

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

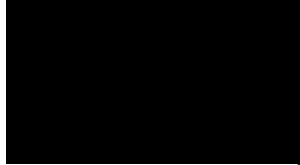
UNITED STATES,	)	<b>MOTION FOR ENLARGEMENT OF TIME (FIRST)</b>
<i>Appellee,</i>	)	
	)	
v.	)	Before Panel No. 3
	)	
Technical Sergeant (E-6),	)	No. ACM 40203
<b>MATTHEW D. SCHAUER,</b>	)	
United States Air Force,	)	22 December 2021
<i>Appellant.</i>	)	

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **8 March 2022**. The record of trial was docketed with this Court on 8 November 2021. From the date of docketing to the present date, 44 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,



N, Maj, USAF

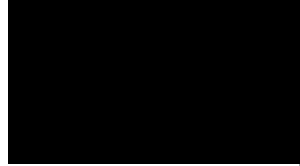
Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 22 December 2021.

Respectfully submitted,



N, Maj, USAF

Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
	)	
Technical Sergeant (E-6)	)	ACM 40203
MATTHEW D. SCHAUER, USAF,	)	
<i>Appellant.</i>	)	Panel No. 3
	)	

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

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

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



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



**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force

Appellate Defense Division on 27 December 2004



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



**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

)  
)  
) **NOTICE OF PANEL**  
) **CHANGE**  
)

It is by the court on this 20th day of January, 2022,

**ORDERED:**

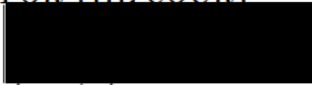
The following records of trial are withdrawn from Panel 3 and referred to Panel 1 for appellate review.

- |   |                       |
|---|-----------------------|
| 1. United States v. Ashmore, Donovan          | No. ACM 40036         |
| 2. United States v. Dixon, JaKorbie R.        | No. ACM 39878 (f rev) |
| 3. United States v. Beehler, Erik M.          | No. ACM 39964         |
| 4. United States v. Lopez, Luis J.            | No. ACM S32681        |
| 5. United States v. Lowe, Dalyn P.            | No. ACM S32707        |
| 6. United States v. Emas, Nicholas F.         | No. ACM 40020         |
| 7. United States v. Kim, Won-Jun              | No. ACM 40057         |
| 8. United States v. Mock, Joshua P.           | No. ACM 40072         |
| 9. United States v. Taylor II, Terry J.       | No. ACM 40086         |
| 10. United States v. Cooper, Calvin M.        | No. ACM 40092         |
| 11. United States v. Ross, Jaden C.           | No. ACM 40107         |
| 12. United States v. Todd, Jeremy T.          | No. ACM S32701        |
| 13. United States v. Scott, Daionte K.        | No. ACM 40130         |
| 14. United States v. Lampkins, Bradley D.     | No. ACM 40135         |
| 15. United States v. Goldsmith, Devonte R.C.  | No. ACM 40148         |
| 16. United States v. Davis, Ryan J.           | No. ACM S32709        |
| 17. United States v. Rivera-Moyet, Jorgediego | No. ACM 40178         |
| 18. United States v. Sanders III, Lonnie E.   | No. ACM S32714        |
| 19. United States v. Covitz, Colin R.         | No. ACM 40193         |
| 20. United States v. Schauer, Matthew D.      | No. ACM 40203         |
| 21. United States v. Dagan, Donivan B.        | No. ACM S32717        |

This panel letter supersedes all previous assignments.



FOR THE COURT

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

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES,</b>	)	<b>MOTION FOR ENLARGEMENT OF</b>
<i>Appellee,</i>	)	<b>TIME (SECOND)</b>
	)	
v.	)	Before Panel No. 1
	)	
Technical Sergeant (E-6),	)	No. ACM 40203
<b>MATTHEW D. SCHAUER,</b>	)	
United States Air Force,	)	1 March 2022
<i>Appellant.</i>	)	

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

Pursuant to Rule 23.3(m)(3) 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 **7 April 2022**. The record of trial was docketed with this Court on 8 November 2021. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

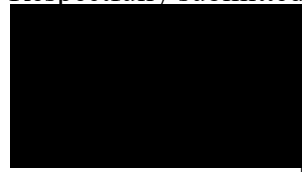
On 14 September 2021, in accordance with his pleas, Appellant was convicted of wrongful production and possession of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 59. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 48 months, and to be discharged from the service with a dishonorable service characterization. R. at 83. The convening authority took no actions on the findings and approved the sentence in its entirety. Record of Trial, Vol. 1, Convening Authority Decision on Action, 4 October 2021.

The record of trial consists of three volumes, three prosecution exhibits, 11 defense exhibits, one court exhibit, and ten appellate exhibits. The transcript is 84 pages. Appellant is confined.

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

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

Respectfully submitted,



N, Maj, USAF

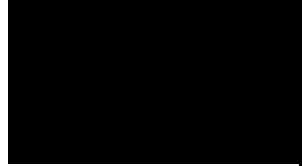
Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 March 2022.

Respectfully submitted,



N, Maj, USAF

Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force





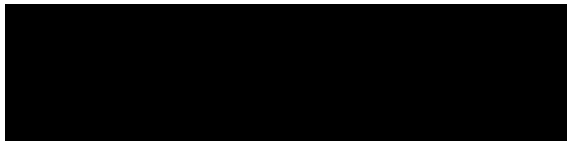
**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
	)	
Technical Sergeant (E-6)	)	ACM 40203
MATTHEW D. SCHAUER, USAF,	)	
<i>Appellant.</i>	)	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.

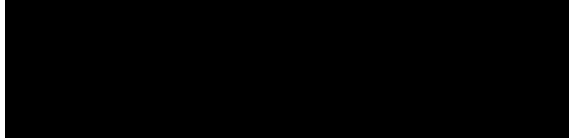


MARY ELLEN PAYNE  
Associate Chief, Government Trial and  
Appellate Operations Division  
Military Justice and Discipline  
United States Air Force

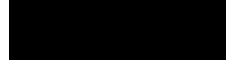


**CERTIFICATE OF FILING AND SERVICE**

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



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



**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES,</b>	)	<b>MOTION FOR ENLARGEMENT OF</b>
<i>Appellee,</i>	)	<b>TIME (THIRD)</b>
	)	
v.	)	Before Panel No. 1
	)	
Technical Sergeant (E-6),	)	No. ACM 40203
<b>MATTHEW D. SCHAUER,</b>	)	
United States Air Force,	)	31 March 2022
<i>Appellant.</i>	)	

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

Pursuant to Rule 23.3(m)(3) 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 **7 May 2022**. The record of trial was docketed with this Court on 8 November 2021. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

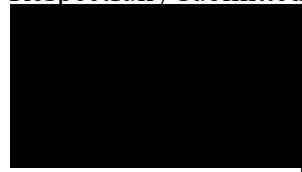
On 14 September 2021, in accordance with his pleas, Appellant was convicted of wrongful production and possession of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 59. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 48 months, and to be discharged from the service with a dishonorable service characterization. R. at 83. The convening authority took no actions on the findings and approved the sentence in its entirety. Record of Trial, Vol. 1, Convening Authority Decision on Action, 4 October 2021.

The record of trial consists of three volumes, three prosecution exhibits, 11 defense exhibits, one court exhibit, and ten appellate exhibits. The transcript is 84 pages. Appellant is confined.

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

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

Respectfully submitted,



N, Maj, USAF

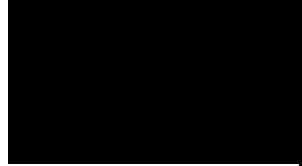
Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 March 2022.

Respectfully submitted,



N, Maj, USAF

Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



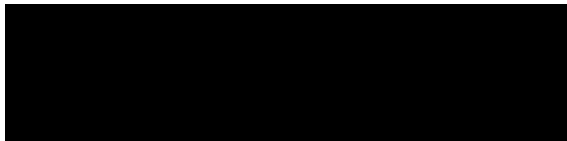
**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
	)	
Technical Sergeant (E-6)	)	ACM 40203
MATTHEW D. SCHAUER, USAF,	)	
<i>Appellant.</i>	)	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.

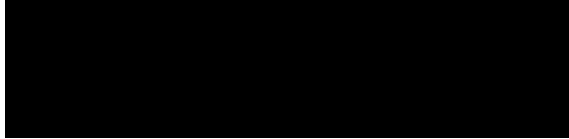


MARY ELLEN PAYNE  
Associate Chief, Government Trial and  
Appellate Operations Division  
Military Justice and Discipline  
United States Air Force

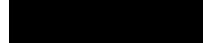


**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force  
Appellate Defense Division on 1 April 2022.



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



**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES,</b>	)	<b>MOTION FOR ENLARGEMENT OF</b>
<i>Appellee,</i>	)	<b>TIME (FOURTH)</b>
	)	
v.	)	Before Panel No. 1
	)	
Technical Sergeant (E-6),	)	No. ACM 40203
<b>MATTHEW D. SCHAUER,</b>	)	
United States Air Force,	)	29 April 2022
<i>Appellant.</i>	)	

**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 **6 June 2022**. The record of trial was docketed with this Court on 8 November 2021. From the date of docketing to the present date, 172 days have elapsed. On the date requested, 210 days will have elapsed.

On 14 September 2021, in accordance with his pleas, Appellant was convicted of wrongful production and possession of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 59. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 48 months, and to be discharged from the service with a dishonorable service characterization. R. at 83. The convening authority took no actions on the findings and approved the sentence in its entirety. Record of Trial, Vol. 1, Convening Authority Decision on Action, 4 October 2021.

The record of trial consists of three volumes, three prosecution exhibits, 11 defense exhibits, one court exhibit, and ten appellate exhibits. The transcript is 84 pages. Appellant is confined.



Counsel is currently assigned 19 cases; 12 cases are pending initial AOE's before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Eight cases have priority over the present case:

1. *United States v. Rocha*, ACM 40134 – Contrary to his pleas, Appellant was convicted at a general court-martial of one charge, one specification of indecent conduct, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 504. The judge sentenced Appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 90 days, and a bad conduct discharge. R. at 532. On 26 April 2021, the convening authority took no action on the findings, approved the sentence, and denied Appellant's request for waiver of all adjudged and automatic forfeitures. The record of trial consists of four volumes. The transcript is 532 pages. There are 22 Prosecution Exhibits, eight Defense Exhibits, and 39 Appellate Exhibits. Appellant is not confined. Counsel has finished reviewing the record of trial, has reviewed sealed materials, and is writing the AOE.

2. *United States v. Lugo*, ACM S32704 – Pursuant to his pleas, Appellant was convicted at a special court-martial for one charge, one specification of impaired driving, in violation of Article 113, Uniform Code of Military Justice (UCMJ); one charge, one specification of incapacitation from drug use, in violation of Article 112, UCMJ; one charge, one specification of wrongful use of a controlled substance, in violation of Article 112a, UCMJ; and one charge, one specification of violating a lawful general order, in violation of Article 92, UCMJ. Record (R.) at 269. The judge sentenced Appellant to reduction to the grade of E-1, a bad conduct discharge, and confinement for 13 months. R. at 341. Pursuant to his plea agreement, all terms of

confinement ran concurrently so Appellant's total confinement was four months. R. at 261. The convening authority took no action on the findings or sentence of the case. Record of Trial, Vol. 1, Convening Authority Decision on Action, 4 June 2021. The record of trial consists of three volumes. The transcript is 342 pages. There are eight Prosecution Exhibits, 12 Defense Exhibits, and 17 Appellate Exhibits. Appellant is not confined. Counsel has reviewed the allied papers, all exhibits, pre-trial matters, and post-trial matters. Counsel has not yet reviewed the transcript.

3. *United States v. Lampkins*, ACM 40135 – Appellant was convicted at a general court-martial of one charge, one specification of attempted larceny, in violation of Article 80, Uniform Code of Military Justice (UCMJ); one charge two specifications of larceny, in violation of Article 121, UCMJ; and one charge, 43 specifications of making, drawing, or uttering check, draft, or order without sufficient funds, in violation of Article 123a, UCMJ. Record (R.) at 317. The judge sentenced Appellant to a reprimand, reduction to the grade of E-1, 46 months confinement, and a dishonorable discharge. R. at 381. The convening authority denied Appellant's request for deferment and waiver of automatic forfeitures and a deferment of reduction in grade. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action. The military judge recommended that all confinement in excess of 24 months be suspended for a period of two years and one month from the date of the findings to allow Appellant to pay restitution to one of the named victims. ROT, Vol. 1, Statement of Trial Results. The convening authority accepted the judge's recommendation and approved the rest of the sentence. ROT, Vol. 1, Convening Authority Decision on Action. The convening authority took no action on the findings. *Id.* The record of trial consists of four volumes. The transcript is 382 pages. There are two Prosecution Exhibits, 11 Defense Exhibits, and 29 Appellate Exhibits. Appellant is not confined. Counsel has not begun a review of Appellant's case.

4. *United States v. Cannon*, ACM 40136 – Pursuant to his pleas, Appellant was convicted at a general court-martial by a military judge at Malmstrom AFB, Montana for one charge, two specifications of committing a lewd act upon a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ); and one charge, one specification of attempting to commit a sexual act upon a child, in violation of Article 80, UCMJ. Record (R.) at 255. The judge sentenced Appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 18 months, and a dishonorable discharge. R. at 279. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 27 April 2021. The record of trial consists of six volumes. The transcript is 280 pages. There are four Prosecution Exhibits, one Defense Exhibit, and 31 Appellate Exhibits. Appellant is not confined for these offenses. Counsel has not begun a review of Appellant's case.

5. *United States v. Heard*, ACM 40159 – In accordance with her pleas, Appellant was convicted of wrongful distribution of marijuana, in violation of Article 112a, Uniform Code of Military Justice (UCMJ); and one charge, two specifications of making a false statement in violation of federal law, in violation of Article 134 UCMJ. R. at 72. The military judge sentenced Appellant to be reduced in grade to E-1, to be confined for 100 days, and to be discharged from the service with a bad conduct discharge characterization. R. at 116. The convening authority took no action on the findings, approved the sentence in its entirety, and dismissed Charge I, Specifications 1 and 2 with prejudice. Record of Trial, Vol. 1, Convening Authority Decision on Action, 17 May 2021. The record of trial consists of two prosecution exhibits, six defense exhibits, and four appellate exhibits. The transcript is 117 pages. Appellant is not currently confined. Counsel has not begun reviewing Appellant's case.

6. *United States v. Suarez*, ACM S32708, Consistent with his pleas, a military judge

sitting alone found Appellant guilty of one charge, one specification of being absent from his place of duty, in violation of Article 86, Uniform Code of Military Justice (UCMJ); one charge, one specification of wrongfully using marijuana, in violation of Article 112a, UCMJ; and one charge, one specification of assault, in violation of Article 128, UCMJ. R. at 56. The judge sentenced Appellant to reduction to the grade of E-1, 89 days of confinement, and a bad conduct discharge. Record of Trial (ROT), Vol 1, Entry of Judgment. The convening authority took no action on the findings or sentence. ROT, Vol 1, Convening Authority Decision on Action. The record of trial consists of five prosecution exhibits, eight defense exhibits, two appellate exhibits, and one court exhibit. The transcript is 91 pages. Appellant is not currently confined. Counsel has not begun reviewing Appellant's case.

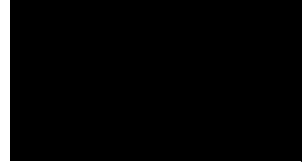
7. *United States v. Davis*, ACM S32709. Consistent with his pleas, a military judge sitting alone found Appellant guilty of one charge, two specifications of wrongful use and distribution of cocaine, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). R. at 48. The judge sentenced Appellant to be reprimanded, to forfeit \$1,190 for six months, be reduced in grade to E-1, to be confined for six months, and to receive a bad conduct discharge. R. at 65. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action. The record of trial consists of three prosecution exhibits, seven defense exhibits, and two appellate exhibits. The transcript is 65 pages. Appellant is not currently confined. Counsel has not begun reviewing Appellant's case.

8. *United States v. Tolano*, ACM 40196. Pursuant to his pleas, Appellant was convicted at a general court-martial by a military judge at Cannon, AFB, New Mexico for one charge and two specifications possessing and distributing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 103. The judge sentenced Appellant to

be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for five years, and to be dishonorably discharged from the service. R. at 153. On 17 August 2021, the convening authority denied Appellant's request for deferments of the reduction in grade and adjudged forfeitures. Record of Trial, Volume 1, Convening Authority Decision on Action, 17 August 2021. The record of trial consists of six prosecution exhibits, two defense exhibits, and ten appellate exhibits. The transcript is 154 pages. Appellant is currently confined.

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

Respectfully submitted,



N, Maj, USAF

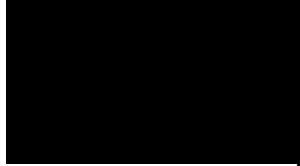
Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**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 Appellate Government Division on 29 April 2022.

Respectfully submitted,



N, Maj, USAF

Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
	)	
Technical Sergeant (E-6)	)	ACM 40203
MATTHEW D. SCHAUER, USAF,	)	
<i>Appellant.</i>	)	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.



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



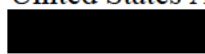
**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force

Appellate Defense Division on 29 April 20



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





**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES,</b>	)	<b>MOTION FOR ENLARGEMENT OF</b>
<i>Appellee,</i>	)	<b>TIME (FIFTH)</b>
	)	
v.	)	Before Panel No. 1
	)	
Technical Sergeant (E-6),	)	No. ACM 40203
<b>MATTHEW D. SCHAUER,</b>	)	
United States Air Force,	)	26 May 2022
<i>Appellant.</i>	)	

**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 **6 July 2022**. The record of trial was docketed with this Court on 8 November 2021. From the date of docketing to the present date, 199 days have elapsed. On the date requested, 240 days will have elapsed.

On 14 September 2021, in accordance with his pleas, Appellant was convicted of wrongful production and possession of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 59. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 48 months, and to be discharged from the service with a dishonorable service characterization. R. at 83. The convening authority took no actions on the findings and approved the sentence in its entirety. Record of Trial, Vol. 1, Convening Authority Decision on Action, 4 October 2021.

The record of trial consists of three volumes, three prosecution exhibits, 11 defense exhibits, one court exhibit, and ten appellate exhibits. The transcript is 84 pages. Appellant is confined.

Counsel is currently assigned 20 cases; 11 cases are pending initial AOE's before this Court. Counsel has one unscheduled *DuBay* hearing and four case pending petitions 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. Six cases have priority over the present case:

1. *United States v. Lampkins*, ACM 40135 – Appellant was convicted at a general court-martial of one charge, one specification of attempted larceny, in violation of Article 80, Uniform Code of Military Justice (UCMJ); one charge two specifications of larceny, in violation of Article 121, UCMJ; and one charge, 43 specifications of making, drawing, or uttering check, draft, or order without sufficient funds, in violation of Article 123a, UCMJ. Record (R.) at 317. The judge sentenced Appellant to a reprimand, reduction to the grade of E-1, 46 months confinement, and a dishonorable discharge. R. at 381. The convening authority denied Appellant's request for deferment and waiver of automatic forfeitures and a deferment of reduction in grade. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action. The military judge recommended that all confinement in excess of 24 months be suspended for a period of two years and one month from the date of the findings to allow Appellant to pay restitution to one of the named victims. ROT, Vol. 1, Statement of Trial Results. The convening authority accepted the judge's recommendation and approved the rest of the sentence. ROT, Vol. 1, Convening Authority Decision on Action. The convening authority took no action on the findings. *Id.* The record of trial consists of four volumes. The transcript is 382 pages. There are two Prosecution Exhibits, 11 Defense Exhibits, and 29 Appellate Exhibits. Appellant is not confined. Although Counsel has not reviewed the transcript, Counsel has reviewed the Prosecution Exhibits, Defense Exhibits,

Appellate Exhibits, and the majority of the allied papers.

2. *United States v. Cannon*, ACM 40136 – Pursuant to his pleas, Appellant was convicted at a general court-martial by a military judge at Malmstrom AFB, Montana for one charge, two specifications of committing a lewd act upon a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ); and one charge, one specification of attempting to commit a sexual act upon a child, in violation of Article 80, UCMJ. Record (R.) at 255. The judge sentenced Appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 18 months, and a dishonorable discharge. R. at 279. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 27 April 2021. The record of trial consists of six volumes. The transcript is 280 pages. There are four Prosecution Exhibits, one Defense Exhibit, and 31 Appellate Exhibits. Appellant is not confined for these offenses. Counsel has not begun a review of Appellant's case.

3. *United States v. Heard*, ACM 40159 – In accordance with her pleas, Appellant was convicted of wrongful distribution of marijuana, in violation of Article 112a, Uniform Code of Military Justice (UCMJ); and one charge, two specifications of making a false statement in violation of federal law, in violation of Article 134 UCMJ. R. at 72. The military judge sentenced Appellant to be reduced in grade to E-1, to be confined for 100 days, and to be discharged from the service with a bad conduct discharge characterization. R. at 116. The convening authority took no action on the findings, approved the sentence in its entirety, and dismissed Charge I, Specifications 1 and 2 with prejudice. Record of Trial, Vol. 1, Convening Authority Decision on Action, 17 May 2021. The record of trial consists of two prosecution exhibits, six defense exhibits, and four appellate exhibits. The transcript is 117 pages. Appellant is not currently confined. Counsel has not begun reviewing Appellant's case.

4. *United States v. Suarez*, ACM S32708, Consistent with his pleas, a military judge sitting alone found Appellant guilty of one charge, one specification of being absent from his place of duty, in violation of Article 86, Uniform Code of Military Justice (UCMJ); one charge, one specification of wrongfully using marijuana, in violation of Article 112a, UCMJ; and one charge, one specification of assault, in violation of Article 128, UCMJ. R. at 56. The judge sentenced Appellant to reduction to the grade of E-1, 89 days of confinement, and a bad conduct discharge. Record of Trial (ROT), Vol 1, Entry of Judgment. The convening authority took no action on the findings or sentence. ROT, Vol 1, Convening Authority Decision on Action. The record of trial consists of five prosecution exhibits, eight defense exhibits, two appellate exhibits, and one court exhibit. The transcript is 91 pages. Appellant is not currently confined. Counsel has not begun reviewing Appellant's case.

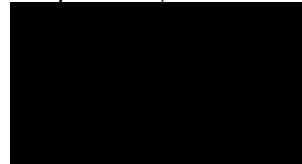
5. *United States v. Davis*, ACM S32709. Consistent with his pleas, a military judge sitting alone found Appellant guilty of one charge, two specifications of wrongful use and distribution of cocaine, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). R. at 48. The judge sentenced Appellant to be reprimanded, to forfeit \$1,190 for six months, be reduced in grade to E-1, to be confined for six months, and to receive a bad conduct discharge. R. at 65. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action. The record of trial consists of three prosecution exhibits, seven defense exhibits, and two appellate exhibits. The transcript is 65 pages. Appellant is not currently confined. Counsel has not begun reviewing Appellant's case.

6. *United States v. Tolano*, ACM 40196. Pursuant to his pleas, Appellant was convicted at a general court-martial by a military judge at Cannon, AFB, New Mexico for one charge and two specifications possessing and distributing child pornography, in violation of Article 134,

Uniform Code of Military Justice (UCMJ). Record (R.) at 103. The judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for five years, and to be dishonorably discharged from the service. R. at 153. On 17 August 2021, the convening authority denied Appellant's request for deferments of the reduction in grade and adjudged forfeitures. Record of Trial, Volume 1, Convening Authority Decision on Action, 17 August 2021. The record of trial consists of six prosecution exhibits, two defense exhibits, and ten appellate exhibits. The transcript is 154 pages. Appellant is currently confined.

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

Respectfully submitted,



N, Maj, USAF

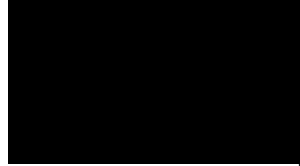
Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**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 Appellate Government Division on 26 May 2022.

Respectfully submitted,



N, Maj, USAF

Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



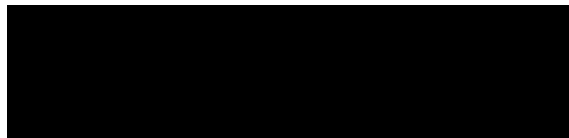
**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
	)	
Technical Sergeant (E-6)	)	ACM 40203
MATTHEW D. SCHAUER, USAF,	)	
<i>Appellant.</i>	)	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.



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



**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force  
Appellate Defense Division on 26 May 2022.



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





**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40203
<i>Appellee</i>	)	
	)	
v.	)	
	)	<b>ORDER</b>
Matthew D. SCHAUER	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	<b>Panel 1</b>

On 26 May 2022, 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 31st day of May, 2022,

**ORDERED:**

Appellant’s Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **6 July 2022**.

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



FOR THE COURT



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

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES,</b>	)	<b>MOTION FOR ENLARGEMENT OF</b>
<i>Appellee,</i>	)	<b>TIME (SIXTH)</b>
	)	
v.	)	Before Panel No. 1
	)	
Technical Sergeant (E-6),	)	No. ACM 40203
<b>MATTHEW D. SCHAUER,</b>	)	
United States Air Force,	)	29 June 2022
<i>Appellant.</i>	)	

**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 **5 August 2022**. The record of trial was docketed with this Court on 8 November 2021. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 14 September 2021, in accordance with his pleas, Appellant was convicted of wrongful production and possession of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 59. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 48 months, and to be discharged from the service with a dishonorable service characterization. R. at 83. The convening authority took no actions on the findings and approved the sentence in its entirety. Record of Trial, Vol. 1, Convening Authority Decision on Action, 4 October 2021.

The record of trial consists of three volumes, three prosecution exhibits, 11 defense exhibits, one court exhibit, and ten appellate exhibits. The transcript is 84 pages. Appellant is confined.

Counsel is currently assigned 19 cases; 9 cases are pending initial AOE's before this Court. Counsel has a *DuBay* hearing scheduled for the end of July and five case pending petitions/supplements 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. Three cases have priority over the present case:

1. *United States v. Cannon*, ACM 40136 – Pursuant to his pleas, Appellant was convicted at a general court-martial by a military judge at Malmstrom AFB, Montana for one charge, two specifications of committing a lewd act upon a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ); and one charge, one specification of attempting to commit a sexual act upon a child, in violation of Article 80, UCMJ. Record (R.) at 255. The judge sentenced Appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 18 months, and a dishonorable discharge. R. at 279. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 27 April 2021. The record of trial consists of six volumes. The transcript is 280 pages. There are four Prosecution Exhibits, one Defense Exhibit, and 31 Appellate Exhibits. Appellant is not confined for these offenses. Counsel has finished reviewing the Appellant's case and is working with Appellant to determine what issues to raise.

2. *United States v. Heard*, ACM 40159 – In accordance with her pleas, Appellant was convicted of wrongful distribution of marijuana, in violation of Article 112a, Uniform Code of Military Justice (UCMJ); and one charge, two specifications of making a false statement in violation of federal law, in violation of Article 134 UCMJ. R. at 72. The military judge sentenced

Appellant to be reduced in grade to E-1, to be confined for 100 days, and to be discharged from the service with a bad conduct discharge characterization. R. at 116. The convening authority took no action on the findings, approved the sentence in its entirety, and dismissed Charge I, Specifications 1 and 2 with prejudice. Record of Trial, Vol. 1, Convening Authority Decision on Action, 17 May 2021. The record of trial consists of two prosecution exhibits, six defense exhibits, and four appellate exhibits. The transcript is 117 pages. Appellant is not currently confined. Counsel has not begun reviewing Appellant's case.

3. *United States v. Tolano*, ACM 40196. Pursuant to his pleas, Appellant was convicted at a general court-martial by a military judge at Cannon, AFB, New Mexico for one charge and two specifications possessing and distributing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 103. The judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for five years, and to be dishonorably discharged from the service. R. at 153. On 17 August 2021, the convening authority denied Appellant's request for deferments of the reduction in grade and adjudged forfeitures. Record of Trial, Volume 1, Convening Authority Decision on Action, 17 August 2021. The record of trial consists of six prosecution exhibits, two defense exhibits, and ten appellate exhibits. The transcript is 154 pages. Appellant is currently confined. Counsel has not begun reviewing Appellant's case.

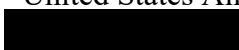
**WHEREFORE**, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

A large black rectangular redaction box covering the signature of the appellant.

N, Maj, USAF

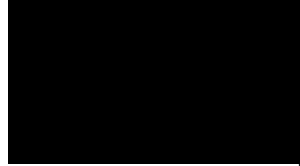
Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force

A black rectangular redaction box covering contact information, likely a phone number or email address.

**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 29 June 2022.

Respectfully submitted,



N, Maj, USAF

Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
	)	
Technical Sergeant (E-6)	)	ACM 40203
MATTHEW D. SCHAUER, USAF,	)	
<i>Appellant.</i>	)	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.



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



**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force

Appellate Defense Division on 30 June 201



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





**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

<b>UNITED STATES</b>	)	<b>No. ACM 40203</b>
<i>Appellee</i>	)	
	)	
<b>v.</b>	)	
	)	<b>ORDER</b>
<b>Matthew D. SCHAUER</b>	)	
<b>Technical Sergeant (E-6)</b>	)	
<b>U.S. Air Force</b>	)	
<i>Appellant</i>	)	<b>Panel 1</b>

On 14 July 2022, Appellant’s counsel submitted a Motion to Examine Sealed Material; specifically, pages 23 and 29–72 of Prosecution Exhibit 1, Court Exhibit A, and Appellate Exhibit X.

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

Appellant’s counsel did not assert that these materials “were produced or released to trial and defense counsel,” but counsel did claim that examination of these sealed materials is reasonably necessary to conduct a complete review of the record of trial. The Government does not oppose the motion, so long as the materials were viewed by both counsel at trial and appellate government counsel can also view the sealed materials.

We find the sealed material that Appellant’s counsel requests permission to examine were available to both trial counsel and defense counsel, and we find a colorable showing has been made that examination of the materials is reasonably necessary to fulfill the professional responsibilities Appellant’s counsel owes to Appellant. This court’s order permits counsel for both parties to examine the materials

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

**ORDERED:**

Appellant's Motion to Examine Sealed Material is **GRANTED**, subject to the following conditions:

(1) Appellate defense counsel and government appellate counsel may view, are authorized to examine **pages 23 and 29–72 of Prosecution Exhibit 1, Court Exhibit A, and Appellate Exhibit X**. Appellate defense counsel and appellate government counsel are not authorized to review any other sealed material. To examine the above-listed materials, counsel will coordinate with the court.

(2) No counsel will photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.



FOR THE COURT

*[Handwritten signature]*  
[Redacted signature]

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

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES</b> <i>Appellee,</i>	)	<b>APPELLANT’S MOTION TO</b>
	)	<b>EXAMINE SEALED MATERIAL</b>
	)	
v.	)	
	)	Before Panel No. 1
Technical Sergeant (E-6)	)	
<b>MATTHEW D. SCHAUER,</b>	)	Case No. ACM 40203
United States Air Force	)	
<i>Appellant</i>	)	14 July 2022
	)	

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

Pursuant to Rules 3.1 and 23.3(f) of this Honorable Court’s Rules of Practice and Procedure, undersigned counsel moves to examine sealed materials in Appellant’s record of trial (Prosecution Exhibit 1, pages 23 (page 12 of attachment 2); 29-72 (attachment 7); and Court Exhibit A). *See also* Record at 15, 27, 70, and Appellate Exhibit X.

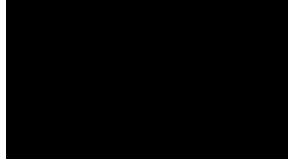
Pursuant to R.C.M. 1113(b)(3)(B)(i), “materials presented or reviewed at trial and sealed...may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel’s responsibilities[.]”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

Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation. *United States v. May*, 47 M.J. 478, 481, (C.A.A.F. 1998).

The sealed material must be reviewed in order for counsel to provide "competent appellate representation." *Id.* Therefore, the examination of sealed materials is reasonably necessary to fulfill appellate defense counsel's responsibilities in this case, since counsel cannot perform his duty of representation under Article 70, UCMJ, 10 U.S.C. §870, without first reviewing the complete record of trial. Undersigned counsel needs to ensure the record of trial is complete and that the images and videos therein meet the definition of child pornography to which Appellant pled guilty.

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

Respectfully submitted,



ON, Maj, USAF

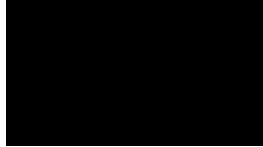
Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 14 July 2022.

Respectfully submitted,



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



**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' RESPONSE
<i>Appellee,</i>	)	TO APPELLANT'S MOTION
	)	TO EXAMINE SEALED
v.	)	MATERIALS
	)	
Technical Sergeant (E-6)	)	ACM 40203
MATTHEW D. SCHAUER, USAF,	)	
<i>Appellant.</i>	)	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 responds to Appellant's Motion to Examine Sealed Materials, dated 14 July 2022. The United States does not object to Appellant's counsel examining any transcript portions or exhibits that were released to both parties at trial, if the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials. The United States thus respectfully requests that any order issued by this Court also allow appellate counsel for the United States to view the sealed materials.

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

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

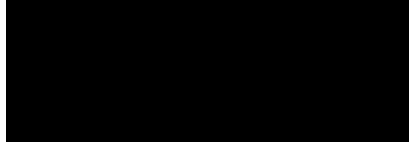


THOMAS J. ALFORD, Lt Col, USAFR  
Appellate Government Counsel  
Government Trial and  
Appellate Counsel Division  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force  
Appellate Defense Division on 18 July 2022.



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



**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES</b>	)	<b>APPELLANT’S MOTION TO</b>
<i>Appellee,</i>	)	<b>EXAMINE SEALED MATERIAL</b>
	)	<b>AND WITHDRAW AND CORRECT</b>
v.	)	<b>PREVIOUS</b>
	)	
Technical Sergeant (E-6)	)	
<b>MATTHEW D. SCHAUER,</b>	)	Before Panel No. 1
United States Air Force	)	
<i>Appellant</i>	)	Case No. ACM 40203
	)	
	)	21 July 2022

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

Pursuant to Rules 3.1 and 23.3(f) of this Honorable Court’s Rules of Practice and Procedure, undersigned counsel moves to examine sealed materials in Appellant’s record of trial (Prosecution Exhibit 1, pages 23 (page 12 of attachment 2); 29-72 (attachment 7); and Court Exhibit A). *See also* Record (R.) at 15, 27, 70, and Appellate Exhibit X. Prosecution Exhibit 1 is a stipulation of fact with attachments that Trial Counsel presented as evidence at trial, the Military Judge accepted into evidence, and the Military Judge subsequently sealed. R. at 15, 27. Defense Counsel reviewed the Prosecution Exhibit 1 and its attachments. *Id.* Trial and Defense Counsel reviewed Court Exhibit A at trial. R. at 64. Counsel respectfully requests to withdraw his previously submitted Motion to Examine Sealed Materials, dated 14 July 2022, to clarify that the Trial and Defense Counsel viewed sealed materials and to correct citations.

Pursuant to R.C.M. 1113(b)(3)(B)(i), “materials presented or reviewed at trial and sealed...may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel’s responsibilities[.]” A review of the entire record is necessary because this Court is




empowered by Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d), to grant relief based on a review and analysis of “the entire record.” To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. §866, counsel must therefore examine “the entire record.”

Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant’s assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation. *United States v. May*, 47 M.J. 478, 481, (C.A.A.F. 1998).

The sealed material must be reviewed in order for counsel to provide “competent appellate representation.” *Id.* Therefore, the examination of sealed materials is reasonably necessary to fulfill appellate defense counsel’s responsibilities in this case, since counsel cannot perform his duty of representation under Article 70, UCMJ, 10 U.S.C. §870, without first reviewing the complete record of trial. Undersigned counsel needs to ensure the record of trial is complete and that the images and videos therein meet the definition of child pornography to which Appellant pled guilty.

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

Respectfully submitted,



ON, Maj, USAF

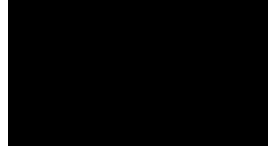
Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 21 July 2022.

Respectfully submitted,



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



**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES</b>	)	<b>APPELLANT’S MOTION TO</b>
<i>Appellee,</i>	)	<b>EXAMINE SEALED MATERIAL</b>
	)	
v.	)	
	)	Before Panel No. 1
Technical Sergeant (E-6)	)	
<b>MATTHEW D. SCHAUER,</b>	)	Case No. ACM 40203
United States Air Force	)	
<i>Appellant</i>	)	29 July 2022
	)	
	)	

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

Pursuant to Rules 3.1 and 23.3(f) of this Honorable Court’s Rules of Practice and Procedure, undersigned counsel respectfully moves to examine sealed materials in Appellant’s record of trial: Any sealed materials for Prosecution Exhibit 1. Specifically, all of Attachment 7 (1 CD containing 10 digital images and two videos of child pornography). *See also* Record (R.) at 15, 27, 70, and Appellate Exhibit X. Prosecution Exhibit 1 is a stipulation of fact with attachments that Trial Counsel presented as evidence at trial, the Military Judge accepted into evidence, and the Military Judge subsequently sealed. R. at 15, 27. Defense Counsel reviewed the Prosecution Exhibit 1 and its attachments. *Id.* Appellant’s prior motion to view sealed materials, based on the sealed materials jump sheet in his record, unintentionally and erroneously implied that Attachment 7 only contained pages 29-72 of a .pdf text conversation between the victim and the Appellant. Appellant now respectfully requests to view all sealed material for Prosecution Exhibit 1 as outlined in Appellate Exhibit X, Order to Seal, dated 14 September 2021.

Pursuant to R.C.M. 1113(b)(3)(B)(i), “materials presented or reviewed at trial and sealed...may be examined by appellate counsel upon a colorable showing to the reviewing or

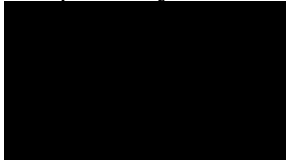
appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities[.]” A review of the entire record is necessary because this Court is empowered by Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d), to grant relief based on a review and analysis of “the entire record.” To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. §866, counsel must therefore examine “the entire record.”

Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation. *United States v. May*, 47 M.J. 478, 481, (C.A.A.F. 1998).

The sealed material must be reviewed in order for counsel to provide “competent appellate representation.” *Id.* Therefore, the examination of sealed materials is reasonably necessary to fulfill appellate defense counsel's responsibilities in this case, since counsel cannot perform his duty of representation under Article 70, UCMJ, 10 U.S.C. §870, without first reviewing the complete record of trial. Undersigned counsel needs to ensure the record of trial is complete and that the images and videos therein meet the definition of child pornography to which Appellant pled guilty.

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

Respectfully submitted,



ON, Maj, USAF

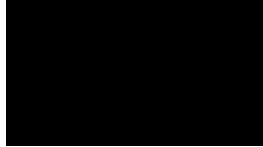
Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 29 July 2022.

Respectfully submitted,



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



**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES' RESPONSE
<i>Appellee,</i>	)	TO APPELLANT'S MOTION
	)	TO EXAMINE SEALED
v.	)	MATERIALS
	)	
Technical Sergeant (E-6)	)	No. ACM 40203
MATTHEW D. SCHAUER, USAF,	)	
<i>Appellant.</i>	)	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 responds to Appellant's updated Motion to Examine Sealed Materials, dated 29 July 2022. The United States does not object to Appellant's counsel examining any transcript portions or exhibits that were released to the parties so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials. The United States thus respectfully requests that any order issued by this Court also allows appellate counsel for the United States to view the sealed materials.

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

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

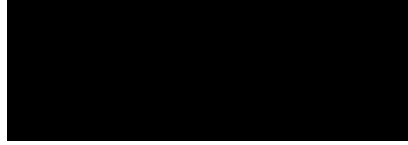


THOMAS J. ALFORD, Lt Col, USAFR  
Appellate Government Counsel  
Government Trial and  
Appellate Counsel Division  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 August 2022.



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



**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

<b>UNITED STATES</b>	)	<b>No. ACM 40203</b>
<i>Appellee</i>	)	
	)	
<b>v.</b>	)	
	)	<b>ORDER</b>
<b>Matthew D. SCHAUER</b>	)	
<b>Technical Sergeant (E-6)</b>	)	
<b>U.S. Air Force</b>	)	
<i>Appellant</i>	)	<b>Panel 1</b>

On 29 July 2022, Appellant’s counsel submitted a Motion to Examine Sealed Material, specifically, any sealed materials from Prosecution Exhibit 1, including Attachment 7.

Appellant’s counsel asserts that these materials were reviewed by trial defense counsel, and ordered sealed by the military judge. Appellant’s counsel claims that examination of these sealed materials is reasonably necessary to conduct a complete review of the record of trial and provide Appellant with competent appellate representation. The Government does not oppose the motion, as long as appellate government counsel can also view the sealed materials “to respond to any assignment of error that references the sealed materials.”

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

We find the sealed materials that Appellant’s counsel requests permission to examine were available to both trial counsel and defense counsel, and we find a colorable showing has been made that examination of the materials is reasonably necessary to fulfill the professional responsibilities Appellant’s counsel owes to Appellant. This court’s order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 2d of August, 2022,

**ORDERED:**

Appellant’s Motion to Examine Sealed Material is **GRANTED**, subject to the following conditions:



(1) Appellate defense counsel and government appellate counsel are authorized to examine **any sealed materials from Prosecution Exhibit 1, including Attachment 7**. Appellate defense counsel and appellate government counsel are not authorized to review any other sealed material. To examine the above-listed materials, counsel will coordinate with the court.

(2) No counsel will photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.



FOR THE COURT



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

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES,</b>	)	<b>MOTION FOR ENLARGEMENT OF</b>
<i>Appellee,</i>	)	<b>TIME (SEVENTH)</b>
	)	
v.	)	Before Panel No. 1
	)	
Technical Sergeant (E-6),	)	No. ACM 40203
<b>MATTHEW D. SCHAUER,</b>	)	
United States Air Force,	)	29 July 2022
<i>Appellant.</i>	)	

**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 **4 September 2022**. The record of trial was docketed with this Court on 8 November 2021. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

On 14 September 2021, in accordance with his pleas, Appellant was convicted of wrongful production and possession of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 59. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 48 months, and to be discharged from the service with a dishonorable service characterization. R. at 83. The convening authority took no actions on the findings and approved the sentence in its entirety. Record of Trial, Vol. 1, Convening Authority Decision on Action, 4 October 2021.

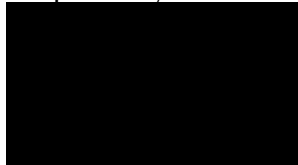
The record of trial consists of three volumes, three prosecution exhibits, 11 defense exhibits, one court exhibit, and ten appellate exhibits. The transcript is 84 pages. Appellant is confined.

Counsel is currently assigned 19 cases; eight cases are pending initial AOE's before this Court. Counsel has two cases pending petitions/supplements to the Court of Appeals for the Armed Forces. Counsel has reviewed the case file, including the majority of sealed materials, and is finalizing issues to raise with Appellant. Counsel filed an additional motion to view sealed materials on 29 July 2022, contemporaneously with this motion for an enlargement of time, to complete his review of all of the sealed materials. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. One case has priority over the present case:

1. *United States v. Cannon*, ACM 40136 – Pursuant to his pleas, Appellant was convicted at a general court-martial by a military judge at Malmstrom AFB, Montana for one charge, two specifications of committing a lewd act upon a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ); and one charge, one specification of attempting to commit a sexual act upon a child, in violation of Article 80, UCMJ. Record (R.) at 255. The judge sentenced Appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 18 months, and a dishonorable discharge. R. at 279. The convening authority took no action on the findings or sentence. Record of Trial, Vol. 1, Convening Authority Decision on Action, 27 April 2021. The record of trial consists of six volumes. The transcript is 280 pages. There are four Prosecution Exhibits, one Defense Exhibit, and 31 Appellate Exhibits. Appellant is not confined for these offenses. Appellant intends to withdraw from appellate review and has mailed his signed withdrawal form to undersigned counsel for filing.

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

Respectfully submitted,



N, Maj, USAF

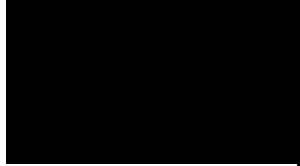
Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**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 29 July 2022.

Respectfully submitted,



N, Maj, USAF

Appellate Defense Counsel  
Appellate Defense Division  
United States Air Force



**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	UNITED STATES'
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
	)	
Technical Sergeant (E-6)	)	No. ACM 40203
MATTHEW D. SCHAUER, USAF,	)	
<i>Appellant.</i>	)	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 circumstance, it should not take any appellant close to one 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 over half of the 18-month standard for this Court to issue a decision, which only leaves approximately 8 months combined for the United States and this Court to perform their separate statutory responsibilities.

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

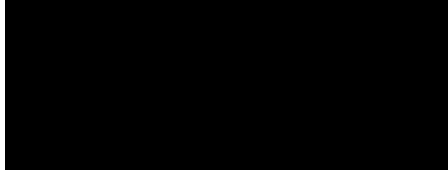


THOMAS J. ALFORD, Lt Col, USAFR  
Appellate Government Counsel, Government  
Trial and Appellate Operations Division  
Military Justice and Discipline  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

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



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





**IN THE UNITED STATES AIR FORCE COURT OF  
CRIMINAL APPEALS**

---

**UNITED STATES,**  
*Appellee,*

v.

**MATTHEW D. SCHAUER,**  
Technical Sergeant (E-6),  
United States Air Force  
*Appellant.*

---

No. ACM 40203

---

**BRIEF ON BEHALF OF APPELLANT**

---

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



Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	<b>BRIEF ON BEHALF OF</b>
<i>Appellee,</i>	)	<b>APPELLANT</b>
	)	
v.	)	Before Panel No. 1
	)	
Technical Sergeant (E-6)	)	No. ACM 40203
<b>MATTHEW D. SCHAUER,</b>	)	
United States Air Force	)	31 August 2022
<i>Appellant</i>	)	

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

ASSIGNMENTS OF ERROR

I.

WHETHER THE GOVERNMENT ERRED IN ITS POST-TRIAL PROCESSING WHEN: 1) BEFORE TRIAL, THE GOVERNMENT REQUESTED THAT THE MILITARY JUDGE APPOINT A SPECIFIC ARTICLE 6B REPRESENTATIVE FOR THE VICTIM; 2) THE MILITARY JUDGE GRANTED THE REQUEST AND ISSUED AN ORDER APPOINTING THE REQUESTED ARTICLE 6B REPRESENTATIVE; 3) THE GOVERNMENT SOLICITED INPUT FOR ACTION FROM A PARENT THAT THE MILITARY JUDGE DID NOT DESIGNATE AS THE VICTIM'S REPRESENTATIVE; AND 4) OVER TRIAL DEFENSE COUNSEL OBJECTION, THE CONVENING AUTHORITY CONSIDERED SAID INPUT FROM THE NON-DESIGNATED PARENT?

II.

WHETHER TSGT SCHAUER'S SENTENCE IS INAPPROPRIATELY SEVERE?<sup>1</sup>

---

<sup>1</sup> TSgt Schauer raises Issue II pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

## STATEMENT OF THE CASE

On 14 September 2021, a Military Judge sitting as a general court-martial convicted Technical Sergeant (TSgt) Matthew Schauer, in accordance with his pleas, of wrongful production and possession of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 59. The Military Judge sentenced TSgt Schauer to reduction to the grade of E-1, to forfeiture of all pay and allowances, to confinement for 48 months, and to be discharged from the service with a dishonorable service characterization. R. at 83. The convening authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Volume (Vol.) 1, Convening Authority Decision on Action, 4 October 2021.

## STATEMENT OF FACTS

Over a month before trial, the Government motioned the Military Judge to appoint L.K., the Victim's mother, "as the Article 6b Representative for the minor victim in this case..." ROT, Vol. 2, Appellate Exhibit (App. Ex.) V at 1. The Government quoted Article 6b(c) which states that a Military Judge can designate, *inter alia*, "legal guardians of the victim" or "family members" to assume the rights of the victim. *Id.* The Government argued that since the Victim was a minor, appointing her mother is "appropriate to best serve the interest of justice and protect the rights of the Victim in this case." *Id.* at 2. The Assistant Trial Counsel signed the motion. *Id.* at 3. Trial Defense Counsel did not oppose the motion and the Military Judge appointed L.K. as the Victim's legal representative the day after the Government's motion. ROT, Vol. 2, App. Ex. VI.

Via email, L.K. provided a victim impact statement to the case paralegal that the Government introduced as Court Exhibit A. R. at 63. Trial Defense Counsel did not object to its admission "with the redactions in place." R. at 64. Because the victim impact included the Victim's

name, the Military Judge ordered the Government to seal Court Exhibit A. R. at 64, 70; App. Ex. 10.

After trial, via official memorandum, the Government notified N.K.—not L.K., the designated victim representative—that he had “the opportunity to submit written matters for the convening authority’s consideration before he decides what, if any, action to take on this case.” ROT, Vol. 2, Submission of Matters, dated 14 September 2021. The Government emphasized to N.K. that “the choice is entirely yours” and that N.K. could describe “the impact TSgt Schauer’s crime had on your life.” *Id.* The same Assistant Trial Counsel who signed the motion to request the Article 6(b) representative signed this memorandum to N.K. *Id.* In the third indorsement of the memorandum, the Staff Judge Advocate memorialized that “[N.K.] provided matters.” *Id.*

As discussed in the Law and Analysis Section below, the statement N.K. provided was different from the statement L.K. provided in court to the Military Judge. *Compare* ROT, Vol. 2, Convening Authority Statement, dated 23 September 2021 *with* Court Exhibit A. In TSgt Schauer’s clemency submission, Trial Defense Counsel objected to N.K.’s submission because he was “not authorized to submit matters.” ROT, Vol. 2, Submission of Clemency Matters and Response to Victim’s Submission of Matters, dated 28 September 2021 at 1. Trial Defense Counsel also objected on the grounds that N.K.’s submission “contain[ed] prohibited maters [*sic*].” *Id.* Trial Defense Counsel also noted that the convening authority was “permitted to reduce, commute, or suspend in whole or in part the reduction in rank or forfeitures.” *Id.* Trial Defense Counsel then asked the convening authority for “any leniency granted under R.C.M. 1109.” *Id.* Trial Defense Counsel closed her submission by “respectfully request[ing] you assist TSgt Schauer on his road to rehabilitation by granting this request.” *Id.* at 2.

The convening authority did not address Trial Defense Counsel’s objections and only stated that he “considered matters timely submitted by TSgt Schauer under R.C.M. 1106 and the [V]ictim under R.C.M. 1106A.” ROT, Vol. 1, Convening Authority Decision on Action, dated 4 October 2021. The convening authority approved the findings and the sentence “in its entirety.” *Id.* The convening authority carbon copied N.K. and L.K. on his response. *Id.*

## ARGUMENT

### I.

**THE GOVERNMENT ERRED IN ITS POST-TRIAL PROCESSING WHEN: 1) BEFORE TRIAL, THE GOVERNMENT REQUESTED THAT THE MILITARY JUDGE APPOINT A SPECIFIC ARTICLE 6B REPRESENTATIVE FOR THE VICTIM; 2) THE MILITARY JUDGE GRANTED THE REQUEST AND ISSUED AN ORDER APPOINTING THE REQUESTED ARTICLE 6B REPRESENTATIVE; 3) THE GOVERNMENT SOLICITED INPUT FOR ACTION FROM A PARENT THAT THE MILITARY JUDGE DID NOT DESIGNATE AS THE VICTIM’S REPRESENTATIVE; AND 4) OVER TRIAL DEFENSE COUNSEL OBJECTION, THE CONVENING AUTHORITY CONSIDERED SAID INPUT FROM THE NON-DESIGNATED PARENT.**

#### Standard of Review

This Court reviews proper completion of post-trial processing *de novo* as a question of law. *United States v. Kim*, No. ACM 40057, 2022 CCA LEXIS 276, at \*3-4 (A.F. Ct. Crim. App. 9 May 2022) (unpub. op.).

#### Law and Analysis

The Government erred in soliciting input from N.K. and this error unfairly prejudiced TSgt Schauer.

*Error to Solicit Input from a Non-Crime Victim*

In a case with a victim, “any crime victim of an offense may submit matters to the convening authority for consideration in the exercise of the convening authority’s powers under R.C.M. 1109 or 1110.” Rule for Court-Martial (R.C.M.) 1106A(a). A “crime victim” is:

[A]n individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty, and on which the convening authority may take action under R.C.M. 1109 or 1110, or the individual’s lawful representative or designee appointed by the military judge under these rules.

R.C.M. 1106A(b)(2) (emphasis added). Here, the Government erred in soliciting input from N.K. because the Military Judge never appointed N.K. as the Victim’s “lawful representative.” *Id.* As such, the Government should have requested input for action from L.K. The Government’s error is self-inflicted: It could have requested that the Military Judge appoint *both* N.K. and L.K. as victim representatives because the language it relied on under Article 6b(c) allows the Military Judge to appoint “legal guardians” or “family members”—plural, not singular. Rather, the Government represented to the Military Judge that only L.K. was “appropriate to best serve the interest of justice and protect the rights of the [V]ictim in this case.” ROT, Vol 2., App. Ex. V at 1. Additionally, in the context of R.C.M. 1001A, this Court has said that statements must come from a victim, victim’s counsel, or the victim’s representative: “Representations *by a non-designated parent* or by trial counsel are insufficient.” *United States v. Cink*, No. ACM 39594, 2020 CCA LEXIS 208, at \*11 (A.F. Ct. Crim. App. 12 June 2020) (unpub. op.) (emphasis added).

“Post-trial conduct must consist of fair play, specifically giving the appellant ‘notice and an opportunity to respond.’” *Kim*, unpub. op. at \*5 (citing *United States v. Hunter*, No. 201700036, 2017 CCA LEXIS 527, at \*4 (N.M. Ct. Crim. App. 8 Aug. 2017) (unpub. op.) (quoting *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996))). “Serving victim clemency correspondence on

the accused for comment before convening authority action protects an accused's due process rights under the Rules for Court-Martial and preserves the actual and perceived fairness of the military justice system." *Id.* (quoting *United States v. Bartlett*, 64 M.J. 641, 649 (A. Ct. Crim. App. 2007)). Here, Trial Defense Counsel had the opportunity to respond and objected to N.K.'s submission to the convening authority, arguing that N.K. was not the designated victim representative. The convening authority appeared to not only ignore this objection, but he also appeared to give his imprimatur to N.K.'s submission by carbon copying N.K. on his Decision on Action. Thus, the Government and the convening authority disregarded the importance of where the victim impact originated and, in doing so, made the post-trial processing unfair. Trial Defense Counsel did everything in her power to remedy the error, but to no avail.

*The Government Unfairly Prejudiced TSgt Schauer*

"[T]he convening authority is an appellant's 'best hope for sentence relief.'" *Kim*, unpub. op. at \*4 (citing *United States v. Bischoff*, 74 M.J. 664, 669 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999))). When reviewing post-trial errors, this Court will not grant relief unless an appellant presents "some 'colorable showing of possible prejudice...'" *Id.* at \*5. (citing *United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Scalo*, 60 M.J. 435, 436-37 (C.A.A.F. 2005))). At least in regard to unauthorized matters submitted by an SJA in an addendum, the Court of Appeals for the Armed Forces (CAAF) stated:

The threshold should be low, and if an appellant makes some colorable showing of possible prejudice, we will give that appellant the benefit of the doubt and 'we will not speculate on what the convening authority might have done' if defense counsel had been given an opportunity to comment.

*United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997) (citations omitted). This “low threshold” for material prejudice reflects the convening authority’s entirely discretionary “power in granting clemency and is designed to avoid undue speculation as to *how certain information might impact the convening authority’s exercise of such discretion.*” *Kim*, unpub. op. at \*6 (quoting *Scalo*, 60 M.J. at 437 (citation omitted) (emphasis added); *see also United States v. Brubaker-Escobar*, 81 M.J. 471, 475 (C.A.A.F. 2021) (finding that a convening authority’s error was procedural, not jurisdictional and thus testing “for material prejudice to a substantial right to determine whether relief is warranted.”). The CAAF has ruled that clemency errors can be materially prejudicial to an appellant’s substantial rights: “Because clemency is a highly discretionary Executive function, *there is material prejudice to the substantial rights of an appellant if there is an error and the appellant makes some colorable showing of possible prejudice.*” *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (quotations and citations omitted) (emphasis added); *see also United States v. Travis*, 66 M.J. 301, 304 (C.A.A.F. 2008) (“Where a servicemember has been deprived of full and fair clemency consideration by a convening authority, we are not reluctant to return a case for an otherwise proper review and action.”). If an Appellant makes a showing of prejudice, this Court “must either provide meaningful relief or return the case to the Judge Advocate General concerned for a remand to a convening authority for a new post-trial recommendation and action.” *Wheelus*, 49 M.J. at 289.

The Convening Authority Statement unfairly prejudiced TSgt Schauer in several ways.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Fourth, Trial Defense Counsel asked the convening authority for specific relief which he denied. By considering an unauthorized representative’s opinion, the convening authority materially prejudiced TSgt Schauer’s right to a “full and fair clemency consideration.” *Travis*, 66 M.J. at 304. This amounts to “some colorable showing of possible prejudice” because now there is “undue speculation as to how certain information might [have] impact[ed] the convening authority’s exercise of such discretion.” *Chatman*, 46 M.J. at 323-24; *Kim*, unpub. op. at \*6 (quoting *Scalo*, 60 M.J. at 437 (citation omitted)). Neither TSgt Schauer nor this Court can be sure that the convening authority did not consider N.K.’s unauthorized opinion and that was the reason why the convening authority denied his clemency request. In fact, the available evidence points to the conclusion that the convening authority considered N.K.’s unauthorized opinion and that could have been the reason he denied TSgt Schauer’s clemency request.

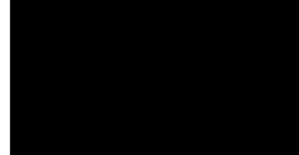
*Conclusion: Error and Prejudice*

The CAAF in *Wheelus* stated that for an appellant to obtain relief for post-trial processing matters, he must “First...allege the error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, an appellant must show what he would do to

resolve the error if given such an opportunity.” 49 M.J. at 288. TSgt Schauer fulfills these three requirements. He has alleged error before this Court; he has shown that the convening authority considered and adopted an unauthorized opinion which *ipso facto* prejudiced him; and, during clemency, he showed what he would do to have the error resolved: Not having the convening authority consider N.K.’s statement so as to “avoid undue speculation as to how certain information might impact the convening authority’s exercise of such discretion.” *Kim*, unpub. op. at \*6 (quoting *Scalo*, 60 M.J. at 437 (citation omitted)).

**WHEREFORE**, TSgt Schauer requests that this Court return his case to the Judge Advocate General for new post-trial processing and convening authority action.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF Appellate  
Defense Counsel  
Appellate Defense Division



**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 31 August 2022.

Respectfully submitted,



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



## APPENDIX A

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

### II.

#### **TSGT SCHAUER'S SENTENCE WAS INAPPROPRIATELY SEVERE.**

In assessing sentence appropriateness, this Court considers “the particular appellant, the nature and seriousness of the offense[s], the appellant’s record of service, and all matters contained in the record of trial.” *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (alteration in original) (citation omitted). This Court should consider the fact that TSgt Schauer deployed overseas four times during his career and each deployment took a significant toll on his marriage and mental health, so he “began to turn more and more to pornography as a means of satisfaction.” ROT, Vol. 2, Defense Exhibit B at 2. During his first deployment, his marriage struggled. *Id.* During his second deployment, his wife cheated on him. *Id.* He knew his third deployment “would likely be the nail in the coffin for [his] marriage and [he] was experiencing severe depression.” *Id.* After this deployment, he got divorced and then the Government deployed him again. *Id.* at 3. This Court should consider TSgt Schauer’s multiple deployments and the effect those deployments had on his marriage, his mental health, and the fact that they explain—in part—the circumstances surrounding the commission of his offense and the reasons for committing it.

**WHEREFORE**, TSgt Schauer respectfully requests that this Honorable Court reassess his sentence.

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES</b>	)	<b>MOTION FOR LEAVE TO FILE</b>
<i>Appellee</i>	)	<b>UNDER SEAL</b>
	)	
	)	
v.	)	Before Panel No. 1
	)	
Technical Sergeant (E-6)	)	Case No. ACM 40203
<b>MATTHEW D. SCHAUER,</b>	)	
United States Air Force	)	
<i>Appellant</i>	)	31 August 2022

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

Pursuant to Rule 13.2(b), 17.2(b), and 23.3(o) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for leave to file a portion of Issue I of his Assignment of Error (AOE) under seal. That issue contains references to sealed portions of the Record of Trial, specifically, Court Exhibit A.

Court Exhibit A is a victim impact statement that the Military Judge ordered to be sealed. Record (R.) at 81; Appellate Exhibit (App. Ex.) X. During trial the Military Judge stated:

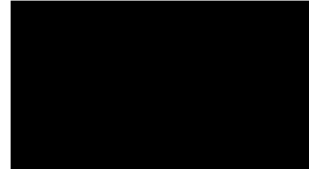
[T]he full name of the victim of the production of child pornography offense appears on that document itself, her full name...I will hear from the parties -- but [this Court] is inclined to seal any document that contains the full name of the victim of a child pornography offense, to prevent any unauthorized or any unwarranted disclosure of such a sensitive matter to the public at large.

R. at 64. Appellant does not use the victim’s name in the AOE and the relevant portion of Issue I only discusses the content, format, and creation of Court Exhibit A. However, the Military Judge’s order sealing Court Exhibit A is broader as it orders the entire document to be sealed and “All records or notes derived from the information contained within the items must remain secured when not being used.” App. Ex. X. Additionally, Rule 17.2(b) of this Court’s Rules of Practice and Procedure states, “Material under seal or *information derived from such material* shall be

separately filed.” (emphasis added). The inclusion of this information is necessary for this Court’s consideration of the case. The relevant portions of Issue I contain three pages total and account for pages 7-9 of Appellant’s brief.

**WHEREFORE**, Appellant respectfully requests this motion be granted.

Respectfully Submitted,

A solid black rectangular redaction box covering the signature of the appellant.

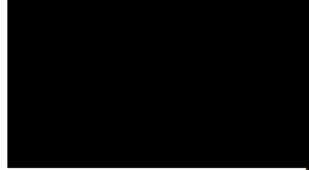
SPENCER R. NELSON, Maj, USAF  
Appellate Defense Counsel  
Appellate Defense Division

A solid black rectangular redaction box covering the contact information of the appellant.

**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 31 August 2022.

Respectfully submitted,



N, Maj, USAF

Appellate Defense Counsel

Appellate Defense Division





**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

<b>UNITED STATES,</b>	)	<b>CONSENT MOTION TO COPY,</b>
	)	<b>RETAIN, AND TRANSMIT</b>
<i>Appellee,</i>	)	<b>SEALED MATERIALS</b>
	)	
v.	)	ACM 40203
	)	
Technical Sergeant (E-6)	)	Panel No. 1
<b>MATTHEW D. SCHAUER, USAF,</b>	)	
	)	
<i>Appellant.</i>	)	

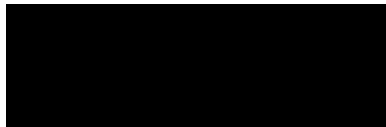
**TO THE HONORABLE, THE JUDGES OF THE  
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rule 23(d) of this Honorable Court’s Rules of Practice and Procedure, the United States hereby moves for leave to file a motion to copy, retain, and transmit to geographically-separated reserve counsel, a Victim Impact Statement sealed by the trial judge (Court Exhibit A). On 31 August 2022, Appellant filed a brief alleging two assignments of error, and, relevant here, Issue I discusses the content, format, and creation of Court Exhibit A. (App. Br. at 1.) On 31 August 2022, Appellant moved this Court for leave to file a portion of Issue I of the Assignment of Error under seal due to that issue containing references to Court Exhibit A. This Court granted Appellant’s motion on 9 September 2022.

This brief is assigned to undersigned counsel, Maj Joshua Austin, a reserve appellate attorney teleworking from his residence located in Mesa, Arizona. Given that the sealed material is necessary for the United States to adequately respond to Appellant’s brief, and the physical distance of Maj Austin’s telework location from Joint Base Andrews, Maryland, the United States requests this Court’s permission for Government counsel and/or its supporting staff to create, securely retain, and transmit a digital copy of this material. Appellant’s counsel, who was consulted prior to this filing, consents to this motion and the transmission of the sealed material in the manner proposed.

If this Court grants the United States' request, undersigned counsel proposes the following procedure for effecting the Court's order, subject to any additional directive by this Court: Government counsel and/or its supporting staff, located at Joint Base Andrews, Maryland, will scan and create an electronic file containing the sealed material. The Government will then electronically transmit that file to an official, encrypted email account. The Government will retain a copy of that electronic file—with clear markings to indicate it contains sealed material—exclusively on the Air Force Government Trial and Appellate Operations Division's secure electronic drive. The Government will securely transmit a copy of the electronic file to Maj Austin via DoD SAFE, and Maj Austin will securely store the file in accordance with his professional rules of conduct governing the retention of sealed material.

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



JOSHUA M. AUSTIN, Maj, USAFR  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
United States Air Force

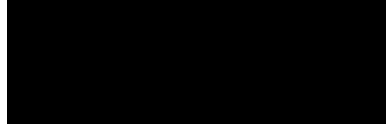


THOMAS J. ALFORD, Lt Col, USAFR  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
United States Air Force



**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 15 September 2022 via electronic filing.



JOSHUA M. AUSTIN, Maj, USAFR  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
United States Air Force



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	ANSWER TO ASSIGNMENT OF
<i>Appellee,</i>	)	ERROR
	)	
v.	)	Before Panel No. 1
	)	
Technical Sergeant (E-6)	)	No. ACM 40203
<b>MATTHEW D. SCHAUER</b>	)	
United States Air Force	)	30 September 2022
<i>Appellant.</i>	)	

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

**ISSUES PRESENTED**

**I.**

**WHETHER THE GOVERNMENT ERRED IN ITS POST-TRIAL PROCESSING WHEN: 1) BEFORE TRIAL, THE GOVERNMENT REQUESTED THAT THE MILITARY JUDGE APPOINT A SPECIFIC ARTICLE 6B REPRESENTATIVE FOR THE VICTIM; 2) THE MILITARY JUDGE GRANTED THE REQUEST AND ISSUED AN ORDER APPOINTING THE REQUESTED ARTICLE 6B REPRESENTATIVE; 3) THE GOVERNMENT SOLICITED INPUT FOR ACTION FROM A PARENT THAT THE MILITARY JUDGE DID NOT DESIGNATE AS THE VICTIM’S REPRESENTATIVE; AND 4) OVER TRIAL DEFENSE COUNSEL OBJECTION, THE CONVENING AUTHORITY CONSIDERED SAID INPUT FROM THE NON-DESIGNATED PARENT?**

**II.**

**WHETHER TSGT SCHAUER’S SENTENCE IS INAPPROPRIATELY SEVERE?<sup>1</sup>**

---

<sup>1</sup> This issue is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

## **STATEMENT OF CASE**

Technical Sergeant Matthew Schauer, Appellant, entered into a plea agreement wherein Appellant agreed to plead guilty to the specifications of Charge III. (App. Ex. VII.) The plea agreement provided a minimum term of confinement of twelve months and a maximum term of confinement of forty-eight months, with no other limitations on sentence. (Id.) Appellant was convicted, in accordance with his pleas, of one charge and two specifications of production and possession of child pornography. (*Entry of Judgment*, ROT, Vol. 1.) The military judge sentenced Appellant to a reduction to the grade of E-1, forfeitures of all pay and allowances, forty-eight months confinement, and a dishonorable discharge. (Id.) The convening authority took no action on the findings and approved the sentence in its entirety. (*Convening Authority Decision on Action*, ROT, Vol. 1.)

## **STATEMENT OF FACTS**

### ***Production of Child Pornography***

Appellant entered active duty on 19 April 2016 and was assigned to the 75th Logistics Readiness Squadron, Hill Air Force Base, Utah when he produced child pornography. (Pros. Ex. 2 at 1.) Appellant and J.K., a minor child, began messaging one another on the Kik application on 20 March 2020 and continued messaging until 4 April 2020. (Pros. Ex. 1 at 2.) Appellant's conversation with J.K. was sexual in nature. (Id.) On 30 March 2020, J.K. messaged Appellant, "do you know how old I am?" (Id.) Appellant responded, "I'm not worried about how old you are age is just a number." (Id.) Appellant further replied it's "kind hard to be daddy to a girl older than me." (Id.) In response, J.K. stated, "ok so what if I was a minor you wouldn't care?" to which Appellant replied, "as far as I know at this moment your not" and "your profile says

your 18 sooooo.” After some additional conversation, J.K. sent the following message to

Appellant:

“I’m a minor but it all depends on if you are willing to meet up because I’ve had sex with plenty of adults before and never told on any of them and I particularly like you and your methods of everything but if you don’t want to meet because I’m a minor that’s your choice and I won’t be angry I’ll be a little dissatisfied but I’ll be okay.” (Id.)

Appellant responded by stating that it’s “unfortunate that you felt the need to tell me that” because he lost “plausible deniability.” (Id. at 2.) Appellant continued messaging with J.K. and agreed to meet up with J.K. if J.K. “can prove to the [Appellant] that you are who you say you are.” (Id.) Appellant stated J.K. would have to “send something that no cop would be able to fake.” (Id.) Appellant then told J.K. to send “a video of you showing your id which shows your age, in the same clip shows you nude and touching yourself.” (Id.) J.K. stated she did not have an I.D., and Appellant suggested she use her school I.D. (Id.) J.K. then sent Appellant a video, in which J.K. holds a student I.D. to the camera, which identified her as an eighth-grade middle school student, and then showed J.K. sitting on the floor with her legs spread apart in front of a mirror. (Id.). While on the floor, J.K. penetrated her vagina with her finger while making an exaggerated face of a sexual nature. (Id.)

Appellant knew J.K. was a minor when he asked her to engage in sexually explicit conduct while recording it and to then send that video to him. (Id.) Appellant was aware he was producing child pornography because he was aware the video was of a minor child engaging in sexually explicit conduct. (Id.) Appellant had sufficient knowledge of J.K. being a minor child based on her statement of such to him, and this being corroborated by the school I.D. captured in the video sent to Appellant. (Id.) J.K. was 14 at the time of this offense. (R. at 34.) Appellant asked J.K. to make the video for his own sexual gratification. (R. at 37.)

### *Possession of Child Pornography*

Appellant knowingly and wrongfully possessed child pornography while deployed at or near Al Udeid AB, Qatar between on or about 1 July 2018 and between on or about 31 January 2019. (Pros. Ex. 1 at 3.) On 22 April 2020, a Special Agent with AFOSI was notified by the National Center for Missing and Exploited Children (NCMEC) that a Tumblr username associated with Appellant was flagged for uploading 21 images of suspected child pornography from an IP address in Al Udeid Air Base, Qatar, on 29 August 2018. (Id.)

Appellant admitted to searching for images of minors engaging in sexually explicit conduct on Tumblr. (R. at 41.) Appellant believed or knew it was possible to find child pornography on Tumblr and used specific search terms, including “young,” “shaven,” and “things of that nature.” (Id. at 42.) Appellant, despite knowing it was wrongful, intentionally sought out child pornography to fulfill his sexual desires. (Id.) Appellant then downloaded and uploaded these images to his Tumblr account to exercise sole control over the images, as no one else had access to this account. (Pros. Ex. 1 at 6.)

A Pediatric Medical Director with the necessary training and qualifications to review images for determining age reviewed the images and videos flagged and noted 11 images and videos that depicted likely underage females engaging in sexually explicit conduct. (Id. at 5.)

The images and videos examined are as follows:

- a. 167292860630. Mp4. A 24 second video depicting a close-up recording of a man rubbing his penis on a nude female child’s vagina. The child’s legs are spread apart with the man standing in between them. (Id. at 5.)
- b. 172130027910\_1.png. A close-up image of a female child’s pubic mound and the top half of the female child’s legs. (Id.)
- c. 172130027910\_2.jpg. A close-up image of a female child’s nude vagina and anus. Two fingers of an off-camera individual are inserted into the female’s anus. (Id.)

- d. Image 175870253775\_3.jpg. An image of a man standing over a naked female child laying on her back. The child's legs are spread open, and the man is standing between them. The man and female child are naked, and the man has a fully erect penis hovering over the female child's pubic area. The man's left hand is on the inner thigh of the female child, and his thumb is at or near the entrance to the child's vagina. (Id.)
- e. Image 175870253775\_9.jpg. An image depicting a man standing over a naked female child laying her back with her legs spread open and the man standing between them. The man has a fully erect penis that is being inserted into the female child's vagina. (Id.)
- f. 175873882375\_2.jpg. An image depicting a naked man standing over a naked female child lying on her back with the child's legs spread open and the man standing in between them. The man has a fully erect penis, and the head of the penis is being pressed against the female child's vagina entrance. (Id.)
- g. 175873882375\_5.jpg. An image depicting a naked man standing over a naked female child lying on her back. The child's legs are spread open, and the man is standing between them and is inserting his fully erect penis into the female child's vagina. The child's face looks very young, and her breasts are undeveloped as other secondary sexual characteristics. (Id. at 5-6.)
- h. 175873882375\_9.jpg. An image depicting a female child standing up and completely nude. (Id. at 6.)
- i. 175874323795\_9.jpg. An image depicting a close-up of a vagina and anus of a female child. (Id. at 6.)
- j. 175874323795\_16.jpg. An image depicting a close-up of a vagina and anus of a female child. (Id. at 6.)
- k. 175874323795\_18.jpg. An image depicting a close-up of a vagina and anus of a female child. The child's vagina is being spread open by three fingers belonging to someone off screen. (Id. at 6.)

### *Plea Colloquy*

On 28 August 2021, the plea agreement that Appellant and his counsel signed on 18 August 2021 was approved. (App. Ex. VII.) During the trial, the military judge conducted an in-depth inquiry on the record with Appellant to ensure Appellant understood the provisions of the plea agreement and had entered into the agreement voluntarily with the benefit of advice from



counsel and with the belief that doing so was in his best interest. (R. at 51-59.) The military judge ultimately determined Appellant's plea was made voluntarily, with full knowledge of its meaning and effect. (Id. at 59.) The military judge also determined Appellant had knowingly, intelligently, and consciously waived the rights against self-incrimination. (Id.) Finally, the military judge advised Appellant that while he found his plea provident, Appellant could withdraw the guilty plea at any time before sentence was announced. (Id.) Appellant did not raise any objections to the terms of the plea agreement, including the confinement parameters, at trial. Appellant also never attempted to withdraw from the plea agreement. The military judge closed the court and deliberated for over an hour before reopening the court and announcing the sentence. (R. at 83.) The maximum punishment for the offense and specifications Appellant plead guilty to was a dishonorable discharge, a reduction to the rank of E-1, total forfeitures of pay and allowances, and 40 years confinement. (R. at 46.) The military judge sentenced Appellant to be reduced to the grade of E-1; to forfeit all pay and allowances; to be confined for 48 months for Specification 1 of Charge III; to be confined for 18 months for Specification 2 of charge III – confinement sentences to run concurrently; and to be dishonorably discharged from the service. (R. at 83.)

### *Clemency*

On 5 August 2021, the United States filed a motion requesting Mrs. L.K., the mother of J.K. and the wife of N.K., be appointed as an Article 6b Representative for the minor victim. (App. Ex. V.) The Court granted the motion on 6 August 2021. (App. Ex. VI.) N.K., the father of J.K., attended the trial of Appellant. N.K. was provided with a notice of a right to submit matters for the convening authority's (CA) consideration on 14 September 2021, the date of trial. (Memorandum for N.K. dtd 14 Sep 21.) L.K. and N.K., on behalf of J.K, submitted

matters to the CA on 23 September 2021. (*Convening Authority Statement*, dtd 23 Sep 21)  
Appellant submitted matters to the CA on 28 September 2021 and argued that J.K.’s submission of matters should not be considered as N.K. was “not authorized to submit matters.” (*Submission of Clemency Matters and Response to Victim’s Submission of Matters*, dated 28 Sep 2021.) Appellant requested, “the CA reduce, commute, or suspend in whole or in part the reduction in rank or forfeitures.” (Id.) The CA took no actions on the findings in the case and approved the sentence in its entirety, noting that before acting he considered matters submitted by Appellant and the Victim. (*Convening Authority Decision on Action*, dtd 04 Oct 2021.)

## **ARGUMENT**

### **I.**

#### **NO ERROR OCCURRED WHEN THE CONVENING AUTHORITY REVIEWED A SUBMISSION OF MATTERS FROM THE PARENTS OF J.K.**

##### ***Standard of Review***

Proper completion of post-trial processing is a question of law which this court reviews *de novo*. See United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004). An Appellant must make, “some colorable showing of possible prejudice.” United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000) (quoting United States v. Wheelus, 49 M.J. 283, 289 (C.A.A.F. 1998)).

##### ***Law and Analysis***

Article 6b, UCMJ delineates the rights of crime victims and mirrors those afforded under the Crime Victims’ Rights Act. United States v. Miller, No. 201900234 (f rev), 2022 CCA LEXIS 418, at \*1 (N-M Ct. Crim. App. July 20, 2022). A “crime victim” is: [A]n individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of

an offense of which the accused was found guilty, and on which the convening authority may take action under R.C.M. 1109 or 1110, or the individual's lawful representative or designee appointed by the military judge under these rules. R.C.M. 1106A(b)(2). Any individual who meets these criteria has rights as a victim and the person need not be a named victim on the charge sheet, or a named victim's designee under Article 6b. Miller at 1. The Court of Appeals for the Armed Forces found the mother of a child pornography victim was a crime victim in light of the crimes committed against her daughter and "the resulting financial and psychological hardships suffered by the family." United States v. Hamilton, 78 M.J. 335, 340 (C.A.A.F. 2019). In a case with a victim, "any crime victim of an offense may submit matters to the CA for consideration in the exercise of the CA's powers under R.C.M. 1109 or 1110." Rule for Court-Martial (R.C.M.) 1106A(a).

"[T]he convening authority is an appellant's 'best hope for sentence relief.'" United States v. Bischoff, 74 M.J. 664, 669 (A.F. Ct. Crim. App. 2015) (quoting United States v. Lee, 50 M.J. 296, 297 (C.A.A.F. 1999)). "Post-trial conduct must consist of fair play, specifically giving the appellant 'notice and an opportunity to respond.'" United States v. Kim, No. ACM 40057, 2022 CCA LEXIS 276, at \*5 (A.F. Ct. Crim. App. 9 May 2022) (citation omitted). "Serving victim clemency correspondence on the accused for comment before convening authority action protects an accused's due process rights under the Rules for Court-Martial and preserves the actual and perceived fairness of the military justice system." Id.

When reviewing post-trial errors, this Court will not grant relief unless an appellant presents some colorable showing of possible prejudice. *See id.* "If the appellant makes such a showing, the U.S. Air Force Court of Criminal Appeals must either provide meaningful relief or return the case to the Judge Advocate General concerned for a remand to a convening authority

for new post-trial action.” Id. (quoting United States v. Wheelus, 49 M.J. 283, 289 (C.A.A.F. 1998)).

N.K., as the father of J.K., is a victim due to the resulting financial and psychological hardships suffered by the family caused by Appellant’s criminal conduct. In the Victim Impact Statement provided to the trial court by J.K.’s parents, N.K. and L.K. detailed the family psychological impact and financial toll they experienced. (Sealed Court Exhibit A.) Thus, this case is analogous to Hamilton where the mother of a child pornography victim was found to be a crime victim in light of the crimes committed against her daughter and "the resulting financial and psychological hardships suffered by the family." (Hamilton at 340.) Appellant does not contest these impacts in his assignment of errors, but instead focuses on N.K. not being appointed as the J.K.’s legal representative. (App. Brief at 3-4) Appellant’s argument never addresses why N.K. should not be a victim and instead operates under the erroneous presumption that J.K. is the only victim. Under the plain language of Article 6b, UCMJ and R.C.M. 1106A(b)(2), N.K. is a victim due to the emotional and pecuniary harm he suffered because of Appellant’s commission of the offense. N.K. has rights as a victim and was therefore entitled to submit matters to the CA for consideration.

Finally, assuming this Court were to find N.K. was not a Victim, – N.K. still submitted matters to the Convening Authority jointly as parents with L.K., the mother of J.K. Appellant concedes L.K. was the appointed representative of J.K. L.K. signed the document and submitted it to the CA jointly as parents of J.K. (*Convening Authority Statement*, dtd 23 Sep 2021.) By signing and submitting the document to the CA for review, L.K. adopted this statement as her own. Submitting this document jointly with N.K. was within the rights of L.K. as J.K.’s appointed representative to submit any matters that reasonably tend to inform the CA’s decision

on whether to reduce the findings or sentence in this case. Appellant had a full opportunity to respond to this submission of matters, and he did so in this case through his trial defense counsel.

Even if including N.K.'s name on the submission was error, Appellant is unable to demonstrate any colorable showing of possible prejudice. L.K. undeniably had the ability to provide information to the CA and could have submitted the same statements submitted jointly with N.K. as her own. Even if N.K.'s name had not been on the statement, L.K. would have been able to submit the same basic information about victim impact to the CA. Appellant had notice and a full opportunity to respond to the submission of matters in this case and did so through his trial defense counsel – fully addressing the victims' submission of matters. Appellant was not prejudiced in any way in the post-trial processing. Therefore, this Court should deny Appellant's request to remand this case for new post-trial processing and CA action.

## II.

### **APPELLANT'S SENTENCE WAS NOT INAPPROPRIATELY SEVERE.**

#### *Standard of Review*

Sentence appropriateness is reviewed de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

#### *Law and Analysis*

In determining whether a sentence is appropriate, the court examines the specific appellant, the nature and seriousness of the offenses, appellant's record of service, and all matters contained in the record of trial. United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citing United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)). Courts possess a great amount of discretion in evaluating whether a sentence is appropriate, however the

court is not authorized to engage in exercises of clemency. United States v. Nerad, 69 M.J. 138, 148 (C.A.A.F. 2010).

While not dispositive on the issue of sentence appropriateness, “a pretrial agreement may be considered as part of the totality of circumstances surrounding a particular case.” United States v. Harley, ACM 38896, 2017 CCA LEXIS 251, at \*5 (A.F. Ct. Crim. App. 6 March 2017) (unpub. op.). United States v. Cron, 73 M.J. 718 (A.F. Ct. Crim. App. 2014), posed an analogous scenario to the current case, where the appellant had signed a pretrial agreement, was sentenced within the limitations of the pretrial agreement, and then on appeal asserted the adjudged sentence was inappropriately severe. In reaching its conclusion that relief was not warranted, this Court looked to the fact that the appellant did not raise any objection at trial and was represented by competent counsel. Id. at 729. Particularly important was that the military judge, after a lengthy inquiry with the appellant, found that appellant entered the agreement voluntarily and intelligently. Id. at 729-730. The Cron court also highlighted that the appellant entered into the agreement to avoid the more severe authorized sentence than that bargained for in the agreement. Id. at 729.

Appellant’s sentence in this case was not inappropriately severe due to the nature and seriousness of the offenses and the impact on the victim. Without the limitations of the plea agreement in the place, the maximum permissible punishment for Appellant’s convictions was a reduction to E-1, total forfeitures, confinement for forty years, and a dishonorable discharge. The forty-eight months of confinement Appellant received is substantially less than the forty years of confinement permitted as the maximum punishment under the law.

Forty-eight months confinement is an appropriate punishment for Appellant given that he produced child pornography by having a fourteen-year-old child record herself with her school

I.D. engaging in sexually explicit conduct. Appellant knew J.K. was a young child, but in his own words was not worried about her age because it's "kind hard to be daddy to a girl older than me." J.K., L.K. and N.K. suffered significant harm due to Appellant's crimes – harm that will likely follow them their whole lives.

In addition to producing child pornography, Appellant also possessed child pornography. As an example, he had an image of a grown man inserting his fully erect penis into a female child's vagina while depicting that young child's face and undeveloped breast – and he did so to "fulfill his sexual desires." He moved the child pornography he actively sought out into his Tumblr account so he would have control over the images.

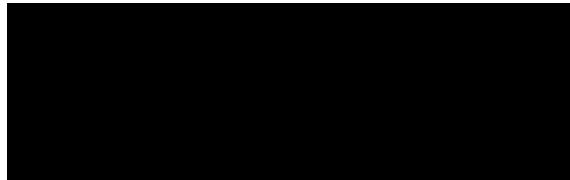
Appellant himself, acting under the advice of qualified counsel - the services of which he was satisfied with - decided it was in his best interest to bargain for and enter the plea with the adjudged sentence as being a distinct possibility. The forty-eight months confinement and dishonorable discharge are far from being inappropriately severe.

Appellant argues that his sentence is inappropriately severe because Appellant deployed multiple times and due to the toll these deployments had on him. It's important to note that these were matters in mitigation brought to the attention of the trial judge during sentencing. These factors were considered in determining the sentence and weighed against the facts of the criminal offenses, the impact of the crimes had on R.S. as well as other appropriate matters in aggravation. Appellant's arguments have already been judged and an appropriate sentence was crafted based on the whole of the case. Evidence of Appellant's deployments were also presented to the CA in Appellant's Submission of Matters and Supporting Materials and the CA determined this was not an appropriate basis to grant relief. Appellant asks this court to engage

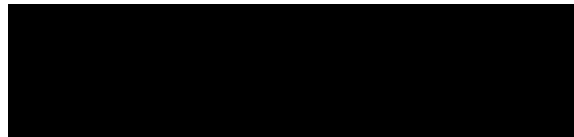
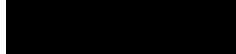
in an act of clemency, which is not permitted under the law. The sentence adjudged was not inappropriately severe. This Court should deny this assignment of error.

**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.



JOSHUA M. AUSTIN, Maj, USAF  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
Military Justice and Discipline Directorate  
United States Air Force



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





**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force  
Appellate Defense Division on 30 September 2022.



JOSHUA M. AUSTIN, Maj, USAF  
Appellate Government Counsel  
Government Trial and Appellate Operations Division  
Military Justice and Discipline Directorate  
United States Air Force



**UNITED STATES AIR FORCE  
COURT OF CRIMINAL APPEALS**

<b>UNITED STATES</b>	)	<b>No. ACM 40203</b>
<i>Appellee</i>	)	
	)	
<b>v.</b>	)	
	)	<b>ORDER</b>
<b>Matthew D. SCHAUER</b>	)	
<b>Technical Sergeant (E-6)</b>	)	
<b>U.S. Air Force</b>	)	
<i>Appellant</i>	)	<b>Panel 1</b>

On 25 July 2022, this court granted Appellant’s motion to view, *inter alia*, Court Exhibit A, a victim impact statement sealed by the military judge in Appellant’s court-martial. Pursuant to the court’s order, appellate government counsel were also allowed to view the materials, including Court Exhibit A.

On 15 September 2022, the Government submitted a Consent Motion to Copy, Retain, and Transmit Sealed Materials.\* Specifically, the Government seeks to copy, retain, and transmit to assigned appellate government counsel, Major Joshua Austin, by secure means, Court Exhibit A. Major Austin is a reserve judge advocate, assigned as appellate government counsel on Appellant’s case, who resides outside the National Capital Region. The Government proposes that government counsel and/or its supporting staff create, securely retain, and transmit to Major Austin, a digital copy of this material via encrypted email or DoD SAFE.

According to the consent motion, Appellant’s counsel “consents to [the] motion and the transmission of the sealed material in the manner proposed.”

Accordingly, it is by the court on this 22d day of September 2022,

**ORDERED:**

---

\* This type of motion is not listed in A.F. CT. CRIM. APP. R. 23.3; accordingly, the motion should have been filed a Motion for Leave to File Consent Motion to Copy, Retain, and Transmit Sealed Materials. *See* JT. CT. CRIM. APP. R. 23(d). However, the court recognizes that the Government’s motion is closely related to a Motion to Examine upon which the court already ruled. In the interests of judicial economy, and in light of Appellant’s consent to the motion, the court will rule upon the motion as if it were properly filed as a Motion for Leave to File Consent Motion to Copy, Retain, and Transmit Sealed Materials.

The Government's Consent Motion to Copy, Retain, and Transmit Sealed Materials, dated 15 September 2022, is **GRANTED**. Government counsel are permitted to scan a hard copy of the sealed Court Exhibit A, and to either email scanned sealed materials using encryption to Major Austin's email address or transmit files containing sealed materials either encrypted or password-protected to Major Austin via DoD SAFE.

Except as specified in this order, no counsel will photocopy, photograph, or otherwise reproduce the sealed material, nor disclose nor make available its contents to any other individual, without this court's prior written authorization.

Once all pleadings in this case are filed with the court, government counsel shall destroy all copies of the sealed materials created and transmitted. Government counsel will provide confirmation to this court and to appellate defense counsel that all such copies have been destroyed.



FOR THE COURT



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

IN THE UNITED STATES AIR FORCE COURT OF  
CRIMINAL APPEALS

---

UNITED STATES,  
*Appellee,*

v.

MATTHEW D. SCHAUER,  
Technical Sergeant (E-6),  
United States Air Force  
*Appellant.*

---

No. ACM 40203

---

REPLY BRIEF

---

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



Counsel for Appellant



for the Armed Forces *found* the mother of a child pornography victim was a crime victim in light of the crimes committed against her daughter.” Answer at 8 (emphasis added). However, the Court of Appeals for the Armed Forces (CAAF) did not review the issue raised here specifically, nor did the parties brief that issue. Rather, the CAAF granted review on whether “victim impact statements admitted pursuant to R.C.M. 1001A evidence [are] subject to the military rules of evidence.” *United States v. Hamilton*, 77 M.J. 368 (C.A.A.F. 2018).

The CAAF’s aforementioned language merely recited what was contained in the victim impact statements—not an endorsement that the victim impact statements were properly admitted into evidence. In fact, the CAAF said: “It is not entirely clear whether the military judge believed that the victim impact statements and video were admissible under R.C.M. 1001(b)(4) (2016) (government evidence in aggravation) or as unsworn statements under R.C.M. 1001A(e) (2016) (victim’s right to be reasonably heard). *In either event, he abused his discretion.*” *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019) (emphasis added). As such, the Government’s invitation to rely on *Hamilton* is inapposite.

*The Plain Text of R.C.M. 1106A Permits a “Crime Victim” or “the Individual’s Lawful Representative or Designee” to Submit Matters—but not Others*

The Government ignored the plain text of R.C.M. 1106A to argue, “Any individual who meets these criteria [definition of ‘victim’] has rights as a victim and the person need not be a named victim on the charge sheet, or a named victim’s designee under Article 6b.” Answer at 8. However, the definition of “crime victim” contains an “or” that is disjunctive. As such, under the plain language of the rule—which is unambiguous on its face—either a victim “or” the victim’s

representative can present matters to the Convening Authority.<sup>1</sup> There is no language in R.C.M. 1106A that allows individuals who are not the victim or the designee to submit matters even if they have suffered some secondary impact.

This plain language reading makes sense because it serves as a limiting principle. If the Government had its druthers, it could argue in this case, or any future case, that the named victim herself, the victim's representative, *and* anyone else who may have suffered secondary impacts as a result of the commission of the offense could submit matters to the Convening Authority. This latter category is *not* enumerated in the plain text of R.C.M. 1106A. In this case, for example, it would not be difficult for the Government to argue that a grandparent was a "victim" of the child pornography offense because they suffered "emotional" harm—at a secondary level—as they watched their granddaughter go through this case. Therefore, they would be entitled to submit matters to the Convening Authority. Likewise, if an underage child pornography victim had to transfer schools, thereby losing her best friend, that best friend could also be considered a victim because of the "emotional" harm suffered. Thus, the best friend could also submit matters to the Convening Authority. Under the Government's theory, the Military Judge could designate a representative for the victim and then dozens of ancillary "victims" who are claiming "direct" harm could submit statements to the convening authority. This is not what R.C.M. 1106A envisions.

It is important to note that if the Government believed both parents were "victims" under the definition of the relevant R.C.M.s, then it would not have had to motion to the Military Judge

---

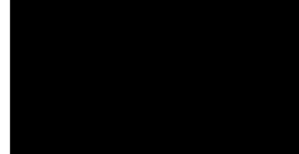
<sup>1</sup> Appellant recognizes that there could be some situation where there is a named victim and a court-appointed representative for the named victim who both submit matters, which would be consistent with the language and intent of R.C.M. 1106. In such case the "or" could be read as a conjunctive, but this would still not open the door for additional third parties to submit matters.

to appoint a victim representative. Likewise, the Government could have avoided this position by simply having the Military Judge appoint both parents as victim representatives.

This Court should find that the applicable rule is contained within the plain text of R.C.M. 1106A. Namely, that the actual victim of the crime and the victim's designated representative may present matters to the Convening Authority. However, the Government cannot pick a designated representative of their own choosing to represent the victim, but then solicit input from another individual who is not the crime victim—nor her designee—to submit matters to the Convening Authority. Such a reading of R.C.M. 1106 allows the Government to backdoor additional “victims” into the Convening Authority's decision making which R.C.M. 1106A does not permit.

**WHEREFORE**, TSgt Schauer requests that this Court return his case to the Judge Advocate General for new post-trial processing and convening authority action.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF Appellate  
Defense Counsel  
Appellate Defense Division





**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 6 October 2022.

Respectfully submitted,



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

