IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **THOMAS M. SAUL,** United States Air Force, *Appellant.*	)	No. ACM 40341
	)	9 November 2022

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **18 January 2023**. The record of trial was docketed with this Court on 20 September 2022. 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 that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 9 November 2022.

Respectfully submitted,

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

14 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) THOMAS M. SAUL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40341 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 14 November 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **THOMAS M. SAUL,** United States Air Force, *Appellant.*	)	No. ACM 40341
	)	11 January 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 February 2023**. The record of trial was docketed with this Court on 20 September 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, Uniform Code of Military Justice (UCMJ); one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. Record (R.) at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's

request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022.

The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 11 January 2023.

Respectfully submitted,

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

12 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) THOMAS M. SAUL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40341 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 January 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **THOMAS M. SAUL,** United States Air Force, *Appellant.*	)	No. ACM 40341
	)	10 February 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **19 March 2023**. The record of trial was docketed with this Court on 20 September 2022. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, Uniform Code of Military Justice (UCMJ); one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. Record (R.) at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's

request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022.

The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 10 February 2023.

Respectfully submitted,

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

13 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) THOMAS M. SAUL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40341 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 February 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **THOMAS M. SAUL,** United States Air Force, *Appellant.*	)	No. ACM 40341
	)	10 March 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **18 April 2023**. The record of trial was docketed with this Court on 20 September 2022. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, Uniform Code of Military Justice (UCMJ); one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. Record (R.) at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's

request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022.

The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined.

Counsel is currently assigned 17 cases; eight cases are pending initial AOEs before this Court. Counsel has oral argument at the end of the month at the Court of Appeals for the Armed Forces (CAAF). Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Four cases have priority over the present case:

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

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

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

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

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

4. *United States v. Maymi*, ACM 40332 – On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120, UCMJ, and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 5 May 2022. The Convening Authority deferred Appellant's reduction in grade, denied a deferment of all automatic forfeitures, but granted a waiver of all automatic forfeitures for the benefit of his family. *Id*. The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 10 March 2023.

Respectfully submitted,

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

13 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) THOMAS M. SAUL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40341 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 March 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **THOMAS M. SAUL,** United States Air Force, *Appellant.*	)	No. ACM 40341
	)	27 March 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **18 May 2023**. The record of trial was docketed with this Court on 20 September 2022. From the date of docketing to the present date, 188 days have elapsed. On the date requested, 240 days will have elapsed.

On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, Uniform Code of Military Justice (UCMJ); one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. Record (R.) at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's

request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022.

The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined.

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

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

The Appellant is not confined. Counsel has finished reviewing the unsealed record of trial, sealed materials, and is finalizing the Assignment of Errors for submission.

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

3. *United States v. Maymi*, ACM 40332 – On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120, UCMJ, and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 5 May 2022. The Convening Authority deferred Appellant's reduction in grade, denied a deferment of all automatic forfeitures, but granted a

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

waiver of all automatic forfeitures for the benefit of his family. *Id*. The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 27 March 2023.

Respectfully submitted,

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

28 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) THOMAS M. SAUL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40341 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40341**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Thomas M. SAUL	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 27 March 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth), requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 28th day of March, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant's brief will be due **18 May 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **THOMAS M. SAUL,** United States Air Force, *Appellant.*	)	No. ACM 40341
	)	9 May 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 June 2023**. The record of trial was docketed with this Court on 20 September 2022. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed.

On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, Uniform Code of Military Justice (UCMJ); one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. Record (R.) at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's

request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022.

The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined.

Counsel is currently assigned 19 cases; eight cases are pending initial AOEs before this Court. Counsel has two cases that are pending petitions for certiorari to the Supreme Court. Counsel also has one Answer that is due to the Court of Appeals for the Armed Forces at the end of May and two cases pending petitions and supplements to the same. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Two cases have priority over the present case:

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

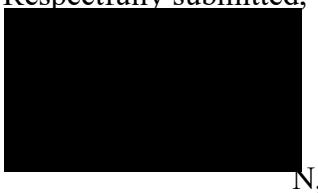
[1] Members acquitted Appellant of one specification of digital penetration, in violation of Article 120 UCMJ.

pages. Appellant is currently confined. Counsel has reviewed 520 pages of the transcript and the rest of the record except for the sealed materials.

2. *United States v. Maymi*, ACM 40332 – On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120, UCMJ, and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 5 May 2022. The Convening Authority deferred Appellant's reduction in grade, denied a deferment of all automatic forfeitures, but granted a waiver of all automatic forfeitures for the benefit of his family. *Id*. The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,



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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 9 May 2023.

Respectfully submitted,

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

10 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) THOMAS M. SAUL, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40341 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 10 May 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **THOMAS M. SAUL,** United States Air Force, *Appellant.*	)	No. ACM 40341
	)	8 June 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 July 2023**. The record of trial was docketed with this Court on 20 September 2022. From the date of docketing to the present date, 261 days have elapsed. On the date requested, 300 days will have elapsed.

On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, Uniform Code of Military Justice (UCMJ); one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. Record (R.) at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's

request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022.

The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined.

Counsel is currently assigned 23 cases; twelve cases are pending initial AOEs before this Court. Counsel has two cases that are pending petitions for certiorari to the Supreme Court and once case pending a petition/supplement to the Court of Appeals for the Armed Forces. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Two Air Force Court cases have priority over the present case:

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

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

pages. Appellant is currently confined. Counsel has reviewed the entire record and is drafting the AOE.

2. *United States v. Maymi*, ACM 40332 – On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120, UCMJ, and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 5 May 2022. The Convening Authority deferred Appellant's reduction in grade, denied a deferment of all automatic forfeitures, but granted a waiver of all automatic forfeitures for the benefit of his family. *Id*. The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 8 June 2023.

Respectfully submitted,

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

8 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) THOMAS M. SAUL, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40341 Panel No. 1

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 June 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **THOMAS M. SAUL,** United States Air Force, *Appellant.*	)	No. ACM 40341
	)	7 July 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 August 2023**. The record of trial was docketed with this Court on 20 September 2022. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, Uniform Code of Military Justice (UCMJ); one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. Record (R.) at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's

request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022.

The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined.

Counsel is currently assigned 23 cases; 12 cases are pending initial AOEs before this Court. Counsel has two cases that are pending petitions for certiorari to the Supreme Court. Since the last EOT, Counsel filed a 50-page AOE with this Court (*United States v. Casillas*). Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. One Air Force Court case has priority over the present case:

1. *United States v. Maymi*, ACM 40332 – On 21 April 2022, contrary to his pleas, a Military Judge sitting at a General Court-Martial convicted Appellant of one charge, one specification of sexual assault, in violation of Article 120, UCMJ, and one charge, one specification of unlawful entry, in violation of Article 129 UCMJ. R. at 541. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 15 months, and to be dishonorably discharged from the service. R. at 590. The Convening Authority took no action on the findings and approved the sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 5 May 2022. The Convening Authority deferred Appellant's reduction in grade, denied a deferment of all automatic forfeitures, but granted a waiver of all automatic forfeitures for the benefit of his family. *Id*. The ROT consists of five volumes, 11 prosecution exhibits, five defense exhibits, and 20 appellate exhibits. The transcript is 591 pages. Appellant is currently confined. Counsel has started his review of this case.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 7 July 2023.

Respectfully submitted,

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

7 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JUSTIN L. AKAKA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32744 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 July 2023.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40341**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Thomas M. SAUL	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 7 July 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 10th day of July, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than 16 August 2023.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **THOMAS M. SAUL,** United States Air Force *Appellant*	)	No. ACM 40341 16 August 2023

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

ASSIGNMENTS OF ERROR

I.

WHETHER STAFF SERGEANT SAUL'S GUILTY PLEA FOR *WILLFUL DESTRUCTION* OF PROPERTY WAS PROVIDENT WHEN HE THRICE TOLD THE MILITARY JUDGE THAT HE "DID NOT INTEND TO DAMAGE THE VEHICLE" AND THAT HE WAS SURPRISED THERE WAS ACTUAL DAMAGE?

II.

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

STATEMENT OF THE CASE

On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Staff Sergeant (SSgt) Thomas M. Saul of one

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

charge, one specification of willfully and wrongfully destroying property, in violation of Article 109, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 909 [hereinafter "Article 109"]; one charge, one specification of wrongfully using a controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ, 10 U.S.C. § 890. Record (R.) at 1162. The Military Judge sentenced SSgt Saul to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for nine months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied SSgt Saul's request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, *Convening Authority Decision on Action*, 25 May 2022.

STATEMENT OF FACTS

SSgt Saul Explained that he "did not Intend to Damage the Vehicle"

SSgt Saul pled guilty to willfully destroying the windshield on his wife's rental car. R. at 544. The night and early morning before hitting the windshield, SSgt Saul got drunk to the point of passing out. R. at 552, 566. This was problematic for SSgt Saul because he is diabetic, so alcohol affects him "tenfold, [not] *per se*, or two-fold, or just it magnifies it by [his] metabolism process." R. at 567. He was angry at his wife about an argument they had about their kids. R. at 551-52. When SSgt Saul woke up the following morning, he and his wife continued their argument. R. at 552. SSgt Saul told his wife that she needed to leave the house permanently, and he walked outside to start her car. *Id.* His wife refused to get into the car and leave. *Id.* In frustration, SSgt Saul slammed his open palm on the top corner of the windshield. R. at 554. SSgt Saul did not realize he broke the windshield until he walked away from the car and his wife pointed it out. R. at 572-73. SSgt Saul expressed "surprise" that the windshield was damaged. R. at 573-74.

When asked why he was guilty, SSgt Saul told the Military Judge:

> I got frustrated with Angela and slammed my hand down on the windshield with an open palm. *I did not intend to damage the vehicle*, but, especially since I was drunk, I must have hit it a lot harder than I intended.

R. at 552 (emphasis added). He again stated he was drunk when he hit the windshield and that he "did not intend to break the windshield." R. at 553. SSgt Saul said that the windshield, without making a sound, "spider webbed" after he hit it. R. at 556, 573. After multiple discussions and a specific question from the Military Judge, SSgt Saul affirmed, "My specific goal wasn't to completely demolish, or annihilate, or damage the window, but my intent was to hit the windshield with a large amount of force." R. at 573.

The Military Judge Realized SSgt Saul's Intoxication Could Impair his Ability to Form the Required Intent

A specific concern that the Military Judge raised with the parties was that SSgt Saul "talked to [him] about drinking alcohol and being drunk" and "voluntary intoxication from alcohol may negate the elements of willfulness." R. at 558. Defense Counsel told the Military Judge that he did not think voluntary intoxication was an issue because SSgt Saul could still appreciate the nature of his conduct. R. at 560. After moving on from this issue, the Military Judge returned to it when he stated, "if you're too drunk to have that intent, that's fine." R. at 565.

The Military Judge Stated, "I Don't Think we Have the on Purpose"

The Military Judge realized that SSgt Saul's account of what happened was problematic. R. at 561. He told SSgt Saul, "I need to understand, now if you tell me you did not intend to damage the vehicle, [*sic*] you are able to willfully damage the vehicle. Does that make sense?" R. at 561. The Military Judge then said, "but if you did not intend to cause the damage, how is the plea provident to this?" R. at 562. The Military Judge later told the parties that SSgt Saul "specifically told me, I did not intend to damage the vehicle . . . . That's the hang up." R. at 565.

After stating that he would accept the guilty plea as provident, and after he elicited additional facts from SSgt Saul, the Military Judge said, "I am just hung up on willfully." R. at 565, 580. He then said, "Willfully, when I read it, is done intentionally or on purpose, and that's — I don't think we have the on purpose. I will state that much." *Id.*

The Military Judge was "Kind of Hung up on" the "Natural Consequences of the Action"

Another concern the Military Judge had throughout the *Care* inquiry was "the natural consequences of the action and I guess that's what I'm kind of hung up on as well." R. at 563. He rhetorically asked, "you slap the corner of the windshield, is that the natural consequence that it's going to spider web to the point of Appellate Exhibit XLV?" R. at 564. The damage in Appellate Exhibit XLV is:

After seeing this image, the Military Judge said, "I mean, that's a big spider web. That's not small by any means." *Id.* The Defense Counsel answered the Military Judge's concern by explaining recklessness:

> [I]f you were to ask Sergeant Saul, what was it [*sic*] your specific intention to completely destroy the windshield, like when you set out, when you were angry, I think the answer would be no, like, *I didn't strike it with the intent of making it completely unusable or annihilate it*, but it is, did you have the intent of very forcefully hitting this windshield ***with, you know, reckless disregard for the consequences*** or with full knowledge of the likely consequences of your actions? *The answer is squarely yes*. That was my intent, I wanted to hit it, I recognized when I was using that force that was a very real possibility that it would damage. Did I think in the moment that I hit is so hard that it was going to cause that much damage? That's hard to say.

Id. (emphases added). At the end of this colloquy, the Military Judge and the Defense Counsel concluded that all of this "might've just been inartfully [*sic*] worded during the initial portion of the *Care*." R. at 565.

With the assistance of the parties, the Military Judge asked SSgt Saul two additional lines of questioning. First, whether it was a "logical consequence" that the windshield would be "destroyed" when SSgt Saul hit it. SSgt Saul agreed with the Military Judge's proposition. R. at 578. Second, that because SSgt Saul was "a large man," he would naturally use more force than "a normal size man" when hitting an object. R. at 578-79. SSgt Saul also agreed to this proposition. *Id.* After these answers the Military Judge said he was still concerned about "willfully" and told the parties he would review relevant case law. R. at 580.

Case Law Review: "Kind of Like . . . Where we Have the Eggshell Client"

The Military Judge and the parties reviewed several cases, but primarily discussed three: *United States v. Johnson*, 24 M.J. 101 (C.M.A. 1987), *United States v. White*, 61 M.J. 521 (N-M Ct. Crim. App. 2005), and *United States v. Hoyt*, 48 M.J. 839 (N-M Ct. Crim. App. 1998). While discussing the cases, the Defense Counsel told the Military Judge that it was the "probable consequence" that there would be "some damage that's done," so that is "sufficient to find it provident." R. at 600. The Military Judge then asked, "So, [the damage] it's the probable

consequences of him slapping the windshield?" *Id.* After an affirmative answer from the Defense Counsel, the Military Judge mused:

> And I want to talk about that. I mean, kind of like if we're dealing with, I guess, tort and all, don't ask me, I'm not caught up in it, but you know, where we have the eggshell client . . . . Is what comes to mind for me. *Where it would not normally cause damage*, but they're in such a state that it does.

Id. (emphasis added).

The Military Judge settled on the "natural consequences" of the action rationale that the cases "seem[ed] to imply." R. at 596. He asked SSgt Saul if the "windshield cracking out and spidering [*sic*] like it did is a natural consequence" of him hitting the windshield. R. at 601. SSgt Saul said, "yes." *Id.* At the end of the case law discussion, the Military Judge found SSgt Saul's guilty plea provident on two rationales. First, because he believed that "whenever Sergeant Saul himself says, 'yeah, it's probable that I smacked the windshield and therefore, it cracks out;' that is a different distinction than me merely finding him guilty because he's a larger individual." R. at 603. Second, that since SSgt Saul "understands that is a probable consequence of him striking the windshield, I do feel like his discussion is sufficient for that specification." R. at 604.

ARGUMENT

I.

STAFF SERGEANT SAUL'S GUILTY PLEA FOR *WILLFUL DESTRUCTION* OF PROPERTY WAS NOT PROVIDENT WHEN HE THRICE TOLD THE MILITARY JUDGE THAT HE "DID NOT INTEND TO DAMAGE THE VEHICLE" AND THAT HE WAS SURPRISED THERE WAS ACTUAL DAMAGE.

Standard of Review

This Court reviews a military judge's decision to accept a guilty plea for an abuse of discretion; however, this Court reviews de novo the military judge's legal conclusion that an

appellant's plea was provident. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996); *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005). A military judge abuses his discretion when there is a "substantial basis" in law and fact "for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.A.A.F. 1991).

Law and Analysis

SSgt Saul's guilty plea was improvident for three reasons. First, he did not intend to damage—let alone destroy—the windshield, which Article 109 requires. Second, the Military Judge erroneously transposed the definitions of "willfully" and "reckless" to find SSgt Saul's plea provident. Third, the ancillary matters that the Military Judge considered did not salvage his application of an erroneous *mens rea*.

1. The Military Judge's Concession that "I Don't Think we Have the on Purpose" is Fatal to the Providence of the Plea

A conviction based on a legal standard that does not constitute an offense is legally insufficient. *United States v. Shavrnoch*, 49 M.J. 334, 338–39 (C.A.A.F. 1998). Here, the *mens rea* that the Government charged under Article 109 was "willfully." ROT, Vol. 1, *Charge Sheet*. Notably, the Government had to prove "willfully" because the "reckless" standard under Article 109 only applies to real property damage. 10 U.S.C. § 909(c)(1) ("This destruction [wasting or spoiling] is punishable whether done willfully, that is intentionally, recklessly, or is through a culpable disregard of the foreseeable consequences of some voluntary act."). Because a "reckless" *mens rea* was not an option, the Military Judge's concession that "I don't think we have on purpose" was fatal. R. at 580. The Military Judge was correct that the parties did not have the "on purpose" because Article 109 defines "willfully" as "intentionally." 10 U.S.C. § 909(c)(2); *see also* Model Penal Code § 2.02 (stating that a person acts "purposely" with respect to a material

element of an offense if "the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature *or to cause such a result*") (emphasis added).

Thus, SSgt Saul had to *intentionally destroy* the windshield. *Id.* However, he said three times that he "*did not intend to damage* the vehicle"—let alone intend to "destroy" it as the Government charged. R. at 552, 553, 573 (emphasis added). All of this points to one conclusion: There is a "substantial basis" in fact to question the providence of SSgt Saul's guilty plea. *Prater*, 32 M.J. at 436.

2. The Military Judge Applied a Reckless Mens Rea *to Convict SSgt Saul*

Because the Military Judge knew that SSgt Saul lacked the intent to the damage the windshield, he shifted to a *mens rea* that he articulated as the "probable consequence" or the "natural consequence" of hitting the windshield. R. at 600, 604. These terms were discussed throughout the *Care* inquiry. However, the Military Judge found the guilty plea provident because of this *mens rea*—as evidenced by his statement that because SSgt Saul "understands that [the damage] is a probable consequence of him striking the windshield, I do feel like his discussion is sufficient for that specification." R. at 604.

The *mens rea* that the Military Judge articulated, however, was recklessness—not willfulness. Recklessness is:

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

Recklessness, BLACK'S LAW DICTIONARY (6th ed. 1990) (emphasis added). Definitions of "recklessness" in the UCMJ also mirror the Military Judge's "probable" or "natural consequence" language. Article 114 describes "reckless" as:

> [C]onduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. The accused need not intentionally cause a resulting harm or know that his conduct is substantially certain to cause that result.

10 U.S.C. § 914c.(1)(c). Both this Court and the Court of Appeals for the Armed Forces (CAAF) have recently, accurately, and favorably quoted definitions of recklessness that include the Military Judge's "probable consequence" language. *United States v. Herrmann*, 76 M.J. 304, 308 (C.A.A.F. 2017); *United States v. Cooper*, No. ACM 40092 (f rev), 2023 CCA LEXIS 7, at *17 (A.F. Ct. Crim. App. Jan. 11, 2023) (unpub. op.). The Military Judge's use of a recklessness *mens rea* is incurable because "[a]n essential aspect of informing Appellant of the nature of the offense is a correct definition of legal concepts." *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004) (finding the plea improvident because the military judge used an incorrect definition of "obscene").

The reason for this error is that the Military Judge and the parties misread *White* and its interpretation of *Johnson*. In *Johnson*, the appellant was charged with the destruction of national defense materials (an aircraft), in violation of 18 U.S.C. § 2155. *Johnson* is distinguishable from the SSgt Saul's case for various reasons. First, unlike here, the CAAF in *Johnson* determined whether the service court used an improper standard in its legal sufficiency review; it did not review the providence of a guilty plea. 24 M.J. at 103. Second, the CAAF in *Johnson* interpreted "intent" as used in 18 U.S.C. § 2155—a sabotage statute—not Article 109. *Id.* Third, the CAAF in *Johnson* underscored that its definition of intent linked the seriousness of the act in question to the definition of "national defense": "Thus, § 2155(a) would be satisfied if someone acted *when he knew that injury to the national defense would be the almost inevitable result*, ***even though the reason for his action had nothing to do with national defense***." *Id.* at 105 (emphases added). Meaning, because the appellant intended to damage the aircraft, he had "the state of mind requisite

for conviction under § 2155(a) -- even though he may not have desired or wished to injure national defense." *Id.* at 107.

Fourth, *assuming arguendo*, this Court disagrees with the above distinctions, the CAAF in *Johnson* established a high *mens rea* for the results of an action. In other words, a *mens rea* which is difficult to meet. The CAAF described a recklessness *mens rea*: (1) results must be "highly foreseeable;" (2) the accused must know the results were "almost certain and nonetheless went ahead;" (3) the accused acted in a way that "he was almost certain would injure or obstruct national defense;" and (4) the accused knew "that it was practically certain" that damage to would occur. *Id.* at 106, 107. *See* BLACK'S LAW DICTIONARY (6th ed. 1990) ("Recklessness" occurs when an appellant "though foreseeing such consequences, persists in spite of such knowledge . . . although no harm was intended."); *see also* 10 U.S.C. § 914c.(1)(c) ("[C]onduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved."). In sum, the Court stated that the service Court had to establish that the accused "had this state of mind—this practical certainty as to the result—[or] it could not uphold the sabotage convictions." *Id.* at 107.

Whatever *mens rea* the CAAF articulated in *Johnson*, SSgt Saul could not meet it because he was "surprise[d]" that there was actual damage. R. at 573-74. Meaning, destruction of the windshield was not foreseeable. He did not intend for damage to happen. R. at 552, 553, 573. And no reasonable person looking at the damage in Appellate Exhibit XLV would believe that that amount of damage—complete destruction to the windshield—could occur by someone hitting it with an open palm. The Military Judge essentially recognized this when he expressed surprise about the amount of damage to the windshield. R. at 564. Regardless, of what *Johnson* may stand for, it appears only to be an advisory opinion on intent because the CAAF "discovered fatal

instructional deficiencies which constitute plain error and in any event preclude affirmance of the sabotage convictions." 24 M.J. at 107.

3. The Additional Concessions the Military Judge Secured from SSgt Saul do not Ameliorate the Error of Using the Wrong Mens Rea

Because the Military Judge used the incorrect legal standard (i.e., *mens rea*) and incorrectly defined legal concepts, SSgt Saul's concessions to the Military Judge do not overcome his errors. *Negron*, 60 M.J. at 141; *Shavrnoch*, 49 M.J. at 338–39. For example, the Military Judge said, "I don't think that Sergeant Saul should be prejudiced just because he's a large individual," but then the Military Judge got SSgt Saul to agree with him that he would naturally use more force than someone who was "an average man." R. at 579, 603. Likewise, the Military Judge observed that the windshield was akin to an "eggshell [skull] client…where [hitting] it would *not* normally cause damage," but it did. R. at 600. Even if the windshield was defective, so it could be destroyed with less force, does not change the legal requirement that the destruction be done "willfully."

"To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Dunn v. United States*, 442 U.S. 100, 106 (1979). While the efforts the Military Judge took to find SSgt Saul's guilty plea provident may be laudable, this Court is "not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Id.* at 107. Stated differently, "An appellate court may not affirm an included offense on a theory not presented to the trier of fact." *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999) (quotation and citation omitted). A recklessness theory was not charged and, indeed, could not be charged; therefore, this Court cannot affirm the finding as alleged or as a lesser included offense.

WHEREFORE, SSgt Saul requests that this Court set aside the finding for willful destruction of property and re-assess his sentence.

II.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[2] WHEN SSGT SAUL WAS NOT CONVICTED OF A VIOLENT OFFENSE AND THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021).

Additional Facts

After his conviction, the Government determined that SSgt Saul's case met the firearm prohibition under 18 U.S.C. § 922. ROT, Vol. 1, Entry of Judgment, 15 June 2022. The Government did not specify why, or under which section his case met the requirements of 18 U.S.C. § 922. *Id.*

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021) (citations omitted).

Law and Analysis

One problem with the Statement of Trial Results and Entry of Judgment is that the Government did not indicate which specific subsection of § 922 it relied on to find that SSgt Saul fell under the firearm prohibition. Thus, SSgt Saul is unable to argue which specific subsection of § 922 is unconstitutional in his case, although he knows it would not be the domestic violence given the facts of his case. Regardless, it appears that the Government cannot be meet its burden of proving a historical analog that barred offenders like SSgt Saul from possessing firearms.

The test for applying the Second Amendment is:

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

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

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

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

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

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

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

An additional argument bolsters SSgt Saul's position: When finalizing this AOE, the Fifth Circuit issued an opinion that held § 922(g)(3) unconstitutional. *United States v. Daniels*, No. 22-60596, 2023 U.S. App. LEXIS 20870 (5th Cir. Aug. 9, 2023). In *Daniels*, the appellant was arrested for driving without a license, but the police officers found marijuana butts in his ashtray. 2023 Lexis 20870, at *3. He was later charged and convicted of a violation of § 922(g)(3). *Id*. at *4. In finding § 922(g)(3) unconstitutional, the Fifth Circuit's bottom line was:

> [O]ur history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users.

Id. at *3.

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

correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority." *Id.* at 763.

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

CAAF's decision in *Lemire* reveals three things. First, the CAAF has the power to order the correction of administrative errors in promulgating orders—even via unpublished decisions regardless of whether the initial requirement was a collateral consequence. Second, CAAF believes that Courts of Criminal Appeals have the power to address collateral consequences under Article 66 since it "directed" the Army Court of Criminal Appeals to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders even if the Court deems them to be a collateral consequence.

Additionally, *Lepore* is distinguishable from this case. In *Lepore*, this Court made clear that "[a]ll references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at n.1. This Court then emphasized "the mere fact that a firearms prohibition annotation, *not required by the Rules for Courts-Martial*, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." *Id.* at

763 (emphasis added). The new 2019 rules, however, contain language that both the Statement of Trial Results and the Entry of Judgment contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101 (a)(6); 1111(b)(3)(F). Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 8 April 2022, para 13.3 required the Statement of Trial results to include "whether the following criteria are met…firearm prohibitions." As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered. Even if this Court does not find this argument persuasive, it still should consider the issue under *Lepore* since this issue is not an administrative fixing of paperwork, but an issue of constitutional magnitude.

WHEREFORE, SSgt Saul requests that this Court find the Government's firearm prohibition unconstitutional, overrule *Lepore* in light of *Lemire*, and order the Government to correct the Statement of Trial Results to reflect which subsection of § 922 it used to prohibit his firearm possession.

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT (FIRST)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **THOMAS M. SAUL** United States Air Force *Appellant.*	)	No. ACM 40341
	)	8 September 2023

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 14-day enlargement of time to respond in the above captioned case. This case was docketed with the Court on 20 September 2022. Since docketing, Appellant has been granted eight enlargements of time. Appellant filed his brief with this Court on 16 August 2023. This is the United States' first request for an enlargement of time. As of the date of this request, 353 days have elapsed. The United States' response in this case is currently due on 15 September 2023. If the enlargement of time is granted the United States' response will be due on 29 September 2023, and 374 days will have elapsed since docketing.

There is good cause for the enlargement of time in this case. The undersigned counsel is a reservist who was only assigned to the Government Trial and Appellate Operations Division as of 28 August 2023 and was only recently assigned to this case. Counsel is remotely performing duties of government appellate counsel and despite the fact that record of trial was shipped on 31 August 2023, counsel has not yet received it at his home of record. Due to the holiday weekend, FedEx did not pick up the package for delivery until 6 September 2023. According to FedEx tracking information the package is currently expected to arrive on 14 September 2023.

The trial transcript in this case is 1,282 pages, and Appellant has raised two assignments of error in a 16-page brief. While much of the first issue can be addressed by reviewing the electronic version of the trial transcript, government appellate counsel needs to review the actual record of trial in order to fully respond to both assignments of error.

Due to current workload in the Air Force Appellate Operations Division there is no other attorney who could complete this brief sooner.

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

[redacted]

ZACHARY T. EYTALIS, Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 September 2023.

[redacted]

ZACHARY T. BYTALIS, Col, USAF
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Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S GENERAL OPPOSITION TO EOT**
v.	)	Before Panel No. 1
Staff Sergeant (E-5), **THOMAS M. SAUL,** United States Air Force, *Appellant.*	)	No. ACM 40341
	)	8 September 2023

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, Appellant hereby enters his general opposition to the Government's Motion for Enlargement of Time (First), dated 8 September 2023.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 8 September 2023.

Respectfully submitted,

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

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee, v. Staff Sergeant (E-5) **THOMAS M. SAUL**, USAF Appellant.	))))))))))	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR** Before Panel No. 1 No. ACM 40341 28 September 2023

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

ZACHARY T. EYTALIS, Col, USAF
Appellate Government Counsel
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United States Air Force
[redacted]

MARY ELLEN PAYNE
Associate Chief
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United States Air Force
[redacted]

ISSUES PRESENTED

I.

WHETHER STAFF SERGEANT SAUL'S GUILTY PLEA FOR WILLFUL DESTRUCTION OF PROPERTY WAS PROVIDENT WHEN HE THRICE TOLD THE MILITARY JUDGE THAT HE "DID NOT INTEND TO DAMAGE THE VEHICLE" AND HE WAS SURPRISED THERE WAS ACTUAL DAMAGE?

II.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. 922 IS CONSTITUIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN SSGT SAUL WAS NOT CONVICTED OF A VIOLENT OFFENSE, AND WHETHER THIS COURT CAN DEICDE THAT QUESTION UNDER UNITED STATES V. LEMIRE, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR UNITED STATES V. LEPORE, 81 M.J. 759 (A.F. CT. CRIM APP. 2021)?

STATEMENT OF THE CASE

The United States agrees with Appellant's statement of the case in his brief, dated 16 August 2023. (App. Br. at 1.)

STATEMENT OF FACTS

On the evening of 19 February 2021, Appellant and his wife, AS, got into an argument at their home. As a result of this argument, AS left the house with their children to go to a friend's house. (R. at 551.) Appellant was extremely upset and started drinking around 0200 hours on 20 February 2021. (R. at 552.) Appellant is diabetic and believes that alcohol has strong effect on him; after drinking alcohol Appellant fell asleep. (Id.) Appellant woke up the following morning between 0800 and 1000 hours. (R. at 567.) When he woke, he discovered

that his wife and children had returned to the house. Appellant states that he was drunk at this time but was able to have a conversation with his wife and understand the conversation. He was able to stand and had sufficient balance to walk around the house. (R. at 568.) At some point during the morning Appellant took the keys to his wife's rental vehicle and walked approximately 40 feet to his wife's vehicle. (R. at 569.) In walking to the vehicle, Appellant did not fall down or use the wall to support himself. (R. at 570.)

Appellant recalled opening the car door and putting his foot on the brake in order to be able push the start button in the vehicle. (Id.) Before exiting the vehicle Appellant turned on the heat because it was "February in Oklahoma." (R at 571.) At this point, Appellant stood approximately 25 to 30 feet from his wife and started demanding that she take the vehicle and leave. (Id.) Appellant's wife persistently responded she was not going anywhere and that if he made her leave, she was going to call the police. (R. at 572.)

Appellant put his hands on the vehicle and hung his head and again asked her to leave. He then struck the windshield and started to walk towards her. (Id.) Appellant intended to hit the windshield and while his specific goal was not to completely demolish, or annihilate, or damage the window, his intent was to hit the windshield with a "large amount of force." (R. at 573.) While continuing to walk towards his wife, Appellant looked back and saw that the windshield was cracked. During the providence inquiry Appellant also stated that he was surprised that there was actual damage. (R. at 573.) However, during the providence inquiry Appellant admitted that the damage windshield was a natural consequence of him striking the windshield. (R. at 601).

The military judge's initial concern with this colloquy was whether the defense of voluntary intoxication applied to Appellant. The military judge directed circuit defense counsel

to the electronic Benchbook and took a short recess so the circuit defense counsel could discuss this possible defense with Appellant. (R. at 558-559.) After the recess circuit defense counsel stated, he did not believe voluntary intoxication was an issue with respect to finding the guilty plea provident. Circuit defense counsel stated that "While …[Appellant] is certainly drunk when this happens, I think it's not to a degree where he can't appreciate the nature of his conduct." (R. at 560.)

During the providence inquiry Appellant agreed that the damage to the vehicle's windshield was a "logical consequence" of him striking it. (R. at 578.) Appellant stated that he as 6'2" inches tall and weighed approximately 235 pounds; Appellant agreed that the force he would use to strike the windshield would be greater than that exhibited by an "average man" defined as 5'10", 180 pounds and that he would cause more damage than an average-sized man. (R. at 579.)

Appellant is a member of a weightlifting gym and is considered a "powerlifter." (R. at 794-795.) Appellant would compete in and win weightlifting and powerlifting competitions. (R. at 809) Appellant could squat between 700 to 800 pounds and bench press approximately 400-500 pounds. (R. at 635.) Appellant was also charged with and convicted of one specification wrongfully using "Trenbolone" on divers occasion under Article 112a, UCMJ. (*Entry of Judgment,* ROT, Vol. 1 at 2.) Trenbolone is an anabolic-androgenic steroid that is not approved for use in humans. (R. at 1003-1004.) The use of this steroid allows individuals to continue exercises with less recovery time. Regardless of the exercise, an individual can do it longer, harder, and with less recovery time. (R. at 1008.)

While discussing the Article 109 specification, the military judge identified the issue with respect to the requirement that Appellant acted "willfully" when he damaged the windshield.

The military judge initially determined that the action was done "intentionally and understanding the natural consequence." (R. at 580.) The military judge asked the parties to review United States vs. White, 61 M.J. 521 (N.M Ct. Crim. App. 2005); United States vs. George, 35 C.M.R. 801 (A.F. Ct. Crim. App. 1965); and United States vs. Hoyt, 48 M.J. 839 (N.M Ct. Crim. App. 1998) before coming back on the record. (R. at 596.)

The ensuing discussion compared the facts of the current case with Hoyt and White. The military judge stated that Hoyt seemed to imply that if the damage was the "natural consequence" of the action he could find the Appellant guilty. However, the military judge also pointed out that in Hoyt, the accused "wanted to damage the bicycle [non-government property]" (R. at 597.)

The military judge next compared the facts of the current case to White. The military judge noted that the appellate court reversed appellant's conviction of Article 109 finding it did not meet the standard for legal and factual sufficiency. This reversal was based on a number of factors to include the ~~a~~ppellant's testimony that he had no intention of damaging the non-government property (a privately owned vehicle), the unrebutted evidence of appellant's emotional distress and his intoxication at the time of the incident, and the relatively low speed of the vehicle upon impact. (R. at 597.)

The military judge opined that Appellant was a larger than average man and questioned whether he should conclude that whenever the Appellant strikes a windshield, that it is going to result in more damage versus the potential damage by an average-sized man. (R at 598.)

During their discussion, circuit defense counsel pointed out that that the distinction in White was that in addition to the damage being the result of a "willful action," the damage had to be "practically certain to follow." circuit defense counsel then stated, that "there's going to be

some amount of damage if a large, specifically large individual, is hitting a windshield with force, some damage is factually certain to follow." (R. at 599.) Circuit defense counsel opined that these facts would meet the standard of willfulness regardless of any desire that the Appellant may have. (Id.)

Circuit defend counsel asserted that although Appellant did not have any desire to destroy/damage the windshield, such damage was "still the practically certain consequence to happen and that such results flow naturally and probably from the action that was taken." (R. at 599.)

In response to the military judge's question about Appellant's size, circuit defense counsel pointed out that his size was one factor to consider:

> Firstly, Sergeant Saul, 6'2", 240 pounds, approximately, upset, angry, intentionally using force, the natural consequences of that action is damage. And again, as the White court points out, it's *practically certain*, not definitively certain, not guaranteed to happened, but practically certain to follow, and then regardless of any desire.

(R. at 601.) (emphasis added)

Circuit trial counsel further distinguished this case from White by pointing out that in the White case, the damage to the non-governmental property was incidental to the appellant's actions that were aimed at injuring himself. In the current case, Appellant intended to hit the windshield. He opined that the natural and probable consequences of such an action would depend on the size and strength of the individual. In other words, the natural and probable consequences of a large and strong individual would be damage to the windshield. Circuit trial counsel implied that such factors (Appellant's size and strength) were established in the current situation. (R. at 602.)

During the colloquy with Appellant, the military judge confirmed with Appellant that the windshield cracking and spidering out was a natural and probable consequence of Appellant striking it. (R. at 601.)

The military judge concluded that the discussion with circuit defense counsel, circuit trial counsel, and Appellant, was sufficient for the specification. (R. at 604.) Accordingly, the military judge found appellant's plea of guilty as provident and accepted. (R. at 608.)

ARGUMENT

APPELLANT'S GUILTY PLEA FOR WILLFUL DESTRUCTION OF NON-GOVERNMENT PROPERTY WAS PROVIDENT DESPITE THE FACT THAT HE TOLD TO JUDGE THAT HE DID NOT INTEND TO DAMAGE THE VEHICLE BECAUSE DAMAGE TO THE VEHICLE WAS A NATURAL AND PROBABLE RESULT OF HIS ACTIONS, THE RESULT WAS HIGHLY FORSEEABLE, AND APPELLANT KNEW THE DAMAGE WAS ALMOST CERTAIN TO OCCUR.

STANDARD OF REVIEW

Pleas of guilty should not be set aside on appeal unless there is a substantial basis in law and fact for questioning the guilty plea. United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991). A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. United States v. Gallegos, 41 M.J. 446 (C.A.A.F.1995).

LAW AND ANALYSIS

A. Appellant's Testimony at the Providence Inquiry was Sufficient to Support a Conviction under Article 109, UCMJ

Despite Appellant's statement that he did not "intend" to damage the windshield, there was sufficient evidence at the providence inquiry to permit the military judge to make a finding that Appellant acted "willfully" when he damaged or destroyed the non-governmental property under Article 109, UCMJ.

To constitute an offense under Article 109, UCMJ, the damage inflicted must be done willfully, that is, "intentionally." "Willfulness" may be proved by circumstantial evidence, such as the manner in which the acts were done. MCM, part IV, para. 33c(2). If the act causing the damage was intentional, such an act does not establish, on its own, that the Appellant intended to damage the property. United States v. Blackwell, 39 C.M.R. 394, 397-98 (A.B.R. 1968). Nevertheless, the intent to cause certain results can be established by evidence that such results flow "naturally and probably from the action that was taken." United States v. White, 61 M.J. 521, 523 (N.M. Ct. Crim. App. 2005) (citing United States v. Johnson 24 M.J. 101 (C.M.A. 1987)).

In White, the appellant jumped in front of an oncoming vehicle in hopes of being struck by it and injured. The appellant landed on top of the hood, causing damage to the vehicle (non-governmental property). The appellant later denied any intention of damaging the vehicle but rather admitted the sole purpose was to cause injury to himself. White 61 M.J. at 522. In determining that the appellant had no intent to willfully damage non-governmental property under Article 109, the court relied on both direct and circumstantial evidence. Id. at 524.

Direct evidence included appellant's testimony during the providence inquiry that he had no intention of damaging the vehicle itself. Circumstantial evidence included evidence of appellant's emotional distress, his level of intoxication at the time of the incident, and the *relatively low speed of the vehicle upon impact*. Id. at 524 (emphasis added). Considering these factors, the court was not convinced that appellant was aware that damage to the vehicle was "almost certain" but nonetheless went ahead in his attempt to injure himself. Nor did the court find that appellant knew that damage to the vehicle was "highly foreseeable" Id. citing Johnson, 24 M.J. at 105-106. The court held that specific "intent is lacking unless the factfinder determines not only that the prohibited results were highly foreseeable, but also that the appellant, in fact, knew they were almost certain and nonetheless went ahead." Id.

The Court in White relied on United States v. Johnson, 24 M.J. 101 (C.M.A. 1987). In Johnson the accused was convicted of the sabotage of two RF-4 aircraft, under 18 U.S.C. § 2155, and violation of Article 108, UCMJ, willfully damaging the same aircraft by placing bolts in their engine intakes. In affirming the appellant 's conviction of sabotage, the court held that the "intent" required under the statute meant the accused must have known:

> that the result is practically certain to follow regardless of any desire, purpose, or motive to achieve the result. Thus, § 2155(a) would be satisfied if someone acted when he knew that injury to the national defense would be the almost inevitable result, even though the reason for his action had nothing to do with national defense.

Johnson, 24 M.J. at 105.

The Johnson court opined that an intent to cause certain results can be established by evidence that such results flow "naturally and probably from the action that was taken." Id. Thus, Johnson's volitional act of placing bolts in the engine intakes gave rise to a permissive inference that he acted with the knowledge of the likely consequences of doing so, and thus, intended such

consequences. Id. However, the court further noted that because only a permissive inference is involved, specific "intent is lacking unless the factfinder determines not only that the prohibited results were highly foreseeable, but also that the accused, in fact, knew they were almost certain and nonetheless went ahead." Id. at 105-06. Applying this standard, the court in White considered not only the appellant's asserted mental state, but also the fact that the vehicle was traveling at a relatively low rate of speed. Therefore, it was not "highly foreseeable" that damage would occur to the vehicle. White 61 M.J. at 524.

In White, the court listed multiple reasons for its determination that the appellant did not act willfully. The appellant's assertion that he had no intent to damage the vehicle was only one of the considerations. The court also considered the fact that the vehicle was traveling at a relatively low rate of speed. This fact cuts against a finding that it was "highly foreseeable" that damage to the vehicle would result. Had the vehicle been traveling at a higher rate of speed such that damage to it was a "near certainty" it is likely that the court would have found the appellant acted willfully in damaging the vehicle despite his statements to the contrary.

The facts in this case are distinguishable from White primarily because the windshield was the direct object of the Appellant's aggression some damage to it was "highly foreseeable" under the circumstances. This situation is also distinguishable from Blackwell, where the appellant was charged with Article 109, UCMJ, when the victim of an assault's eyeglasses (non-government property) were damaged when appellant struck the victim. The victim fell forward and her eyeglasses "fell off and broke." Regardless of the willfulness of the striking, there was no expressed or implied intent to damage personal property. United States v. Blackwell, 39 C.M.R. 394, 397-98 (A.B.R. 1968); *see also* United States v. Garcia, (Appellant inadvertently broke a glass case when using a screwdriver to open it and steal the items inside the case. There

was no intent to damage the glass case.) United States v. Garcia, 29 M.J. 721 (C.G.C.M.R. 1989).

In this case there is no evidence Appellant was trying to accomplish some other ancillary goal in striking the windshield. He was not trying to injure himself, assault anyone, or steal the contents of a glass case. Instead, the windshield was the direct object of his action. And while the direct evidence of Appellant's intent was lacking in that he stated he did not "intend" to damage the vehicle or that he was "surprised" that there was actual damage, other direct and circumstantial evidence supports a finding that he acted willfully. (R. at 552, 573.)

First, Appellant admitted that he intended to strike the windshield and that the windshield cracking out and spidering out is a natural consequence of his actions. (R. at 601.) Second, Appellant admitted that his goal was to hit the windshield with a "large amount of force." (R. at 573.) Appellant did so while the windshield was cold. (R. at 571.) And lastly, the size and the strength of Appellant weighs heavily in support of a finding that damage was both "highly foreseeable" and that Appellant knew damage was almost certain to occur.

While the military judge had the opportunity to view Appellant and comment on his size, it was only later revealed that Appellant was a competitive "powerlifter" who can squat between 700 to 800 pounds and bench press approximately 400-500 pounds. (R. at 635.) Additionally, Appellant was convicted of using steroids during the same timeframe that he damaged the windshield. (*Entry of Judgment*, ROT, Vol. 1 at 2.) It is therefore reasonable to conclude that when Appellant applied what he described as a "large amount of force" that he knew damage would likely result. Notably, a finding of willfulness does not require Appellant had a full *conscious awareness* of the probably ultimate consequences of their purposeful act. United States v. George, 35 C.M.R. 801, 811 (C.M.A. 1965) (emphasis added).

In determining the providence of pleas, it is uncontroverted that an appellate court must consider the entire record in the case. United States v. Bester, 42 M.J. 75 (C.A.A.F. 1995); *see also* United States v. Martin, 39 M.J. 111 (C.M.A. 1994); United States v. Smith, 34 M.J. 319, 324 (C.M.A. 1992). Therefore, while the military judge had some knowledge that Appellant was charged with the use of steroids and was an above average-sized individual, the true extent of his strength was only later revealed during the findings portion of the trial and its sworn testimony. These addition facts buttress the circumstantial evidence considered by the military judge during the providence inquiry and is properly considered by this Court as evidence that it was "highly foreseeable" that damage would result to the windshield and that Appellant knew as much. At the very least, consideration of the entire record shows that there is nothing "that would raise a substantial question regarding [Appellant]'s guilty plea." United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008).

The fact that Appellant, an accomplished powerlifter on steroids, initially asserted he did not "intend" to damage the windshield or that he was "surprised" that it was damaged is superseded by the objective certainty that some damage would result from his striking the windshield. The resulting damage to the windshield was practically certain to follow regardless of any desire, purpose, or motive to achieve the result. White, 61 M.J. 521 at 523, (citing Johnson, 24 M.J. 101 at 105). Appellant later appeared to acknowledge this certainty during the providence inquiry.

> MJ: Do you agree that *you* striking the windshield, and the windshield cracking out and spidering [sic] like it did is a natural consequence of *you* striking the windshield? Or a probably consequence?
>
> ACC: Yes. Yes, Your Honor.

> MJ: Okay. I kind of spoke over you, so I want to make sure it's clear; do you agree that *you* smacking the windshield, a natural consequence of that action is that the windshield will spider out?
>
> ACC: Yes, Your Honor

(R. at 601-602.) (emphasis added).

This colloquy stands in contrast to the earlier discussion when Appellant stated that he was surprised or did not intend to damage the windshield. Notably, this conversion followed the discussion of Appellant's size and the degree of force that we used. (R. at 579, 599.)

The situation is similar to an individual who intentionally punches a wall out of frustration or anger. If child punches a piece of drywall, objectively, damage is unlikely to follow from that action. If a powerlifter strikes a piece of drywall with a self-proclaimed "large amount of force," he or she may not want to actually damage the wall, but objectively, some damage is a near certainty. And the powerlifter cannot claim a lack of intent when the results are a near certainty. Accordingly, in this situation there is sufficient evidence to support a finding that the Appellant acted willfully when he struck and damaged the windshield.

The facts in this situation are similar to the guilty plea in United States v. Hoyt, 48 M.J. 839 (N.M Ct. Crim. App. 1998). There, the appellant testified that he angrily exited his barracks and came upon a bicycle belonging to a fellow Marine. Although there is no indication that this bicycle, nor the Marine, had ever done anything to the accused, he picked up and threw the bicycle and caused damage to it. Hoyt 48 M.J. at 841. When asked his purpose for throwing the bicycle, the appellant responded "…when I tossed the bike, it was going to break. Something was going to happen to it." The military judge followed up with "So, you were mad, and you wanted to break something? You wanted to smash something?" Appellant answered in the affirmative. Id.

The Hoyt Court cited the longstanding principle that a court-martial is free to infer that a sane person intends the natural and probably consequence of his conduct. Id. at 842 (citing United States v. Christensen, 15 C.M.R. 22, 25 (C.M.A. 1954)). The Court also noted that even absent the appellant's express statement that he intended to break or smash something, under the facts of the case, the appellant's willfulness was readily inferred. Id.

In the current case, Appellant was similarly angry and seeking to vent his frustration. The only difference is that in this case, instead of throwing a bicycle, Appellant struck a windshield out of anger with what he described as a "large amount of force." In Hoyt the natural and probably consequence of his action was damage to the bicycle. In this case the natural and probable consequence of striking the windshield was damage to it. Despite his assertions to the contrary, Appellant's willfulness is readily inferred as it was in Hoyt.

The military judge's statement "I don't think we have on purpose" is not fatal to his later finding that sufficient evidence existed to find Appellant guilty. (R. at 580.) The military judge made this statement before he directed the parties to review the relevant case law and apply the law to the situation at hand. He stated that further review of the law would be necessary before he could continue analyzing the charge and specification. (R. at 580.) This is exactly how one would expect a military judge to operate when there is a question as to the applicable law. He identified the issues, reviewed the case law, and asked all participants for their input before making any decisions. The record of trial reflects this methodical approach and the military judge appropriately found Appellant, in accordance with his plea, guilty of the offense.

B. The Military Judge Thoroughly Reviewed Relevant Case Law with all Parties and Applied the Proper Legal Standard to his Analysis under Article 109.

The military judge did not apply the incorrect *mens rea* to convict Appellant when he asked Appellant if he believed that striking the windshield, and the windshield cracking like it did was a "natural consequence" of striking the windshield.

As articulated in White and Johnson an "intent" to cause certain results can be established by evidence that such results flow "naturally and probably from the action was taken." White, 61 M.J. 521 at 523. Therefore, the military judge's inquiry into the action's "probable consequence" or its "natural consequence" was entirely appropriate because it was relevant to determine the Appellant's intent. Moreover, the Military Judge's Benchbook under Article 92, UCMJ, defines "willfully" as the doing of an act knowingly and purposely, specifically intending the *natural and probable consequences of the act*. Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judge's Benchbook*, para 3a-16-3. (emphasis added).

Appellant points to "probable consequence" language in support of his assertion that the military judge incorrectly applied a recklessness standard and the fact that this language was used in cases applying a reckless *mens rea* citing United States v. Herrmann, 76 M.J. 304, 308 (C.A.A.F. 2017) and United States v. Cooper, No. ACM 40092, 2023 CCA LEXIS 7, at *17 (A.F. Ct. Crim. App. Jan. 11, 2023)(unpub. op.). (App. Br. at 9). However, these cases do not advance Appellant's argument because the same language "probable consequence" language is also included in White. What distinguishes White and Herrman is the certainty of a particular result. In Herrman, a case involving reckless endangerment, the court was concerned with a determination as to when a certain harm is "likely" to result from appellant's conduct under Article 134, UCMJ.

Appellant also cites the definition for recklessness pursuant to Article 114, UCMJ, but there is no evidence in the record that the military judge applied this lesser standard of culpability or even discussed recklessness after reviewing the relevant caselaw. Instead, the military judge identified the intent issue and applied the standards articulated in White, 61 M.J. 521; Hoyt, 48 M.J. 839; and Johnson, 24 M.J. 101.

Appellant asserts that the military judge and the parties misread White and its interpretation of Johnson. (App. Br. at 9). This is incorrect. While Johnson is distinguishable from the current case because is not an Article 109 case (18 U.S.C. § 2155(a)), Johnson remains persuasive and instructive in determining the element of intent. Johnson articulates two different theories of intent in criminal law; one embracing the "specific requirement of purpose" or the "more general one of knowledge or awareness." Johnson, 24 M.J. at 105.

> "[I]t is now generally accepted that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result."

Id. (citing United States v. Gypsum Co., 438 U.S. 422, 445 (1978)).

In Johnson, the court determined that the "intent" in § 2155(a), a sabotage statute, had the meaning of knowing "that the result is practically certain to follow," regardless of any desire, purpose, or motive to achieve the result. Id. The court noted that normally, the intent to cause certain results is established by evidence that those results followed "naturally and probably from the action that was taken;" however, the necessary intent is lacking unless the factfinder further determines not only that the prohibited results were foreseeable, but also that the appellant, in fact, knew they were almost certain to happen and nonetheless went ahead. Id. at 106.

The White court adopted the same standard used in Johnson – namely, that a person who acts intends a result of his act when he knows that the result is practically certain to follow from his conduct whatever his desire may be as to that result. White, 61 M.J. at 524. The court did not apply the higher standard where the actor "consciously desires" a specific result.

The White court recognized that an intent to cause certain results can be established by evidence that such results flow "naturally and probably from the action that was taken." In the context of a providence inquiry, the court next evaluated the direct and circumstantial evidence to determine the appellant's intent and whether he was aware that damage to the non-government property was "almost certain" or that he knew damage to the vehicle was "highly foreseeable." White, 61 M.J. 523-524.

In the current case, the record of trial supports a finding that the military judge, with the assistance of counsel, followed the standard described in Johnson and White. After reviewing the case law, circuit defense counsel articulated the legal standard as set forth in Johnson and White.

> CDC: Then the result, the end result was practically certain to follow. So, I think that's a legitimate point, that there's going to be some amount of damage if a large, specifically a large individual, is hitting a windshield with force, some damage is *factually certain to follow*. And they went on to say regardless of any desire that they might have. *So, he doesn't have a desire to destroy the windshield*, and perhaps doesn't have a desire to damage it to that extent, but it's still the practically certain consequence to happen and that *such results flow naturally and probably from the action that was taken*.

(R. at 599-600) (emphasis added).

Circuit defense counsel correctly identified, based on White and Johnson, the fact that Appellant did not require a "conscious desire" to destroy the windshield. Instead, he noted that the results, the damaged windshield, flowed naturally and probably from the action that was taken. He pointed out that the end result was practically certain to follow. Moreover, a finding of

willfulness does not require Appellant to have a full *conscious awareness* of the probably ultimate consequences of their purposeful act. United States v. George, 35 C.M.R. 801, 811 (C.M.A. 1965) (emphasis added).

Circuit defense counsel next pointed out that the intent requirement by stating:

> CDC: I think it's more about Sergeant Saul's *own subjective understanding*, or someone that was Sergeant Saul's size, right? *Their understanding of the probable consequences of what's going to happen from that action.* Again, if this is a 12-year-old kid who's 95 pounds, and he's frustrated, and he smacks the windshield, I don't think that either subjectively or objectively anyone would think that would cause damage to a car.
>
> Firstly, Sergeant Saul, 6'2", 240 pounds, approximately, upset, angry, intentionally using force, the natural consequence of that action is damage. And again, as the White court points out, it's practically certain, not definitively certain, not guaranteed to happen, but practically certain to follow, and then regardless of any desire.

(R. at 601) (emphasis added).

Circuit defense counsel directed the military judge to Appellant's subjective understanding of the probable consequences of his action. In other words, whether the evidence supported a finding that Appellant knew some damage was either almost certain or highly foreseeable. In doing so, circuit defense counsel directed the military judge's attention to the circumstantial evidence including the fact that Appellant was a large individual, upset, angry, and intentionally using force, the natural consequence of is damage. The military judge then asked Appellant if he agreed that the cracking and spidering windshield was a natural consequence of him striking it – to which Appellant responded in the affirmative. (R. at 601).

In response to the discussion with circuit trial and defense counsel, the military judge stated the following:

> MJ: Okay. I'll say first of all, I appreciate both counsel's discussion on this. And after the discussion, I tend to agree that the case is different from White and the intent element. I will say that I don't think that Sergeant Saul should

> be prejudiced just because he's a large individual, you know, and smacks the windshield and therefore, you know, causes damage. *But I do believe that whenever Sergeant Saul himself says, yeah, it's probable that I smacked the windshield and therefore, it cracks out;* that is a different distinction than me merely finding him guilty because he's a larger individual.

(R. at 603.) (emphasis added).

The military judge stated that this case is different from White in regard to the intent element. And while the judge was trying not to penalize Appellant for his size, the military judge appears to have given significant weight to Appellant's ready admission that if he "smacks" the windshield it is probable that it is going to crack out. As with the court in White, this admission is but one fact that the military judge is using to establish intent.

The military judge only convicted Appellant of Article 109, UCMJ after a thorough review of the Johnson and White decisions and an extensive on-the-record discussion with circuit trial counsel and circuit defense counsel and only accepted Appellant's plea after he was confident there were sufficient facts to support the conviction. Accordingly, the military judge applied to proper legal standard to find Appellant's plea provident and his decision to accept Appellant's plea was not arbitrary, fanciful, clearly erroneous or clearly unreasonable. He did not abuse his discretion. This Court should deny this assignment of error.

II.

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

ADDITIONAL FACTS

The maximum punishment for wrongful use of a controlled substance in violation of Article 112a, UCMJ, is a dishonorable discharge, and confinement for five years. The maximum punishment for willful dereliction of duty in violation of Article 90, UCMJ, is a dishonorable discharge and confinement for five years. The Entry of Judgment in Appellant's case provides: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*Entry of Judgement*, ROT, Vol 1.)

STANDARD OF REVIEW

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim . App. 2021).

LAW AND ANALYSIS

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him because regardless of which specific provision the government is relying on, the government cannot meet its burden of proving a historical analog that barred offenders like Appellant from possessing firearms. (App. Br. at 12.) Appellant asserts that any prohibitions on the possession of firearms imposed on him runs afoul of the Second Amendment, U.S. CONST. amend. II, and the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (analyzing New York's concealed carry regime). Appellant's arguments fail.

The Gun Control Act of 1968, 18 U.S.C. § 922, makes it unlawful for any person, inter alia, "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. Id. at § 922(g)(1). Here, Appellant was found guilty of wrongful use of a controlled substance, in violation of Article 112a, UCMJ; and willful dereliction of duty, in violation of Article 90, UCMJ. Both crimes are punishable by imprisonment for a term exceeding one year. (See *Entry of Judgment*, ROT, Vol. 1 at 2.)

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

This Court lacks jurisdiction under Article 66, UCMJ, to order the correction of the Statement of Trial Results or EOJ on the grounds requested by Appellant. In United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021), this Court clearly held that it "lacks authority under Article 66, UCMJ, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition" in a court-martial order. Nevertheless, Appellant argues here that, because the Court in United States v. Lemire, 82 M.J. 263, n.* (C.A.A.F. 9 March 2022) (decision without published opinion), ordered the Army to correct a promulgating order that annotated an appellant as a sex offender, this Court now has the authority to modify his Statement of Trial Results and EOJ. (App. Br. at 15.) Appellant argues that CAAF's decision in Lemire reveals three things: (1) That CAAF has the authority to correct administrative errors in promulgating orders; (2) by extension, CAAF believes that the service courts of criminal appeal (CCAs) have power to correct administrative errors under Article 66, UCMJ; and (3) CAAF believes both appellate courts have the authority to address constitutional errors in promulgating orders even if they amount to collateral consequences of a conviction. (Id.)

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

Court to follow a mere footnote in a decision without a published opinion, which contains no analysis of jurisdiction and no language indicating that correction of a Statement of Trial Results or EOJ is proper.

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

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

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

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

sentence." 81 M.J. at 762 (citations omitted). This Court should reach an identical conclusion here.

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

Moreover, both the Navy-Marine Corps and the Air Force CCAs have held that matters outside the UCMJ and MCM, such as Defense Incident-Based Reporting System (DIBRS) codes and indexing requirements under 18 U.S.C. § 922, are outside their authority under Article 66, UCMJ. *See* United States v. Baratta, 77 M.J. 691 (N-M. Corp. Ct. Crim. App. 2018); Lepore, 81 M.J. at 763. Both courts reasoned that they only possessed jurisdiction to act with respect to the findings and sentence as approved by the convening authority. Id. But here, even under the updates made to Article 66(d), UCMJ, this Court's jurisdiction is still limited to acting "with respect to the findings and sentence as entered into the record." 10 U.S.C. § 866(d). The annotation on the first indorsements to the EOJ and Statement of Trial Results is simply not a part of the finding or sentence entered into the record. Nor does R.C.M. 918 list the firearm

prohibition requirements from 18 U.S.C. § 922(g) as part of a court-martial finding. Therefore, 18 U.S.C. § 922(g)'s firearm prohibitions and the indexing requirements that follow that statute are well outside the scope of this Court's jurisdiction.

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

Even if this Court has jurisdiction to review this issue, Appellant is not entitled to relief. The SJA followed the appropriate regulations in signing the first indorsement to the Statement of Trial Results and EOJ. Appellant received a conviction for two qualifying offenses under 18 U.S.C. § 922(g)(1). *See* DAFI 51-201, dated 14 April 2022, para. 29.32.

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

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

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

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

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

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

> conduct falls outside the Second Amendment's "unqualified command."

(citations omitted). In his concurrence, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008) (finding that the Second Amendment is an individual, not collective, right), and McDonald v. City of Chicago, 561 U.S. 742 (2010) (applying that right to the states), that the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2133 (Kavanaugh, J., concurring) (citations omitted). Accordingly, the proper interpretation of the Second Amendment allows for a "variety" of gun regulations. Id. (citing Heller, 554 U.S. at 636.)

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

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

Heller, 554 U.S. at 573.

Appellant acknowledges that both Bruen and Heller limit the application of the Second Amendment to "law abiding, responsible citizens." (App. Br. at 15.) However, Appellant nonetheless cites to United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), for the proposition that the Government cannot prove that Appellant's firearm prohibition for a "non-violent offense" is in keeping with the United States' historical tradition of firearm regulation. (App. Br. at 13.) But this is contrary to what the Fifth Circuit in Rahimi held. That court concluded that

the term "law abiding, responsible citizens," was "shorthand in explaining that [Heller's] holding … should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]" Rahimi, 61 F.4th at 451 (citing Heller, 554 U.S. at 626-627). The Rahimi court went on to assert that Bruen*'s* reference to "ordinary, law abiding" citizens was no different than Heller—it was meant to exclude "from the Court's discussion groups that have historically been stripped of their Second Amendment Rights[.]" Id. The Court determined that defendant Rahimi did not fall into that category of felons prohibited from owning a firearm at the time he was convicted of violating the firearm prohibition under 18 U.S.C. § 922(g)(8), since Rahimi was only subject to an agreed-upon domestic violence restraining order at the time he was convicted. Id. at 452. Thus, he did not have a felony conviction at the time he was charged with illegal possession of a firearm. Id. The Fifth Circuit thus found that the Government had not shown that 18 U.S.C. § 922(g)(8)'s restriction of his Second Amendment rights "fit[] within our Nation's historical traditional of firearm regulation." Id. at 460.

The appellant in Rahimi was in a fundamentally different position than Appellant here. In this case, Appellant has been convicted of an offense punishable by well over a year of confinement (i.e., a felony). He is thus prohibited from owning a firearm under 18 U.S.C. § 922(g)(1). Both the Supreme Court and the Fifth Circuit acknowledge that felony convictions are part of the United States' longstanding tradition on firearm prohibitions. Moreover, these cases make no distinction between violent and non-violent felonies—prior to Bruen, the Fifth Circuit opined, "[i]rrespective of whether [an] offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow

citizens." United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004). The court found that limiting a felon's ability to keep and possess firearms was not inconsistent with the "right of Americans generally to individually keep and bear their private arms as historically understood" in the United States. Id.; accord Folajtar v. AG of the United States, 980 F.3d 897 (3rd Cir. 2020) (upholding the constitutionality of 18 U.S.C. § 922(g)(1) as applied to felons—including nonviolent felons—based upon the Second Amendment's history and tradition).

Appellant's conviction for use of a controlled substance and willful dereliction of duty, both of which independently carry a possible sentence exceeding one year, fits squarely into the categories of individuals that should be prohibited from possessing a firearm. Therefore, the Indorsements in the EOJ and Statement of Trial Results correctly annotated that Appellant is subject to 18 U.S.C. 922's prohibitions. Appellant is not entitled to relief.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **THOMAS M. SAUL,** United States Air Force *Appellant*	)	No. ACM 40341 5 October 2023

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

Staff Sergeant (SSgt) Thomas M. Saul, Appellant, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer, dated 28 September 2023 [hereinafter Answer]. SSgt Saul stands on the arguments in his initial Brief and submits additional arguments for the issues listed below.

I.

STAFF SERGEANT SAUL'S GUILTY PLEA FOR *WILLFUL DESTRUCTION* OF PROPERTY WAS IMPROVIDENT WHEN HE THRICE TOLD THE MILITARY JUDGE THAT HE "DID NOT INTEND TO DAMAGE THE VEHICLE" AND THAT HE WAS SURPRISED THERE WAS ACTUAL DAMAGE.

The Government generally alleges that there was "sufficient evidence" to find that "Appellant acted 'willfully' when he damaged or destroyed the non-governmental property under Article 109, UCMJ." Answer at 8. The Government is incorrect because (1) it has ferhoodled the meaning of "willfully;" (2) it has contravened the seminal case on Article 109, UCMJ, 10 U.S.C. § 909; and (3) the rule of lenity weighs in favor of SSgt Saul.

1. The Government's Interpretation of "Willfully" Conflicts with the Plain Meaning and Supreme Court Precedent

"Willfully" differentiates "between deliberate and unwitting conduct." *Bryan v. United States*, 524 U.S. 184, 191 (1998). However, in the criminal context it also "refers to a culpable state of mind." *Id.* Stated differently, "a 'willful' act is one undertaken with a 'bad purpose.'" *Id.*[1] As such, to prove that a defendant "willfully" violated a statute, the Government "must prove that the defendant acted with knowledge that his conduct was unlawful." *Bryan*, 524 U.S. at 192 (citation omitted). This requires that the Government evince that a defendant acted "with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Id.* at 193.

Although Supreme Court precedent is binding on this Court and that alone should be sufficient to resolve this issue, the plain meaning of "willful" also shows the Government has confused its meaning:

[1] *Id.* (citing *Heikkinen* v. *United States,* 355 U.S. 273, 279 (1958) ("There can be no *willful* failure by a deportee, in the sense of § 20(c), to apply to, and identify, a country willing to receive him in the absence of evidence . . . of a 'bad purpose' or '[non-]justifiable excuse,' or the like . . . . It cannot be said that he acted 'willfully' -- *i.e.*, with a 'bad purpose' or without a 'justifiable excuse'"); *United States* v. *Murdock*, 290 U.S. 389, 394 (1933) ("When used in a criminal statue [willfully] generally means an act done with a bad purpose"); *Felton* v. *United States,* 96 U.S. 699, 702 (1878) ("Doing or omitting to do a thing knowingly and wil[l]fully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. 'The word "wil[l]fully,"' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' 20 Pick. 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. i. sect. 428"); 1 L. Sand, J. Siffert, W. Loughlin, & S. Reiss, *Modern Federal Jury Instructions* 3A.01, p. 3A-18 (1997) ("'Willfully' means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law.").

> Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. *Intending the result which actually comes to pass*; designed; intentional; purposeful; not accidental or involuntary . . . An act or omission is "willfully" done, if done voluntarily and intentionally and *with the specific intent to do something the law forbids*, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Black's Law Dictionary, 1599 (6th ed. 1990) (emphases added). Using either the Supreme Court's or the *Black's* definition of "willful," the evidence against SSgt Saul is insufficient to find him guilty because he did not have the specific intent to cause damage to the windshield—regardless of what the Government thinks was "probable." Answer at 14.

In this case, SSgt Saul stated three times that he "did not intend to damage the vehicle." R. at 552-53, 573. He did not act with the required "evil-meaning mind." *Bryan*, 524 U.S. at 193. It was then fatal that the Military Judge agreed with SSgt Saul, stating "I don't think we have the on purpose." R. at 580. Therefore, the Government's argument that "other direct and circumstantial evidence supports a finding that he acted willfully" is unavailing because both SSgt Saul and the Military Judge agreed that they did not have the "on purpose;" they agreed that SSgt Saul did not have a "culpable state of mind." Answer at 11; *Bryan*, 524 U.S. at 191. The Military Judge did not then seek additional evidence for willfulness as the Government suggests. Answer at 11-12. Rather, he sought and found a different standard—*United States v. Johnson*, 24 M.J. 101 (C.M.A. 1987) and *United States v. White*, 61 M.J. 521, 523 (N.M. Ct. Crim. App. 2005)—which he incorrectly used to accommodate SSgt Saul's declaration that he "did not intend to damage the vehicle." R. at 552, 553, 573.

2. The Seminal Case States that Specific Intent is Required Under Article 109, UCMJ

In 1963, the Court of Military Appeals first considered the question of whether "plea of guilty was improvident" under Article 109, UCMJ, "because the offense of willful and wrongful damage to private property requires proof of an actual intention to damage, as distinguished from

a reckless disregard of property rights of such a high degree as to carry an implication of willfulness?" *United States v. Bernacki*, 33 C.M.R. 173, 174 (C.M.A. 1963). This is the same question this Court is considering *sub judice*.

The court in *Bernacki* started its analysis by recognizing that with personal property under Article 109, UCMJ, "a reckless act is singularly missing; the Code outlaws damage or destruction done 'willfully and wrongfully.' Regarding the second category, then, it is patent the act denounced must be, always and in every instance, willful." *Id.* at 175. Thus, the quiddity of destruction of personal property under Article 109, UCMJ, is specific intent. The court underscored this, stating, "it is obvious" that "more than mere reckless action is contemplated thereby, for recklessness is mentioned, in the very same Article but separately from, willful acts." *Id.*

Although not explicitly stated, the court used the related-statutes canon to determine that Article 109, UCMJ, required specific intent. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). The court found that an analysis of Article 108, UCMJ, was "quite illuminating" for two reasons. *Bernacki*, 33 C.M.R. at 176. First, negligent damage can constitute an offense under Article 108, UCMJ, while under Article 109, UCMJ, it cannot with regard to personal property. *Id.* Second, the court found that the definition of "willfully" in Article 108, UCMJ, "has long been settled" to mean "specific intent." *Id.* For those reasons, the court held that "the term has the same import in Article 109." *Id.* The court reasoned:

> [I]t would be placing a strained interpretation on the two sections to hold that the Congress intended different meanings when it used "willfully" in each. To the contrary, it would appear that, having treated with an extremely similar subject and in consecutive Articles, *the legislature in its wisdom meant precisely the same thing when it outlawed willful damage in each instance*. Surely, had a different result been contemplated, action of different and less culpable nature would have been specifically denounced as, for example and as we have earlier noted, reckless and negligent acts were in other portions of the two Articles.

Id. (emphasis added). "Specific intent," as the court used it, aligns with *Black's* definition of "The subjective desire or knowledge that the prohibited result will occur." *Black's Law Dictionary*, 1399 (6th ed. 1990). The court's reasoning, definitions, and holding all track with Supreme Court precedent.

Regardless of why the Military Judge and Counsel relied on *Johnson* and *White*, their reliance was misplaced. *Bernacki* is the controlling—and more persuasive—case. Perforce, the Government's argument that the military judge applied the "proper legal standard" when he "only convicted Appellant of Article 109, UCMJ after a thorough review of the *Johnson* and *White* decisions" is wrong. Answer at 19. The Military Judge applied the incorrect legal standard for "willful," and this Court should find that he abused his discretion in so doing.

It is also worth noting that that the Analysis of the Punitive Articles cites to *Bernacki* as authoritative for the damage of non-military property. Manual for Courts-Martial, United States (2016 ed.), App. 23, at A23-10. As recently as 2022, this Court also favorably cited *Bernacki*. *United States v. McCameron*, No. ACM 40089, 2022 CCA LEXIS 663, at *12 (A.F. Ct. Crim. App. Nov. 17, 2022) (unpub. op.). Both of these references indicate that not only is *Bernacki* still good law, but that this Court should have no hesitation relying on it.

3. The Rule of Lenity Weighs in Favor of SSgt Saul

The rule of lenity means that an "ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor." ANTONIN SCALIA & BRYAN A. GARNER,

Reading Law: The Interpretation of Legal Texts 230 (2012). SSgt Saul's position is clear: The statute is not ambiguous, it requires specific intent, and he should prevail on the arguments he has previously made. However, if this Court disagrees with that position, then certainly this issue would be a close call, requiring the application of the rule of lenity.

"When [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (citation omitted). The rule of lenity applies to ambiguities in the scope and breadth of criminal statutes: "[A]mbiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). The Court of Appeals for the Armed Forces' predecessor, the Court of Military Appeals, favorably applied the doctrine in multiple settings. *United States v. Guerrero*, 28 M.J. 223, 227 (C.M.A. 1989) ("Applying the Supreme-Court-approved rule of lenity, we find Congress intended a single offense to exist on these facts" for obstruction of justice); *United States v. Schelin*, 15 M.J. 218, 220 (C.M.A. 1983) (describing two definitions of "military property" as a "glaring ambiguity" that "must be resolved in favor of the accused").

If this Court believes that this question is ambiguous, it should rule in favor of SSgt Saul, requiring the Government to have proved that he *intended* to damage the windshield.

WHEREFORE, SSgt Saul requests that this Court set aside the finding for willful destruction of property and reassess his sentence.

II.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[2] WHEN SSGT SAUL WAS NOT CONVICTED OF A VIOLENT OFFENSE AND THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021).

The Government argued that "[b]oth the Supreme Court and the Fifth Circuit acknowledge that felony convictions are part of the United States' longstanding tradition on firearm prohibitions." Answer at 27. The Government then stated, "These cases make no distinction between violent and non-violent felonies." *Id.* The Government then used these statements to argue that 18 U.S.C. § 922's firearm prohibition is constitutional. Unfortunately, the Government has fallen into the same trap that has beset lower courts; namely, giving the Second Amendment short shrift or treating it as a "second-class right":

> Members of the Supreme Court have repeatedly criticized lower courts for disfavoring the Second Amendment. The Supreme Court has now responded by setting forth a new legal framework in *Bruen*. It is incumbent on lower courts to implement *Bruen* in good faith and to the best of our ability.

United States v. Rahimi, 61 F.4th 443, 462-63, 464 (5th Cir. 2023) (Ho, J., concurring). Stated differently, the courts must now be "more forceful guardians" of the right to keep and bear arms by using the text, history, and tradition test. *Id.* at 461.

The Government's cursory review of the text, history, and tradition of firearms regulation has two main problems. First, it failed to recognize that a felony conviction today is vastly different from what constituted a felony prior to the 20th century, let alone at the time of this country's founding. This is problematic because categorizing crimes as felonies has not only increased, but

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

has done so in a manner inconsistent with the traditional understanding of a felony:

> The need [for historical research] is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 697 (2009). Notably, the "federal felon disability--barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm--is less than [63] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with the majority of this country's history and tradition.

The Government's second problem is its assertion that there is "no distinction between violent and non-violent felonies" in the historical record. Answer at 27. In fact, the Government is dead wrong, as this was the actual test that was used throughout this country's history *if* a law imposed a ban at all:

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

Id. at 698 (emphasis added).

In addition, the Fifth Circuit recently found that § 922(g)(3)—which bars firearm possession for unlawful drug users or addicts—is unconstitutional because it is not supported by historical references. *United States v. Daniels*, No. 22-60596, 2023 U.S. App. LEXIS 20870 (5th Cir. Aug. 9, 2023). In *Daniels*, the appellant was arrested for driving without a license, but the police officers found marijuana butts in his ashtray. *Id.* at *3. He was later charged and convicted

of a violation of § 922(g)(3). *Id*. at *4. In finding § 922(g)(3) unconstitutional, the Fifth Circuit's bottom line was:

> [O]ur history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users.

Id. at *3.

Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" Marhsall, 32 HARV. J.L. & PUB. POL'Y at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not own or have in his possession or under his control, a pistol or revolver." *Id*. at 701 (citation and quotations omitted). A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking." *Id.* (citations and quotations omitted). It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* 698.

As mentioned previously, prior to World War I, firearm prohibitions on convicts were largely nonexistent. There were no federal firearms regulations and to the extent that states regulated firearms, it was against *carrying* weapons in a concealed manner, not banning *possession*. *Id.* at 707. Notably, "it is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

For an understanding of the founder's thinking, three proposals from the constitutional convention emerged that show the distinction was between violent and non-violent crimes. First, "that the Constitution protect the right to bear arms and also provide that 'no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of *public*

injury from individuals.'" *Id*. at 712 (emphasis added, quotations omitted). Second, from Samuel Adams, that the Constitution "be never construed . . . to prevent the people of the United States who are *peaceable* citizens, from keeping their own arms." *Id.* at 713 (emphasis added, quotations omitted). Third, that "Congress shall never disarm any Citizen unless such as are or have been in *Actual Rebellion*." *Id.* (emphasis added, quotations omitted).

The text, history, and tradition from the founding indicates that 18 U.S.C. § 922's firearm ban, as applied to SSgt Saul, is not constitutional. The Government not only failed to meet its burden of proof, but it did not cite to accurate history on firearms regulations. "The right to keep and bear arms has long been recognized as a fundamental civil right. Blackstone saw it as an essential component of 'the natural right' to 'self-preservation and defence.'" *Rahimi*, 61 F.4th at 461 (Ho, J., concurring) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008)). This Court should follow Judge Ho's lead in finding it "incumbent" to "implement *Bruen* in good faith." *Id.* at 463. In doing so, this Court will find "how respect for the Second Amendment is entirely compatible with respect for our profound societal interest in protecting citizens from *violent* criminals." *Id.* at 461-62 (emphasis added).

WHEREFORE, SSgt Saul requests that this Court find the Government's firearm prohibition unconstitutional, overrule *Lepore* in light of *Lemire*, and order the Government to correct the Statement of Trial Results to reflect which subsection of § 922 it used to prohibit his firearm possession.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 5 October 2023.

Respectfully submitted,

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