possibility of the defense.

2. The R.C.M. 706 inquiry findings reduced any potential mental responsibility defense to nothing more than a mere possibility.

Even if this Court find's Appellant did not specifically disavow the defense of lack of mental responsibility, like in Glenn, 66 M.J. at 66, there is no evidence that his diagnosed conditions, without more, would be a defense to his offense. In fact, the uncontested conclusions of the R.C.M. 706 inquiry definitively foreclosed the possibility of the defense of lack of mental responsibility under Article 50a, UCMJ because it eliminated the "essential elements" of the defense. *See* Hayes, 70 M.J. at 459-460 (finding there was not the possibility of a defense where three essential elements of the defense were plainly absent). Because this finding was uncontested, it deserved great weight in determining whether Appellant had only the "mere possibility" of a defense and so further inquiry was not required. Riddle, 67 M.J.at 338-339.

This is because, like in Riddle, 67 M.J. at 339, "this is not a case in which there were conflicting evaluations of Appellant's mental responsibility"

The defense of lack of mental responsibility has two elements: (1) that the accused suffered a severe mental disease or defect and (2) that because of that severe mental disease or defect he was unable to appreciate the nature and quality or wrongfulness of his acts. Article 50a, UCMJ,

a. Element 1: Severe Mental Disease or Defect

A severe mental disease or defect "does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects." R.C.M. 706(c)(2)(A). Even where a mental health condition may be considered a psychotic disorder, mental diseases or defects exist in a range of degrees. *See* United States v. Curtis, 2009 CCA LEXIS 11, *20 (A.F. Ct. Crim. App. Jan. 6, 2009) (unpub. op.) (noting that like many other mental diseases or defects, post-traumatic stress disorder exists in a range of degrees).

Appellant was diagnosed with his mental health conditions before the R.C.M. 706 inquiry. (*Compare*, App. Ex. IV and *Stipulation of Fact* at Attachment 2). The R.C.M. 706 inquiry found Appellant was not suffering from a severe mental disease or defect at the time of his criminal conduct despite Appellant's mental health diagnoses. (App. Ex. IV). This means that Appellant's mental health conditions did not rise to the degree of a severe mental disease or defect. Nothing in Appellant's unsworn statement or the findings of the medical evaluation board contradicts this. Therefore, this critical element is absent.

b. Element Two: Appreciation of the Nature and Quality or Wrongfulness

The second element of Article 50a, UCMJ, is that because of the severe mental disease or defect, Appellant "was unable to appreciate the nature and quality or the wrongfulness of the acts." Not only did the R.C.M. 706 inquiry determine this element was absent, but also Appellant disclaimed that any of his symptoms or conditions affected his mental responsibility when, after explaining his mental health, he said he was "aware of his actions." (R. at 101). Therefore, the second element of the defense is absent. With neither of the elements of the defense present, Appellant's statements seeking to set up mitigating facts "simply do not put the elements of [the defense] in play in a way that would necessitate further inquiry and resolution." Hayes, 70 M.J. at 459.

There are two presumptions available to a military judge in cases where an accused's mental disease or defect is raised in the context of the providence of a guilty plea, "that the accused is sane, and furthermore, that counsel is competent." Riddle, 67 M.J. at 338 (citing Shaw, 64 M.J. at 463). When an accused is taking an action with the assistance of counsel, "the military judge may properly presume, in the absence of any indication to the contrary, that counsel has conducted a reasonable investigation into the existence of the defense [of lack of mental responsibility]." Id. In consideration of these presumptions, trial defense counsel's decision, with full awareness of Appellant's mental health history, treatment, and pending medical discharge, trial defense counsel to not object to the findings of the report further supports that Appellant did not have a possible defense.

Trial defense counsel received the full report, and so they were in the best position to determine whether the report's findings precluded the defense of lack of mental responsibility. (R.C.M. 706(c)(3)(B); App. Ex. IV). Armed with this information, trial defense counsel did not contest the findings and twice specifically disavowed any concern with Appellant's mental

capacity. (R. at 9, 27). Instead, they made the strategic decision to present Appellant's mental health struggles as evidence in mitigation. But even when presenting Appellant's mental health struggles as mitigation during his unsworn statement, Appellant affirmed that he was aware of his actions despite his mental health conditions. (R. at 101). Based on this, the military judge could properly rely on the presumption "that counsel has conducted a reasonable investigation into the existence of the defense [of lack of mental responsibility]" and determined there was, if anything, only the mere possibility of a defense. Riddle, 67 M.J. at 338. Therefore, the military judge could conclude that reopening the plea colloquy to inquire further was unnecessary, and she did not abuse her discretion. Id. at 338-339.

This Court should weigh the uncontested conclusions of the R.C.M. 706 inquiry heavily and find that the record, if at all, raises only the mere possibility of the defense. Therefore, the judge did not abuse her discretion in accepting Appellant's guilty plea without further inquiry and this Court should deny Appellant's requested relief.

B. Appellant's plea was not improvident despite the advice he received regarding the maximum punishment authorized by statute.

"A plea of guilty may be improvident because it is predicated upon a substantial misunderstanding on the accused's part of the maximum punishment to which he is subject." United States v. Mincey, 42 M.J. 376, 378 (C.A.A.F. 1995) (citation omitted). There is not a mathematical formula for determining what amounts to a substantial misunderstanding. Id. (citing United States v. Hemmingway, 36 M.J. 349, 352, 353 (C.M.A. 1993)). Instead, the court considers all the circumstances of the case to determine whether the maximum sentence affected the guilty plea, or whether that factor was insubstantial in Appellant's decision to plead guilty. Id.

In Hemmingway, 36 M.J. at 352, the military judge misadvised the appellant that the total maximum confinement authorized was 40 years when it was only 30 years. The court found that this error did not render the appellant's plea improvident because it was not material in the appellant's decision to plead guilty. Id. at 353. In reaching this conclusion, the court considered all the circumstances of the case including that appellant pleaded guilty pursuant to a deal with the convening authority that he would only approve 24 months of confinement. The court found this to be a "truly substantial inducement regardless of whether the legal maximum was 30 years, 35 years, or 40 years." Id.

Some circumstances that this Court has considered in evaluating the providence of a plea despite misadvice about the maximum punishment include: whether the appellant claims he would have pleaded not guilty if he knew of the correct maximum punishment compared to whether he alleges merely that he would have sought a more favorable plea agreement and whether the evidence of guilt reflected in the record was overwhelming such that it dictated it would be in the appellant's best interest to accept responsibility and plead guilty. United States v. Blodgett, 2004 CCA LEXIS 160, *2 (A.F. Ct. Crim. App. 30 July 2004) (per curiam); United States v. Busch, 2015 CCA LEXIS 51, *18-19 (A.F. Ct. Crim. App. 11 Feb 2015).

A violation of 8 U.S.C. § 1324(A)(1)(a)(ii) has a maximum term of confinement of five years. 8 U.S.C. § 1324(B)(i) contains a sentence enhancement for up to ten years of confinement if the offense was done for private financial gain. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)[10]. We acknowledge that, pursuant to Apprendi, the Government could not have

[10] Our superior Court has applied Apprendi to military courts. *See* United States v. Castellano, 72 M.J. 217, 222 (C.A.A.F. 2013) (noting that there is no question that aggravating factors must

sought the sentence enhancement under 8 U.S.C. §1324(B)(i) at a litigated trial unless the fact that Appellant acted for private financial gain was in the specification and proved to the fact-finder beyond a reasonable doubt.

It appears that while avoiding a problem with calculating the maximum punishment on a "per alien" basis, trial defense counsel, government trial counsel, and the military judge missed the Apprendi problem. (*See* Appendix A, Declaration of Major Matthew Leal; Appendix B, Declaration of Captain Joshua Lopes; App. Ex. VI). All parties then miscalculated the maximum punishment based on the facts of the case rather than the specification. This resulted in Appellant being advised that the maximum confinement for the offense he pleaded guilty to was ten rather than five years. Despite this error, Appellant's plea of guilty was provident because the maximum sentence permissible was an insubstantial factor in Appellant's decision to plead guilty. Mincey, 42 M.J. 376.

The circumstances of Appellant's plea establish that the maximum punishment possible was insubstantial in his decision to plead guilty. In fact, the circumstances this Court has previously used in determining whether a miscalculation was insubstantial to a guilty plea are present in this case.

First, like in Blodgett, 2004 CCA LEXIS at *3, Appellant does not claim that his that he would have pleaded not guilty if he had known the maximum punishment was five years instead of 10 years – because he would not have. Appellant had no desire to litigate this case based on the strength of the evidence and his desire to be away from his child as little as possible. (Appendix A, Declaration of Major Matthew Leal). Appellant could have submitted a declaration with his initial brief making this claim, but he chose not to.

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be pleaded in the specification, instructed upon to members, and determined by the trier of fact in accordance with Apprendi).

Second, Appellant pleaded guilty pursuant to a highly favorable plea agreement. Because of Appellant's desire to limit his confinement exposure, trial defense counsel negotiated and secured an agreement that limited his punitive exposure to between two and six months of confinement – drastically below even a five-year maximum. Like Hemmingway, 36 M.J. at 353, whether the maximum punishment was five years or 10 years or 20 years, a plea agreement that favorable is "truly substantial inducement."

Third, the evidence against Appellant was overwhelming such that it dictated that it was in Appellant's best interest to plead guilty. Like in Busch, 2015 CCA LEXIS at *19, the evidence included a confession by Appellant to the police and incriminating text messages (*Stipulation of Fact* at paras. 10, 13[11]; Attachment 1). Additionally, there was dash camera footage of people fleeing Appellant's car when he is pulled over and Appellant can be heard crying in the back seat of the police car and calling himself stupid after he was placed under arrest. (*Stipulation of Fact* at Attachment 5). Trial defense counsel considered this overwhelming evidence and ultimately recommended Appellant plead guilty. (Appendix A, Declaration of Maj Matthew Leal). It was in Appellant's best interest to plead guilty and secure a deal to drastically limit his punitive exposure and achieve his goal of being away from his child as little as possible – regardless of maximum confinement authorized by statute. Based on this, this Court should be "confident that [Appellant] would still have pled guilty" even if he had been informed that the maximum sentence was five years. Busch, 2015 CCA LEXIS *18.

Appellant's claim that the maximum punishment advice rendered "the choice to enter the plea agreement [. . .] little choice at all – so much so that he was willing to sacrifice his medical retirement through a mandatory bad-conduct discharge to avoid it" rings hollow. (App. Br. at

[11] There appears to be a typographical error in the stipulation of fact since paragraphs 11 and 12 are absent.

25). First, Appellant knew the Government was not seeking anywhere near the statutory maximum. (Appendix B, Declaration of Captain Joshua Lopes). Second, Appellant did not agree to the mandatory bad-conduct discharge to avoid the statutory maximum as he suggests. (App. Br. at 25). He offered it to further lower the floor of the confinement range. (Appendix A, Declaration of Major Matthew Leal). There is no evidence Appellant would not have pleaded guilty if he had known he risked five years of confinement rather than ten. The advice Appellant received about the maximum confinement authorized under statute was insubstantial to Appellant's decision to plead guilty. Therefore, this Court should find Appellant's plea was provident and deny his requested relief.

V.

TRIAL DEFENSE COUNSEL'S DETERMINATION OF THE MAXIMUM CONFINEMENT AUTHORIZED DID NOT PREJUDICE APPELLANT BECAUSE IT DID NOT AFFECT THE OUTCOME OF THE PLEA PROCESS.

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. United States v. Bradley, 71 M.J. 13, 17 (C.A.A.F. 2012) (citation omitted).

Law

Appellant bears the burden of establishing (1) that trial defense counsel's representation fell measurably below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984). The requirement to show prejudice is based on the conclusion that "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691.

In a guilty plea context, the first part of the Strickland test is the same, but the second prong is modified to focus on whether the ineffective performance affected the outcome of the plea process. United States v. Bradley, 71 M.J. 13, 16 (C.A.A.F. 2012) (citing Hill v. Lockhart, 474 U.S. 52, 56-60 (1985)). The question becomes, whether "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012) (quoting Hill, 474 U.S. at 59).

"Standing alone, an appellant's 'post hoc assertions . . . about how he would have pleaded but for his attorney's deficiencies' are not enough to establish prejudice. United States v. Furth, 81 M.J. 114, 118 (C.A.A.F. 2021) (quoting Lee v. United States, 582 U.S. 357 (2017)). The court must look to "contemporaneous evidence to substantiate" such a claim. Id. "This is so because the appellant has an incentive to claim, in retrospect, that the result of the plea process would have been different regardless of whether that claim is, in fact, true." Id. (quotation and citation omitted).

"Defendants obviously weigh their prospects at trial in deciding whether to accept a plea." Lee, 582 U.S. at 367 (citing Hill, 474 U.S. at 59). A defendant facing long odds of success at trial because they do not have a viable defense "will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial." Id.

"It is not necessary to decide the issue of deficient performance when it is apparent that the alleged deficiency has not caused prejudice" Bradley, 71 M.J. at 17.

Analysis

Appellant has not alleged, let alone established, a reasonable probability that but for his trial defense counsel's advice that he would have pleaded not guilty and insisted on going to trial. Instead, he merely claims in his brief that the advice renders what happened at trial

unreliable and warrants correction. (App. Br. at 27). This is insufficient and so his claim must fail.

Even if he made such an after-the-fact assertion, the evidence contemporaneous with his plea support that there is not a reasonable probability that Appellant would have pleaded not guilty if he had known the maximum confinement authorized was five years rather than ten. Appellant's objective was to minimize his confinement time to be away from his child as little as possible. (Appendix A, Declaration of Major Matthew Leal). Appellant's highly favorable "guilty plea that offer[d] him a better resolution than would be likely after trial." Lee, 582 U.S. at 367. There are long odds that Appellant would have received a sentence of three months of confinement if he had proceeded to trial without the benefit of the plea agreement's sentencing limitations and the dismissal of two other specifications which lowered his confinement exposure from a total of 11 years to six months. Because of this, any claim that he was prejudiced by his counsel's advice is unpersuasive.

Additionally, the facts support that the maximum confinement possible played no role in negotiating a plea agreement because the Government never intended to seek a sentence near the maximum. (*See* Appendix B, Declaration of Captain Joshua Lopes at para. 5). Because of this, trial defense counsel's advice to Appellant about whether to enter a plea agreement would not have changed if the maximum confinement authorized by statute was five years or ten years. (Appendix A, Declaration of Major Matthew Leal; Appendix B, Declaration of Captain Joshua Lopes).

Appellant's claim that the distinction between the misadvice and the correct maximum punishment was "having the opportunity to see part of his beloved daughter's remaining childhood versus missing it altogether" is unpersuasive. (App. Br. at 24-25). Appellant's daughter was three at the time of his court-martial. (*Compare* R. at 1 (date of trial) and R. at 99

(daughter's birthday)). It is not only contrary to his stated goal of limiting confinement as much as possible, but also there is not a reasonable probability that Appellant would have been willing to risk 11 years of confinement – missing all his daughter's young childhood – by insisting on proceeding to trial. Whether the total maximum potential confinement was 21 years or 11 years, there is not a reasonable probability that Appellant would have pleaded not guilty. He has never claimed otherwise, despite having the opportunity to submit an affidavit or declaration on appeal. Because of this, Appellant continues to fail to establish that but for the maximum punishment calculation, he would have pleaded not guilty and insisted on going to trial. Because Appellant cannot establish that he was prejudiced by the advice under the Hill standard, this Court should deny his assignment of error.

VI.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. §922 IS CONSTITUTIONAL.

Standard of Review

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

Law and Analysis

Pursuant to United States v. Vanzant, 84 M.J. 671, 675 (A.F. Ct. Crim. App. 2024), 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence. Therefore, they are beyond the scope of this Court's jurisdiction under Article 66, U.C.M.J. and this Court lacks jurisdiction to grant Appellant relief.

Additionally, this Court cannot order correction of the first indorsement to the entry of judgment under Article 66(d)(2), UCMJ, as Appellant suggests. (App. Br. at 35). Article 66(d)(2), UCMJ, states:

> ERROR OR EXCESSIVE DELAY—In any case before the Court of Criminal Appeals under sub-section (b), the Court may provide appropriate re-lief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record under section 860c of this title (article 60c).

In United States v. Johnson, our superior Court rejected the same claims Appellant raises now. The Court found that the first indorsement "is part of the EOJ and cannot be an error . . . in the processing of the court-martial after the judgment was entered into the record under Article 66(d)(2), UCMJ." ___ M.J. ___, 2025 CAAF LEXIS 499, *13 (C.A.A.F. 2025) (internal quotations omitted) (alteration in original). Finally, because any claim of error in the first indorsement to the EOJ is not a justiciable error under Article 66(d)(2), UCMJ, it is also beyond this Court's authority to provide "other appropriate relief" as done in United States v. Valentin-Andino, 83 M.J. 537 (A.F. Ct. Crim. App. 2023), to address post-trial delay under Article 66(d)(2), UCMJ. (App. Br. at 36). Accordingly, Appellant's claim must fail.

VII.[12]

APPELLANT WAIVED ANY ISSUE REGARDING THE SUFFICIENCY OF THE R.C.M. 706 INQUIRY WHEN HE PLEADED GUILTY.

Standard of Review

Whether an appellant has waived an issue is a legal question that an appellate court reviews de novo. Haynes, 79 M.J. at 19.

[12] Appellant personally raised this issue pursuant to Grostefon, 12 M.J. 431.

Failure to raise a challenge on the sufficiency of an inquiry into an accused's mental capacity or mental responsibility under R.C.M. 706 forfeits it absent affirmative waiver. R.C.M. 905(e)(2). Forfeited issues are evaluated for plain error. Andrews, 77 M.J. at 398. Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. King, 83 M.J. at 120-21.

Law and Analysis

Pursuant to his plea agreement, Appellant waived all waivable motions. (App. Ex. VII). An accused intentionally relinquishes a waivable objection by including a clause waiving all waivable motions in a plea agreement. Day, 83 M.J. 56. The sufficiency of the R.C.M. 706 inquiry is a waivable objection. Additionally, the R.C.M. 706 inquiry implicates a factual issue of Appellant's guilt to the offense he pleaded guilty to. Pursuant to R.C.M. 910(j), a plea of guilty that results in a finding of guilty waives any objection, whether or not previously raised, as to the factual issue of guilt of the offense to which the plea was made. Therefore, Appellant waived this issue and there is "no error for this Court to correct on appeal." King, 83 M.J. at 120.

Even if Appellant forfeited, rather than waived, the issue, there is no plain error. Appellant did not challenge the sufficiency of the R.C.M. 706 inquiry at trial and so if not waived, his challenge is reviewed for plain error. R.C.M. 905(e)(2); Andrews, 77 M.J. at 398. Appellant has not met his burden to establish that there was clear or obvious error that resulted in material prejudice to his substantial rights. R.C.M. 706(c)(2)(A) – (D) detail the questions that must be answered in the inquiry report. All required questions were answered in the report of Appellant's inquiry. (App. Ex. IV). Appellant has provided no evidence to support his claim that the board asked questions "irrelevant to his state of mind at the time of the charged offenses" occurred or the that the board did not comply with the requirements of R.C.M. 706. Because

Appellant has not met his burden to show clear or obvious error, his assignment of error must fail, and this Court should deny his requested relief.

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.

[redacted]

HEATHER R. BEZOLD, Capt, USAF
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[redacted]

MARY ELLEN PAYNE
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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 1 August 2025

[redacted]

HEATHER R. BEZOLD, Capt, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**REPLY TO UNITED STATES' ANSWER**
v.	)	Before Panel No. 1
	)	No. ACM 40651
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*	)	8 August 2025

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

Pursuant to Rule 18(d)(2) of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Appellant, Senior Airman Brennen J. Patterson, replies to the United States' answer filed on 1 August 2025 (Government's Br.).

Argument

III.[1]

THE MILITARY JUDGE ABUSED HER DISCRETION IN ACCEPTING APPELLANT'S PLEA OF GUILTY TO A KNOWING MENS REA.

Law and Analysis

The Government's brief begins with two misdirects regarding the nature of the issue alleged, neither of which have any actual bearing on the error of which Appellant complains. Both should therefore be disregarded by this Court.

[1] Though starting with Issue III, Appellant acknowledges that the cases highlighted by the Government concerning Issue I having to do with jurisdiction, *United States v. Cotton*, 535 U.S. 625 (2002), and *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), are controlling for that issue. Government's Br. at 5-7. In light of those precedents, the appropriate lens to assess the propriety of the specification at issue is failure to state an offense, as discussed in Issue II. Br. on Behalf of Appellant (Appellant's Br.) at 14-15; Government's Br. at 6-15. As always, the

The first is that the Government's brief changes the issue presented. Whereas Appellant only challenged the military judge's acceptance of a guilty plea to a knowing mens rea, Appellant's Br. at 15-19, the Government's brief would prefer to take on the broader issue of both the knowing *and* reckless mens rea that the prosecution charged in the disjunctive. Government's Br. at iii, 16. Seeking to morph the issue into being about the specification as a whole does not make the portion that was done incorrectly—the guilty plea to "with knowledge of, or"—any less wrong.

The second misdirect is at the outset of the Government's analysis, where it points out that Appellant did not allege ineffective assistance of counsel related to the guilty plea to the specification as written. Government's Br. at 18 n.7. While the Government's observation is correct, the Government also points to no case to suggest that failing to raise ineffective assistance of counsel has any bearing on the propriety of a providence inquiry. *See* Government's Br. at 17-20. That absence of supporting case law for the Government's point is unsurprising because it is the military judge, not trial defense counsel, who is "charged with determining" the propriety of the guilty plea. *United States v. Inabinette*, 66 M.J. 320, 321-22 (C.A.A.F. 2008) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). Here, the problem lies not with the entry of the plea of guilty with the advice of counsel, but with the acceptance of that plea by the military judge. *See* Rule for Courts-Martial 910(e)[2] ("The *military judge* shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the *military judge* that there is a factual basis for the plea." (emphasis added)).

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professionalism of the Government's pleading in fostering a comprehensive assessment of Appellant's case is appreciated.

[2] The version of the Rules for Courts-Martial applicable to Appellant's trial is that in the 2019 edition of the *Manual for Courts-Martial (MCM)* as amended by Exec. Order No. 14062 of 26 January 2022, 87 Fed. Reg. 4763 (Jan. 31, 2022), and Annexes 1 and 2 to Exec. Order No. 14103 of 28 July 2023, 88 Fed. Reg. 50535 (Aug. 2, 2023).

If anything, the record generated as a result of the separate ineffective assistance of counsel claim that Appellant did raise reinforces the notion that the military judge was off-target in her assessment of the specification at issue. As Captain JL points out, the trial defense team "took care to avoid raising issues or concerns" related to problems with the prosecution's charging. Decl. of Captain JL at 2 ¶ 7.

Such problems were patent. One defect with which the Government agrees is that the prosecution got the maximum punishment wrong. Government's Br. at 28-29; *see also* Captain JL Decl. at 1 ¶ 4 ("all parties agreed 10 years of confinement was the correct maximum confinement"). And the prosecution altogether omitted the element of 8 U.S.C. § 1324(a)(1)(A)(ii) requiring that the transportation at issue be "in furtherance of" the charged Mexican national's illegal entry or continued presence in the United States.[3] Yet the military judge did not comment on the record on the absence of the latter, leaned into the former problem by blowing past the four corners of the charge sheet, and even articulated an element about transportation into the United States that was never charged. Charge Sheet at 1; Trial Tr. at 36, 41-43. The military judge took the same approach with the knowledge element, giving it cursory treatment and focusing on Appellant's recklessness. Appellant's Br. at 17-18; Trial Tr. at 36-42.

[3] While the Government's brief suggests that this element is trivial, Government's Br. at 13, defaulting in the manner suggested to a presumption that the transportation was unlawful fails to comport with case law or logic. For example, if there were a violent car crash involving an illegal alien, the Government's logic suggests that subsequent transportation to the hospital for emergency medical care would be in furtherance of the illegal presence in the United States because "transporting an illegal alien anywhere except to immigration enforcement or back across the border advances the alien's unlawful presence in the United States." *Id*. Such a broad construction of "in furtherance of" has been rejected by courts for decades. *See, e.g.*, *United States v. Moreno*, 561 F.2d 1321, 1322 (9th Cir. 1977) ("mere transportation of an alien is not sufficient to violate" 8 U.S.C. § 1324(a)(2)); *United States v. Stonefish*, 402 F.3d 691, 695 (6th Cir. 2005) (requiring a specific intent to assist an alien to illegally be in the United States); *United States v. Barajas-Chavez*, 162 F.3d 1285, 1288 (10th Cir. 1999) (en banc) (requiring that the defendant's conduct "will help, advance, or promote the alien's illegal entry or continued illegal presence in the United States" based on the "unambiguous" language of the statute).

The Government's proposed cure for this is that the proof of knowledge was there all along, albeit under the guise of deliberate avoidance. Military judges are no stranger to the notion of deliberate avoidance. *See, e.g.*, Dep't of the Army, Pam. 27-9, Legal Services, Military Judges' Benchbook ch. 3A, ¶ 3A-10-1 (2020) (discussing deliberate avoidance in the context of failing to go to an appointed place of duty). But the military judge here did not conduct a colloquy addressing deliberate avoidance like the military judge did in the case cited by the Government, *United States v. Adams*, 63 M.J. 223, 224-25 (C.A.A.F. 2006). Government's Br. at 19. During the appellant's guilty plea in *Adams*, the military judge asked whether the appellant "deliberately avoided" finding his appointed place of duty. *Adams*, 63 M.J. at 225. But "avoid" only comes up once during Appellant's guilty plea—and nowhere in relation to Appellant's mens rea. Trial Tr. at 42. Likewise, "deliberate" comes up only once during the trial as a whole—in the military judge's delineation of the element for "recklessness." Trial Tr. at 36.

At bottom, despite the clear record of the military judge's sparse and conclusory treatment of the knowing mens rea during the actual providence inquiry, the Government's brief is asking this Court to turn the "or" that was charged into an "and" to find Appellant acted with both knowledge and recklessness. Such an approach is unsupported by the inquiry itself, where the military judge did not question Appellant on deliberate avoidance. Such an approach is unsupported here where all of the should-haves, could-haves, and would-haves about Appellant's state of mind to which the Government points, Government's Br. at 19, are in the context of a discussion about recklessness. And such an approach is not warranted in light of Appellant's explicit denial of actual knowledge.

Notwithstanding the manifestation of deliberate avoidance now articulated in the Government's brief, Appellant specifically claimed to "*not* know" the Mexican national "entered into the United States in violation of law." Trial Tr. at 38 (emphasis added). The Government's brief acknowledges this fact but then ignores it in its analysis. Government's Br. at 17-20. But how this should have been addressed by the military judge was identified just weeks ago by the United States Court of Appeals for the Armed Forces in *United States v. Saul*, __ M.J. __, USCA Dkt. No. 24-0098/AF, 2025 CAAF LEXIS 578 (C.A.A.F. July 21, 2025). In *Saul*, the appellant told the military judge he did not intend to cause the damage at issue in the case. *Id.* at *10-11. In *Saul*, the Government pointed to *Adams*, as it does here. *Id.* at *12-13; Government's Br. at 17-19. And in *Saul*, the Court rejected *Adams* because the military judge failed to reconcile the affirmative denial of the relevant mens rea with the plea of guilty, per Article 45(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 845(a).[4] *Saul*, 2025 CAAF LEXIS 578, at *10-13. Even if the military judge in this case were endeavoring to establish the providence of Appellant's knowledge—which is not evident from the threadbare and conclusory statements elicited—the same rejection should follow here for the same reasons as in *Saul* because Appellant explicitly rejected the knowing portion of the charged mens rea.

Taken together, the proof of knowledge was insufficient, and whatever proof was introduced was inconsistent. The portion of the guilty plea specific to Appellant's knowledge

[4] The version of the UCMJ in effect at the time of the alleged offense was that reprinted in Appendix 2 of the *Manual for Courts-Martial, United States* [hereinafter *MCM*] (2019 ed.), as amended by the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019); the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (2021); the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021); and the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022).

cannot be sustained. If the Court otherwise deems Appellant's guilty plea provident, this Court should except the words "with knowledge of, or" and set aside the excepted words.

IV.

APPELLANT'S PLEA OF GUILTY WAS IMPROVIDENT AS A WHOLE.

Though presumably the result of an inadvertent drafting error, the first main point of the Government's analysis—that Appellant and his counsel disavowed any concern with Appellant's mental responsibility—is predicated on misquoting the "pivotal qualifier" it claims the defense ignored from *United States v. Phillippe*, 63 M.J. 307, 310-11 (C.A.A.F. 2006). The Government's brief emphasizes that military judges need not inquire into mental responsibility issues raised during or following an accused's guilty plea "in the 'absence of any prior disavowals.'" Government's Br. at 24 (purporting to quote *Phillippe*, 63 M.J. at 310-11). But the word "any" is an addition to *Phillippe* of the Government's authorship, not the Court of Appeals for the Armed Forces. *Compare* Government's Br. at 24, *with Phillippe*, 63 M.J. at 310.

The import of this clarification is that the requirement of further judicial inquiry when a defense is raised is not as tilted against scrutiny as the Government's brief suggests. To the Government, the word "any"—which presumably is the intended target of the unreflected "emphasis added" portion of the citation—means that a single disavowal of a mental responsibility defense would be categorically dispositive, regardless of what follows. Government's Br. at 24. Such a black-and-white approach is untenable when considering the other cases cited in the Government's brief. As the Government points out, the determination about whether further inquiry is needed draws on the context of the case. Government's Br. at 23 (citing *United States v. Riddle*, 67 M.J. 335, 339 (C.A.A.F. 2009)). If "any" prior disavowal would close the door on reopening the providence inquiry, then the context later arising in a case,

such as during litigation on a contested specification or sentencing matters, would be irrelevant and could never demand additional questioning by the military judge. Such reasoning cannot prevail because it would see the purported "any" exception swallow the law codified in Article 45(a), UCMJ.

A comparison with the cases relied upon by the Government's brief illustrates how Appellant's case is different and needed follow-up questioning by the military judge to comport with Article 45(a). In *United States v. Shaw*, 64 M.J. 460, 464 (C.A.A.F. 2007), a one-off reference to a diagnosis of bipolar disorder preceding the charged conduct did not warrant further inquiry. In *United States v. Glenn*, 66 M.J. 64, 65-66 (C.A.A.F. 2008), which reached the same result, mental health disorders were again raised by the appellant, but were unsupported by other evidence and not connected in any way to the charged conduct. Yet, despite the record in this case, the Government opines that Appellant's case is like *Glenn*.

Far from *Glenn*, Appellant did more than just allude to his mental health as a mitigating factor. Nearly a third of Appellant's unsworn statement detailed his mental health, both in a general sense and specific to the offense, including his treatment history, hospitalization, medication failures, lack of medication at the time of the offense, lack of sleep at the time of the offense, and "spiraling" mental health symptoms at the time of the offense. Trial Tr. at 96-102.[5] The unsworn presentation was augmented by documentary evidence offered by both the prosecution and defense setting out Appellant's mental health diagnoses—so significant that he was being discharged from military service because of them—and the impact of those conditions on Appellant. Prosecution Ex. 1 at 14; Defense Ex. C at 10, 12.

[5] The reference to "[n]early a third" at the outset of the sentence is based on what appears to be thirty-nine lines of Appellant's 123-line unsworn statement addressing Appellant's mental health in the trial transcript.

The closest that the cases identified by the Government get to Appellant's is *Riddle*, but even that case is distinguishable considering the four main reasons articulated in *Riddle* for why that appellant's mental responsibility did not call into question the guilty plea:

First, in *Riddle*, the military judge "specifically asked" the appellant about her mental responsibility at the time of the offense. 67 M.J. at 339. That did not happen in Appellant's case.

Second, in *Riddle*, the appellant's unsworn statement "repeated the [judge's earlier] inquiry into Appellant's mental responsibility for her acts." 67 M.J. at 339. That did not happen here. Instead, Appellant said he was "aware of [his] actions" but, on the other side of the comma, detracted from that purported awareness by highlighting that he "was not in a healthy mental state." Trial Tr. at 100. Adding greater specificity to show the manner in which his mental state was impacting him in relation to the timing of the charged conduct, Appellant noted his "spiraling" mental health problems at the time of the charged conduct overlapping with his lack of medication and sleep. *Id*. Rather than clean up any potential mental responsibility issue in sentencing like in *Riddle*, Appellant's unsworn statement highlighted its significance.

Third, in *Riddle*, the military judge "placed his impressions of Appellant's behavior at trial on the record and repeated those observations as to Appellant's mental acuity following sentencing." 67 M.J. at 339. That did not happen here.

Fourth, in *Riddle*, a mental health evaluation completed nine days prior to the preferral of charges opined that the appellant was mentally responsible, without evidence to the contrary in the record. 67 M.J. at 337, 339. And while that might be analogized to the inquiry conducted here under R.C.M. 706, nothing in *Riddle* suggests that such an inquiry was the be-all-end-all when it came to the context considered for determining if further inquiry was required under

Article 45(a). Were that the case, none of the other factors would have mattered to the *Riddle* court's analysis. Likewise, to hold that the R.C.M. 706 inquiry is so compelling that it outweighs everything else that came later—without comment or question from the military judge—would not comport with the very real possibility of a defense raised by the matters before the military judge: defense evidence, and an unsworn pointing to Appellant's persistent mental health challenges and challenges specific to the commission of the charged conduct. Trial Tr. at 99-100; Prosecution Ex. 1 at 14; Defense Ex. C at 10, 12.

Taking these factors together, Appellant's case is distinguishable from *Riddle* and the other cases. The vast amount of information concerning his mental health challenges, in particular those challenges that were corroborated by evidence offered by both parties and specific to the charged conduct, triggered Article 45(a)'s mandate to clean it up or reject the guilty plea and therefore required more from this military judge. The military judge failed to deliver. As such, Appellant's guilty plea should be deemed improvident, and the findings and sentence should be set aside.

Respectfully Submitted,

[redacted]

ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 8 August 2025.

[redacted]
ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**SECOND MOTION TO CITE SUPPLEMENTAL AUTHORITY**
v.	)	Before Panel No. 1
Senior Airman (E-4) **BRENNEN J. PATTERSON** United States Air Force *Appellant*	)	Case No. ACM 40651 29 August 2025

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

Pursuant to Rule 23.3(d) of this Court's Rules of Practice and Procedure, Appellant moves to cite as supplemental authority the decision by the United States Court of Appeals for the Armed Forces in *United States v. Cook*, __ M.J. __, USCA Dkt. No. 24-0221/AF (C.A.A.F. Aug. 28, 2025).

The decision in *Cook* involved issues similar to those raised here concerning the maximum punishment for the incorporated offense of 8 U.S.C. § 1324(a)(1)(A)(ii), and the resolution of those issues is relevant to Issues I and VI raised in this case. *Cook*, slip op. at 2-4. For Issue I, the Court of Appeals for the Armed Forces reiterated that the omission of an element for an offense incorporated under clause 3 of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, does not create a jurisdictional defect. *Cook*, slip op. at 8 n.5. For Issue IV, the Court of Appeals for the Armed Forces reiterated that miscalculation of the maximum punishment may render a guilty plea improvident where it is substantial and material. *Cook*, slip op. at 10 (citing *United States v. Harden*, 1 M.J. 258, 259-60 (C.M.A. 1986).

WHEREFORE, this Court should grant this motion.

Respectfully Submitted,

[redacted]

ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief

[redacted]

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were delivered by e-mail to the Court and served on the Government Trial and Appellate Operations Division on 29 August 2025.

ALLEN S. ABRAMS, Lieutenant Colonel, USAF
Deputy Chief
Air Force Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40651**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Brennen J. PATTERSON	)	**CHANGE**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 15th day of December, 2025,

ORDERED:

The record of trial in the above-styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review.

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

GRUEN, PATRICIA A., Colonel, Senior Appellate Military Judge
PERCLE, DAYLE P., Lieutenant Colonel, Appellate Military Judge
MORGAN, CHRISTOPHER S., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner