UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40608**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dyllin V. E. ROBERTS	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 26 June 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 opposes the motion.

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

Accordingly, it is by the court on this 1st day of July, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **4 September 2024**.

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request 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. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time.

Counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME**
	)	**(FIRST)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4)	)	
DYLLIN V.E. ROBERTS,	)	No. ACM 40608
United States Air Force,	)	
Appellant.	)	26 June 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, Senior Airman Dyllin V.E. Roberts, Appellant, hereby moves for the first enlargement of time to file his assignments of error. Appellant requests an enlargement for a period of 60 days, which will end on **4 September 2024**. The record of trial was docketed with this Court on 7 May 2024. From the date of docketing to the present date, 50 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

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 26 June 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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28 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DYLLIN V.E. ROBERTS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40608 Panel No. 2

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

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

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

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 June 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS,** United States Air Force,	)	No. ACM 40608
Appellant.	)	23 August 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Dyllin V.E. Roberts, Appellant, hereby moves for a second enlargement of time to file his assignments of error. SrA Roberts requests an enlargement for a period of 30 days, which will end on **4 October 2024**. The record of trial was docketed with this Court on 7 May 2024. From the date of docketing to the present date, 108 days have elapsed. On the date requested, 150 days will have elapsed.

On 23 January 2023, 13 April 2023, 13 July 2023, and 9-15 October 2023, at Joint Base Andrews, Maryland, and Barksdale Air Force Base, Louisiana, a general court-martial comprised of officer and enlisted members convicted SrA Roberts, contrary to his pleas, of four specifications of committing sexual abuse of a child involving sexual contact, one specification of sexual assault of a child who has attained the age of 12 years, one specification of sexual abuse of a child involving indecent conduct, and one specification of indecent recording, in violation of Articles 120b and 120c, Uniform Code of Military Justice. R. at 305-06, 1523-24; Charge Sheet. The military judge sentenced SrA Roberts to a reprimand, reduction to the grade of E-1, 14 years' confinement, and a dishonorable discharge. R. at 1626. The convening authority took no action on the findings and sentence, but approved SrA Roberts' request to defer his reduction in grade

until the military judge signed the entry of judgment and waived all automatic forfeitures for a period of six months for the benefit of SrA Roberts' dependent. Convening Authority Decision on Action.

SrA Roberts' 11-volume record of trial consists of 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, and 102 appellate exhibits. The transcript is 1,627 pages. SrA Roberts is confined.

Through no fault of SrA Roberts, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SrA Roberts was (1) advised of his right to a timely appeal, (2) provided an update on the status of undersigned counsel's progress on his case, (3) advised of the request for an enlargement of time, and (4) agrees with the request for an enlargement of time.

WHEREFORE, SrA Roberts respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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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 23 August 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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27 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DYLLIN V.E. ROBERTS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40608 Panel No. 2

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 August 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS,** United States Air Force, *Appellant.*	)	No. ACM 40608
	)	25 September 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Dyllin V.E. Roberts, Appellant, hereby moves for a third enlargement of time to file his assignments of error. SrA Roberts requests an enlargement for a period of 30 days, which will end on **3 November 2024**. The record of trial was docketed with this Court on 7 May 2024. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 23 January 2023, 13 April 2023, 13 July 2023, and 9-15 October 2023, at Joint Base Andrews, Maryland, and Barksdale Air Force Base, Louisiana, a general court-martial comprised of officer and enlisted members convicted SrA Roberts, contrary to his pleas, of four specifications of committing sexual abuse of a child involving sexual contact, one specification of sexual assault of a child who has attained the age of 12 years, one specification of sexual abuse of a child involving indecent conduct, and one specification of indecent recording, in violation of Articles 120b and 120c, Uniform Code of Military Justice. R. at 305-06, 1523-24; Charge Sheet. The military judge sentenced SrA Roberts to a reprimand, reduction to the grade of E-1, 14 years' confinement, and a dishonorable discharge. R. at 1626. The convening authority took no action on the findings and sentence, but approved SrA Roberts' request to defer his reduction in grade

until the military judge signed the entry of judgment and waived all automatic forfeitures for a period of six months for the benefit of SrA Roberts' dependent. Convening Authority Decision on Action.

SrA Roberts' 11-volume record of trial consists of 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, and 102 appellate exhibits. The transcript is 1,627 pages. SrA Roberts is confined.

Through no fault of SrA Roberts, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SrA Roberts was (1) advised of his right to a timely appeal, (2) provided an update on the status of undersigned counsel's progress on his case, (3) advised of the request for an enlargement of time, and (4) agrees with the request for an enlargement of time.

Undersigned counsel currently represents 26 clients and is presently assigned 13 cases pending initial brief before this Court. Six cases currently have priority over the present case:

1. *United States v. George*, USCA Dkt. No. 24-0206/AF, No. ACM 40397 – The United States Court of Appeals for the Armed Forces granted review and has ordered briefing on one issue. The appellant's grant brief and the joint appendix are due on 8 October 2024.
2. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. The appellant is confined. His case was docketed on 14 December 2023.
3. *United States v. Dawson*, No. ACM 24041 – The record of trial consists of 13 prosecution exhibits, 9 defense exhibits, 1 court exhibit, and 41 appellate exhibits. The

transcript is 761 pages. The appellant is not confined. Undersigned counsel has prioritized this case above others because it was docketed on 4 October 2023. This Court and undersigned counsel received the verbatim transcript on 9 August 2024.

4. *United States v. Hagen*, No. ACM 40561 – The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. The appellant is not confined. His case was docketed on 26 January 2024.
5. *United States v. Valadez*, No. ACM 40553 – The record of trial consists of four volumes, six appellate exhibits, two prosecution exhibits, five defense exhibits, and two court exhibits. The transcript is 151 pages. The appellant is confined. His case was docketed on 6 February 2024.
6. *United States v. Blair*, No. ACM S32778 – The record of trial consists of 7 prosecution exhibits, 22 defense exhibits, and 6 appellate exhibits. The transcript is 187 pages. The appellant is confined. His case was docketed on 22 April 2024.

Since requesting SrA Roberts' second enlargement of time, undersigned counsel completed and filed briefs in *United States v. Benoit, Jr.*, No. ACM 40508; *United States v. Rocha*, No. ACM 40134 (rem); and *United States v. Cole*, No. ACM 40189 (rem). During the requested enlargement of time, undersigned counsel will be (1) attending a Joint Appellate Advocacy Training at Fort Belvoir, Virginia, on 26-27 September 2024; (2) preparing for and participating as a moot judge in at least five moot arguments; and (3) on preauthorized leave outside of the local area (over Indigenous Peoples' Day weekend) on 9-14 October 2024.

WHEREFORE, SrA Roberts respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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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 25 September 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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30 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DYLLIN V.E. ROBERTS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40608 Panel No. 2

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

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

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

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 30 September 2024.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME OUT OF TIME (FOURTH)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS,** United States Air Force,	)	No. ACM 40608
Appellant.	)	28 October 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Dyllin V.E. Roberts, Appellant, hereby moves for a fourth enlargement of time to file his assignments of error. SrA Roberts requests an enlargement for a period of 30 days, which will end on **3 December 2024**. The record of trial was docketed with this Court on 7 May 2024. From the date of docketing to the present date, 174 days have elapsed. On the date requested, 210 days will have elapsed. Undersigned counsel submits this motion out of time, due to no fault of SrA Roberts. Undersigned counsel was attentive to her docket and checked to see if any filings were due last week. However, undersigned counsel errored by using a calendar and miscalculating when SrA Roberts' motion was due. Undersigned counsel recognized her error today and filed this motion as soon as she realized. SrA Roberts' case is undersigned counsel's seventh priority, and she has not yet begun reviewing his case.

On 23 January 2023, 13 April 2023, 13 July 2023, and 9-15 October 2023, at Joint Base Andrews, Maryland, and Barksdale Air Force Base, Louisiana, a general court-martial comprised of officer and enlisted members convicted SrA Roberts, contrary to his pleas, of four specifications of committing sexual abuse of a child involving sexual contact, one specification of sexual assault of a child who has attained the age of 12 years, one specification of sexual abuse

of a child involving indecent conduct, and one specification of indecent recording, in violation of Articles 120b and 120c, Uniform Code of Military Justice. R. at 305-06, 1523-24; Charge Sheet. The military judge sentenced SrA Roberts to a reprimand, reduction to the grade of E-1, 14 years' confinement, and a dishonorable discharge. R. at 1626. The convening authority took no action on the findings and sentence, but approved SrA Roberts' request to defer his reduction in grade until the military judge signed the entry of judgment and waived all automatic forfeitures for a period of six months for the benefit of SrA Roberts' dependent. Convening Authority Decision on Action.

SrA Roberts' 11-volume record of trial consists of 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, and 102 appellate exhibits. The transcript is 1,627 pages. SrA Roberts is confined.

Through no fault of SrA Roberts, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SrA Roberts was (1) advised of his right to a timely appeal, (2) provided an update on the status of undersigned counsel's progress on his case, (3) advised of the request for an enlargement of time, and (4) agrees with the request for an enlargement of time.

Undersigned counsel currently represents 27 clients and is presently assigned 13 cases pending initial brief before this Court. Six cases currently have priority over the present case:

1. *United States v. Alton*, No. ACM 40215 – Undersigned counsel was detailed on 25 October 2024 to represent the petitioner before the U.S. Court of Appeals for the Armed Forces. The petitioner's answer to a motion to dismiss is due on 31 October 2024.

2. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1,627 pages. The appellant is confined. His case was docketed on 14 December 2023.
3. *United States v. Dawson*, No. ACM 24041 – The record of trial consists of 13 prosecution exhibits, 9 defense exhibits, 1 court exhibit, and 41 appellate exhibits. The transcript is 761 pages. The appellant is not confined. This Court and undersigned counsel received the verbatim transcript on 9 August 2024; undersigned counsel has prioritized this case above others because it was docketed on 4 October 2023.
4. *United States v. Hagen*, No. ACM 40561 – The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. The appellant is not confined. His case was docketed on 26 January 2024.
5. *United States v. Valadez*, No. ACM 40553 – The record of trial consists of four volumes, six appellate exhibits, two prosecution exhibits, five defense exhibits, and two court exhibits. The transcript is 151 pages. The appellant is confined. His case was docketed on 6 February 2024. A motion for undersigned counsel to withdraw as appellate defense counsel is pending before this Court.
6. *United States v. Blair*, No. ACM S32778 – The record of trial consists of 7 prosecution exhibits, 22 defense exhibits, and 6 appellate exhibits. The transcript is 187 pages. The appellant is confined. His case was docketed on 22 April 2024.

Since requesting SrA Roberts' third enlargement of time, undersigned counsel completed and filed a grant brief and joint appendix in *United States v. George*, USCA Dkt. No. 24-0206/AF, No. ACM 40397. She also completed and filed a reply brief in *United States v. Benoit, Jr.*, No.

ACM 40508. She further prepared for and participated as a moot judge in six moot arguments for three cases. She also attended two arguments and a Joint Appellate Advocacy Training at Fort Belvoir, Virginia, on 26-27 September 2024. Lastly, she was on leave outside of the local area (over Indigenous Peoples' Day weekend) on 9-14 October 2024.

WHEREFORE, SrA Roberts respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

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 28 October 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS,** United States Air Force,	)	No. ACM 40608
Appellant.	)	22 November 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Dyllin V.E. Roberts, Appellant, hereby moves for a fifth enlargement of time to file his assignments of error. SrA Roberts requests an enlargement for a period of 30 days, which will end on **2 January 2025**. The record of trial was docketed with this Court on 7 May 2024. From the date of docketing to the present date, 199 days have elapsed. On the date requested, 240 days will have elapsed.

On 23 January 2023, 13 April 2023, 13 July 2023, and 9-15 October 2023, at Joint Base Andrews, Maryland, and Barksdale Air Force Base, Louisiana, a general court-martial comprised of officer and enlisted members convicted SrA Roberts, contrary to his pleas, of four specifications of committing sexual abuse of a child involving sexual contact, one specification of sexual assault of a child who has attained the age of 12 years, one specification of sexual abuse of a child involving indecent conduct, and one specification of indecent recording, in violation of Articles 120b and 120c, Uniform Code of Military Justice. R. at 305-06, 1523-24; Charge Sheet. The military judge sentenced SrA Roberts to a reprimand, reduction to the grade of E-1, 14 years' confinement, and a dishonorable discharge. R. at 1626. The convening authority took no action on the findings and sentence, but approved SrA Roberts' request to defer his reduction in grade

until the military judge signed the entry of judgment and waived all automatic forfeitures for a period of six months for the benefit of SrA Roberts' dependent. Convening Authority Decision on Action.

SrA Roberts' 11-volume record of trial consists of 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, and 102 appellate exhibits. The transcript is 1,627 pages. SrA Roberts is confined.

Through no fault of SrA Roberts, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SrA Roberts was (1) advised of his right to a timely appeal, (2) provided an update on the status of undersigned counsel's progress on his case, (3) advised of the request for an enlargement of time, and (4) agrees with the request for an enlargement of time.

Undersigned counsel currently represents 25 clients and is presently assigned 12 cases pending initial brief before this Court. Six cases currently have priority over the present case:

1. *United States v. George*, *Jr.*, USCA Dkt. No. 24-0206/AF – The appellant's reply brief for a granted issue is due to the Court of Appeals for the Armed Forces (CAAF) on Monday, 25 November 2024. Currently, undersigned counsel is dedicating her time to editing the appellant's brief in preparation of filing. Following the submission of appellant's reply brief, undersigned counsel will need to prepare for oral argument via multiple moot arguments and oral argument is scheduled at the CAAF on 10 December 2024.

2. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1,627 pages. The appellant is confined. His case was docketed on 14 December 2023.
3. *United States v. Manzano-Tarin*, USCA Dkt. No. 25-0033/AF – The appellant's supplement to the petition for grant of review is due on 12 December 2024.
4. *United States v. Dawson*, No. ACM 24041 – The record of trial consists of 13 prosecution exhibits, 9 defense exhibits, 1 court exhibit, and 41 appellate exhibits. The transcript is 761 pages. The appellant is not confined. This Court and undersigned counsel received the verbatim transcript on 9 August 2024; undersigned counsel has prioritized this case above others because it was docketed on 4 October 2023.
5. *United States v. Hagen*, No. ACM 40561 – The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. The appellant is not confined. His case was docketed on 26 January 2024.
6. *United States v. Blair*, No. ACM S32778 – The record of trial consists of 7 prosecution exhibits, 22 defense exhibits, and 6 appellate exhibits. The transcript is 187 pages. The appellant is confined. His case was docketed on 22 April 2024.

WHEREFORE, SrA Roberts respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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Air Force Appellate Defense Division
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Email: samantha.golseth@us.af.mil

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 22 November 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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25 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DYLLIN V.E. ROBERTS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME OUT OF TIME ACM 40608 Panel No. 2

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 29 October 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS,** United States Air Force, *Appellant.*	)	No. ACM 40608
	)	16 December 2024

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

Senior Airman (SrA) Dyllin V.E. Roberts, Appellant, hereby moves for a sixth enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SrA Roberts requests an enlargement for a period of 30 days, which will end on **1 February 2025**. The record of trial was docketed with this Court on 7 May 2024. From the date of docketing to the present date, 223 days have elapsed. On the date requested, 270 days will have elapsed.

On 23 January 2023, 13 April 2023, 13 July 2023, and 9-15 October 2023, at Joint Base Andrews, Maryland, and Barksdale Air Force Base, Louisiana, a general court-martial comprised of officer and enlisted members convicted SrA Roberts, contrary to his pleas, of four specifications of committing sexual abuse of a child involving sexual contact, one specification of sexual assault of a child who has attained the age of 12 years, one specification of sexual abuse of a child involving indecent conduct, and one specification of indecent recording, in violation of Articles 120b and 120c, Uniform Code of Military Justice. R. at 305-06, 1523-24; Charge Sheet. The military judge sentenced SrA Roberts to a reprimand, reduction to the grade of E-1, 14 years' confinement, and a dishonorable discharge. R. at 1626. The convening authority took no action on the findings and sentence, but approved SrA Roberts' request to defer his reduction in grade until the military judge signed the entry of judgment and waived all automatic forfeitures for a

period of six months for the benefit of SrA Roberts' dependent. Convening Authority Decision on Action.

SrA Roberts' 11-volume record of trial consists of 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, and 102 appellate exhibits. The transcript is 1,627 pages. SrA Roberts is confined.

Through no fault of SrA Roberts, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SrA Roberts was (1) advised of his right to a timely appeal, (2) provided an update on the status of undersigned counsel's progress on his case, (3) advised of the request for an enlargement of time, and (4) agrees with the request for an enlargement of time.

Undersigned counsel currently represents 22 clients and is presently assigned 10 cases pending initial brief before this Court. Three cases currently have priority over the present case[1]:

1. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1,627 pages. The appellant is confined. His case was docketed on 14 December 2023. Undersigned counsel is currently reviewing the appellant's case and anticipates filing his brief by 7 January 2025.
2. *United States v. Dawson*, No. ACM 24041 – The record of trial consists of 13 prosecution exhibits, 9 defense exhibits, 1 court exhibit, and 41 appellate exhibits. The transcript is 761 pages. The appellant is not confined. This Court and undersigned

[1] In previous enlargements of time, undersigned counsel explained that *United States v. Blair*, No. ACM S32778, had a higher priority for review than SrA Roberts' case. Major Matthew Blyth has now been detailed to review *Blair* in undersigned counsel's place, with the appellant's consent. Therefore, undersigned counsel intends to move to withdraw as appellate defense counsel in *Blair* and has removed the case from her list of priorities.

counsel received the verbatim transcript on 9 August 2024; undersigned counsel has prioritized this case above others because it was docketed on 4 October 2023.

3. *United States v. Hagen*, No. ACM 40561 – The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. The appellant is not confined. His case was docketed on 26 January 2024.

Since filing SrA Roberts' fifth enlargement of time on 22 November 2024, undersigned counsel completed in *United States v. George*, *Jr.*, USCA Dkt. No. 24-0206/AF, at the U.S. Court of Appeals for the Armed Forces (CAAF): (1) the appellant's reply brief on 25 November 2024; (2) moot arguments on 26 November 2024, 3 December 2024, and 6 December 2024; (3) argument at CAAF on 10 December 2024; and (4) preparation for each moot argument and argument. On 12 December 2024, undersigned counsel also filed the appellant's supplement to the petition for grant of review in *United States v. Manzano-Tarin*, USCA Dkt. No. 25-0033/AF, and a consent motion for reconsideration and suggestion for *en banc* proceedings in *United States v. Norris*, No. ACM 24045. She further provided three peer reviews to her colleagues and provided edits to civilian counsel's substantive motions in *United States v. Matthew*, No. ACM 39796 (reh). Additionally, undersigned counsel also needed to attend to other matters beyond her docket because undersigned counsel's mother was unexpectedly hospitalized. Since 22 November 2024, there was also a federal holiday on 28 November 2024 and family day on 29 November 2024. Moreover, during the currently granted enlargement of time, when undersigned counsel will be working on *Casillas*, there will be two federal holidays (25 December 2024 and 1 January 2025) and two family days (26 December 2024 and 2 January 2025).

Additionally, between now and the requested date, undersigned counsel anticipates preparing for and participating as a moot judge in six moot arguments to help her colleagues prepare for upcoming arguments at CAAF (which she anticipates will require a total of 10+ hours). Undersigned counsel will also be on leave from 16-21 January 2025 (over Presidents Day weekend) for a family event out of the local area (this will be undersigned counsel's opportunity to see family as she anticipates working between the Thanksgiving, Christmas, and New Years holidays) to complete the appellant's brief in *Casillas*.

WHEREFORE, SrA Roberts respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

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 16 December 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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18 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DYLLIN V.E. ROBERTS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40608 Panel No. 2

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

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

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 18 December 2024.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS,** United States Air Force,	)	No. ACM 40608
Appellant.	)	22 January 2025

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

Senior Airman (SrA) Dyllin V.E. Roberts, Appellant, hereby moves for a seventh enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SrA Roberts requests an enlargement for a period of 30 days, which will end on **3 March 2025**. The record of trial was docketed with this Court on 7 May 2024. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 23 January 2023, 13 April 2023, 13 July 2023, and 9-15 October 2023, at Joint Base Andrews, Maryland, and Barksdale Air Force Base, Louisiana, a general court-martial comprised of officer and enlisted members convicted SrA Roberts, contrary to his pleas, of four specifications of committing sexual abuse of a child involving sexual contact, one specification of sexual assault of a child who has attained the age of 12 years, one specification of sexual abuse of a child involving indecent conduct, and one specification of indecent recording, in violation of Articles 120b and 120c, Uniform Code of Military Justice. R. at 305-06, 1523-24; Charge Sheet. The military judge sentenced SrA Roberts to a reprimand, reduction to the grade of E-1, 14 years' confinement, and a dishonorable discharge. R. at 1626. The convening authority took no action on the findings and sentence, but approved SrA Roberts' request to defer his reduction in grade

until the military judge signed the entry of judgment and waived all automatic forfeitures for a period of six months for the benefit of SrA Roberts' dependent. Convening Authority Decision on Action.

SrA Roberts' 11-volume record of trial consists of 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, and 102 appellate exhibits. The transcript is 1,627 pages. SrA Roberts is confined.

Through no fault of SrA Roberts, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SrA Roberts was (1) advised of his right to a timely appeal, (2) provided an update on the status of undersigned counsel's progress on his case, (3) advised of the request for an enlargement of time, and (4) agrees with the request for an enlargement of time.

Undersigned counsel currently represents nineteen clients and is presently assigned seven cases pending initial brief before this Court. One case currently has priority over the present case:

> *United States v. Hagen*, No. ACM 40561 – The record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. The appellant is not confined. His case was docketed on 26 January 2024.

Since filing SrA Roberts' sixth enlargement of time on 16 December 2024, undersigned counsel completed a brief on behalf of the appellant in *United States v. Casillas*, No. ACM 40551. This brief was extremely time intensive due to the size of the record and number of issues raised. Moreover, undersigned counsel filed four motions related to the filing of the brief in *Casillas*. Since filing SrA Roberts' sixth enlargement of time, undersigned counsel also filed a motion for

reconsideration and suggestion for en banc proceedings in *In re Alton*, Misc. Dkt. No. 2024-12, on 3 January 2025. During this time, there were also three federal holidays (25 December 2024, 1 January 2025, 20 January 2025), three family days (26 December 2024, 2 January 2025, 17 January 2025), and one day of mourning (9 January 2025) and this Court and undersigned counsel's office were closed. Further, undersigned counsel helped her colleagues to prepare for oral argument as a moot judge in multiple moot arguments and was required to attend argument on 14 January 2025.

WHEREFORE, SrA Roberts respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

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 22 January 2025.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

23 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DYLLIN V.E. ROBERTS, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40608 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time 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 nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS,** United States Air Force,	)	No. ACM 40608
Appellant.	)	21 February 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 eighth enlargement of time to file his assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **2 April 2025**. The record of trial was docketed with this Court on 7 May 2024. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

On 23 January 2023, 13 April 2023, 13 July 2023, and 9–15 October 2023, at Joint Base Andrews, Maryland, and Barksdale Air Force Base, Louisiana, a general court-martial comprised of officer and enlisted members convicted Appellant, contrary to his pleas, of four specifications of committing sexual abuse of a child involving sexual contact, one specification of sexual assault of a child who has attained the age of twelve years, one specification of sexual abuse of a child involving indecent conduct, and one specification of indecent recording, in violation of Articles 120b and 120c, Uniform Code of Military Justice. Trial Tr. at 305–06, 1523–24; Charge Sheet. The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, fourteen years' confinement, and a dishonorable discharge. Trial Tr. at 1626. The convening authority took no action on the findings and sentence, but approved Appellant's request to defer his reduction in grade until the military judge signed the entry of judgment and waived all automatic

forfeitures for a period of six months for the benefit of Appellant's dependent. Convening Authority Decision on Action.

The eleven-volume record of trial includes thirty prosecution exhibits, three defense exhibits, one court exhibit, and 102 appellate exhibits. The transcript is 1,627 pages. Appellant is confined.

Through no fault of Appellant, undersigned counsel has been unable to prepare a brief in Appellant's case. An enlargement of time is necessary to allow counsel to prepare such a brief. Appellant was advised of his right to a timely appeal. Appellant has been provided an update on the status of undersigned counsel's progress on this case. Appellant was advised of the request for this enlargement of time. Appellant provided limited consent to disclose a confidential communication with counsel wherein Appellant consented to the request for this enlargement.

In accordance with A.F. Ct. Crim. App. R. 23.2(m)(6), counsel notes the following. This is one of six cases pending initial briefing before this Court to which the undersigned counsel is assigned. Two of those cases—both fully contested—were docketed before this case (*United States v. Slayton*, No. ACM 40583, and *United States v. Kindred*, No. ACM 40607). The undersigned counsel has prioritized *Slayton* ahead of this case. The undersigned counsel is also assigned to a case pending a supplement to the petition for grant of review at the Court of Appeals for the Armed Forces with priority above this case (*United States v. Ericson*, USCA Dkt. No. 25-0096/AF). His participation in that case is caused by the extraordinary circumstance of the appellant's detailed military appellate defense counsel (a Reservist) being prohibited from performing military duty in light of the geographical distance between her home of record and assigned duty station at Joint Base Andrews, Maryland, and her status as a federal government employee in her civilian capacity, which prevents her from representing the appellant other than in a military duty status. *See* 18 U.S.C. § 205.

The undersigned counsel has reviewed more than 1,400 pages of the 1,627-page transcript and has identified issues that will be briefed to this Court. Counsel will almost certainly complete review of the unsealed portions of the record and transcript before the current due date of 3 March 2025. Additional time will be required for research, briefing, and consultation.

WHEREFORE, SrA Roberts respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

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 February 2025.

Respectfully submitted,

[redacted]

Dwight H. Sullivan
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

24 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DYLLIN V.E. ROBERTS, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40608 Panel No. 2

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

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

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

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

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

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

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel
Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40608**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dyllin V.E. ROBERTS	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 6 March 2025, Appellant's counsel submitted a Consent Motion to Examine Sealed Materials, requesting counsel for both parties be allowed to examine certain portions of the record of trial ordered sealed, specifically Prosecution Exhibit 12 and Appellate Exhibits XLVII–LIII. Appellant's counsel avers the parties at trial had access to these sealed exhibits, and that the Government consents to the relief sought in this motion. Finally, Appellant's counsel asserts "review of the sealed material is necessary to conduct a complete review of the record of trial and to be able to advocate competently on Appellant's behalf."

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." R.C.M. 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2024 ed.).

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 11th day of March, 2025,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibit 12 and Appellate Exhibits XLVII–LIII** subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**APPELLANT'S CONSENT MOTION TO EXAMINE SEALED MATERIAL**
v.	)	
	)	Before Panel 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS,** United States Air Force, *Appellant*	)	No. ACM 40608
	)	6 March 2025

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

Pursuant to Rules 3.1(c) and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial 1113(b)(3(B)(i), Appellant moves for both parties to examine the following sealed material:

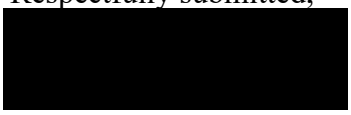
- Prosecution Exhibit 12
- Appellate Exhibits XLVII through LIII

All parties at trial had access to the sealed exhibits. *See* Trial Tr. at 188–92, 1084–86. Appellate defense counsel's review of the sealed material is necessary to conduct a complete review of the record of trial and to be able to advocate competently on Appellant's behalf.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by Appellant.

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

Respectfully submitted,

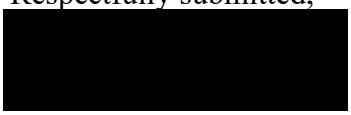


Dwight H. Sullivan
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

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 6 March 2025.

Respectfully submitted,



Dwight H. Sullivan
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	
	)	Before Panel No. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS,** United States Air Force, *Appellant.*	)	No. ACM 40608
	)	24 March 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 a ninth enlargement of time to file his assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **2 May 2025**. The record of trial was docketed with this Court on 7 May 2024. From the date of docketing to the present date, 321 days have elapsed. On the date requested, 360 days will have elapsed.

On 23 January 2023, 13 April 2023, 13 July 2023, and 9–15 October 2023, at Joint Base Andrews, Maryland, and Barksdale Air Force Base, Louisiana, a general court-martial comprised of officer and enlisted members convicted Appellant, contrary to his pleas, of four specifications of committing sexual abuse of a child involving sexual contact, one specification of sexual assault of a child who has attained the age of twelve years, one specification of sexual abuse of a child involving indecent conduct, and one specification of attempted indecent recording, in violation of Articles 120b and 80, Uniform Code of Military Justice. Trial Tr. at 305–06, 1523–24; Charge Sheet. The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, fourteen years' confinement, and a dishonorable discharge. Trial Tr. at 1626. The convening authority took no action on the findings or sentence, but approved Appellant's request to defer his reduction in grade until the military judge signed the entry of judgment and waived all

automatic forfeitures for a period of six months for the benefit of Appellant's dependent. Convening Authority Decision on Action.

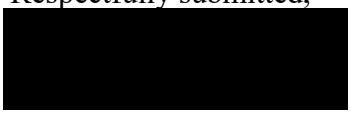
The eleven-volume record of trial includes thirty prosecution exhibits, three defense exhibits, one court exhibit, and 102 appellate exhibits. The transcript is 1,627 pages. Appellant is confined.

The undersigned counsel has completed a review of the trial transcript, including the sealed transcripts of the closed sessions, and has reviewed the sealed exhibits. He has identified multiple issues requiring further research and briefing. He has begun to draft a brief in this case. Barring unforeseen circumstances, he expects that brief to be completed during the requested enlargement period if this Court were to grant this motion. Appellant was advised of his right to a timely appeal. Appellant has been provided an update on the status of undersigned counsel's progress on this case. Appellant was advised of the request for this enlargement of time. Appellant provided limited consent to disclose a confidential communication with counsel wherein Appellant consented to the request for this enlargement.

In accordance with A.F. Ct. Crim. App. R. 23.2(m)(6), counsel notes the following. This is one of five cases pending initial briefing before this Court to which the undersigned counsel is assigned. Four of those cases were fully contested. The average length of the transcript in those five cases is 1,327 pages. This case is the undersigned counsel's highest priority.

WHEREFORE, SrA Roberts respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

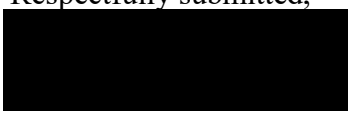


Dwight H. Sullivan
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

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 24 March 2025.

Respectfully submitted,



Dwight H. Sullivan
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
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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. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS,** United States Air Force, *Appellant.*	)	No. ACM 40608
	)	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 opposition to Appellant's Motion for Enlargement of Time to file an Assignments of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstance, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

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CERTIFICATE OF FILING AND SERVICE

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

VANESSA BAIROS, Maj, USAF
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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 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS** United States Air Force, *Appellant.*	)	No. ACM 40608
	)	2 May 2025

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

Assignments of Error[1]

I.

The Government failed to docket this case with this Court within the 150-day standard established by *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020), warranting a modest, proportional reduction in sentence under this Court's Article 66(d)(2), Uniform Code of Military Justice, authority.

II.

The portion of the sentence providing for confinement for fourteen years for Charge I, Specification 5 is inappropriately severe.

III.

The entry of judgment erroneously recites the Uniform Code of Military Justice article alleged by Charge II to which Appellant pleaded not guilty and of which he was found guilty.

IV.

Appellant's constitutional rights were violated when he was convicted of offenses with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously that he is guilty.[2]

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[1] In addition to the four assignments of error noted below, Appellant personally raises nine assignments of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix.

[2] The defense raises this assignment of error for issue preservation purposes.

Statement of the Case

Appellant, Senior Airman Dyllin V. E. Roberts, U.S. Air Force, was tried by a general court-martial convened by the Commander, Fifth Air Force, at Joint Base Andrews, Maryland; Kadena Air Base, Japan; and Barksdale Air Force Base, Louisiana, on 23 January, 13 April, 13 July, and 9 through 15 October 2023. Contrary to Appellant's pleas, a panel consisting of officer and enlisted members found him guilty of one specification of violating Article 80 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880, and six specifications of violating Article 120b of the UCMJ, 10 U.S.C. § 920b.[3] The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, a dishonorable discharge, and confinement for a total of fourteen years.[4] The convening authority took no action on the findings or sentence, but approved Appellant's request to defer his reduction in grade until the military judge signed the entry of judgment and waived all automatic forfeitures for a period of six months for the benefit of Appellant's dependent.[5] The record of trial was docketed with this Court on 7 May 2024, 205 days after the sentence was adjudged.[6]

Statement of Facts

HC is Appellant's daughter.[7] Appellant was sixteen years old when she was born.[8] HC was initially raised by a grandmother, then lived with Appellant for approximately a month.[9] Starting just before she turned six, HC lived with two of her great-grandparents.[10] In December 2020, when

[3] Trial Tr. at 305–06, 1523–24; Charge Sheet; App. Ex. LXI; App. Ex. LXVI.
[4] Trial Tr. at 1626.
[5] Convening Authority Decision on Action (16 Nov. 2023).
[6] https://afcca.law.af.mil/docket.html, last accessed 1 May 2025.
[7] Trial Tr. at 698.
[8] *Id.* at 906.
[9] *Id.* at 697–98.
[10] *Id.* at 907.

she was twelve years old, HC moved to Okinawa to live with Appellant, who was then assigned at Kadena Air Base as a senior airman.[11] HC moved into an apartment at Camp Foster with Appellant.[12] She turned thirteen on 27 January 2021.[13]

HC testified that in approximately February 2021, Appellant began to touch her sexually.[14] At first, according to HC, he touched and squeezed her breasts.[15] She then described a series of escalating contact sexual encounters that occurred three to four times a week.[16] According to HC, these encounters culminated on the night of 24 to 25 July 2021, when Appellant digitally penetrated what she called her "period hole" for five to ten seconds.[17] She also alleged that over the course of that night, he touched her breasts, bit both of her ears, kissed and sucked her nipples, and twice kissed her on the lips.[18] The following morning, HC sent an electronic message to her friend TA saying Appellant had been "sexually touching" her.[19] HC arranged to spend the night at TA's home.[20] Before TA and her parents arrived to pick her up, HC took a shower.[21]

After going to TA's home and speaking with her mother, HC went to an Air Force Office of Special Investigations (OSI) office.[22] TA's mother (Ms. A.) was with HC when she was

[11] *Id.* at 697, 699–701, 704, 906.
[12] *Id.* at 704, 889.
[13] *Id.*at 906.
[14] *Id.* at 709.
[15] *Id.* at 709.
[16] *Id.* at 709–14, 733–36.
[17] *Id.* at 754–55.
[18] *Id.* at 755, 759.
[19] *Id.* at 763; Pros. Ex. 1 at page 2 of 3.
[20] Trial Tr. at 763.
[21] *Id.* at 763, 785–86, 788, 826, 895.
[22] *Id.* at 788–89, 890–91, 954.

interviewed by OSI agents.[23] The following day, HC was interviewed by OSI agents a second time and then received a sexual assault medical forensic examination.[24]

HC also testified that at some point after she moved in with Appellant, he started to enter the apartment's sole bathroom while she showered.[25] She testified that on one occasion approximately a week before 25 July, she saw Appellant's phone over the shower curtain.[26] She testified that she "kind of freaked out" and asked Appellant for his phone.[27] According to HC, after Appellant asked her if her hands were dry and told her to give him a second, he gave her his phone.[28] She looked at the phone's photo gallery and saw no photographs taken while she was in the shower; she then handed the phone back to Appellant.[29] At trial, the prosecution called a digital forensic examiner, as a witness.[30] He testified that he found two deleted photographs in Appellant's cellphone taken on 17 July 2021 at 1644 hours and then moved to the phone's trash a little more than a minute later.[31] Trial Tr. at 1252; Pros. Ex. 19. One of the photographs showed a shower curtain rod, part of the inside of a shower, and what appears to be a showerhead; no person is visible in the image.[32] The other is a blurry image of what appears to be a shower curtain similar in appearance to another picture of the shower curtain in Appellant's apartment.[33] The Government

[23] *Id.* at 891, 970.
[24] *Id.* at 954–55, 970, 1016, 1018, 1047; Pros. Ex. 13.
[25] Trial Tr. at 740–41.
[26] *Id.* at 743–44.
[27] *Id.* at 743.
[28] *Id.* at 743–44.
[29] *Id.* at 744, 816–17.
[30] *Id.* at 1228.
[31] *Id.* at 1252; see also Pros. Exs. 19, 21.
[32] Pros. Ex. 19, page 1 of 2.
[33] *Id.* at page 2 of 2. *See also* Pros. Ex. 6, Trial Tr. at 745–49.

originally charged Appellant with an Article 120c indecent recording offense.[34] Over defense objection, the military judge allowed the prosecution to amend the charge to allege an attempt.[35]

The members found Appellant guilty of divers occasions of committing lewd acts upon HC by touching her breast with an intent to gratify his sexual desire; one instance of committing a lewd act upon HC by touching her breast with his mouth with an intent to gratify his sexual desire; divers occasions of committing lewd acts upon HC by touching, through the clothing, her genitalia with his finger with an intent to gratify his sexual desire; one instance of committing a sexual act upon HC by intentionally touching, not through the clothing, her genitalia with his finger with an intent to gratify his sexual desire; one occasion of committing a sexual act upon HC by penetrating her vulva with his finger with an intent to gratify his sexual desire; divers occasions of committing a lewd act upon HC by licking and biting her ear; and attempting to make a recording of the private area of HC without her consent and under circumstances in which she had a reasonable expectation of privacy.[36]

The military judge was the sentencing authority.[37] In addition to adjudging a dishonorable discharge, reduction to the grade of E-1, and a reprimand, the military judge imposed a term of confinement for each of the seven specifications of which Appellant was convicted, all to run concurrently.[38] The longest period of adjudged confinement was fourteen years for the digital penetration offense.[39]

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[34] Charge II, Charge Sheet.
[35] App. Exs. LIX, LX, LXI; Trial Tr. at 256–57.
[36] Trial Tr. at 1523–24.
[37] *Id.* at 1526.
[38] *Id.* at 1626.
[39] *Id.*

Argument

Assignment of Error I

The Government failed to docket this case with this Court within the 150-day standard established by *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020), warranting a modest, proportional reduction in sentence under this Court's Article 66(d)(2), Uniform Code of Military Justice, authority.

A. `Additional Facts

Appellant was sentenced on 15 October 2023.[40] The military judge executed the entry of judgment on 21 December 2023.[41] The case was docketed with this Court on 7 May 2024,[42] 205 days after Appellant was sentenced.

B. Standard of Review

A Court of Criminal Appeals necessarily considers de novo whether excessive post-trial delay warrants relief under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

C. Law and Analysis

This case is marred by presumptively unreasonable post-trial delay. In *United States v. Livak*,[43] this Court considered the standards for presuming unreasonable delay that the Court of Appeals for the Armed Forces prescribed in *United States v. Moreno*[44] and adapted them to the reformed post-trial processing system enacted by the Military Justice Act of 2016.[45] This Court concluded that "the specific requirement in *Moreno* which called for docketing to occur within 30 days of action no longer helps us determine an unreasonable delay under the new procedural

[40] Trial Tr. at 1626.
[41] Entry of Judgment (21 Dec. 2023).
[42] AFCCA Court Docket, available at https://afcca.law.af.mil/docket.html, last accessed 21 Apr. 2025.
[43] *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020).
[44] *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006).
[45] Military Justice Act of 2016, Division E, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001-42, 130 Stat. 2000, 2894–968 (2016).

rules."[46] Instead, this Court determined that under the new system, it is appropriate to "apply the aggregate standard threshold the majority established in *Moreno*: 150 days from the day Appellant was sentenced to docketing with this court."[47] This Court explained, "This 150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in *Moreno*."[48] Here, the Government exceeded that 150-day threshold by fifty-five days. That delay was presumptively unreasonable.[49]

This Court is statutorily empowered to "provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial after the judgment was entered into the record."[50] That provision codified the authority the Court of Appeals for the Armed Forces previously recognized for Courts of Criminal Appeals to "grant sentence relief . . . where there has been unreasonable post-trial delay," even absent either prejudice or extraordinary circumstances.[51] While asserting his constitutional right to timely completion of his appeal, Appellant does not allege that the delay thus far has violated his constitutional due process right to timely appeal. Rather, Appellant seeks relief under this Court's express statutory authority to grant "appropriate relief" for excessive post-trial delay.[52]

This Court has identified non-exhaustive factors it considers when deciding whether relief for post-trial delay is appropriate.[53] Two of the factors ask, "Is there any evidence of institutional

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[46] *Livak*, 80 M.J. at 633.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).
[51] *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). *See also United States v. Valentin-Andino*, __ M.J. __, No. 24-0208, 2025 CAAF LEXIS 248, at *10 n.4 (C.A.A.F. Mar. 31, 2025) (holding that *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), "and its progeny have been superseded by Article 66(d)(2)").
[52] Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).
[53] *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015).

neglect concerning timely post-trial processing, either across the service or at a particular installation?" and "Given the passage of time, can this court provide meaningful relief in this particular situation?"[54] Here, those factors favor a modest, proportional reduction in Appellant's sentence to address the presumptively unreasonable post-trial delay.

Facially unreasonable post-trial delay is all-too-common in Air Force military justice practice. As this Court observed in *United States v. Valentin-Andino*, the unduly prolonged post-trial processing in that case was "not an aberration."[55] Rather, this Court noted that post-trial processing errors "are happening at an alarming frequency in the Air Force," leading this Court to "find a systemic problem indicating institutional neglect."[56] In the almost-eleven months since this Court decided *Valentin-Andino*, still more cases suffering from unreasonable post-trial delay have come before it.[57] In November this Court observed in *United States v. Cassaberry-Folks*:

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[54] *Id.*

[55] *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. June 7, 2024), *aff'd on other grounds*, __ M.J. __, No. 24-0208, 2025 CAAF LEXIS 248 (C.A.A.F. Mar. 31, 2025).

[56] *Id*.

[57] *See, e.g.*, *United States v. Cook*, No. ACM 40333, 2024 CCA LEXIS 276 (A.F. Ct. Crim. App. July 3, 2024) (200 days between sentencing and docketing; no relief granted), *petition granted on other grounds*, __ M.J. __, No. 24-0221/AF, 2025 CAAF LEXIS 65 (C.A.A.F. Jan. 29, 2025); *United States v. Hennessy*, No. ACM 40439, 2024 CCA LEXIS 343 (A.F. Ct. Crim. App. Aug. 20, 2024) (412 days between sentencing and docketing; relief granted), *vacated and reconsidered on other grounds*, 2024 CCA LEXIS 494 (A.F. Ct. Crim. App. Oct. 9, 2024) (order), *upon reconsideration*, No. ACM 40439, 2024 CCA LEXIS 503 (A.F. Ct. Crim. App. Nov. 25, 2024), *reconsideration denied*, No. ACM 40439 (A.F. Ct. Crim. App. Jan. 10, 2025) (order), *certificate for review filed on other grounds*, __ M.J. __, No. 25-0112/AF, 2025 CAAF LEXIS 183 (C.A.A.F. Mar. 11, 2025), *petition filed*, __ M.J. __, No. 25-0113/AF, 2025 CAAF LEXIS 184 (C.A.A.F. Mar. 11, 2025); *United States v. Byrne*, No. ACM 40391, 2024 CCA LEXIS 346 (A.F. Ct. Crim. App. Aug. 22, 2024) (290 days between sentencing and docketing; no relief granted), *petition denied*, __ M.J. __, No. 25-0014/AF, 2024 CAAF LEXIS 821 (C.A.A.F. Dec. 17, 2024); *United States v. Folts*, No. ACM 40322, 2024 CCA LEXIS 353 (A.F. Ct. Crim. App. Aug. 26, 2024) (362 days between sentencing and docketing; no relief granted), *petition granted on other grounds*, __ M.J. __, No. 25-00043/AF, 2024 CAAF LEXIS 170 (C.A.A.F. Mar. 5, 2025); *United States v. Scott*, No. ACM 40411. 2024 CCA LEXIS 415 (A.F. Ct. Crim. App. Oct. 7, 2024) (297 days

> This court has recently been obliged to grapple with a series of cases involving post-trial delay at various stages, all of which raise serious questions as to the scope of potential institutional neglect within the Air Force, particularly when it comes to timely and accurate assembly of records of trial and forwarding of verbatim trial transcripts.[58]

In *Cassaberry-Folks*, this Court "fashion[ed] a remedy that significantly reduce[d] Appellant's sentence."[59]

This case provides still more evidence of institutional neglect. In *Cassaberry-Folks*, this Court aptly observed that "[f]or the sake of Appellant, and for the health of the entire Air Force military justice system, an appropriate remedy is required."[60] More than one dose of medicine is necessary to cure the persistent disease of unreasonable post-trial delay.

"Excellence In All We Do" is an Air Force core value.[61] Attention to detail is an essential aspect of Air Force culture.[62] By any objective measure, post-trial processing of Air Force courts-martial has often fallen short of what is acceptable in the Department of the Air Force. Such repeated failures are intolerable. Yet, to this point, they have largely been tolerated.[63] Article

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between sentencing and docketing; no relief granted), *petition denied*, __ M.J. __, No. 25-0038/AF, 2025 CAAF LEXIS 250 (C.A.A.F. Apr. 1, 2025); *United States v. Nakken*, No. ACM S32767, 2024 CCA LEXIS 420 (A.F. Ct. Crim. App. Oct. 10, 2024) (222 days between sentencing and docketing; no relief granted); *United States v. Atencio*, No. ACM S32783, 2024 CCA LEXIS 543 (A.F. Ct. Crim. App. Dec. 20, 2024) (166 days between sentencing and docketing; no relief granted); *United States v. Floyd*, No. ACM S32784, 2025 CCA LEXIS 31 (A.F. Ct. Crim. App. Feb. 3, 2025) (155 days between sentencing and docketing; no relief granted); *United States v. Covitz*, No. ACM 40193 (reh), 2025 CCA LEXIS 105 (A.F. Ct. Crim. App. Mar. 19, 2025) (155 days between sentencing and docketing; no relief granted).

[58] *United States v. Cassaberry-Folks*, No. ACM 40444, 2024 CCA LEXIS 500, at *43 (A.F. Ct. Crim. App. Nov. 22, 2024).

[59] *Id.* at *44.

[60] *Id.* at *51.

[61] AIR FORCE HANDBOOK 1 AIRMAN, ¶ 1.3.3 (15 Feb. 2025).

[62] *See, e.g.*, Airman Sean M. Crowe, Attention to detail: difference between life, death, Air Mobility Command (May 9, 2013), available at https://www.amc.af.mil/News/Commentaries/Display/Article/149290/attention-to-detail-difference-between-life-death/.

[63] *See supra* note 57.

66(d)(2), UCMJ, anoints this Court as the guardian of the Air Forces' core values for post-trial processing purposes. Here, this Court can fulfill that function by applying a proportional remedy that will signal this Court's unwillingness to tolerate further instances of unreasonable appellate delay, thereby incentivizing greater institutional vigilance. Accordingly, this Court should order the appropriate, proportional remedy of decreasing Appellant's confinement by the same number of days the Government exceeded the 150-day standard for docketing: fifty-five.

WHEREFORE, this Court should disapprove at fifty-five days of Appellant's confinement.

Assignment of Error II

The portion of the sentence providing for confinement for fourteen years for Charge I, Specification 5 is inappropriately severe.

A. Additional Facts

The members found Appellant guilty of six specifications of violating Article 120b, UCMJ.[64] Charge I, Specification 5 alleged that Appellant, "on divers occasions," committed "a sexual act upon [HC], a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating her vulva with his finger, with an intent to gratify his sexual desire."[65] That was the only alleged penetrative offense.[66] The members found Appellant guilty of that offense except for the words "on divers occasions" and substituting therefore "on one occasion" with a specific date.[67] During sentencing argument, the trial counsel addressed the "appropriate sentence" for each of the specifications of which Appellant was convicted. The trial counsel argued that the "appropriate sentence" for Charge I, Specification 5 was "13 years," the longest of the

[64] Trial Tr. at 1523. Four of the findings of guilty involved exceptions and substitutions.
[65] Charge Sheet.
[66] *Id.*
[67] Trial Tr. at 1523.

Government's proposed periods of confinement.[68] The trial counsel also argued for a two-year sentence for Charge II and its specification.[69] The trial counsel proposed that the confinement for all Charge I specifications run concurrently and that the confinement for Charge II and its specification run consecutively for a total of fifteen years' confinement.[70] The military judge imposed fourteen years of confinement for Charge I, Specification 5, the longest term of confinement he adjudged for any specification.[71] The military judge ordered that all periods of confinement run concurrently, resulting in a total of fourteen years' confinement.[72]

B. Standard of Review

The appropriateness of Appellant's sentence is subject to de novo review by this Court.[73]

C. Law and Analysis

This case—in which every finding of guilty was for an offense occurring between 1 February and 25 July 2021—is subject to this Court's sentence appropriateness review authority under the version of Article 66(d)(1), UCMJ, enacted by section 542(b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021.[74] Under that standard, this "Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds

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[68] *Id.* at 1608.
[69] *Id.*
[70] *Id.* at 1609.
[71] *Id.* at 1626.
[72] *Id.*
[73] *United States v. Cabuhat*, 83 M.J. 755, 770 (A.F. Ct. Crim. App. 2023) (en banc), *petition denied*, 84 M.J. 275 (C.A.A.F. 2024).
[74] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611 (2021). The amendment of Article 66(d)(1) enacted by section 539E of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021), applies only to cases in which all findings of guilty are for offenses occurring after December 27, 2023. *Id.* at § 539E(f), 135 Stat. at 1706. Hence, that amendment is inapplicable to this case.

correct in law and fact and determines, on the basis of the entire record, should be approved."[75]

Both Congress and the President have directed that the punishment imposed by a court-martial shall be "sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces."[76] A period of confinement greater than thirteen years for Charge I, Specification 5 is not "necessary" to promote justice and maintain good order and discipline.

The trial counsel requested a thirteen-year term of confinement for Charge I, Specification 5.[77] The trial counsel of a general court-martial "prosecute[s] in the name of the United States."[78] While "[m]ilitary judges are not rubber stamps of the Government,"[79] the Government's view of what sentence is "not greater than necessary[] to promote justice and to maintain good order and discipline in the armed forces" should be a weighty factor. Indeed, in the course of applying its sentence appropriateness powers to reduce an adjudged sentence, this Court has highlighted the fact that the adjudged sentence exceeded that recommended by the trial counsel.[80]

Confinement for thirteen years is a significant sentence. It is even more significant when

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[75] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. at 3611.
[76] UCMJ art. 56(c)(1), 10 U.S.C. § 856(c)(1) (that language appeared in Article 56(c)(1) both before and after the National Defense Authorization Act for Fiscal Year 2022's amendment of article 56; Pub. L. No. 117-81, § 539E(c), 135 Stat. at 1701); Rule for Courts-Martial (R.C.M.) 1002(f), *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.). A substantively identical provision appears in R.C.M. 1002(c) of the 2024 edition of the *MCM*. Both the statute and the R.C.M. list certain factors that shall be taken into consideration in applying that standard.
[77] Trial Tr. at 1608.
[78] UCMJ art. 38(a), 10 U.S.C. § 838(a). The version of Article 38, UCMJ, in effect at the time of trial is the same as the current version.
[79] *United States v. Arroyo*, No. ACM 40321 (f rev), 2024 CAAF LEXIS 242, at *37 (A.F. Ct. Crim. App. June 18, 2024) (Ramírez, J., concurring in part/dissenting in part).
[80] *United States v. Douglas*, No. ACM 40324 (f rev), 2024 CCA LEXIS 254, at *8–9 (A.F. Ct. Crim. App. June 27, 2024).

coupled with a dishonorable discharge and reduction from E-4 to E-1.[81] Courts-martial must not adjudge a sentence greater than "necessary" to promote justice and maintain good order and discipline in the armed forces.[82] Here, neither justice nor good order and discipline would suffer by limiting Appellant's confinement for Charge I, Specification 5 to the length requested by the United States' representative at trial. Absent such a necessity, a longer sentence is inappropriate.

While the total confinement adjudged by the military judge was less than the total confinement recommended by the trial counsel, that was a result of differing views on the distinct question of whether certain periods of confinement should run concurrently or consecutively. At the time of Appellant's court-martial, the law required military judges to adjudge confinement on a segmented basis.[83] A Court of Criminal Appeals "must review the appropriateness of each segmented period of confinement and each segmented amount of any fine."[84] A Court of Criminal Appeals must also review the appropriateness of the entire sentence[85] and may conduct an abuse of discretion review concerning the military judge's concurrent versus consecutive determination.[86] Thus, this Court must make an individualized determination of the appropriateness of the confinement adjudged for Charge I, Specification 5 separate from any consideration of the total amount of confinement resulting from the consecutive versus concurrent determination. In conducting its review of the appropriateness of the segmented confinement adjudged for Charge I, Specification 5, this Court should hold that no more than thirteen years'

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[81] *See* Trial Tr. at 1626.
[82] UCMJ art. 56(c)(1), 10 U.S.C. § 856(c)(1); R.C.M. 1002(f) (2019 *MCM*).
[83] R.C.M. 1002(d)(2)(A) (2019 MCM).
[84] *United States v. Flores*, 84 M.J. 277, 281 (C.A.A.F. 2024).
[85] *Id.* at 282.
[86] *See, e.g.*, *United States v. Braum*, No. ACM 40434, 2024 CCA LEXIS 419, at *35 (A.F. Ct. Crim. App. Oct. 10, 2024) ("We review a military judge's determination that a specification's confinement term should run concurrently or consecutively to another specification for abuse of discretion.").

confinement is appropriate.

WHEREFORE, this Court should disapprove confinement in excess of thirteen years for Charge I, Specification 5.

Assignment of Error III

The entry of judgment erroneously recites the UCMJ article alleged by Charge II to which Appellant pleaded not guilty and of which he was found guilty.

A. Additional Facts

The second charge originally alleged a violation of Article 120c, UCMJ.[87] The specification alleged that Appellant "knowingly made a recording of the private area of [HC], without her consent and under circumstances in which she had a reasonable expectation of privacy."[88] The prosecution moved in limine to amend the charge to allege instead an attempt in violation of Article 80, UCMJ.[89] The defense opposed the motion, arguing that it was a major change.[90] The military judge granted the prosecution's motion.[91] Consistent with the military judge's ruling, on 10 October 2023, the special trial counsel made handwritten revisions to the charge sheet to change Charge II from alleging an Article 120c offense to alleging an Article 80 offense, narrow the charged period, and add the words "attempt to" in the specification.[92]

On the "flyer," Charge II alleges an Article 80 offense.[93] During his findings instructions, the military judge informed the members that "[i]n the Specification of Charge II, the accused is

[87] Charge Sheet, Charge II.
[88] *Id.*
[89] App. Ex. LIX.
[90] App. Ex. LX.
[91] App. Ex. LXI.
[92] Charge Sheet, Charge II.
[93] App. Ex. LXVI.

charged with the offense of Attempted Indecent Recording, in violation of Article 80, UCMJ."[94] The members found Appellant guilty of Charge II and its specification.[95]

In listing the "Arraigned Offense(s)," the statement of trial results provides for Charge II, "Art. 120c (amended after arraignment to delete '120c' and replace it with '80')."[96] The same document also notes the changes to the specification.[97] The entry of judgment, however, lists Charge II as "Art. 120c" with no indication that it had been amended.[98] The plea is listed as "NG" and the finding as "G."[99] On the other hand, the entry of judgment's recitation of Charge II's specification includes the post-arraignment amendments.[100]

B. Standard of Review

Proper completion of post-trial processing is a question of law this Court reviews de novo.[101]

C. Law and Analysis

An entry of judgment must include "the plea of the accused" for each finding and specification and "the findings or other disposition of each charge and specification."[102] Here, the entry of judgment misstates the finding as to Charge II, which was guilty of violating Article 80, UCMJ (Attempts) rather than Article 120c, UCMJ (Other sexual misconduct). This Court has the authority to modify the judgment.[103] This Court should exercise that authority by directing

[94] Trial Tr. at 1441; App. Ex. XCIX at 4. There are minor stylistic differences between the versions included in the trial transcript and in App. Ex. XCIX. The quotation is based on the former.
[95] Trial Tr. at 1524; App. Ex. XCVIII at 2.
[96] Statement of Trial Results, *United States v. Roberts* 3 (17 Dec. 2023).
[97] *Id.*
[98] Entry of Judgment, *United States v. Roberts* 3 (21 Dec. 2023).
[99] *Id.*
[100] *Id.*
[101] *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004).
[102] R.C.M. 1111(b)(1) (2019 *MCM*).
[103] R.C.M. 1111(c)(2) (2019 *MCM*).

modification of the entry of judgment to reflect that Charge II involved a plea of not guilty and finding of guilty to a violation of Article 80, UCMJ.

WHEREFORE, this Court should order a corrected entry of judgment.

Assignment of Error IV

Appellant's constitutional rights were violated when he was convicted of offenses with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously that he is guilty.

A. Additional Facts

The defense moved in limine to require that any finding of guilty be by a unanimous vote of the members.[104] The prosecution opposed that motion.[105]

On 29 June 2023, during a break between Article 39(a) sessions, the Court of Appeals for the Armed Forces issued its opinion in *United States v. Anderson* rejecting a constitutional challenge to the lack of a unanimity requirement for court-martial panel verdicts.[106] The military judge appeared to treat that ruling as a de facto denial of the defense's motion for a unanimous verdict. When subsequently advising Appellant of his forum selection rights, the military judge told him that "three-fourths of the members must agree before you could be found guilty of any offense."[107]

The military judge's findings instructions included the following:

> The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have eight members, that means six members must concur in any finding of guilty.
>
> If you have at least six votes of guilty for any offense, then that will result

[104] App. Ex. XLIV.
[105] App. Ex. XLV.
[106] *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024); *see* Trial Tr. at 137 (13 April 2023 Article 39(a) session ending), 138 (13 July 2023 Article 39(a) session beginning).
[107] Trial Tr. at 186.

in a finding of guilty for that offense.[108]

The members found Appellant guilty of two charges and a total of seven specifications.[109] It is unknown and unknowable whether each of those findings of guilty was based on a vote of 6-2, 7-1, or 8-0.

B. Standard of Review

The standard of review for questions of constitutional law is de novo.[110]

C. Law and Analysis

In *Anderson*, the Court of Appeals for the Armed Forces held that non-unanimous findings of guilty do not violate a court-martial accused's constitutional rights.[111] Appellant acknowledges that, absent intervening Court of Appeals for the Armed Forces or Supreme Court case law, this Court is bound by the *Anderson* opinion. Nevertheless, Appellant maintains that *Anderson* was wrongly decided and expressly preserves this issue for further appellate review.

Respectfully submitted,

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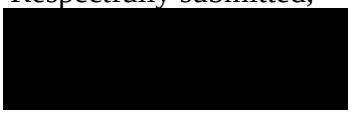
[108] Trial Tr. at 1492; App. Ex. XCIX at 13. There are minor stylistic differences between the versions included in the trial transcript and in App. Ex. XCIX. The quotation is based on the former.
[109] Trial Tr. at 1523–24; App. Ex. XCVIII.
[110] *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016).
[111] *Anderson*, 83 M.J. at 294–302.

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 2 May 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

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 matters:

List of Issues

I.

THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE OF HC'S STATEMENTS DURING TWO INTERVIEWS WITH AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS AGENTS BECAUSE A THIRD PARTY—THE MOTHER OF A FRIEND OF HC'S—WAS IN THE ROOM DURING BOTH INTERVIEWS AND INTERJECTED DURING THE INTERVIEWS.

II.

THE MILITARY JUDGE ERRED BY ADMITTING A NOTE APPELLANT WROTE TO HC AND ALLOWING THE PROSECUTORS TO TELL THE MEMBERS THAT IT CONSTITUTED PROOF OF CONSCIOUSNESS OF GUILT.

III.

THE MLITARY JUDGE ERRED BY ADMITTING EVIDENCE DERIVED FROM DNA SWABS OF APPELLANT BECAUSE THE SWABS' CHAIN OF CUSTODY WAS COMPROMISED.

IV.

THE MILITARY JUDGE ERRED BY FAILING TO EXCLUDE UNRELIABLE TESTIMONY CONCERNING A WITNESS'S EXPERIMENT WITH ATTEMPTING TO TAKE PHOTOGRAPHS OF A RAINSTORM AND EXTRAPOLATION OF HIS FINDINGS TO A PHOTOGRAPH OF A BATHROOM SHOWER.

V.

THE MILITARY JUDGE ERRED BY DECLINING TO ANSWER A MEMBER'S QUESTION CONCERNING THE DEFINITION OF SEXUAL GRATIFICATION.

VI.

THE FINDINGS OF GUILTY ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE INCONSISTENCIES BETWEEN HC'S IN-COURT TESTIMONY AND PRIOR STATEMENTS RENDER HER TESTIMONY INSUFFICIENTLY RELIABLE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

VII.

THE FINDINGS OF GUILTY ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE THEY WERE INFLUENCED BY IMPLAUSIBLE DNA EVIDENCE.

VIII.

THE MILITARY JUDGE ERRED BY DECLINING TO ASK A MEMBER'S QUESTION CONCERNING HC'S RETURN TO APPELLANT'S APARTMENT AFTER REPORTING THE ALLEGED OFFENSES.

IX.

APPELLANT'S SENTENCE TO A TOTAL OF FOURTEEN YEARS' CONFINEMENT IS INAPPROPRIATELY SEVERE WHEN COMPARED TO SENTENCES FOR OTHER COMPARABLE, OR EVEN MORE SERIOUS, OFFENSES.

Legal Authority and Argument

I.

THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE OF HC'S STATEMENTS DURING TWO INTERVIEWS WITH AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS AGENTS BECAUSE A THIRD PARTY—THE MOTHER OF A FRIEND OF HC'S—WAS IN THE ROOM DURING BOTH INTERVIEWS AND INTERJECTED DURING THE INTERVIEWS.

Additional Facts

When HC went to an Air Force Office of Special Investigations (OSI) office to be interviewed on both 25 and 26 July 2021, the mother of HC's friend TA accompanied her. Trial Tr. at 891, 970. During cross-examination, Ms. A. agreed that she was "part of that interview."

Id. at 898. She also initially agreed that she "interjected multiple times during that interview" before backtracking and stating, "I don't remember." *Id.* at 898–99. Ms. A. subsequently stated on cross-examination that "I was there to stand up for [HC] and speak for her if she needed me to." *Id.* at 899.

The OSI agent who interviewed HC testified at trial. *Id.* at 949. During cross-examination, the following exchange occurred:

> Q. So, you were in the room, [HC] is in the room. Additionally, there's another agent in the room taking notes, right?
>
> A. Mmm hmm.
>
> Q. And there was one other person in the room, and that was [Ms. A.]?
>
> A. Yes.
>
> Q. Who was [Ms. A.] to [HC]?
>
> A. Her friend's mother.
>
> Q. And why was [Ms. A.] in the room?
>
> A. At the time, to provide support or comfort.
>
> Q. [Ms. A.] wasn't given any parameters that her job was to simply provide support or comfort, right?
>
> A. Correct.
>
> Q. You didn't tell [Ms. A.] it's important that we be using [HC's] language, don't interject, right?
>
> A. Yes.
>
> Q. And in fact, [Ms. A.] interjected multiple times during your interview, right?
>
> A. She did.
>
> Q. Not just the first interview, but the second interview as well?

A. Yes.

Q. And she interjected to define things for [HC], right?

A. Well, if she – she interjected when she felt there was something that maybe she knew that maybe here we didn't know, or if there's was [sic] any details she could help clarify.

Q. Exactly. So she was clarifying details for OSI, right?

A. Yes.

Q. And very early in that interview, literally within the first two minutes, [Ms. A.] starts talking, right?

A. Yes.

Q. And she's giving you the background information for [HC], right?

A. Yes.

Q. She goes to Lester Middle School, right?

A. Mmm hmm.

Q. She lived with her great grandparents, right?

A. Yes.

Q. Her mom's out of the picture, right?

A. Yes.

Q. All that information is coming from [Ms. A.], correct?

A. Yes.

Q. And actually, in those first couple minutes, [Ms. A.] says, "I hope it's okay I helped answer." And you say, "Yes?"

A. Yes.

Q. There were times in the interview with [HC], that from her facial expressions and body language, it was clear she didn't understand the terms you were using, right?

A. She spoke up for particularly the one where we explained this is bodily fluids, which she did not understand.

Q. My question is, it was clear from her facial expressions and her body language that there were times in which she did not understand the terms that you were using, right?

A. Times?

Q. Exactly. One of those times was when you were talking about ejaculation, right?

A. Mmm hmm.

. . . .

Q. And [HC] pauses in the interview, and [Ms. A.] turns to [HC] and says, "Do you know what that means [HC]?" Right?

A. Yes.

Q. [HC] shakes her head, correct?

A. I don't remember if she shook her head.

Q. She indicated she didn't understand, right?

A. Yes.

Trial Tr. at 970–72.

The special trial counsel subsequently asked the military judge to admit into evidence a DVD containing a video recording of HC's first OSI interview. Trial Tr. at 982–83. The defense objected on foundation, relevance, and hearsay grounds. *Id.* at 983. The special trial counsel then asked the military judge to admit into evidence a DVD containing a video recording of HC's second OSI interview. *Id.* at 984. The defense again objected on foundation, relevance, and hearsay grounds. *Id.* at 985. The senior defense counsel later added a Military Rule of Evidence 403 objection. *Id.* at 988.

The military judge ultimately admitted portions of those recordings of HC's OSI interviews into evidence. *Id.* at 1193–94; Pros. Exs. 8, 9. The prosecution played Prosecution Exhibits 8 and 9 for the members while an OSI agent was on the stand providing supporting explanations. Trial Tr. at 1194–215. The prosecution subsequently elicited testimony from the OSI agent concerning instances during the interviews when HC corrected erroneous information provided by Ms. A. *Id.* at 1215–18.

Argument

Ms. A.'s involvement in HC's two OSI interviews deprives them of reliability. Ms. A. was not a percipient witness to any of the alleged offenses, yet she influenced the narrative that HC provided to OSI. This is particularly disturbing because HC did not have the vocabulary to describe her allegations with precision. Ms. A.'s involvement created a substantial risk of modifying HC's statements about what occurred. As the defense argued at trial, "Mrs. [A.] interjects herself to define things for [HC]. That is what defense counsel was specifically attacking with regards to Mrs. [A.], who admitted to doing so." *Id.* at 1141. The military judge erred by admitting portions of the interview recordings into evidence over defense objection.

WHEREFORE, Appellant personally and respectfully asks this Honorable Court to set aside all findings of guilty and the sentence.

II.

THE MILITARY JUDGE ERRED BY ADMITTING A NOTE APPELLANT WROTE TO HC AND ALLOWING THE PROSECUTORS TO TELL THE MEMBERS THAT IT CONSTITUTED PROOF OF CONSCIOUSNESS OF GUILT.

Additional Facts

At trial, the Government offered into evidence a handwritten note from Appellant to HC that read: "Don't Blame Yourself for this. I just couldn't live with the thought of hurting you

anymore. Get therapy and live a happy life. Love always from Your Father Dyllin AKA Shitty Dad." Pros. Ex. 26. Appellant wrote that note shortly before his court-martial was originally scheduled to commence, approximately fourteen months before the start of the actual trial, in what the special trial counsel termed "the context of a suicide attempt." Trial Tr. at 611, 616. The military judge and the parties first discussed the note when reviewing visual aids the prosecution intended to use during opening statement. *Id.* at 611–13. The defense counsel objected to the exhibit on Military Rule of Evidence 403 grounds. *Id.* at 613. The defense counsel also raised concern about informing the members about the fact that a court-martial session had been previously scheduled to occur. *Id.* The military judge allowed the prosecution to refer to the exhibit during opening statement and to tell the members the note was found while Appellant was awaiting trial, but without specifying the "temporal proximity." *Id.* at 617–18. The following exchange occurred during the prosecution's opening statement:

> ATC: . . . [W]hile trial was pending, a note was found in [Appellant's] apartment. It's a short note addressed to [HC], expressing his guilty conscience –
>
> DC: Objection, Your Honor. This is 404(b).
>
> MJ: So, I'm going to overrule the objection and just remind members again. Opening statements are not evidence, it's just what trial counsel expects the evidence will show.
>
> ATC: He said to her, "Don't blame yourself for this, I just couldn't live with the thought of hurting you anymore. Get therapy and live a happy life." Again members, his words.

Id. at 633–34.

At the conclusion of the prosecution's opening statement, the defense asked for an Article 39(a) session, which the military judge agreed to. *Id.* at 634–35. During that session, the defense asked "for reconsideration" of the military judge's "previous ruling." *Id.* at 636. The

defense counsel explained, "Specifically, government counsel literally in their opening statement, explicitly said that our client had a guilty conscience, which is absolutely unnoticed 404(b)." *Id.* at 636. The military judge disagreed, explaining that "for purposes of MRE 404(b), simply talking about something that's relevant to a charged offense, is not an act. . . . I see this as a statement under 304(d) . . . rather than something that falls under MRE 404(b)." *Id.* at 638. The military judge subsequently ruled, "I am denying defense counsel's request to reconsider my decision to overrule their objection to trial counsel's opening regarding the note left by Senior Airman Roberts." *Id.* at 639.

Immediately after HC's testimony, the military judge and the parties had an extensive discussion about the note during an Article 39(a) session. *Id.* at 871–81. At the end of that discussion, the military judge stated that he would allow admission of the note and testimony about how it was found, while adding that he would continue to consider "whether there may be some additional limitations." *Id.* at 881.

The military judge ultimately admitted the note into evidence. *Id.* at 1369; Pros. Ex. 26. The parties stipulated that Appellant "wrote the letter contained in Prosecution Exhibit 26 in or around August of 2022. The letter was discovered by a member of law enforcement in August 2022." App. Ex. XCVII. The military judge admitted the document into evidence with the understanding that "defense wants to preserve its objection." Trial Tr. at 1369. During a subsequent colloquy with Appellant concerning the stipulation, the military judge told Appellant that "[e]ntering into this stipulation does not waive your defense counsel's objection to these facts being admissible." *Id.* at 1374. Shortly thereafter, the prosecution published the exhibit to the members and the military judge informed them of the stipulation. *Id.* at 1377. During closing argument, the special trial counsel referred to Prosecution Exhibit 26, telling the

members that "this note demonstrates that [Appellant] is not disputing what [HC] had reported he did to her." *Id.* at 1468.

Argument

For the reasons articulated by the trial defense counsel, the military judge erred by admitting Prosecution Exhibit 26 into evidence and allowing the Government to characterize it to the members as proof of Appellant's consciousness of guilt. Given this improperly admitted evidence's highly prejudicial nature, all findings of guilty and the sentence should be set aside.

WHEREFORE, Appellant personally and respectfully asks this Honorable Court to set aside all findings of guilty and the sentence due to the military judge's erroneous rulings concerning Prosecution Exhibit 26.

III.

THE MLITARY JUDGE ERRED BY ADMITTING EVIDENCE DERIVED FROM DNA SWABS OF APPELLANT BECAUSE THE SWABS' CHAIN OF CUSTODY WAS COMPROMISED.

Additional Facts

The pediatric nurse practitioner who conducted the sexual assault forensic examination of HC testified at trial. Trial Tr. at 1016–108. She described collecting swabs in areas where HC indicated Appellant's saliva might be present. *Id.* at 1082–83. Those areas included HC's mouth, ears, neck, shoulders, breasts, and abdomen. *Id.* The pediatric nurse practitioner explained that because the examination concluded after midnight, she put the swabs in a safe to be collected later by an OSI agent. *Id.* at 1095. The examination of HC concluded at 0020 (12:20 a.m.) on 27 July 2021. *Id.* at 1095, 1098. According to the chain of custody document, the nurse practitioner put the swabs into the safe at 0343 (3:43 a.m.). Pros. Ex. 13. When asked about that gap in time, the pediatric nurse practitioner explained what she "typically" does and what

"usually" occurs. *Id.* at 1098. She did not testify to what occurred in this specific instance.

Argument

The more-than-three-hour gap in time between when the examination of HC ended and when the swabs purportedly taken during that examination were first accounted for in the chain-of-custody document renders those swabs unreliable. Those swabs resulted in extremely prejudicial DNA evidence. *See* Trial Tr. at 1358–61; Pros. Ex. 25. That DNA evidence should never have been admitted because it was predicated on swabs with a compromised chain-of-custody.

WHEREFORE, Appellant personally and respectfully asks this Honorable Court to set aside the findings of guilty to Charge I and its six specifications and the sentence.

IV.

THE MILITARY JUDGE ERRED BY FAILING TO EXCLUDE UNRELIABLE TESTIMONY CONCERNING A WITNESS'S EXPERIMENT WITH ATTEMPTING TO TAKE PHOTOGRAPHS OF A RAINSTORM AND EXTRAPOLATION OF HIS FINDINGS TO A PHOTOGRAPH OF A BATHROOM SHOWER.

Additional Facts

The prosecution sought to prove Charge II's attempted indecent recording specification by suggesting Appellant tried to photograph HC as she showered. Trial Tr. at 1474–77. The prosecution called to the stand Mr. J., a digital forensic examiner, who testified concerning two deleted photographs he found on Appellant's cellphone. *Id.* at 1236; Pros. Ex. 19. One of the photographs showed a showercurtain rod, part of the inside of a shower, and what appears to be a showerhead. Pros. Ex. 19, page 1 of 2. The exhibit included dates suggesting the photographs were taken on 17 July 2021 at 1644 (4:44 p.m.). Trial Tr. at 1252; Pros. Ex. 19. They were moved to the phone's trash a little more than a minute later. Trial Tr. at 1256; Pros. Ex. 21. An issue arose

at trial as to whether water was running in the shower when those photographs were taken. *See*, *e.g.*, Trial Tr. at 1273–74. It was in the prosecution's interest for the members to interpret the first photograph in Prosecution Exhibit 19 as not foreclosing the possibility that water was running in the shower despite the absence of visible water. *See id.* at 1269. The following exchange occurred between the special trial counsel and Mr. J. on direct examination:

> Q. If you look at Prosecution Exhibit 19 on page 1, were you able to determine whether or not any water is visible coming out of the shower nozzle?
>
> A. I cannot determine whether the water is on or off.
>
> Q. Why is that?
>
> A. Well, this specific image was taken at a shutter speed of 128th of a second. In order to capture water, generally you will need on one-thousandths of a second photograph to capture water.

Id. at 1257.

The defense counsel then objected that "this witness is not an expert and has not been recognized as an expert in anything to do with camera shutter speeds or anything of that, of that nature." *Id.* at 1257–58. The military judge responded, "To the extent the witness knows, I'm going to allow him to answer the question. And I'll just instruct the members about the limits of what he's been qualified in." *Id.* at 1258. Mr. J. then continued, "I have specifically tested this with a Samsung camera at 128th of a second, taking a photo of a rainstorm. And you could not see droplets of the rainstorm ----" *Id.* The defense then made a relevance objection, which the military judge overruled. *Id.* The special trial counsel then asked, "When you tested it, were you able to see the droplets that were falling?" *Id.* Mr. J. responded, "I was not able to duplicate trying to take a picture at that speed and still be able to see droplets coming out." *Id.* The military judge subsequently instructed the members that Mr. J. "has been recognized as an expert . . . in digital forensics. To the extent any of his testimony was outside of that area of expertise, you

are not required to consider those credentials when you consider that testimony." *Id.* at 1259.

Further testimony concerning Mr. J's rainstorm experiment and shutter speeds occurred during both cross-examination and redirect examination. *Id.* at 1272–77. The prosecution later recalled Mr. J. as its final witness to provide still more testimony about shutter speeds. Trial Tr. at 1378–80.

Argument

Had an expert attempted to provide Mr. J.'s testimony, it would have been inadmissible under *Daubert v. Merrell Dow Pharmaceauticals*, 509 U.S. 579 (1993), and its progeny. Mr. J.'s testimony about his amateurish experimentation calls to mind Justice Scalia's quip that under *Daubert* and its progeny, the trial judge is a gatekeeper charged with excluding "expertise that is *fausse* and science that is junky." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 159 (1999) (Scalia, J., concurring). Mr. J.'s testimony was less admissible—not more admissible—because of what the military judge recognized as his lack of relevant expertise. *See* Trial Tr. at 1259; Mil. R. Evid. 701 (2019 *MCM*) ("If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: . . . (c) not based on scientific, technical, or other specialized knowledge within the scope of Mil. R. Evid. 702."). The defense correctly objected that "this witness is not an expert and has not been recognized as an expert in anything to do with camera shutter speeds or anything of that, of that nature." *Id.* at 1258. The military judge abused his discretion by allowing Mr. J. to testify about matters based on supposed technical or other specialized knowledge beyond the ken of his expertise.

WHEREFORE, Appellant personally and respectfully asks this Honorable Court to set aside the findings of guilty to Charge II and its specification.

V.

THE MILITARY JUDGE ERRED BY DECLINING TO ANSWER A MEMBER'S QUESTION CONCERNING THE DEFINITION OF SEXUAL GRATIFICATION.

Additional Facts

The military judge instructed the members that "for all of the Specifications of Charge I, the accused's intent to gratify his sexual desire must be proved beyond a reasonable doubt." Trial Tr. at 1444. Immediately before the court-martial closed for deliberations, the president of the court-martial panel posed a question to the military judge, leading to the following exchange:

> PRES: . . . [Y]ou provided earlier, legal definitions for some terms. Is there a legal definition for sexual gratification?
>
> MJ: So, that term is not defined. So, it's left up to you to define, generally speaking. Do you think you need a definition? That's something that I can take up with counsel.
>
> PRES: For the clarification, Your Honor, it's we're free to interpret it as plain language?
>
> MJ: Correct.

Id. at 1504.

In a subsequent Article 39(a) session, the military judge asked both parties if they requested an instruction on the term. *Id.* at 1505. Neither did. *Id.* The military judge concluded the discussion by stating, "Then I will leave the members to interpret that term as plain language." *Id.*

Argument

Appellant maintains that the military judge erred by failing to provide the members with a definition of the term "sexual gratification" and instead leaving it to the members to devise

their own definition. Doing so created a risk that the members found Appellant guilty of Charge I and its six supporting specifications based on an incorrect understanding of the law.

WHEREFORE, Appellant personally and respectfully asks this Honorable Court to set aside the findings of guilty to Charge I and its six specifications and the sentence.

VI.

THE FINDINGS OF GUILTY ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE INCONSISTENCIES BETWEEN HC'S IN-COURT TESTIMONY AND PRIOR STATEMENTS RENDER HER TESTIMONY INSUFFICIENTLY RELIABLE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

Additional Facts

At trial, the prosecution asked HC if, during any of the incidents, Appellant's "penis was hard." Trial Tr. at 791. She replied, "It felt like it, yeah." *Id.* She also testified on cross-examination that she had felt Appellant's erection *Id.* at 829. Subsequently on cross-examination, the following exchange occurred:

> Q. Isn't it true that OSI asked you if you had ever felt if your dad's penis was hard, and you said no?
>
> A. I believe that was true.
>
> Q. But today, you testified to something different, correct?
>
> A. Correct.

Id. at 830.

Later during cross-examination, the senior defense counsel confirmed with HC that when OSI interviewed her, she knew "what it meant for a penis to be hard or erect." *Id.* at 832. The senior defense counsel then asked, "And so, later you changed . . . what you think happened, but you knew at the time that they asked you what it meant, and you said it didn't happen, right?" *Id.* HC answered, "That is correct." *Id.*

The lead OSI agent for HC's interviews confirmed that HC "indicate[d] that at no time did she feel her dad hard." *Id.* at 974. In response to a member's question as to whether the statement about HC not feeling Appellant hard was "specifically about the final incident that occurred days prior, or throughout her many incidents," the OSI agent responded, "Throughout all the incidents." *Id.* at 1014.

Argument

HC was the most important prosecution witness in this case. Her shifting narrative, as demonstrated by her inconsistent accounts of whether she felt an erection during any of the encounters, renders her testimony insufficiently reliable to establish guilt beyond a reasonable doubt.

WHEREFORE, Appellant personally and respectfully asks this Honorable Court to set aside the findings and the sentence.

VII.

THE FINDINGS OF GUILTY ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE THEY WERE INFLUENCED BY IMPLAUSIBLE DNA EVIDENCE.

Additional Facts

After the alleged incident on the night of 24 to 25 July 2021, HC showered before being picked up by her friend TA and TA's parents. Trial Tr. at 788–89, 890–91, 954. HC's sexual assault forensic examination did not begin until after 2000 (8 p.m.) on the night of 26 July 2021, *id.* at 1097—almost 48 hours after the final alleged incident. Yet despite her showering and that passage of time, a forensic DNA examiner from the U.S. Army Criminal Investigation Laboratory testified that he found Appellant's DNA on swabs taken during that sexual assault forensic examination of HC's lateral left breast, right breast, left ear, and right ear. *Id.* at 1357–58; Pros.

Ex. 25. He further testified that "the mixed DNA profiles are one quintillion times more likely to have originated from [HC] and Dyllin Roberts than if it would have originated from [HC] and an unknown individual." Trial Tr. at 1358. He subsequently added that, concerning the DNA on HC's ear, "it's my opinion that would have originated from a potential body fluid. Just based on the sheer amount of male DNA that was detected." *Id.* at 1360. He also opined that "[s]ome form of contact would have had to have occurred" to produce the results of the DNA testing of the swabs of HC's breasts. *Id.* at 1361.

Argument

In light of HC showering between the alleged incident and her sexual assault forensic examination and the passage of time, it is implausible that another individual's DNA in such high quantities would be found on her body. Applying common sense, this Court should conclude that the DNA evidence was both unreliable and unfairly prejudicial.

WHEREFORE, Appellant personally and respectfully asks this Honorable Court to set aside the findings and the sentence.

VIII.

THE MILITARY JUDGE ERRED BY DECLINING TO ASK A MEMBER'S QUESTION CONCERNING HC'S RETURN TO APPELLANT'S APARTMENT AFTER REPORTING THE ALLEGED OFFENSES.

Additional Facts

At the conclusion of Ms. A.'s testimony, the president of the court-martial wrote out several questions:

> To your knowledge did you or someone else drive [HC] to her [apartment] after 25 July 2021?
>
> If so, what was the purpose of the trip? What items were picked up, if any? Were there any other trips with [HC] to the [apartment]? Was there any contact with her father? If so, what was the content or subject?

App. Ex. LXXXII. Neither party objected to any of those questions. *Id.*

In response to the first question, Ms. A. said that she drove HC to her apartment. Trial Tr. at 903. She explained that the purpose of the trip was for HC to collect some of her belongings. *Id.* Ms. A. testified that HC "picked up clothing, hair accessories, shoes, socks, and underwear." *Id.* When asked if there were any other trips with HC to the apartment, Ms. A. responded, "Not that I can recall." *Id.* The military judge then asked, "Was there any contact with her father. " *Id.* Ms. A. replied, "Not that I am aware of." *Id.* The military judge then told the president of the court-martial, "I believe your last question is not applicable given her previous answers." *Id.*

Argument

The military judge erred by not asking the court-martial president's final question, "If so, what was the content or subject?"

WHEREFORE, Appellant personally and respectfully asks this Honorable Court to set aside the findings and the sentence.

IX.

APPELLANT'S SENTENCE TO A TOTAL OF FOURTEEN YEARS' CONFINEMENT IS INAPPROPRIATELY SEVERE WHEN COMPARED TO SENTENCES FOR OTHER COMPARABLE, OR EVEN MORE SERIOUS, OFFENSES.

Argument

The appropriateness of Appellant's sentence is subject to de novo review by this Court. *United States v. Cabuhat*, 83 M.J. 755, 772 (A.F. Ct. Crim. App. 2023) (en banc), *petition denied*, 84 M.J. 275 (C.A.A.F. 2024). In assessing the appropriateness of a sentence, this Court "may consider unrelated cases as CCAs typically have discretion to consider and compare other specific

courts-martial sentences when they are reviewing a case for sentence appropriateness and relative uniformity." *Id.* at 772 (cleaned up).

Appellant calls this Court's attention to four cases in which a service member received a lesser term of confinement for comparable or more aggravated offenses.

- In *United States v. Baumgartner*, No. ACM 40413, 2025 CCA LEXIS 95 (A.F. Ct. Crim. App. Feb. 18, 2025), the accused was convicted, contrary to his pleas, of two specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b, and three specifications of assault consummated by a battery upon a child under the age of 16 in violation of Article 128, UCMJ, 10 U.S.C. § 928, all involving the accused's teenage daughter. *Baumgartner*, 2025 CCA LEXIS 95, at *2. The confinement portion of his sentence was only three years. *Id.*
- In *United States v. Kim*, No. ARMY 20200689, 2023 CCA LEXIS 453 (A. Ct. Crim. App. Oct. 20, 2023), the accused was convicted, in accordance with his pleas, of four specifications of sexual abuse of a child, one specification of making an indecent recording, one specification of assault consummated by a battery, and one specification of indecent conduct, in violation of Articles 120b, 120c, 128, and 134, UCMJ, 10 U.S.C. §§ 920b, 920c, 928, and 934. *Id.* at *2. The offenses, which involved his stepdaughter, occurred over a two-year span starting when she was twelve years old. *Id.* The confinement portion of his sentence was 130 months. *Id.*
- In *United States v. Cleveland*, No. ARMY 20170496, 2020 CCA LEXIS 483 (A. Ct. Crim. App. Dec. 28, 2020), the accused was convicted, contrary to his pleas, of one specification of rape of a child, two specifications of sexual abuse of a child,

and one specification of communicating a threat, in violation of Articles 120b and 134, UCMJ, 10 U.S.C. §§ 920b and 934. *Id.* at *1–2. All of the offenses occurred with his biological daughter and occurred when she was between the ages of seven and ten. *Id.* at *3–4. The confinement portion of his sentence was eight years. *Id.* at *2.

- In *United States v. James*, No. ACM 39458, 2019 CCA LEXIS 438 (A.F. Ct. Crim. App. Oct. 31, 2019), the accused was convicted, contrary to his pleas, of one specification of sexual assault of a child (his stepdaughter) in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. The confinement portion of his sentence was confinement for eleven months.

To promote general sentence uniformity, this Court should exercise its sentence appropriateness authority to reduce the term of confinement to one proportional to the sentences in those cases.

WHEREFORE, Appellant personally and respectfully asks this Honorable Court to reduce his term of confinement.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40608**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dyllin V.E. ROBERTS	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

Appellant filed his assignments of error brief on 2 May 2025. Joint Rule of Appellate Procedure (JRAP) 18(d)(1) provides Appellee's answer brief "shall be filed no later than 30 days after the filing of an appellant's brief," which falls on 1 June 2025. JRAP 15 provides that because 1 June 2025 falls on a Sunday, Appellee may file its answer brief on the next business day, Monday, 2 June 2025.

On 27 May 2025, counsel for Appellee submitted a Motion for Enlargement of Time Out of Time (First), "request[ing] a 14-day enlargement of time to respond" to Appellant's assignments of error. However, Appellee's motion then states, "If the enlargement of time is granted the United States' response will be due on 12 June 2025, and 401 days will have elapsed since docketing[sic]." Appellee's motion later again refers to a request for a "14-day enlargement of time." Appellant does not oppose the motion.

The court has considered Appellee's motion, prior filings in this case, case law, and this court's Rules of Practice and Procedure. We conclude Appellee's intent is to request a 14-day enlargement of time, and we interpret the inconsistent references to "12 June 2025" and "401 days" to be clerical errors.

Accordingly, it is by the court on this 30th day of May, 2025,

ORDERED:

Appellee's Motion for Enlargement of Time Out of Time (First) is **GRANTED**. Appellee shall file its answer to Appellant's assignments of error not later than **15 June 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 OUT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS** United States Air Force *Appellant.*	)	No. ACM 40608 27 May 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 a 14-day enlargement of time to respond in the above captioned case. This case was docketed with the Court on 7 May 2024. Since docketing, Appellant has been granted nine enlargements of time. Appellant filed his brief with this Court on 2 May 2025 This is the United States' first request for an enlargement of time. As of the date of this request, 385 days have elapsed. The United States' response in this case is currently due on 2 June 2025. If the enlargement of time is granted the United States' response will be due on 12 June 2025, and 401 days will have elapsed since docketing.

There is good cause for the enlargement of time in this case. Undersigned counsel was on a temporary duty status from 12 to 15 May to Tyndall Air Force Base as senior counsel for a general court-martial, United States v. Cooper. Additionally, undersigned counsel was Appellate counsel for United States v. Harnar, No. ACM 40559 (f rev), which was filed with this Court on 21 May 2025. This case is now undersigned counsel's first priority. Undersigned counsel has completed review of the record of trial and has begun drafting the brief.

The trial transcript in this case is 1631 pages and the record of trial consists of eleven volumes. Appellant raised four assignments of error through his appellate defense counsel and personally raised nine additional assignments of error. Given undersigned counsel's workload, the large record of trial, and Appellant's 13 assignments of error a 14-day enlargement of time is warranted.

Due to office workload, there is no other appellate government counsel who could complete a brief sooner. The other counsel in the office all have assigned briefs and duties that restrict their availability.

There is good cause for this motion being filed out of time. When calculating when the motion would be due under Rule 23.3(m)(1), undersigned counsel interpreted Rule 15 to extend the seven-day window because the rule makes the brief due on 2 June due to 1 June being a Sunday. This led undersigned counsel to believe this motion was due no later than the date of this filing and that the seven-day deadline had not passed. If this misinterpretation had not occurred, undersigned counsel would've correctly calculated the due date and filed this motion on time.

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

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 27 May 2025

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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. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS** United States Air Force *Appellant.*	)	No. ACM 40608
	)	12 June 2025

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

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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. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS** United States Air Force *Appellant.*	)	No. ACM 40608 12 June 2025

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

ISSUES PRESENTED

I.

THE GOVERNMENT FAILED TO DOCKET THIS CASE WITH THIS COURT WITHIN THE 150-DAY STANDARD ESTABLISHED BY UNITED STATES V. LIVAK, 80 M.J. 631, 633 (A.F. CT. CRIM. APP. 2020), WARRANTING A MODEST, PROPORTIONAL REDUCTION IN SENTENCE UNDER THIS COURT'S ARTICLE 66(d)(2), UNIFORM CODE OF MILITARY JUSTICE, AUTHORITY.

II.

THE PORTION OF THE SENTENCE PROVIDING FOR CONFINEMENT FOR FOURTEEN YEARS FOR CHARGE I, SPECIFICATION 5 IS INAPPROPRIATELY SEVERE.

III.

THE ENTRY OF JUDGMENT ERRONEOUSLY RECITES THE UNIFORM CODE OF MILITARY JUSTICE ARTICLE ALLEGED BY CHARGE II TO WHICH APPELLANT PLEADED NOT GUILTY AND OF WHICH HE WAS FOUND GUILTY.

IV.

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS CONVICTED OF OFFENSES WITH NO REQUIREMENT THAT THE COURT-MARTIAL PANEL (THE FUNCTIONAL EQUIVALENT OF THE JURY) VOTE UNANIMOUSLY THAT HE IS GUILTY

V. [1]

THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE OF H.C.'S STATEMENTS DURING TWO INTERVIEWS WITH AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS AGENTS BECAUSE A THIRD PARTY—THE MOTHER OF A FRIEND OF HC'S—WAS IN THE ROOM DURING BOTH INTERVIEWS AND INTERJECTED DURING THE INTERVIEWS.

VI.

THE MILITARY JUDGE ERRED BY ADMITTING A NOTE APPELLANT WROTE TO HC AND ALLOWING THE PROSECUTORS TO TELL THE MEMBERS THAT IT CONSTITUTED PROOF OF CONSCIOUSNESS OF GUILT.

VII.

THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE DERIVED FROM DNA SWABS OF APPELLANT BECAUSE THE SWABS' CHAIN OF CUSTODY WAS COMPROMISED.

VIII.

THE MILITARY JUDGE ERRED BY FAILING TO EXCLUDE UNRELIABLE TESTIMONY CONCERNING A WITNESS'S EXPERIMENT WITH ATTEMPTING TO TAKE PHOTOGRAPHS OF A RAINSTORM AND EXTRAPOLATION OF HIS FINDINGS TO A PHOTOGRAPH OF A BATHROOM SHOWER.

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[1] Along with the four assignments of error raised by appellate defense counsel, Appellant personally raised nine assignments of error under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982). He numbered these issues as I through IX in his Appendix. These assignments of error have been renumbered as V through XIII for clarity in this brief.

IX.

THE MILITARY JUDGE ERRED BY DECLINING TO ANSWER A MEMBER'S QUESTION CONCERNING THE DEFINITION OF SEXUAL GRATIFICATION.

X.

THE FINDINGS OF GUILTY ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE INCONSISTENCIES BETWEEN HC'S IN-COURT TESTIMONY AND PRIOR STATEMENTS RENDER HER TESTIMONY INSUFFICIENTLY RELIABLE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

XI.

THE FINDINGS OF GUILTY ARE FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE THEY WERE INFLUENCED BY IMPLAUSIBLE DNA EVIDENCE.

XII.

THE MILITARY JUDGE ERRED BY DECLINING TO ASK A MEMBER'S QUESTION CONCERNING HC'S RETURN TO APPELLANT'S APARTMENT AFTER REPORTING THE ALLEGED OFFENSES.

XIII.

APPELLANT'S SENTENCE TO A TOTAL OF FOURTEEN YEARS' CONFINEMENT IS INAPPROPRIATELY SEVERE WHEN COMPARED TO SENTENCES FOR OTHER COMPARABLE, OR EVEN MORE SERIOUS, OFFENSES.

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant was found guilty, contrary to his pleas, of with one charge and six specifications of violating Article 120b, UCMJ and one charge and one specification of attempting to make an indecent recording in violation of Article 80, UCMJ. (ROT Vol. 1,

Charge Sheet). Those six specifications of violating Article 120b, UCMJ, include four specifications of sexual abuse of a child and two specifications of sexual assault of a child. (Id.) The victim of Appellant's sexual abuse, assault, and attempted indecent recording was his 13-year-old daughter, H.C.[2] (R. at 696, 709; *Charge Sheet*). H.C. only lived with Appellant for a short period when she was six years old. (R. at 907). Her great-grandparents had custody of her. (Id.) In early December 2020, H.C. moved to Japan with Appellant. (R. at 699). She was excited to have a father-daughter relationship with him. (R. at 700).

Within two months of H.C. moving to live with Appellant, he began sexually abusing her. (R. at 708-709). It started with what he called "cuddling" where he would lay on the couch with H.C. and touch and squeeze her breasts. (R. at 709-710). At first, it was an infrequent occurrence, but the frequency of the abuse increased to three to four times a week lasting 30 to 45 minutes at a time. (R. at 709, 711). Appellant then began putting his hand in her pants and underwear. (R. at 710). He would rub the outside of her vagina with his hand and put his fingers between her labia. (R. at 733-735). He did this two to four times a week for 20 to 40 minutes at a time. (R. at 736). The first time Appellant touched H.C.'s vagina, she went to her room, curled up in a ball, and cried. (R. at 738).

During this time, Appellant continued to invade H.C.'s privacy by entering the bathroom when she was showering. (R. at 740). When she would lock the door, he would use his fingernail to unlock it and enter. (R. at 742). One time, Appellant put his phone above the

[2] At the time of trial, the victim had a hyphenated last name for the initials H.C.R. (R. at 3). In her victim impact statement, she used only her second last name. (Court Ex. A). During trial, she was, at times, referred to by her second last name – Ms. R. For consistency with Appellant's brief, she is referred to as H.C. throughout this brief.

shower curtain and attempted to take a picture of H.C. (R. at 743; Pros Ex. 19). When H.C. asked for Appellant's phone, he stalled and deleted the photographs. (R. at 743-745, 1235).

Appellant victimized H.C. for the last time around 25 July 2021. (R. at 745, 888, 980). When H.C. was tired, Appellant carried her to his bed. (R. at 753). Once in the bed, Appellant fondled H.C.'s nipples and rubbed her vagina. (R. at 754). He then inserted his finger into what H.C., even two years later at trial, described as her "period hole." (R. at 754-755). He bit her ear – causing pain and bruising. (R. at 755, 1078-1079). He told H.C., "You like that, don't you." (R. at 755). He sucked on her nipples so hard they were bruised. (R. at 755, 1079-1080). He kissed H.C. on the lips. (R. at 755).

H.C. returned to her room the next morning. (R. at 759). Appellant entered her room and began sexually abusing her again. He put his hand on her breast and started biting her ear. (R. at 759). When H.C. told Appellant it hurt, he told her to stop complaining. (R. at 760-761).

Later that day, H.C. reported the sexual abuse to her friend, T.A. (R. at 763-764; Pros. Ex. 1). When T.A. and her mother, M.A., came to pick H.C. up, H.C. started crying. (R. at 890). Appellants sexual victimization of H.C. had severe effect on her. She developed facial tics, she had panic attacks and anxiety, she started wetting the bed, she would go into a trance like state, she struggled in school, and had trouble sleeping. (R. at 1530-1534). She began cutting herself on her arms, chest, back, and legs. (R. at 1533). She carved the word "worthless" into her skin. (Id.) She attempted suicide. (R. at 1534).

ARGUMENT

I.

THE DELAY IN POST-TRIAL PROCESSING WAS NOT EXCESSIVE, AND SO RELIEF IS INAPPROPRIATE.

Additional Facts

Appellant's court-martial was a fully litigated general court-martial. The court was convened at Kadena, Air Base, Japan, moved first to Joint Base Andrews, Maryland and then moved a second time to Barksdale AFB, Louisiana. (ROT Vol. 1, *Special Order A-5*, 18 March 2022; *Special Order A-14*, 19 July 2022; R. at 180). There were three Article 39a proceedings – arraignment and discussion about Appellant's release of both his military defense counsel on 23 January 2023; motions on 13 April 2023 to address trial defense counsel's change of venue motion; and a final motions hearing on 13 July 2023 to address trial defense counsel's motion to continue the case. (R. at 1-81; 82-137; 138-179).

Trial lasted seven days. (R. at 180; 1627). The record of Appellant's trial is large. It consists of 11 volumes containing, among other documents,1631 pages of transcript, 30 prosecution exhibits, and 102 appellate exhibits.

There were four court reporters assigned to different parts of this case. (R. at 1628-1631). The court reporter detailed to the final session of trial ensured all trial transcripts prepared by the previous three court reporters were complete and completed transcription of the transcript on 14 February 2024 – 121 days after the announcement of the sentence. (ROT Vol. 5, *Court Reporter Chronology;* R. at 1631). Given the volume of the transcription, he requested assistance with the transcription 20 October 2023 – five days after the announcement of the sentence – but was not provided any. (Id.)

The legal office finalized the record of trial on 25 April 2024 and mailed it to JAJM. Changes in the requirements for records of trial occurred in the middle of preparing Appellant's record. (Appendix, *Attachment to Declaration - Chronology*). These changes, along with technical difficulties in preparing an electronic record of trial, delayed finalization of the record of trial by 19 days. (Id.) The case was docketed with this Court on 7 May 2024 – 205 days after the announcement of the sentence.

Standard of Review

This Court reviews de novo whether excessive post-trial delay warrants relief under Article 66(d)(2), UCMJ.

Law and Analysis

"[C]onvicted servicemembers have a due process right to timely review and appeal of [their] courts-martial convictions." United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). In United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020), this Court established an aggregated sentence-to-docketing 150-day threshold for facially unreasonable delay in cases referred to trial on or after 1 January 2019.

Relief is not appropriate in every case which exceeds the 150-day Livak post-trial processing standard. United States v. Cassaberry-Folks, 2024 CCA LEXIS 500, *43 (A.F. Ct. Crim. App. 22 November 2024) (citing United States v. Valentin-Andino, 2024 CCA LEXIS 223, *19 (A.F. Ct. Crim. App. 7 June 2024)). Instead, the 150-day threshold is a starting point. Exceeding the threshold triggers and analysis of the four Barker factors to determine whether there has been a due process violation. Moreno, 63 M.J. 129.

If there has not been a due process violation, the Court may choose to grant relief if it finds there has been excessive delay in post-trial processing. Article 66(d)(2), UCMJ. "As ever,

the severity of a post-trial processing violation must be assessed on a case-by-case basis." Cassaberry-Folks, 2024 CCA LEXIS at *43.

Appellant does not claim his right to due process was violated. (App. Br. at 7). So, this Court may only grant relief if it finds there was excessive post-trial delay. Article 66(d)(2), UCMJ. The post-trial delay in Appellant's case was not excessive. Even if it were, relief is not appropriate.

Another 55-days to process Appellant's large record of trial is not excessive. As our sister service aptly noted, "some cases justifiably take longer than 150 days to process for appellate review." United States v. Winfield, 83 M.J. 662, 665 (A. Ct. Crim. App. 2023). Appellant's record of trial is large – 11 volumes, more than 1600 pages of transcription, 102 appellate exhibits, and 30 prosecution exhibits. It took time to not only assemble the record but also to ensure it was assembled without error.

"The goal of achieving an accurate record sometimes requires additional time from what we would aspire to under optimum conditions." United States v. Bigelow, 57 M.J. 64, 69 (C.A.A.F. 2002). As Appellant notes, attention to detail is an essential aspect of Air Force culture. (App. Br. at 9). Applying close attention to detail to such a large record of trial with cross continental coordination takes time. The case paralegal's chronology shows that attention to detail was present – the case paralegal ensured the checklist was followed and an accurate record of trial was prepared. (Appendix, *Attachment to Declaration - Chronology*).

Our superior Court has 244-days to prepare a record of trial to not be inordinate where the record of trial that was four volumes with trial participants assigned to three bases in three countries across Europe. Bigelow, 57 M.J. at 68-69. Here, the record was more than twice that size and the trial participants were on separate continents. Given the size and complexity of

Appellant's record of trial, this Court should find that the 55-day delay was not excessive and deny Appellant's requested relief.

Should this Court find the delay was excessive, relief is inappropriate. Assuming the non-exhaustive factors enumerated in United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015) are still helpful in analyzing whether relief is appropriate under Article 66(d)(2), UCMJ, they do not favor granting Appellant relief.

1. The delay is justified and there is not bad faith or gross indifference to post trial processing.

As explained above, the delay is justified based on the size and complexity in coordination required for Appellant's record of trial. There was not bad faith or gross indifference to post-trial processing. The Government worked diligently to complete this record of trial without error. Technical difficulties and changes in the requirements for records of trial contributed to the delay in post-trial processing. (Appendix, *Attachment to Declaration - Chronology*).

2. There was no harm to Appellant or the institution by the delay.

Despite Appellant's claim that his case was "marred" by presumptively unreasonable delay, he has identified no harm to himself because of the delay. (App. Br. at 6). Nothing suggests that the justified delay in Appellant's case has harmed the institution. On the other hand, it would harm the institution for this Court to grant Appellant relief because it would distort the 150-day threshold into a mandate that may be unreasonable in complex situations like Appellant's

3. The delay did not lessen the disciplinary effect of the sentence.

There is no evidence, and Appellant does not claim, that the delay has lessened the disciplinary effect of his sentence.

4. Decreasing Appellant's term of confinement is not consistent with the dual goals of justice and good order and discipline.

Decreasing Appellant's term of confinement, even by 55-days, is inconsistent with justice and good order and discipline. Appellant repeatedly sexually abused and sexually assaulted his 13-year-old daughter. His crimes had severe negative effects on her mental and physical wellbeing resulting in, among other things, her carving the word "worthless" into her skin and attempting suicide. Appellant deserved every day of confinement for his crimes. It would be antithetical to justice and good order and discipline to grant Appellant *any* sentence relief for less than two months of delay to process a large record of trial. This is especially true where the delay had no impact on Appellant.

5. Appellant's case is not a symptom of institutional neglect.

Appellant's characterization of 10 cases, including his string cite and Cassaberry-Folks, as evidence of institutional neglect is unpersuasive because it ignores this Court's important consideration of the circumstances of each case. Appellant's case is starkly unlike Cassaberry-Folks. In that case, the Government took nearly three times the time allotted under Livak to compile a small record of trial – 337 pages of transcription and 11 appellate exhibits, four prosecution exhibits, and three defense exhibits – and had no excuse for the delay. Cassaberry-Folks, 2024 CCA LEXIS at *44. The court found the 412-day post-trial delay created by personnel overseeing post-trial processing brought the case to an "intolerably close proximity to gross indifference." Id. at *50 (quotation omitted). The 55-day delay in Appellant's case, caused by a comparatively large record of trial – 1631 pages of transcription, 102 appellate exhibits, 30 prosecution exhibits, three defense exhibits, and a court exhibit –and multiple steps of coordination across the Pacific Ocean removes his situation from any analogue to Cassaberry-

Folks. Justifiable delay does not reflect institutional neglect. The delay in Appellant's case was justified and relief is not appropriate.

While the delay here did exceed the 150-day threshold, the presumption that it was unreasonable delay has been rebutted. This Court should find that the delay was not excessive given the circumstances and decline to grant Appellant relief.

II.

APPELLANT'S SENTENCE TO CONFINEMENT FOR 14 YEARS FOR SEXUALLY ASSAULTING HIS 13-YEAR-OLD DAUGHTER IS NOT INAPPROPRIATELY SEVERE.

Standard of Review

This Court reviews issues of sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law and Analysis

This Court may only affirm the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. Article 66(d)(1), UCMJ.[3] "The numerous permutations and combinations of sentencing alternatives available to the sentencing authority are so broad that, normally, there will not be only one sentence that is appropriate for a particular appellant." United States v. Joyner, 39 M.J. 965, 966 (A.F.C.M.R. 1994). The proper test for sentence appropriateness is "whether, when viewed as a whole, the approved sentence is inappropriate for this appellant based on appellant's character and the circumstances surrounding the offense." Id.

[3] The government agrees with Appellant that the amendment to Article 66(d)(1) enacted by section 539E of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021) does not apply to his case. (App. Br. at 11, n.74).

Sentence appropriateness is assessed by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters in the record of trial. United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (citation omitted). Although the Courts of Criminal Appeals are empowered to "do justice" with reference to some legal standard, they are not authorized to "grant mercy." United States v. Guinn, 81 M.J. 195, 203 (C.A.A.F. 2021) (quoting United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)).

"The sentence recommendation made by Government counsel during the sentencing argument is just that—a recommendation." United States v. Rosales, 2018 CCA LEXIS 52, *3-4 (A.F. Ct. Crim. App. 30 Jan 2018) (unpub. op.). It is not binding on a military judge. United States v. Greene, 2021 CCA LEXIS 42, *8 (A.F. Ct. Crim. App. 4 Feb 2021) (unpub. op.) (citing Rosales, 2018 CCA LEXIS at *4; *see also* United States v. Frantz, 2020 CCA LEXIS 404, at *42 (A.F. Ct. Crim. App. 10 Nov. 2020) (unpub. op.)).

As in Greene and Rosales, Appellant's claim that his term of confinement for sexually assaulting his daughter is inappropriately severe relies only on military judge's sentence exceeding the recommendation – by one year – of trial counsel. (App. Br. at 12-13). Contrary to Appellant's assertion, trial counsel's recommendation does not make the judge's sentence to 14 years greater than necessary to promote justice and maintain good order and discipline in the armed forces. While the sentence recommendation of trial counsel is a matter in the record of trial and may be considered by this court, it does not outweigh consideration of the Appellant's circumstances and the nature and seriousness of Appellant's offense – both of which establish that Appellant's sentence was not inappropriately severe.

1. Appellant's Circumstances

Nothing in Appellant's short service record or in the minuscule amount of sentencing evidence presented suggests that 14-years of confinement is inappropriately severe. Appellant does not argue that consideration of his circumstances indicates that 14-years of confinement for sexually assaulting his daughter is inappropriately severe. As a result, this Court should find this factor weighs against finding his sentence inappropriately severe.

2. Nature and Seriousness of Appellant's Offense

Appellant sexually assaulted his 13-year-old daughter by penetrating her vulva with his finger. (*Charge Sheet*). Even without context, that is a reprehensible offense deserving of at least 14 years of confinement. But the circumstances of Appellant's continuous sexual victimization of his daughter make that even more clear. Appellant's daughter, H.C., moved in with Appellant after living with her great-grandparents for almost her entire life. (R. at 699-700). She was excited to live with her dad because she didn't get to grow up around him. (R. at 700-701). She wanted to have a father-daughter relationship with him. (R. at 700).

Less than two months after she moved in, he began sexually abusing her during what he called "cuddling." (R. at 708-709; 806). His molestation of H.C. by grabbing her breasts and rubbing her vagina increased in frequency over time until he was sexually abusing her three to four times a week for a half hour or more. (R. at 709-711, 733-736). Along with his vulgar acts of molesting his daughter, Appellant attempted to take a picture of H.C. while she was in the shower. (R. at 741-742; ROT Vol. 1, *Entry of Judgment*).

Months of sexual abuse ended with the offense for which Appellant was sentenced to 14-years of confinement– sexually assaulting his daughter by digitally penetrating her vagina. (ROT Vol. 1, *Entry of Judgment*). Appellant carried H.C. to his bed. (R. at 753). Once there he

began the same routine of sexually abusing his daughter by touching her breasts and nipples and rubbing her vagina. (R. at 754). He caused bruising to his daughter's ear and nipples by biting and sucking. (R. at 755-756, 786, 1079-1080.) Then, he escalated his depraved abuse of H.C. and pushed his finger into – what his 13-year-old daughter, in her youthful naivete, could only describe as her "period hole" – her vagina. (Id).

H.C. eventually left the room but Appellant did not stop his abuse. He went into her room and lay next to her. (R. at 759). He put his hand on her right breast and started biting her ear. (Id.) When H.C. complained about the pain, he chastised her. (R. at 760-761).

The severity of Appellant's crime is evident in the severe psychological impacts it had on H.C. She had panic attacks and suffered from anxiety, facial and finger twitches, she regressed to wetting the bed, and required counseling. (R. at 911, 936, 1530, 1549). She began cutting herself on her arms, chest, back, and legs and carved the word "worthless" into her skin. (Id.) She tried to commit suicide. (R. at 1533-1554). The nature and severity of Appellant's crime supports that Appellant's sentence to 14-years of confinement was not inappropriately severe.

This Court should find that Appellant's sentence to confinement for 14-years is not inappropriately severe. The recommendations of trial counsel are just that – recommendations. The military judge, as the sentencing authority, had the duty to determine what sentence was appropriate based on the evidence. He determined 14-years was appropriate for Appellant's sexual assault of his 13-year-old daughter. The nature and seriousness of the offense supports that this sentence is not inappropriately severe and nothing in the record or information about Appellant outweighs that.

Appellant's argument that 13-years of confinement would be an appropriate sentence distorts the question before this Court. "[N]ormally, there will not be only one sentence that is

appropriate for a particular appellant." Joyner, 39 M.J. at 966. Because of this, the question is not whether there may be *another* appropriate sentence but whether the sentence given is inappropriate. Appellant committed heinous crimes against his daughter. Justice is upheld by him serving the confinement that he received. Neither factor suggests the sentence was inappropriately severe and so this Court should not second guess the trial judge's determination of what sentence is appropriate. Therefore, this Court should deny Appellant's requested relief.

III.

THIS COURT SHOULD EXERCISE ITS POWER TO CORRECT THE MISSING LANGUAGE IN THE ENTRY OF JUDGMENT.

Additional Facts

The specification of Charge II was amended from alleging a violation of Article 120c, UCMJ, to a violation of Article 80, UCMJ. (*Charge Sheet*). The members found Appellant guilty of Charge II and its specification. (R. at 1524; App. Ex. XCVIII at 2). In listing the "Arraigned Offense(s)," the Statement of Trial Results (STR) contains the following statement next to Charge II – "Art. 120c (amended after arraignment to delete '120c' and replace it with '80')." (ROT Vol. 1, *STR* at 3). The Entry of Judgment (EOJ) only includes "Art. 120c" in the "Arraigned Offense(s)" column. (ROT Vol. 1, *EOJ* at 3). It does not have a statement noting the amendment after arraignment.

Standard of Review

Proper completion of post-trial processing is a question of law that court's review de novo. United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted).

Law and Analysis

The EOJ "reflects the result of the court-martial, as modified by any post-trial actions, rulings, or orders." R.C.M. 1111(a)(2). A Court of Criminal Appeals "may modify a judgment in the performance of their duties and responsibilities." R.C.M. 1111(c)(2); United States v. Pullings, 83 M.J. 205, 217 (C.A.A.F. 2023).

Appellant was convicted of violating Article 80, UCMJ. The Government agrees that without language clarifying that the charge was amended, such as what was in the STR, the EOJ does not accurately reflect the results of the court-martial. However, in the interest of ensuring Appellant's right to speedy post-trial processing – which Appellant has already complained about in Issue I – this Court should not delay Appellant's appellate review by remanding the case for correction of this single error. Instead, this Court should exercise its authority under R.C.M. 1111(c)(2) and modify the judgment.

IV.

THE UNITED STATES DID NOT VIOLATE APPELLANT'S RIGHTS BY NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURT-MARTIAL.

Standard of Review

The adequacy of a military judge's instructions is reviewed de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (citing United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

In United States v. Anderson, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. 25 March 2022) (unpub. op.), this Court rejected the same claims Appellant raises now. Then, as

Appellant readily admits, our superior Court affirmed this Court's decision and definitively held that military members do not have a right to a unanimous verdict at court-martial under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. See United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023), *cert denied*, No. 23-437, 144 S. Ct. 1003 (2024); see also United States v. Cunningham, 83 M.J. 367 (C.A.A.F. 2023), *cert denied*, No 23-666, 144 S. Ct. 1096 (2024). Accordingly, the military judge did not err in not providing an instruction for a unanimous verdict, and Appellant's claim must fail.

V.

THE MILITARY JUDGE DID NOT ERR BY ADMITTING PORTIONS OF H.C.'S RECORDED INTERVIEWS WITH OSI.

Additional Facts

After trial defense counsel cross examined H.C., the Government moved to admit two recordings of H.C.'s interviews with OSI as prosecution exhibits 8 and 9. (R. at 983-984). Trial counsel sought to admit the recordings as prior consistent statements under M.R.E. 801(d)(1)(b)(i) and (ii) because of the way trial defense counsel attacked H.C.'s credibility in both her initial report and her in court testimony. (R. at 990-995). Trial defense counsel's questions of H.C. attacked her credibility in three ways: (1) by attacking her memory; (2) by implying there was an improper influence on H.C.'s testimony or recent fabrication based on her listening to opening statements by trial and defense counsel as well as testimony of T.A.; and (3) by implying there was improper influence on H.C.'s testimony based on M.A.'s presence during her interview with OSI. (R. at 796, 798-799, 800-802, 811-812).

The defense objected to admission of the evidence based on foundation, hearsay, relevance, cumulativeness, and M.R.E. 403. (R. at 988). After thorough deliberation and review

of the offered recordings, the military judge admitted portions of the recordings. (R. at 1137). He found that trial defense counsel impeached H.C. multiple times during her testimony and that the impeachment could be rebutted under M.R.E. 801(d)(1)(B)(ii). (R. at 1001).

The military judge rejected trial counsel's assertion that the recordings were admissible under M.R.E. 801(d)(1)(B)(i) because the alleged improper influence of M.A.'s presence during the OSI interview would have occurred contemporaneously with the statement not before. (R. at 1143-1149). [4] But he admitted portions of the recordings under M.R.E. 801(d)(1)(B)(ii). The military judge found that the prior statements of H.C. were "mostly consistent as required by [United States v.]Finch," 79 M.J. 389 (C.A.A.F. 2020). (R. at 1137). He also found that the witness was subject to cross-examination, and that her credibility as to those issues had been impeached on a ground other than improper motive or improper influence. (Id.) He articulated that he considered M.R.E. 403 and found the probative value of rehabilitating H.C.'s credibility with a prior consistent statement was not substantially outweighed by the danger of unfair prejudice. (R. at 1137-1138).

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. Finch, 79 M.J. at 394 (quoting United States v. Frost, 79 M.J. 104, 109 (C.A.A.F. 2019)).

[4] The record lacks any evidence that the military judge considered trial counsel's argument that the prior consistent statements were admissible under M.R.E. 801(d)(1)(b)(ii) based on trial defense counsel implying there was an improper influence through H.C. hearing opening statements and witness testimony. The prior consistent statements would be admissible based on these facts because the alleged improper influence occurred after the prior consistent statements were made and the other requirements under M.R.E. 801(d)(1) were met.

Law

Military judges abuse their discretion (1) if the findings of fact on which they predicate their ruling are not supported by the evidence; (2) if they use incorrect legal principles; or (3) if their application of the correct legal principles to the facts is clearly unreasonable. Id.

"To reverse for an abuse of discretion involves far more than a difference in opinion. The challenged action must be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal." United States v. Hyppolite, 79 M.J. 161, 166 (C.A.A.F. 2019) (cleaned up) (citation omitted).

While hearsay statements are usually inadmissible, prior consistent statements are not hearsay if certain thresholds are met. M.R.E. 801(d)(1)(b). The requirements are: (1) the declarant of the statement testifies at the court-martial, (2) the declarant is subject to cross-examination, and (3) the statement is consistent with the declarant's testimony. Finch, 79 M.J. at 394-395 (citing M.R.E. 801(d)(1)(b)). One reason a prior consistent statement may be offered is if it is offered to rehabilitate the declarant's credibility as a witness when attacked on another ground. M.R.E. 801(d)(1)(b)(ii).

When a military judge conducts a proper M.R.E. 403 balancing on the record, his decision will not be overturned absent a clear abuse of discretion. United States v. Stephens, 67 M.J. 233, 235 (C.A.A.F. 2009).

Analysis

Appellant misapprehends the rules of evidence in arguing that the recorded interviews were inadmissible because M.A.'s involvement in the interview "deprives them of reliability" because M.A.'s involvement created "a substantial risk of modifying H.C.'s statement about what occurred." (App. Br. at 6). There is no evidence that the recording was unreliable or

tampered with. Instead, Appellant appears to use the term "reliability" as an attack on the truthfulness of what H.C. said in her interviews. Whether H.C.'s prior consistent statements were truthful went to the weight of the evidence, not admissibility. Trial defense counsel was free to, and did, cross examine all witnesses on any influence on H.C.'s report to attack the "reliability" of H.C.'s statements to OSI.

Where trial defense counsel lodges an attack on the credibility of a witness, the entire substantive portion of a recorded interview is admissible as a prior consistent statement. *See* United States v. Norwood, 81 M.J. 12, 18 (C.A.A.F. 2021) (finding that the entire substantive portion of the recorded interview admissible where the trial defense counsel implied the Government had coached the victim's testimony). The defense opened the door to the admissibility of this evidence by attacking H.C.'s credibility based on her memory of the events and the consistency of her recitation of what happened. The military judge correctly found that H.C., the declarant, testified under oath at the court-martial and was subject to cross-examination, that statements in the recorded interviews were consistent with her in court testimony and that statements were admissible under M.R.E. 801(d)(1)(b)(ii).

The military judge put his analysis of M.R.E. 403 on the record and should therefore only be overturned if there was a clear abuse of discretion. Stephens, 67 M.J. at 235. He appropriately considered whether the probative value was substantially outweighed by the danger of unfair prejudice under M.R.E. 403 and found that it did not because the substantive information was already in front of the fact finder. This was not a clear abuse of discretion.

Based on this, the military judge's application of case law and M.R.E. 801(d)(1)(B)(ii) and M.R.E. 403 were not arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

Hyppolite, 79 M.J. at 166. Because the military judge did not abuse his discretion, this Court should deny Appellant's assignment of error.

VI.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY ADMITTING APPELLANT'S NOTE TO H.C. IT WAS NOT ERROR FOR TRIAL COUNSEL TO ARGUE IT WAS EVIDENCE OF CONSCIOUSNESS OF GUILT.

Additional Facts

There were several discussions between trial defense counsel, trial counsel, and the military judge about the admissibility of Appellant's suicide note to H.C. telling H.C. to not blame herself and to get therapy and live a happy life. (Pros. Ex. 26). The discussion occurred first while the parties were reviewing trial counsel's slides for opening, a second time during trial counsel's opening statement, and finally just before the Government introduced the evidence through witness testimony.

Trial defense counsel conceded the note was admissible under M.R.E. 304(d). (R. at 609). Trial defense counsel argued the note was unnoticed M.R.E. 404(b) evidence because trial counsel said during opening that note expressed Appellant's "guilty conscience." (R. at 633-634, 636). The military judge overruled the objection. He found the note was not an uncharged crime, wrong, or act, but an admissible statement of the accused under M.R.E. 304(d) as Appellant's expression of guilt. (R. at 363, 877). The military judge explained that the act of making a statement is not the same as an uncharged crime, wrong, or other act under M.R.E. 404(b). (R. at 637-638). He explained the distinction by comparing the note, which was, as he phrased it, like a "quasi admission or confession," to an accused going to the Office of Special Investigations and writing a statement. (R. at 879).

The judge found probative value in the note as well as in the members knowing that the note was written while charges were pending. (R. at 876). Originally, trial counsel sought to admit the fact that there was a previous court-martial scheduled, and that Appellant had attempted suicide, but they withdrew that offer after trial defense counsel expressed concern. (R. at 875-877). Despite trial counsel's agreement to only introduce the general fact that Appellant wrote the note when charges were pending, the military judge was concerned that there may be unfair prejudice based on the context in which the note was found. (R. at 879) He was considering how he would limit how the witness could testify about context surrounding the discovery of the note to alleviate any unfair prejudice from knowing it was found during Appellant's suicide attempt, but before he could announce a limitation his concern was mooted through the stipulation of fact. (R. at 876, 881).

The parties stipulated that Appellant wrote the note in August 2022 and that a member of law enforcement discovered it. (R. at 1365-67; App. Ex. XCVII). Trial defense counsel preserved objection to the admissibility of the facts in the stipulation. (R. at 1369; 1374). The note was admitted into evidence. (Pros. Ex. 26).

Trial counsel, in closing argument, referred to the note and told the members that it "demonstrates that [Appellant] is not disputing what [H.C.] had reported he did to her." (R. at 1468). Trial defense counsel did not object to trial counsel's statement.

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. Finch, 79 M.J. at 394 (quotation and citation omitted).

Law

The law detailed in issue V is incorporated here.

M.R.E. 404(b)(1) provides that evidence of a crime, wrong, or other act is generally not admissible as evidence of a person's character to show the person acted in conformity with that character on a particular occasion. But such evidence may be admissible for another purpose, such as to prove intent, knowledge, or absence of mistake. M.R.E. 404(b)(2).

"Consciousness of guilt evidence is different from propensity evidence." United States v. Quezada, 82 M.J. 54, 59 (C.A.A.F. 2021). "Consciousness of guilt evidence is an acceptable form of circumstantial evidence used to show 'awareness of an accused that he or she has engaged in blameworthy conduct.'" Id. at 59 (quoting Black's Law Dictionary 379 (11th ed. 2019)). "By contrast, propensity evidence is a generally impermissible form of character evidence in which members 'prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.'" Id. (quoting M.R.E. 404(b)(1)).

A military judge's rulings under M.R.E. 404(b) and M.R.E. 403 will not be disturbed "except for a clear abuse of discretion." United States v. Morrison, 52 M.J. 117, 122 (C.A.A.F. 1999) (citing United States v. Miller, 46 M.J. 63, 65 (C.A.A.F. 1997)). M.R.E. 403 requires a military judge to decide whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Analysis

The military judge did not abuse his discretion by admitting Appellant's note to H.C. He correctly found that the note was not propensity evidence under M.R.E. 404(b). M.R.E. 404(b) *only* prohibits evidence of a person's character or character trait to prove that on a particular

occasion the person acted in accordance with that character. It does not prohibit all evidence that might fit under an exception to the rule.

The apology note is not evidence of Appellant's character, nor does it show Appellant acted in accordance with some character trait. (R. at 363, 637-638, 876, 877, 879). Like the statement in United States v. Moreno, 2025 CCA LEXIS 220, *30-31, (A.F. Ct. Crim. App. 19 May 2025), "I assume prison," Appellant's statement is not evidence of a crime, wrong, or other act that show's Appellant had a particular character trait. The judge correctly drew this distinction when he explained to trial defense counsel that Appellant's action of writing the note was not an act under M.R.E. 404(b). (R. at 637-638, 879). The note was an acceptable form of circumstantial evidence used to show Appellant's awareness that he had engaged in blameworthy conduct. Id. (citing, Quezada, 82 M.J. at 59). Therefore, M.R.E. 404(b) was not a limitation on admitting the note into evidence.

The military judge put his M.R.E. 403 balancing test on the record, and so his decision should be afforded the most deference. United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000). He found probative value in the note. (R. at 876). His only concern for unfair prejudice – arising from the specific circumstances of the discovery of the note – was mooted by the stipulation of fact because that evidence was never admitted. As a result, the unfair prejudice that may have existed had that context been offered was not present and the probative value of the note was not outweighed. This analysis was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous and should not be overturned. Hyppolite, 79 M.J. at 166.

Because the note was admissible under M.R.E. 304(d), as trial defense counsel conceded, was not subject to M.R.E. 404(b) and was not inadmissible under M.R.E. 403, the military judge did not err in admitting the note. With the note in evidence, it was not improper for trial counsel

to argue it as circumstantial evidence of Appellant's consciousness of guilt. Therefore, this Court should deny Appellant's requested relief.

VII.

APPELLANT WAIVED HIS OBJECTION TO THE ADMISSIBILITY OF THE DNA EVIDENCE.

Additional Facts

After H.C. reported Appellant's sexual misconduct to OSI, she went to a hospital for a sexual assault forensic exam (SAFE). (R. at 789). A pediatric nurse practitioner conducted the exam. (R. at 1017, 1047). During the SAFE, the nurse swabbed H.C.'s ears, neck, shoulders, breasts, and abdomen to collect any DNA that may be present. (R. at 1082). The exam ended around 0020, and the box containing the swabs were put into a locked safe around 0343. (R. at 1095-1096).

The nurse testified that her procedure after she takes the swabs is to place them in boxes that come with the sexual assault kit. (R. at 1046). Those boxes are labeled based on what part of the body was swabbed. (Id.) All the swab boxes are then put into an evidence box and taped with evidence tape so the lab can tell if it has been tampered with. (Id.) After the box is sealed, if OSI is not around, it is placed in a safe. (Id.) The nurse explained that after placing the boxes containing the swabs in the taped evidence box, she typically begins writing the information she got from the victim during the exam before putting the sealed box in the safe. (R. at 1098-1099).

The swabs taken from H.C. were sent to the United States Army Criminal Investigations Laboratory (USACIL) for examination by J.F., a forensic DNA examiner. (R. at 1311, 1325). J.F. compared the swabs taken from H.C. to swabs taken from Appellant to determine whether the DNA left on H.C. was Appellant's. (R. at 1327).

Trial defense counsel objected to J.F.'s testimony about the results of the DNA comparison based on hearsay and relevance. (R. at 1327-1350). His objection only concerned the use of Appellant's DNA swab. (Id.) The discussion of trial defense counsel's objection took almost an hour, and not once did trial defense counsel did object to J.F.'s use of the swabs collected from H.C. (R. at 1326-1351). Trial defense counsel were asked if they had any other objection to J.F.'s report and said, "No, Your Honor." (R. at 1354).

Standard of Review

Whether an appellant waived an issue is a legal question that this Court reviews de novo. United States v. Davis, 79 M.J. 329, 331(C.A.A.F. 2020).

Law and Analysis

Waiver is the intentional relinquishment or abandonment of a known right. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). A valid waiver leaves no error to correct on appeal. United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009) (internal quotation marks and citation omitted).

"When an appellant does not raise an objection to the admission of evidence at trial, [this Court] first must determine whether the appellant waived or forfeited the objection." United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018) (citation omitted). When an appellant affirmatively waives objection to the admission of evidence, the waiver also waives the right to complain about its admission on appeal. United States v. Ahern, 76 M.J. 194, 198 (C.A.A.F. 2017) (citation omitted).

If this Court finds Appellant did not waive an issue but merely forfeited it, the issue is reviewed for plain error. United States v Sweeney, 70 M.J. 296, 304 (C.A.A.F. 2011). Plain

error occurs where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused. Id. (citation omitted).

When an appellant affirmatively states that he has no objection to the admission of evidence, the issue is waived and his right to complain on appeal is extinguished. United States v. Andersen, 82 M.J. 543, 547 (A.F. Ct. Crim. App. 2022) (citing Davis, 79 M.J. at 331; Ahern, 76 M.J. at 198).

This court has applied five non-exhaustive factors when considering whether waiver has been clearly established and there is an intentional relinquishment or abandonment of a known right or privilege. United States v. Monarque, 2017 CCA LEXIS 245, *10 (A.F. Ct. Crim. App. 6 Mar. 2017) (unpub. op.) (citations omitted). Those factors include:

> (1) whether the right was a known right or privilege at the time of the waiver; (2) whether the waiver was part of the defense's trial strategy; (3) whether the defense had knowledge of the proffered evidence and had time and opportunity to review it; (4) whether the defense was given an opportunity to object to the admissibility of the evidence; and (5) whether [the appellant] now raises ineffective assistance of counsel with regard to the issue of waiver.

Id. (footnotes and citation omitted).

These factors establish that Appellant waived his objection to the DNA swabs collected from H.C. Appellant had the right to object to the DNA swabs collected from H.C. Trial defense counsel was aware they could object to DNA evidence based on chain of custody because they objected to Appellant's DNA swabs under that theory and the military judge provided an appropriate instruction. (R. at 1346-1348; 1451). Trial defense counsel was aware of the three-hour gap in specific accounting of the swabs both from the provision of evidence during discovery and because trial counsel elicited the information on direct. (R. at 1096-1097). Despite knowing about the gap, trial defense counsel did not object to the DNA swab taken from

H.C. (R. at 1354). Instead, the senior defense counsel used it as part of their strategy by cross examining the nurse about the gap. (R. at 1098). Appellant does not claim his trial defense counsel were ineffective. Trial defense counsel's affirmative statement that they had no objection to the evidence except for the part relating to Appellant's DNA swab was an intentional relinquishment of known right. The issue is therefore waived, and Appellant's right to complain on appeal is extinguished. Andersen, 82 M.J.at 547.

Even if Appellant merely forfeited the objection, there was not plain error. First, there was not error. "A missing link in chain of custody does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be." United States v. Maxwell, 38 M.J. 148, 151 (C.A.A.F. 1993). "The Court need only be satisfied that in reasonable probability [that] the article had not been changed in important respects." Id. Any deficiencies in the chain of custody go to the weight of the evidence not its admissibility. Id. at 152.

There was sufficient evidence to support a reasonable probability that the DNA samples taken from H.C.'s body had not been changed. The gap between taking the sample and putting it in the safe was short – just over three hours. The nurse testified that it was standard procedure for the swabs to be placed first in an individual box for each swab and then in an evidence box sealed with tape. (R. at 1046). There is no evidence the nurse had a motive to tamper with the samples and there is no evidence the samples were tampered with. Therefore, the three-hour gap goes to the weight of the evidence, not the admissibility, and there was no error in the admission of the DNA evidence. This Court should deny Appellant's requested relief.

VIII.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY ALLOWING B.J. TO TESTIFY ABOUT WHAT SHUTTER SPEED IS NEEDED TO SEE WATER DROPLETS. EVEN IF IT WAS AN ABUSE OF DISCRETION, THE ERROR WAS HARMLESS.

Additional Facts

B.J. testified in Appellant's court-martial as an expert in digital forensics. (R. at 1232). In his review of Appellant's cellphone, he found two relevant photographs – one taken over the shower curtain in Appellant's home and a blurry photo of the shower curtain. (Pros. Ex. 19). These pictures were taken on 17 July 2021 and deleted around a minute after they were taken. (R. at 1252, 1256; Pros. Ex. 19, 21).

H.C. testified on cross examination that the shower was running when she saw Appellant's phone over the shower curtain. (R. at 816-817). Water is not visible in the photo taken above the shower curtain that B.J. recovered. (Pros. Ex. 19). On direct, B.J. testified that he could not determine whether the water in the picture was on or off. (R. at 1257). He explained that the image was taken at a shutter speed of 128th of a second – which he determined from his forensic examination of the image – and "generally you will need on[e] one thousandths of a second photograph to capture water." (R. at 1257, 1272, 1380). Trial defense counsel objected based on B.J. not being recognized as an expert in camera shutter speeds. (R. at 1257-1258). The judge overruled the objection. (Id.)

B.J. explained he had tested when water droplets were visible at different shutter speeds by taking photos in a rainstorm. (R. at 1258). Right after B.J.'s testimony on direct, the judge provided the members an instruction on his testimony. He told the members that B.J. had been recognized as an expert in digital forensics and "[t]o the extent any of his testimony was outside

of that area of expertise, you are not required to consider those credentials when you consider that testimony." (R. at 1259). On cross-examination, B.J. conceded that he has not been recognized as an expert in photography, he is not an expert in shutter speeds, and that the test with a rainstorm was not the same scenario as the shower. (R. at 1272-1275).

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. Finch, 79 M.J. at 394 (quotation and citation omitted).

Law and Analysis

The law detailed in issue V is incorporated here.

M.R.E. 702 governs the testimony of expert witnesses in a trial by court-martial. Under the rule, a witness "qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if," among other criteria, "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue" and "the testimony is the product of reliable principles and methods." M.R.E. 702. "[A]n expert witness may not offer opinions that exceed[ ] the scope of the witness's expertise." United States v. Flesher, 73 M.J. 303, 315 (C.A.A.F. 2014) (second alteration in original) (internal quotation omitted).

M.R.E. 701 allows a witness, not testifying as an expert, to express an opinion that is rationally based on the witness' perception; helpful to clearly understand the witness' testimony or to determine a fact in issue; and not based on scientific, technical, or other specialized knowledge within the scope of M.R.E. 702. Nothing prohibits expert witnesses from also providing lay testimony in accordance with M.R.E. 701. United States v. Richard, 2021 CCA LEXIS 632, *40 (A.F. Ct. Crim. App. 24 November 2021) (rev'd on other grounds).

The judge did not abuse his discretion by allowing B.J. to testify about whether water droplets are visible in a photo taken at a particular camera shutter speed because it was lay witness testimony. Whether the water droplets would have been visible was based on his perception from doing a basic test of taking pictures in a rainstorm. Anyone with a camera could come to this conclusion. Even Appellant acknowledges it was "amateurish experimentation." (App. Br. at 30). It was not a scientific test, nor was it based on scientific, technical, or specialized knowledge. This explanation of how he came to his lay opinion, helped the members understand his testimony that he could not offer an opinion about whether the water was on in the photo. Without the explanation of his perception, the fact finder would have been left wondering why he could not say the water was off when no water was visible. Because it was admissible lay witness testimony under M.R.E. 701, the judge did not abuse his discretion in permitting the testimony.

Even if the judge abused his discretion, the error was harmless. Whether an error was harmless is reviewed de novo. United States v. Norman, 74 M.J. 144, 150 (C.A.A.F. 2015) (citing United States v. Hall, 66 M.J. 53, 54 (C.A.A.F. 2008)). "For nonconstitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings." Id. (quoting Hall, 66 M.J. at 54). This Court determines whether prejudice resulted from an erroneous evidentiary ruling by weighing: (1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of evidence in question; and (4) the quality of the evidence in question. Id.

B.J.'s testimony did not have a substantial influence on the findings. Just after B.J.'s testimony about shutter speeds, the military judge provided an instruction to the panel that directed them to not consider his expert qualifications for matters outside his expertise. (R. at

1259). Following the instruction, trial defense counsel thoroughly cross examined B.J. on his lack of qualifications on shutter speeds and the significant differences in environments between a rainstorm and a shower. (R. at 1272-1275).

The Government's case for Charge II and its specification was strong. In closing argument, the Government did not mention B.J's lay testimony about whether the water droplets were visible because it was unnecessary for their case. (R. at 1466-1467,1474-1478). Instead, trial counsel pointed out the consistency between H.C.'s testimony and B.J.'s expert analysis of the phone and the consistencies between H.C.'s testimony and the photograph. (Id.) H.C. testified that Appellant entered the bathroom while she was showering a week before she made her report and put his phone over the shower curtain. (R. at 744). She said the phone was closer to the shower nozzle. (R. at 745). When she noticed the phone, she thought about whether she should say anything. (Id.) She moved shower head to face the wall. (Id.) This is consistent with one of the photographs B.J. recovered from Appellant's phone. The photo above the shower curtain is taken with the phone closer to the shower nozzle and the showerhead is moved towards the wall. (Pros. Ex. 19).

When H.C. asked for Appellant's phone, he stalled before handing it to her. (R. at 816). When she looked through the photos, she did not see any photos of herself. (R. at 817). B.J.'s expert testimony about his forensic analysis of Appellant's phone corroborated H.C.'s testimony. Appellant's phone took two photos less than seconds apart on the 17 July 2021 – one over the top of the shower curtain and another a blurry photo of the shower curtain. (R. at 1234; Pros. Ex. 19). Those photos were deleted less than a minute later. (R. at 1253-1256; Pros Ex. 20, 21).

The defense's case was weak. The defense highlighted that H.C. is not visible in the photograph, but that is to be expected given the blind spots created by the shower curtain. (R. at

1486; Pros. Ex. 19). The defense did not attack the authenticity of the photograph or attempt to explain why Appellant took the photo and then deleted it. Instead, trial defense counsel relied on attacking H.C.'s credibility based on minor differences between her account and the photograph such as when she moved the shower head and whether the water was running. (R. at 1486).

Finally, the quality of the testimony was low. The defense capitalized on the low quality of the evidence when they not only thoroughly cross examined B.J. on his lack of expertise but also when they argued it was "the government [] throwing anything and everything at the wall." (R. at 1486). B.J. conceded on cross-examination that he was not an expert on the topic, that there were significant environmental differences between his test and the shower, and that even with his test he could not opine on whether the water was on or off based on the photograph. (R. at 1272-1275).

Because the Government's case was strong, the defense case was weak, and the quality of the testimony was low the admission of B.J.'s testimony did not have a substantial impact on the finding of guilt for Charge II and its specification. Therefore, the admission of B.J.'s testimony about his test of whether the shutter speed of Appellant's camera would pick up water droplets, if it was error, was harmless error.

IX.

APPELLANT WAIVED ISSUE WITH THE OMISSION OF A DEFINITION OF "SEXUAL GRATIFICATION".

Additional Facts

The military judge instructed the members that "for all the Specifications of Charge I, the accused's intent to gratify his sexual desire must be proved beyond a reasonable doubt." (R. at 1444). Following instructions, the president of the court-martial panel asked the military judge if there was a legal definition for the term "sexual gratification." (R. at 1504). The military judge

informed the member that it was left up to the panel to define but offered to take it up with counsel. (Id.) The military judge, in an Article 39(a), asked both counsel if either party was requesting he provide a definition to the panel based on the panel president's question. (R. at 1505). Trial defense counsel responded, "We're not requesting one, Your Honor." (Id.)

Standard of Review

Whether an appellant waived an issue is a legal question that this Court reviews de novo. Davis, 79 M.J. at 331.

Law and Analysis

The law detailed in issue VII is incorporated here.

"Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection." R.C.M. 920(f). Despite the rule directing forfeiture, waiver can still occur where an appellant "did not just fail to object . . . [but] affirmatively declined to object to the instructions and offered no additional instructions." Davis, 79 M.J. at 330.

Appellant was offered the opportunity to challenge and perhaps modify the military judge's instruction to the members that they could define "sexual gratification" using the plain language. Like Davis, Appellant directly bypassed that offered opportunity and affirmatively waived any objection to the instruction on appeal. Id. Therefore, there is nothing to be corrected on appeal, and this Court should deny his requested relief. Campos, 67 M.J. at 332.

X.

APPELLANT'S CONVICTIONS ARE FACTUALLY AND LEGALLY SUFFICIENT.

Additional Facts

H.C. testified that she felt Appellant have an erection at some point during his sexual abuse of her. (R. at 829-830). Trial defense counsel cross examined H.C. on that assertion. (R. at 830). Trial defense counsel elicited that when H.C. told OSI that she had not felt Appellant's penis "hard." (Id.) H.C. explained, "I had not thought that it was him being hard at that time until later on after I had left." (Id.) She continued to explain that she originally thought may have been his knee "or something" but that after she thought it over, she realized it was his penis. (Id.)

Standard of Review

This Court reviews factual and legal sufficiency is de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023) (citing Lane, 64 M.J. at 2).

Law and Analysis

A CCA "may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with [Article 66(d)(1)(B)]." Article 66(d)(1)(A), UCMJ (2024 ed.).[5] Factual sufficiency review is triggered only if an appellant (1) asserts it as an assignment of error, and (2) shows "a specific deficiency in proof." Article 66(d)(1)(B)(i), UCMJ; United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024).

[5] All Appellant's offenses occurred after 1 January 2021. (*Charge Sheet)*. Congress amended Article 66(d), UCMJ in the National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612-13 (1 Jan 2021). This amended version of factual sufficiency review went into effect on 1 January 2021 and so it applies to Appellant's case. All references to Article 66, UCMJ refer to this amended version.

If both threshold elements are met, a CCA may "weigh the evidence and determine controverted questions of fact." Article 66(d)(1)(B)(ii). The CCA must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Id. "[T]he degree of deference will depend on the nature of the evidence at issue." Harvey, 85 M.J. at 130-131. Then, the CCA must be "clearly convinced that the finding of guilty was against the weight of the evidence" before they may "dismiss, set aside, or modify the finding, or affirm a lesser finding." Article 66(d)(1)(B)(iii), UCMJ.

Factual Sufficiency

It is within this Court's discretion to determine what level of deference is appropriate to give evidence. Harvey, 85 M.J. at 131. Our superior Court has indicated that deference for a witness who testified may be high because the CCA judges did not see the witness testify. Id.

"[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." Id. at 131(internal quotation marks omitted). For this Court "to be clearly convinced that the finding of guilty was against the weight of the evidence, two requirements must be met." Id. at 131-132. First, this Court must find that the evidence, "does not prove that the appellant is guilty beyond a reasonable doubt." Id. Second, this Court "must be clearly convinced of the correctness of this decision." Id.

H.C.'s inconsistency between whether she felt Appellant's penis erect during the sexual abuse was minor and does not invalidate the rest of the evidence. H.C. was otherwise consistent with her description of the repeated sexual abuse Appellant inflicted on her. Her testimony that Appellant began touching and squeezing her breasts in February 2021 during what he called "cuddling" was consistent with her report to OSI. (R. at 709-712; R. at 1193; Pros. Ex. 8). Her

testimony about Appellant putting his hand in her pants and underwear and rubbing her vagina was not inconsistent with her report to OSI. (R. at 710, 733-738, 1197 Pros. Ex. 8). Her testimony of Appellant entering the bathroom while she was showering and putting his phone above the shower curtain to attempt to take a picture of her is consistent with her report to OSI and the recovered photographs. (R. at 742-749; 1206-1207; Pros. Ex. 19). Her testimony about appellant licking and sucking her breasts was consistent with her report to OSI and the sexual assault forensic exam. (R. at 712; 754-756; 787;1198, R. at 1202-1203). Her testimony about Appellant biting her ear was consistent with her report to OSI and the sexual assault forensic exam. (R. at 755; 760; 7871202, 1204). Her testimony about him telling her "You like that, don't you" was consistent with her report to OSI. (R. at 755; 1198, 1202). Her testimony about Appellant coming into her room after she left, getting into bed with her, and squeezing her breast was consistent with her report to OSI. (R. at 759; 1204). No inconsistency has been presented with H.C.'s description of how Appellant raped her by inserting his finger in her vagina. (R. at 754-756). Appellant has presented no evidence contradicting any of this testimony. Appellant has presented no compelling evidence of a motive to fabricate.

A single, minor inconsistency in whether H.C., a 13-year-old victim, could identify if Appellant's penis was erect when he sexually abused and assaulted her does not render Appellant's conviction factually insufficient. The rest of H.C.'s testimony and evidence was consistent in terms of the facts supporting each element of the offenses. Giving appropriate deference to the testimony of H.C. because this Court did not observe her testimony, this Court should not be clearly convinced that the finding of guilty was against the weight of the evidence. Harvey, 85 M.J. at 131. Therefore, this Court should find Appellant's convictions factually sufficient and deny his requested relief.

Legal Sufficiency

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

"In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, [this Court is] mindful that the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." Id. The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011). Legal sufficiency is a very low threshold. King, 78 M.J. at 221 (internal citations and quotations omitted).

Viewing the evidence presented – especially the details specified in the factual sufficiency section above – in a light most favorable to the prosecution a rational fact finder could have found the essential elements of Appellant's crimes beyond a reasonable doubt.

Therefore, this Court should find Appellant's convictions legally sufficient and deny his requested relief.

XI.

APPELLANT'S CONVICTIONS ARE FACTUALLY AND LEGALLY SUFFICIENT.

Standard of Review

This Court reviews factual and legal sufficiency is de novo. McAlhaney, 83 M.J. at 166 (citation omitted).

Law

The law from issue X is incorporated here.

Analysis

Appellant's claim that the DNA evidence analyzed and explained by a forensic DNA examiner is "implausible" lacks any evidentiary support and should be rejected. Nothing in the record supports the notion that it is implausible that DNA would've remained on H.C.'s body or that collection and examination of the DNA was unreliable. This Court should reject Appellant's baseless claim that the DNA evidence renders his convictions legally and factually insufficient.[6] H.C.'s testimony was credible and corroborated by her injuries to hear ear and breast as documented in her sexual assault forensic exam. Even without the DNA evidence, providing appropriate deference to witness testimony, this Court should not be clearly convinced that Appellant's convictions were against the weight of the evidence. Harvey, 85 M.J. at 131. Additionally, in drawing every reasonable inference in favor of the prosecution, any rational trier

[6] Appellant challenges all the findings in this assignment of error, but DNA evidence was not relevant to proving Charge II and its specification because it only involved Appellant attempting to take a photograph of H.C. while she showered. Even if the DNA evidence were "unreliable" as Appellant claims, it would not impact his conviction for Charge II and its specification.

of fact could have found the essential elements of the crime beyond a reasonable doubt. King, 78 M.J. 218, 221; Barner, 56 M.J. 131, 134. Therefore, this Court should deny Appellant's requested relief.

XII.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY NOT ASKING A MEMBER'S QUESTION.

Additional Facts

The panel president asked M.A., T.A.'s mother who picked up H.C. after she told T.A. about Appellant's abuse, questions following examination by trial and defense counsel. (R. at 902-903, App. Ex. LXXXII). The final questions were, "Was there any contact with her father?" and "If so, what was the content or subject?" (App. Ex. LXXXII). When M.A. was asked if there was any contact with H.C.'s father, Appellant, she responded, "Not that I am aware of." (R. at 903). The military judge then told the panel president, "I believe your last question is not applicable given her previous answers." (Id.) He did not ask the final question.

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. Finch, 79 M.J. at 394 (citation omitted).

Law and Analysis

The law detailed in issue V is incorporated here.

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. M.R.E. 401. Irrelevant evidence is not admissible. M.R.E. 402(b).

The military judge did not abuse his discretion by not asking the court-martial president's final question because it was a conditional question. The relevance of the question was

conditional upon a positive response to the previous question – as shown by the words "if so" preceding the question. The military judge correctly found M.A.'s answer to the question about whether there was any contact with Appellant when she took H.C. back to her house rendered the contingent question inapplicable. The military judge's ruling was based on the facts, it applied the correct legal principles, and his application of the facts to the law was not unreasonable. Therefore, this Court should find the military judge did not abuse his discretion and should deny Appellant's requested relief.

XIII.

SENTENCE COMPARISON IS INAPPROPRIATE IN THIS CASE AND APPELLANT'S SENTENCE IS NOT INAPPROPRIATELY SEVERE.

Standard of Review

This Court reviews sentence appropriateness de novo. Lane, 64 M.J. at 2.

Law

The law in issue VI is incorporated here.

This Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. Article 66(d), UCMJ. This review includes the ability to consider uniformity and even-handedness of sentencing decisions. United States v. Cabuhat, 83 M.J. 755, 772 (C.A.A.F. 2023) (citing United States v. Behunin, 83 M.J. 158, 161 (C.A.A.F. 2023)).

This Court is not required to engage in sentence comparison with specific other cases except in those rare times when sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases. Cabuhat, 83 M.J. at 772 (citing United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999)).

Sentence comparison is not required unless the Court finds that any cited cases are "closely related" to Appellant's case and the sentences are "highly disparate." Lacy, 50 M.J. at 288. "[A]n appellant bears the burden of demonstrating that any cited cases are closely related to his or her case and that the sentences are highly disparate. If the appellant meets that burden, or if the court raises the issue on its own motion, then the Government must show that there is a rational basis for the disparity. Id.

Cases are "closely related" when, for example, they include "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared…" United States v. Wacha, 55 M.J. 266, 267 (C.A.A.F. 2001).

When cases are not closely related, the Court is permitted, but not required, to engage in sentence comparison. Id. at 267. Should Appellant fail to meet the burden of proving that the cases are "closely related," then the sentence's appropriateness "generally should be determined without reference or comparison to sentences in other cases." United States v. LeBlanc, 74 M.J. 650, 659 (A.F. Ct. Crim. App. 2015) (en banc).

"Sentence comparison, even when appropriate, does not mean sentence equation." United States v. Roberts, 1998 CCA LEXIS 243, at *3-4 (A.F. Ct. Crim. App. 13 May 1998) (unpub. op.). When an appellate court chooses to consider the sentences adjudged in other cases, this consideration is just one of the many aspects of sentence appropriateness and may be given such weight as the Court sees fit under all the circumstances. Id. (citing United States v. Reeder, 29 M.J. 563, 564 (A.F.C.M.R. 1989).

This Court's "assessment of whether a sentence is highly disparate may consider both the elements of the sentences to be compared as well as the punitive exposure each person faced."

United States v. Jennings, 2014 CCA LEXIS 845, at *4-6 (A.F. Ct. Crim. App. 6 November 2014) (unpub. op.). In that regard, the Court must examine what the other individual was convicted of, the maximum sentence authorized in their case, the facts and evidence presented, and whether there was a plea agreement involved in the case. Id.

Analysis

Appellant does not assert that his case is closely related to any case. Instead, he points to four individuals in non-closely related cases that received less confinement than Appellant. (App. Br. at 36-37.) Because Appellant has not met his burden to establish that the cases are closely related, this Court is not required to engage in sentence comparison. Wacha, 55 M.J. at 267. Instead, this Court should follow the general procedure that sentence appropriateness is determined without reference or comparison to sentences in other cases. LeBlanc, 74 M.J. at 659 (A.F. Ct. Crim. App. 2015) (en banc).

Even if this Court chooses to engage in sentence comparison, Appellant's case is not like the four cases he cites. For United States v. Baumgartner, 2025 CCA LEXIS 95 (A.F. Ct. Crim. App. Feb. 18, 2025), the number of sexual offenses – two specifications of sexual abuse of a child compared to Appellant's five specifications of sexual assault and one specification of sexual abuse – and the nature of the offenses – solitary non-penetrative acts that were not for sexual gratification – renders the sentence not comparable. In United States v. Kim, 2023 CCA LEXIS 453 (A. Ct. Crim. App. Oct. 20, 2023), the appellant was convicted of fewer sexual offenses, the offenses were non-penetrative, and the appellant pleaded guilty. Therefore, the sentence not comparable. In United States v. Cleveland, 2020 CCA LEXIS 483 (A. Ct. Crim. App. 28 Dec 2020), the appellant was convicted of half the number of sexual offenses and almost half the total number of offenses of Appellant. Therefore, the sentence is not comparable.

Finally, United States v. James, 2019 CCA LEXIS 438 (A.F. Ct. Crim. App. 31 Oct 2019), involved a conviction based on a single charge and specification. Therefore, the sentence is not comparable to Appellant's two charges and seven specifications. Because these cases are not comparable, this Court consider only the factors detailed in Sauk, 74 M.J. 594, explained in issue II, to determine whether Appellant's sentence is inappropriately severe.

As explained in issue II, Appellant's sentence to 14-years of confinement is not inappropriately severe in consideration of the nature and seriousness of his offenses and the lack of mitigation from his circumstances. Therefore, this Court should find Appellant's sentence to 14 years of confinement for sexually assaulting his 13-year-old daughter after repeatedly sexually abusing her is not inappropriately severe and deny Appellant's 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]

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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 12 June 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	
	)	Before Panel 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS** United States Air Force, *Appellant.*	)	No. ACM 40608
	)	20 June 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 replies to the United States' answer filed on 12 June 2025 (hereinafter Government's Brief).

Assignment of Error I

The Government's Brief, which argues that the 205-day delay between sentencing and docketing in this case "is not excessive," reinforces the need for this Court to address the systemic slowness of the Air Force court-martial post-trial processing system.

As Abraham Lincoln would put it, the Air Force court-martial post-trial processing system "has got the 'slows.'"[1] Appellant's opening brief cataloged numerous cases over the last year in which the Government violated the 150-day post-trial processing standard this Court

[1] President Abraham Lincoln complained that Major General George McClellan "has got the 'slows.'" RECOLLECTED WORDS OF ABRAHAM LINCOLN 32 (Don E. Fehrenbacher & Virginia Fehrenbacher eds., 1996).

established in *United States v. Livak*.[2] Since Appellant filed his brief, this Court has decided still more cases in which the Government failed to meet that standard.[3]

"The first step to fixing a problem is admitting you have one."[4] The Government's Brief demonstrates that the Government has not yet taken that necessary first step. This Court should use this case as a vehicle for providing the needed intervention.

First, the Government maintains that the 205-day delay between sentencing and docketing "is not excessive."[5] In support, the Government points to a case tried in 1998.[6] Significantly, that was a pre-*Moreno* case.[7] Thus, its post-trial processing occurred before the Court of Appeals for the Armed Forces established a presumption of unreasonable delay where a convening authority's action is not taken within 120 days of the completion of trial and the case is not docketed with the applicable Court of Criminal Appeals within thirty days of the convening authority's action.[8] The Government's attempt to justify its delay in this case by comparing it to one from the pre-*Moreno* bad old days is telling. Its use of a pre-*Moreno* benchmark to evaluate its behavior helps explain why the Government has not taken the first step to fixing the problem: admitting there is one. It falls to this Court to ensure that the Government understands that the Air Force post-trial processing system's case of the "slows" is problematic.

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[2] Appellant's Brief at 8–9 nn.57–58; *see United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).
[3] *United States v. Johnson*, No. ACM 40537, 2025 CCA LEXIS 193 (A.F. Ct. Crim. App. May 2, 2025) (196 days between sentencing and docketing; no relief granted); *United States v. Hagen*, No. ACM 40561, 2025 CCA LEXIS 234 (A.F. Ct. Crim. App. May 28, 2025) (183 days between sentencing and docketing; no relief granted).
[4] *Iowa v. Council on Env't Quality*, 765 F. Supp. 3d 859, 896 (D.N.D. 2025).
[5] Government's Brief at 8.
[6] *United States v. Bigelow*, 55 M.J. 531 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 64 (C.A.A.F. 2002).
[7] *See United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).
[8] *Id.* at 142.

Relief is further warranted by the Government's acknowledgment that "[g]iven the volume of the transcription," the court reporter "requested assistance with the transcription 20 October 2023 – five days after the announcement of the sentence – but was not provided any."[9] That fact aggravates the delay in this case. The court reporter recognized the need for assistance to accomplish timely post-trial processing. Yet the Government did not provide the requested assistance, which could have been supplied with contract labor without adversely affecting the timely processing of other records of trial. Providing the modest, proportionate relief requested here would incentivize the Government to be more forthcoming with assistance the next time a lack of resources endangers timely post-trial processing.

WHEREFORE, this Court should disapprove fifty-five days of Appellant's confinement.

Assignment of Error II

The Government's Brief ignores the statutory and regulatory mandates that a court-martial sentence be "sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces . . . ."

1 January 2019 is a red-letter day in the history of the American military justice system. That is the effective date for most of the Military Justice Act of 2016's provisions.[10] One of the significant changes that occurred on that date was the prescription of a mandatory sentencing principle. Article 56(c)(1) added this compulsory provision to the Uniform Code of Military

[9] Government's Brief at 6 (citing Record of Trial, vol. 5, *Court Reporter Chronology*).
[10] The Military Justice Act of 2016 was enacted as Division E of the National Defense Authorization Act for Fiscal Year 2017. Pub. L. No. 114-328, §§ 5001–542, 130 Stat. 2000, 2894–968 (2016). That act generally delegated to the President the authority to establish the effective date of the act's provisions, "which date shall be not later than the first day of the first calendar month that begins two years after" the act's 23 December 2016 enactment date. *Id.*, § 5542(a), 130 Stat. at 2967. President Trump prescribed an effective date of 1 January 2019. Exec. Order No. 13825 of March 1, 2018, § 3(a), 83 Fed. Reg. 9889, 9889 (Mar. 8, 2018). He further ordered that, except as provided otherwise, the amendments would not apply to any case in which charges were referred to trial before 1 January 2019. *Id.*, § 3(d), 83 Fed. Reg. at 9889.

Justice (UCMJ): "In sentencing an accused under section 853 of this title (article 53), a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces . . . ."[11] The President foot-stomped that requirement by including it in Rule for Courts-Martial (R.C.M.) 1002(f).[12] Both Appellant's sentence and the Government's response to his sentence appropriateness challenge are inconsistent with that principle.

Significantly, the Government's Brief fails to even cite Article 56(c)(1) or R.C.M. 1002(f), much less attempt to explain how Appellant's sentence complied with those provisions' requirements. In fact, every case the Government's Brief cites in its section on this assignment of error concerns a sentence that predates the Military Justice Act of 2016's effective date.[13]

The Government's Brief cites a 1994 opinion by this Court for the proposition that "normally, there will not be only one sentence that is appropriate for a particular appellant."[14] That proposition is no longer valid. Because of the statutory and regulatory requirement that a sentence not be "greater than necessary" to promote justice and to maintain good order and discipline in the armed forces, only the least severe otherwise-appropriate sentence may now be imposed. The Government's Brief does not suggest that the thirteen years of confinement the

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[11] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5301(a), 130 Stat. at 2919 (codified at Art. 56(c)(1), UCMJ, 10 U.S.C. § 856(c)(1)).
[12] R.C.M. 1002(f), *Manual for Courts-Martial, United States* (2019 ed.).
[13] *See supra* note 10; Government's Brief at 11–15 (citing *United States v. Joyner*, 39 M.J. 965 (A.F.C.M.R. 1994); *United States v. Sauk*, 74 M.J. 594 (A.F. Ct. Crim. App. 2015); *United States v. Guinn*, 81 M.J. 195 (C.A.A.F. 2021) (sentence adjudged in 2017, 81 M.J. at 198); *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010); *United States v. Rosales*, No. ACM 39113, 2018 CCA LEXIS 52 (A.F. Ct. Crim. App. Jan. 30, 2018); *United States v. Greene*, No. ACM 39731, 2021 CCA LEXIS 42 (A.F. Ct. Crim. App. Feb. 4, 2021) (trial began 6 September 2018, Brief on Behalf of Appellant at 1, *United States v. Greene*, 2021 CCA LEXIS 42); *United States v. Frantz*, No. ACM 39657, 2020 CCA LEXIS 404 (A.F. Ct. Crim. App. Nov. 10, 2020) (sentence adjudged 19 October 2018, 2020 CCA LEXIS 404, at *1)).
[14] Government's Brief at 11, 14–15 (citing *Joyner*, 39 M.J. at 966).

United States' trial-level representative proposed for Charge I, Specification 5 was inappropriate.[15] The fourteen-year confinement term the military judge imposed for that specification[16] violated Article 56(c)(1), UCMJ, and R.C.M. 1002(f) to the extent it was greater than the appropriate Government-proposed punishment. A sentence imposed in violation of Article 56(c)(1)'s and R.C.M. 1002(f)'s edicts is not "correct in law" and, therefore, may not be affirmed upon sentence appropriateness review under the version of Article 66 that applies to this case.[17]

WHEREFORE, this Honorable Court should affirm a period of confinement of thirteen years for Charge I, Specification 5.

Respectfully submitted,

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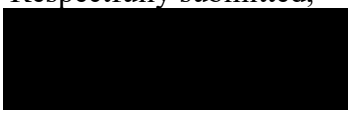
[15] Trial Tr. at 1608. *See* Art. 38(a), UCMJ, 10 U.S.C. § 838(a) ("The trial counsel of a general or special court-martial shall prosecute in the name of the United States . . . .").
[16] Trial Tr. at 1626.
[17] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611–12 (2021) (codified at Art. 66(d)(1)(A), UCMJ, 10 U.S.C. § 866(d)(1)(A)) ("The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.").

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 20 June 2025.

Respectfully submitted,



Dwight H. Sullivan
Air Force Appellate Defense Division

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 2
Senior Airman (E-4) **DYLLIN V.E. ROBERTS** United States Air Force *Appellant.*	)	No. ACM 40608 12 June 2025

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

Pursuant to Rule 23(b) of this Honorable Court's Rules of Practice and Procedure, the United States moves to attach a document:

- Appendix – Declaration of TSgt Mary Allen, dated 3 June 2025 (10 pages with one attachment)

On 2 May 2025, Appellant filed his assignments of error with this Court which included a request for relief due to delay in post-trial processing. (App. Br. at 6-10). The Appendix explains the reason for the delay of 55-days. The Appendix is relevant and necessary for this Court to resolve Appellant's allegation that the delay in his case was excessive and warrants relief. Consistent with United States v. Jessie, 79 M.J. 437, 445 (C.A.A.F. 2020), this Court may consider this attachment to resolve an issue raised, but not fully resolvable, by the record.

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

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40608**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Dyllin V.E. ROBERTS	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 4th day of August, 2025,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

AGNIESZKA M. GAERTNER, Capt, USAF
Commissioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40608**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dyllin V.E. ROBERTS	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

This court specifies the following issue for briefing in the above-captioned case:

> WHETHER THE MILITARY JUDGE'S FAILURE TO INCLUDE THE REQUIRED INSTRUCTION PURSUANT TO RULE FOR COURTS-MARTIAL 920(e)(4) THAT THE MEMBERS MAY ONLY CONSIDER MATTERS PROPERLY BEFORE THE COURT-MARTIAL RESULTED IN PREJUDICIAL ERROR.

Accordingly, it is by the court on this 11th day of August, 2025,

ORDERED:

Appellant and Appellee shall file briefs on the specified issue with this court. Both briefs are due **not later than 28 August 2025**. No further briefs for this issue will be permitted without leave from the court.

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' ANSWER TO THE COURT'S SPECIFIED ISSUE
v.	)	
	)	Before Panel No. 3
Senior Airman (E-4) **DYLLIN V.E. ROBERTS** United States Air Force	)	No. ACM 40608
Appellant.	)	28 August 2025

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

SPECIFIED ISSUE

WHETHER THE MILITARY JUDGE'S FAILURE TO INCLUDE THE REQUIRED INSTRUCTION PURSUANT TO RULE FOR COURTS MARTIAL 920(e)(4) THAT THE MEMBERS MAY ONLY CONSIDER MATTERS PROPERLY BEFORE THE COURT-MARTIAL RESULTED IN PREJUDICIAL ERROR.

STATEMENT OF CASE

Contrary to Appellant's pleas, a panel of officer and enlisted members found him guilty of one charge and one specification of violating Article 80, UCMJ, and one charge and six specifications of violating Article 120b, UCMJ. (*Entry of Judgment* (*EOJ*), 21 December 2023, ROT, Vol. 1). The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for a total of fourteen years, and a dishonorable discharge. (Id.) The convening authority took no action on the findings or sentence, but approved Appellant's request to defer his reduction in grade until the military judge signed the entry of judgment and waived all automatic forfeitures for six months for the benefit of Appellant's dependent. (Id.)

Appellant submitted thirteen assignments of error to this Court – four raised by counsel and nine that he personally raised under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982). (*Brief on Behalf of Appellant*, 2 May 2025). None of the assignments of error alleged a problem with the instructions given to the members. (*See generally* Id.) The United States responded to each of Appellant's assignments of error. (*Answer to Assignments of Error*, 12 June 2025). Later, this Court ordered additional briefing on the specified issue above. (*Order*, 11 August 2025).

STATEMENT OF FACTS

After the court was assembled, the military judge provided the members with preliminary instructions. (R. at 337). He instructed them that they "must determine whether the accused is guilty or not guilty based solely upon the evidence presented here in court and upon the instructions I will give you." (R. at 339). He also instructed them that they must not listen to or read any accounts of the case, visit the scene of any incident alleged or mentioned during the trial, consult any source of law or information about any matters involved in the case, or conduct their own investigation or research. (R. at 344-345). The military judge instructed the members that when he sustains an objection, or if the question is withdrawn, they are to disregard the question and answer. (R. at 344).

Throughout the trial, there were objections to evidence and trial defense counsel requested instructions from the military judge. Whenever they made such request, and at times sua sponte, the military judge instructed the members to disregard information that was not properly before the court-martial. (R. at 674, 1175-1176, 1178, 1224, 1226, 1318). During one objection, the military judge told the members,

> Members, you just heard a comment by trial counsel about the entire contents of the video that you just heard portions of. You are to disregard that comment. Comments by counsel are not evidence. The rules of evidence control what may be received into evidence, and ultimately, I decide what evidence is admissible under those rules. You may not speculate as to any evidence you have not received.

(R. at 1226).

Before giving findings instructions, the military judge provided the parties with a draft of a specific instruction for Prosecution Exhibit 1, his findings instructions and discussed draft instructions on the record. (R. at 866-870; 1384-1401; 1404-1420). Trial defense counsel offered a significant amount of input on the draft instructions but offered no objections or revisions to the sufficiency of the military judge's instruction under R.C.M. 920(e)(4). For the instruction on Prosecution Exhibit 1, trial defense counsel objected to trial counsel's proposed change by identifying the difference between trial counsel's language and how hearsay is defined in the rule. (R. at 869-870). Further, during the discussions on instructions generally, trial defense counsel argued what the listed overt act should be for Charge II and its specification, for specific witnesses to be included in the prior inconsistent statement instruction, for specific words to be provided in the event of exceptions and substitutions, and identified a missing definition. (R. at 1389-1393, 1395-1399, 1407-1409, 1423). Trial defense counsel requested specific instructions, like the chain of custody instruction (R. at 1412). But strategically she did not request an instruction on witness opinion on credibility or guilt because she was concerned about drawing attention to the issue. (R. at 1413). After that discussion, the military judge asked trial defense counsel if there were any other instructions needed to properly instruct the court members. (R. at 1420). Trial defense counsel, after conferring with co-counsel, responded, "Nothing additional, Your Honor." (Id.) The military judge then provided all parties with a

second draft of the instructions based on their discussion. (R. at 1423, 1425). After all parties had reviewed the updated instructions, the military judge again asked trial defense counsel if she had any objections to the current version of the instructions. (R. at 1426). She responded, "No, Your Honor." (Id.) No objection was raised before the court closed for deliberations.

At the end of the presentation of evidence, the military judge provided the members with findings instructions as approved of by both government and defense counsel. (R. at 1434). He instructed the members again that "each of [them] must resolve the ultimate question of whether the accused is guilty or not guilty *based upon the evidence presented here in court* and upon the instructions I will give you." (Id.) (emphasis added). For each Charge and all specifications, the military judge reminded the members that to find Appellant guilty they must be convinced, beyond a reasonable doubt, by "legal and competent evidence." (R. at 1434, 1436, 1437, 1439, 1440, 1441). The military judge further instructed the members that "an accused may be convicted based only on evidence before the court and not on evidence of a general criminal disposition." (R. at 1450).

The military judge provided detailed instructions on how the members could use evidence such as circumstantial evidence, the stipulation of fact, expert testimony, prior inconsistent statements, prior consistent statements/recent fabrication, other crimes, wrongs, or acts evidence, and spillover evidence, redacted evidence. (R. at 1444-1455). Knowing the members were going to be presented with redacted documents, he instructed them,

> You are not to speculate about what was redacted or why it was redacted. You must base your decision based on evidence presented to the court and not speculate about evidence you have not received.

(R. at 1454).

He addressed the fact that arguments made by counsel are not evidence by saying,

> Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in this case on the evidence as you remember it and apply the law as I instruct you.

(Id.)

When trial defense counsel objected to trial counsel's argument for facts not in evidence, the military judge instructed the members again saying, "I'll just instruct the members again, arguments of counsel are not evidence, and you should base your decision on the evidence as you remember it." (R. at 1490). He also provided specific limiting instructions, in a page by page, message by message analysis for Prosecution Exhibit 1. (R. at 1452-1453).

ARGUMENT

I.

APPELLANT WAIVED ANY ISSUE WITH THE INSTRUCTIONS, BUT EVEN IF HE DID NOT THE MILITARY JUDGE DID NOT FAIL TO INSTRUCT THE MEMBERS IN ACCORDANCE WITH R.C.M. 920(e)(4) SO THERE WAS NOT ERROR.

Standard of Review

Whether the members were properly instructed is a question of law and therefore reviewed de novo. United States v. Payne, 73 M.J. 19, 22 (C.A.A.F. 2014) (citation omitted).

"Whether an appellant has waived an issue is a legal question that this Court reviews de novo." United States v. Davis, 76 M.J. 224, 229 (C.A.A.F. 2017).

Law and Analysis

R.C.M. 920(e)(4) requires the military judge to provide instructions on findings that includes, "A direction that only matters properly before the court-martial may be considered[.]"

A. Trial defense counsel waived any issue with the instructions when she told the judge that she had "Nothing additional" to add to the instructions and then affirmed she had no objection to the instructions.

"Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection." R.C.M. 920(f). The court reviews the forfeited issue for plain error. Payne, 73 M.J. at 23 (citing United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013). But "required findings instructions can be waived." United States v. Rich, 79 M.J. 472, 475 (C.A.A.F. 2020) (citing United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020)).

"Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." Rich, 79 M.J. at 475 (internal citation and quotation omitted). In the context of findings instructions, "[f]ailure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection." R.C.M. 920(f). "But, when counsel affirmatively declines to object and offers no additional instructions, counsel expressly and unequivocally acquiesces to the military judge's instructions and his actions thus constitute waiver." Rich, 79 M.J. at 476 (citing Davis, 79 M.J. at 332) (cleaned up). This court cannot review waived issues at all because a valid waiver leaves no error to correct on appeal. United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009).

Congress amended Article 66(d)(1)(A) removing the phrase "should be approved." National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, § 524(b)(1)(A), 134 STAT. 3388, 3661-62 (1 Jan. 2021). Therefore, this Court "no longer [has] the ability to pierce waiver with regard to findings to address what would otherwise be prejudicial error." United

States v. George, 2025 CCA LEXIS 224, *3 (A.F. Ct. Crim. App. 7 June 2024) (citing United Staes v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016)).

First and foremost, even though informing the members that they can only consider matters properly before the court-martial is a finding instruction required by R.C.M. 920(e)(4), our superior Court has made clear that required instructions can be waived. Rich, 79 M.J. at 475. Under the facts of this case, Appellant waived the instruction.

In Rich, our superior Court found it persuasive that it was apparent in the record that trial defense counsel knew how to preserve objections to findings instructions. 79 M.J. at 477. The record in Appellant's case also demonstrates that trial defense counsel knew how to identify deficiencies in and object to findings instructions. The military judge provided trial defense counsel with ample opportunity to review the proposed instructions, identify any deficiencies, raise objections, and propose changes. Trial defense counsel did so – she proposed and intentionally rejected specific instructions, raised objections, and identified a missing definition. (R. at 1389-1423). Trial defense counsel knew how to object to findings instructions and made strategic decisions doing so. (R. at 1413). Yet, there was no objection alleging that the military judge didn't instruct the members in accordance with R.C.M. 920(e)(4).

Instead, after she raised other issues, she "expressly and unequivocally acquiesced" to the military judge's instructions. Davis, 79 M.J. at 332. Just as in Davis, trial defense counsel twice affirmatively declined to object to the proposed findings instructions – once by saying she had "[n]othing additional" to add to the instructions and again when she affirmed that she had no objection to the instructions. (R. at 1420, 1426). Trial defense counsel's strategic objections to other parts of the instructions, coupled with her twice declining to provide further objection supports that she made a deliberate decision to abandon any further objection to the military

judge's proposed instructions – including the sufficiency of his instruction under R.C.M. 920(e)(4). Therefore, Appellant waived the issue that this Court has specified and so this Court cannot review the issue because there is no error to correct, and this Court no longer has the ability to pierce waiver. Campos, 67 M.J. at 332; George, 2024 CCA LEXIS *3.

B. The military judge did not fail to instruct the members on the requirements of R.C.M. 920(e)(4).

Even if this Court were to review the issue, there is no error to correct because the military judge did not fail to comply with the requirements of R.C.M. 920(e)(4). "A trial judge has considerable discretion in choosing the language of an instruction so long as the substance of the relevant point is adequately expressed." Boyle v. United States, 556 U.S. 938, 946 (2009). "Our decisions repeatedly have cautioned that instructions must be evaluated not in isolation but in the context of the entire charge." Jones v. United States, 527 U.S. 373, 391 (1999) *See also* United States v. Hills, 75 M.J. 350, 357 (C.A.A.F. 2016).

In the context of the entire charge, the military judge properly conveyed the substance of the required instruction – that the members were to only consider matters properly before the court. His repeated instruction that the "each of [the members] must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions I will give you" and then further refined that instruction by defining the contours of the proper purposes of the evidence so that the members could clearly understand what matters were properly before the court for their consideration. (R. at 337, 339, 344-345, 1434-1441, 1450, 1444-1455). Because the military judge's entire charge conveyed the substance of R.C.M. 920(e)(4), he did not fail to give the required instruction. Because there was no error, Appellant is not entitled to relief.

C. Even if this Court finds the military judge did not give the required direction, such error cannot satisfy the requirements of plain error.

"It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." United States v. Frady, 456 U.S. 152, 166 (1982).

"Under a plain error analysis, the accused has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." Davis, 76 M.J. at 230 (citing Payne, 73 M.J. at 23). As explained above, there was no error. But even if this Court finds error, it was not plain or obvious and there was no prejudice.

1. The error was not plain or obvious because the military judge's robust instructions appeared to encompass the direction required in R.C.M. 920(e)(4).

"[E]rror cannot be plain or obvious if the law is unsettled on the issue at the time of trial and remains so on appeal." United States v. Schmidt, 82 M.J. 68, 74 (C.A.A.F. 2022) (citation and quotation omitted). In Schmidt, our superior Court held that when the Court had never held "one way or the other" what a particular phrase in a statute required, there cannot be plain or obvious error. Id. Like Schmidt, no court has held one way or another on what is specifically required to satisfy R.C.M. 920(e)(4). The military judge, as explained above, provided robust instructions which included directing the members to only consider the evidence and defining the contours of what evidence is available for consideration and how it may be used. Should this Court, for the first time, define that phrase to encompass more than the judge's detailed instructions such error would not be plain or obvious. Appellant is therefore not entitled to relief.

2. Even assuming it was constitutional error, any alleged error was harmless beyond a reasonable doubt.

While a plain error analysis requires the Appellant show that he suffered prejudice, where the issue implicates constitutional considerations, the burden shifts to the Government to prove that the error was harmless beyond a reasonable doubt. United States v. Tovarchavez, 78 M.J. 458, 462-463 (C.A.A.F. 2019). Even assuming that the error alleged implicates constitutional considerations, which the United States does not concede, the evidence supports that the error was harmless beyond a reasonable doubt.

These errors are evaluated for whether "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002) (quoting Chapman v. California, 386 U.S. 18, 24 (1967). "Stated differently, the test is: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" Id. (quoting Neder v. United States, 527 U.S. 1, 18 (1999).

It is clear, beyond a reasonable doubt, that even if the military judge had used the exact language from R.C.M. 920(e)(4) that a rational jury still would have found Appellant guilty. The exact language from R.C.M. 920(e)(4) does not add any clarifying or limiting context to the detailed instructions already provided by the military judge – in fact, it is more amorphous. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." Hills, 75 M.J. at 358 (citing Boyde v. California, 494 U.S. 370, 380 (1990)). Even with the exact language, the military judge would have still had to explain to the members that they could only consider the evidence before the court within the confines of his detailed limiting instructions – as he did. Because the military judge would have still had to provide the same detailed instructions, any error did not contribute to the verdict.

This is not a case in which no direction was given at all such that members would have likely relied on impermissible evidence to find Appellant guilty. *See* United States v. McDonald, 57 M.J. 18, 22 (C.A.A.F. 2002) (distinguishing United States v. Barnes, 39 M.J. 230 (C.M.A. 1994) as a case when, absent an instruction, the members presumably had no choice but to convict the appellant). Nor is it like Hills, 75 M.J. at 357, where the instruction implicated fundamental concepts of justice because it "invited the members to bootstrap their ultimate determination of the accused's guilt" to a lower standard of proof. Further distinguishing this case from Hills is the fact that there was ample evidence in the record, as detailed in the United States' *Answer to Assignments of Error*, to support Appellant's conviction. Id.

To the extent there were any matters not properly before the court, the military judge remedied them both by instructing the members on disregarding questions and answers following sustained objections and with detailed curative instructions. (R. at 1175-1176, 1178, 1224, 1226, 1318). If this Court finds error, it should be convinced beyond a reasonable doubt that the error did not contribute to the verdict and therefore not grant Appellant any relief.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court answer the specified issue in the negative and affirm the findings and sentence in this case.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 28 August 2025.

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