IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman First Class (E-3) **ELIJAH W. SCHINDLEY,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 2 Case No. ACM S32740 Filed on: 6 November 2022

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 60 days, which will end on 3 February 2023. The record was docketed with this Court on 6 October 2022. On the date requested, 120 days will have elapsed from the date this case was docketed.

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

Respectfully Submitted,

//signedASK6Nov22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 6 November 2022.

//signedASK6Nov22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

8 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ELIJAH W. SCHINDLEY, USAF *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32740 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 November 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman First Class (E-3) **ELIJAH W. SCHINDLEY,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 Case No. ACM S32740 Filed on: 23 January 2023

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 a second enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 5 March 2023. The record was docketed with this Court on 6 October 2022. From the date of docketing to this present date, 109 days have elapsed. On the date requested, 150 days will have elapsed from the date this case was docketed.

The appellant was sentenced to a reprimand, reduction to E-1, 180 days confinement and a bad conduct discharge for one charge and two specifications of indecent conduct in violation of Article 134, UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 8 appellate exhibits; the transcript is 234 pages. Appellant is not currently confined. Undersigned counsel has been working on other matters and has been unable to complete a brief on 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.

Respectfully Submitted,

//signedASK23Jan23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 23 January 2023.

//signedASK23Jan23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

25 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ELIJAH W. SCHINDLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32740 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 25 January 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman First Class (E-3) **ELIJAH W. SCHINDLEY,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 2 Case No. ACM S32740 Filed on: 23 January 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 4 April 2023. The record was docketed with this Court on 6 October 2022. From the date of docketing to this present date, 140 days have elapsed. On the date requested, 180 days will have elapsed from the date this case was docketed.

The appellant was sentenced to a reprimand, reduction to E-1, 180 days confinement and a bad conduct discharge for one charge and two specifications of indecent conduct in violation of Article 134, UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 8 appellate exhibits; the transcript is 234 pages. Appellant is not currently confined. Undersigned counsel has been working on other matters and has been unable to complete a brief on 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.

Respectfully Submitted,

//signedASK23Feb23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 23 February 2023.

//signedASK23Feb23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

24 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ELIJAH W. SCHINDLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32740 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 February 2023.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32740**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Elijah W. SCHINDLEY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 23 February 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Third) requesting an additional 30 days to submit Appellant's assignments of error. The court notes that the motion reflects a filing date of 23 January 2023, but a service date of 23 February 2023. The Government generally opposed the motion.

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. In the absence of specific government objections and in the interest of judicial economy, the court elects not to deny Appellant's motion despite its deficiencies. However, we expect counsel to exercise attention to detail, as the failure to do so, results in a misallocation of judicial time and resources.

Accordingly, it is by the court on this 27th day of February, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Third) is **GRANTED**. Appellant shall file any assignments of error not later than **4 April 2023**.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman First Class (E-3) **ELIJAH W. SCHINDLEY,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 2 Case No. ACM S32740 Filed on: 19 March 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 4 May 2023. The record was docketed with this Court on 6 October 2022. From the date of docketing to this present date, 164 days have elapsed. On the date requested, 210 days will have elapsed from the date this case was docketed.

The appellant was sentenced to a reprimand, reduction to E-1, 180 days confinement and a bad conduct discharge for one charge and two specifications of indecent conduct in violation of Article 134, UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 8 appellate exhibits; the transcript is 234 pages. Appellant is not currently confined. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not been able to draft the brief. Undersigned counsel is a reservist that works a full-time civilian job as an Assistant United States Attorney in the Southern District of

Indiana. Counsel is currently assigned approximately 25 cases as a federal prosecutor and has 2 other cases that are pending initial AOEs before this Court. One of the other pending AOEs and four civilian matters take priority over this case.

1. *United States v. Pagan*, ACM S32738 - The record of trial consists of 6 prosecution exhibits, 4 defense exhibits, and 16 appellate exhibits; the transcript is 276 pages. Undersigned counsel has conducted a thorough review of the ROT but needs additional time to draft the brief.

2. *United States v. Swanson*, 1:20-cr-77 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 22 March 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

3. *United States v. Payne*, 1:21-cr-253 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 29 March 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

4. *United States v. Henderson*, 1:20-cr-340 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 13 April 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

5. *United States v. Brady*, 1:20-cr-263 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 18 April 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

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

Respectfully Submitted,

//signedASK19Mar23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 19 March 2023.

//signedASK19Mar23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

20 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ELIJAH W. SCHINDLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32740 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 March 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman First Class (E-3) **ELIJAH W. SCHINDLEY,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Panel No. 2 Case No. ACM S32740 Filed on: 26 April 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 3 June 2023. The record was docketed with this Court on 6 October 2022. From the date of docketing to this present date, 202 days have elapsed. On the date requested, 240 days will have elapsed from the date this case was docketed.

The appellant was sentenced to a reprimand, reduction to E-1, 180 days confinement and a bad conduct discharge for one charge and two specifications of indecent conduct in violation of Article 134, UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 8 appellate exhibits; the transcript is 234 pages. Appellant is not currently confined. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not been able to draft the brief. Undersigned counsel is a reservist that works a full-time civilian job as an Assistant United States Attorney in the Southern District of

Indiana. Counsel is currently assigned approximately 20 cases as a federal prosecutor and has 2 other cases that are pending initial AOEs before this Court. One of the other pending AOEs and three civilian matters take priority over this case.

1. *United States v. Pagan*, ACM S32738 - The record of trial consists of 6 prosecution exhibits, 4 defense exhibits, and 16 appellate exhibits; the transcript is 276 pages. Undersigned counsel has conducted a thorough review of the ROT but needs additional time to draft the brief.

2. *United States v. Swanson*, 1:20-cr-77 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 9 May 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

3. *United States v. Tomlin*, 1:21-cr-328 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 23 May 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

4. *United States v. Driver*, 1:19-cr-336 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 1 June 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

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

Respectfully Submitted,

//signedASK26Apr23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 26 April 2023.

//signedASK26Apr23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

27 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ELIJAH W. SCHINDLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32740 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 April 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32740**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Elijah W. SCHINDLEY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 26 April 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **3 June 2023**.

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

FOR THE COURT

[redacted]E, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman First Class (E-3) **ELIJAH W. SCHINDLEY,** United States Air Force, *Appellant.*	**CONSENT MOTION TO VIEW SEALED MATERIAL** Before Panel No. 2 Case No. ACM S32740 Filed on: 7 May 2023

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3), and Rule 23.3(f) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the portion of Appellant's record of trial that is sealed: Prosecution Exhibit 2 entitled "Photograph of Victim."

The above referenced sealed material was produced or released to trial and defense counsel. In accordance with R.C.M. 1113(b)(3)(B)(1), which requires a colorable showing that examination of these materials is reasonably necessary to fulfill appellate counsel's responsibilities, undersigned counsel avers that viewing the referenced material is reasonably necessary to determine whether the Appellant is entitled to relief due to errors associated with the application, or lack thereof, of the cited documents during trial. A review of the entire record of trial is also 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(d), appellate defense 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 referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, good cause exists in this case since undersigned counsel cannot fulfill their duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial. Undersigned counsel also moves for appellate counsel for the government to be allowed to view these sealed materials as necessary to respond to Appellant's brief. The government does not oppose this motion.

WHEREFORE, Appellant respectfully requests the Court grant this motion.

Respectfully Submitted,

//signed//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

//signed//
MATTHEW L. BLYTH
Major, USAF
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 7 May 2023.

//signed//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

//signed//
MATTHEW L. BLYTH
Major, USAF
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32740**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Elijah W. SCHINDLEY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 7 May 2023, Appellant's counsel submitted a Consent Motion to Examine Sealed Material, requesting both parties be allowed to examine Prosecution Exhibit 2.

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

The court has considered Appellant's motion, case law, and this court's Rules of Practice and Procedure. The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 8th day of May, 2023,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibit 2**, subject to the following conditions:

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

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman First Class (E-3) **ELIJAH W. SCHINDLEY,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)** Before Panel No. 2 Case No. ACM S32740 Filed on: 25 May 2023

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

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

The appellant was sentenced to a reprimand, reduction to E-1, 180 days confinement and a bad conduct discharge for one charge and two specifications of indecent conduct in violation of Article 134, UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 8 appellate exhibits; the transcript is 234 pages. Appellant is not currently confined. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not been able to draft the brief. Undersigned counsel is a reservist that works a full-time civilian job as an Assistant United States Attorney in the Southern District of

Indiana. Appellant has been advised on undersigned counsel's civilian job and understands the limitations it places on how quickly he can complete the initial AOE. Appellant has further been advised on his right to a speedy appeal and consents to this EOT. Counsel is currently assigned approximately 20 cases as a federal prosecutor and has 2 other cases that are pending initial AOEs before this Court. One of the other pending AOEs and six civilian matters take priority over this case.

1. *United States v. Pagan*, ACM S32738 - The record of trial consists of 6 prosecution exhibits, 4 defense exhibits, and 16 appellate exhibits; the transcript is 276 pages. Undersigned counsel has conducted a thorough review of the ROT but needs additional time to draft the brief.

2. *United States v. Driver*, 1:19-cr-336 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 1 June 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

3. *United States v. Sanders*, 1:22-cr-171 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 7 June 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

4. *United States v. Stalanaker*, 1:21-cr-231 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 8 June 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

5. *United States v. Hancock*, USCA No. 22-2614 – This is a federal criminal case pending appeal in the 7th Circuit Court of Appeals. Undersigned counsel is ordered by the court to respond to the Appellant's brief by no later than 9 June 2023.

6. *United States v. Earthman*, 1:21-cr-249 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 21 June 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

7. *United States v. Cooks* - This is a federal criminal case in the Southern District of Indiana set for sentencing on 27 June 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

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

Respectfully Submitted,

//signedASK25May23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 25 May 2023.

//signedASK25May23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

30 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ELIJAH W. SCHINDLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32740 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 May 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman First Class (E-3) **ELIJAH W. SCHINDLEY,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 2 Case No. ACM S32740 Filed on: 25 June 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a seventh enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 2 August 2023. The record was docketed with this Court on 6 October 2022. From the date of docketing to this present date, 262 days have elapsed. On the date requested, 300 days will have elapsed from the date this case was docketed.

The appellant was sentenced to a reprimand, reduction to E-1, 180 days confinement and a bad conduct discharge for one charge and two specifications of indecent conduct in violation of Article 134, UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 8 appellate exhibits; the transcript is 234 pages. Appellant is not currently confined. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not been able to draft the brief. Undersigned counsel is a reservist that works a full-time

civilian job as an Assistant United States Attorney in the Southern District of Indiana. Appellant has been advised on undersigned counsel's civilian job and understands the limitations it places on how quickly he can complete the initial AOE. Appellant has further been advised on his right to a speedy appeal and consents to this EOT. Counsel does not anticipate needing any further EOTs on this case. Counsel is currently assigned approximately 20 cases as a federal prosecutor and has 1 other cases that are pending initial AOE before this Court. Six of the civilian matters take priority over this case. Although the other pending AOE does not take priority over this case, undersigned counsel recently completed an AOE in *United States v. Pagan*, ACM S32738 on 23 June 2023. In addition, undersigned counsel recently had a C.A.A.F. petition granted in *United States v. Cole*, Dkt. No. 23-0162/AF and will be required to submit a brief in that case.

1. *United States v. Cooks*, 1:21-cr-329 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 27 June 2023. Undersigned counsel is the prosecutor on this case and needs to prepare for and appear at the sentencing hearing.

2. *United States v. Hancock*, 22-2614 - This is a federal criminal case on appeal in the 7th Circuit. Undersigned counsel is the appellee on the case and is required to respond to appellant's brief by 24 July 2023.

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

Respectfully Submitted,

//signedASK25June23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 25 June 2023.

//signedASK25June23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
[redacted]

26 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ELIJAH W. SCHINDLEY, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32740 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 June 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32740**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Elijah W. SCHINDLEY	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 25 June 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh) 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 27th day of June, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED**. Appellant shall file any assignments of error not later than **2 August 2023**.

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

FOR THE COURT

[redacted]

SEAN J. SULLIVAN, Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ELIJAH W. SCHINDLEY** United States Air Force, *Appellant*	)	No. ACM S32740 31 July 2023

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

Assignments of Error

I. WAS A1C SCHINDLEY'S RIGHT TO REMAIN SILENT VIOLATED WHEN THE MILITARY JUDGE INQUIRED INTO AGGRAVATION EVIDENCE DURING THE *CARE* INQUIRY?

II. WAS A1C SCHINDLEY'S SENTENCE OF 180 DAYS CONFINEMENT AND A BAD CONDUCT DISCHARGE UNDULY SEVERE?

Statement of the Case

On 22 July 2022, Airman First Class (A1C) Elijah W. Schindley was tried by a military judge sitting as a special court-martial at Sheppard Air Force Base, Texas. Record of Trial (ROT) Vol. 1, Entry of Judgement. In accordance with his pleas, the military judge found him guilty of one charge and two specifications of violations of Article 134 of the Uniform Code of Military Justice (UCMJ). *Id.* The military judge sentenced A1C Schindley to a total of 180 days confinement, a reprimand, reduction to E-1, and a bad conduct discharge (BCD). R. at 223. The Convening Authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Action.

Statement of Facts

A1C Schindley grew up under very difficult circumstances that involved being physically, emotionally, mentally, and verbally abused by his father and stepmother. R. at 198. Specific instances of abuse included being hit with baseball bats and hangers, being denied food for a long period of time, and being locked in a closet. R. at 198-99. This culminated in him running away at the age of 17 and being homeless for a period of time until a coworker allowed him to stay with her. R. at 199. Eventually, A1C Schindley reconnected with his biological mother and moved back in with her when he was 18. *Id.*

Shortly after that he met C.K. *Id.* They began a monogamous romantic relationship that was supported by both of their parents. R. at 200-201. A1C Schindley also joined the Air Force around this time. R. at 200. Over time, the relationship became sexual with C.K. being the first to make that suggestion. *Id.* On 4 November 2021, A1C Schindley and C.K. engaged in both oral sex and vaginal intercourse. Pros. Ex. 1. This occurred in San Antonio, TX after A1C Schindley's graduation from Basic Military Training. *Id.* A1C Schindley was 18 years old and C.K. was 15 years old when this occurred. *Id.*

On 25 November 2021, C.K. asked A1C Schindley if he would like to see a "topless" photo of her. *Id.* A1C Schindley responded that he would but only if C.K. was comfortable doing it. *Id.* C.K. subsequently sent him a photo showing one of her breasts fully visible and the other partially visible in the frame. *Id.* At the time of this incident, A1C Schindley was 19 years old and C.K. was 15 years old. *Id.*

On 2 March 2022, A1C Schindley was interviewed by Air Force Office of Special Investigations (AFOSI) special agents. *Id.* A1C Schindley fully cooperated with investigators to include admitting his misconduct, providing information regarding his social media accounts, and contact information for various witnesses AFOSI could interview regarding these allegations. *Id.*

Charges were preferred against A1C Schindley on 28 April 2022. ROT Vol. 1, Charge Sheet. On 13 May 2022, A1C Schindley waived his right to a preliminary hearing. App. Ex. II. On 24 May 2022, a plea agreement was signed in this case. App. Ex. IV. In exchange for his plea of guilty, A1C Schindley received the following consideration: (1) dismissal of two preferred Specifications, (2) referral of the remaining Specifications to a special court-martial, and (3) a minimum of 90 days and a maximum of 180 days confinement for each remaining count to run concurrently. *Id.* On 2 June 2022, the charges were referred to a special court-martial. ROT Vol. 1, Charge Sheet.

On 21 July 2022 (less than three months after charges were preferred), A1C Schindley pled guilty to the charged offenses. R. at 31. During the *Care* inquiry, the military judge asked details about the sexual acts after A1C Schindley already explained to the military judge that C.K. performed oral sex on him, he performed oral sex on her, and that they had vaginal intercourse. R. at 77. The military judge asked, "The vaginal intercourse, be precise. What happened? Who penetrated who? How did that occur? What did you penetrate her with if it was you penetrating her?" *Id.* The military judge further demanded elaboration on the oral sex. R. at 78. Despite these details, the military judge continued to request more information on

the sexual acts by asking A1C Schindley, "Did you have an erection when you were engaging in sexual acts with her." *Id.* He also asked him (1) if he ejaculated, (2) if he wore a condom, and (3) whether he ejaculated into the condom. *Id.*

The military judge continued on this road. Prior to continuing, the military judge conceded to A1C Schindley, "[Y]ou've admitted to me a couple things that bear on the question of indecency." R. at 79-80. Despite that concession, the military judge continued to elicit facts outside of what was required for the elements. One example was the military judge asking A1C Schindley, "why do you think children are unable to give consent?". R. at 80. After A1C Schindley answered this question, he continued onward, asking "do you feel like you exploited the distinction in where you were in life and where she was?" R. at 81. The military judge also asked whether the fact that A1C Schindley received parental permission made him feel as if "it wasn't as much of sexual abuse of a child". R. at 84.

At one point the military judge elaborated on his reasons for asking such questions: "I'm attacking these questions from different angles to ensure that we have a complete understanding of one another. It's why you're placed under oath. It's why I'm allowed to ask these questions. After consulting with your attorneys, you're allowed *and encouraged to answer if you choose to maintain your plea*." R. at 85 (emphasis added). Later, the military judge asked him, "What do you think happens if children are treated as sexual objects by adults in society?" R. at 86. The military judge later asked A1C Schindley to speculate on victim impact by asking him "What has been the consequence of this coming to light for (C.K.)" R. at 87. When A1C Schindley stated he could not answer that question because he was not sure, the

military judge stated, "I take it from that there has been some fallout or separation between you two?" R. at 88. When trial defense counsel tried to speak during this line of questioning, the military judge responded, "It's not going to work for supporting the plea. You can answer the question, but it has to come from him." *Id.* Trial defense counsel attempted to tell the military judge that A1C Schindley did not have personal knowledge of this and there was no victim impact statement submitted. R. at *Id.* The military judge however, continued further:

"Well, he was talking to her all the time. He's not talking to her now, or he is talking to her now, and it connects back to whether or not this is the kind of behavior that is of a nature to bring discredit upon the armed forces if there are consequences and those consequences were foreseeable. So that's what I'm connecting back to. The stipulated facts are that they talk all the time.
He answered in his prepared back to me that he had spent many of his phone calls during training on conversations involving her. His misconduct has since been investigated. He's pleading guilty to it now. So I'm not positive how it would be beyond his capacity to answer the question of whether or not there was some fallout or separation between them two today. I'm not speaking about anything further than that, Defense Counsel.
So I'll pose the question again. And if he can't answer it, I'll take that under consideration in determining whether or not I'm going to accept his plea.
So the immediate question is simply, has there been some fallout or separation between you two *since the conduct alleged in Specification 1 of the Charge?* R. at 88-89 (emphasis added).

Ultimately, A1C Schindley answered this question stating that he had still been in contact with C.K. and her family. R. at 89. He added that she never brought up anything that's negatively impacted her but that it was more her worrying about all that has happened to him with this entire process. *Id.* At that point the military judge moved on to a different line of question regarding whether the conduct was service discrediting.

During the *Care* inquiry for Specification 2, the military judge asked A1C Schindley, "How often did you look at this topless photo of the alleged victim between on or about 4 November 2022 and on or about 3 January 2022." R. at 110. A1C Schindley answered, "maybe once a month." *Id.* After discovering that AFOSI recovered the image on 2 March 2022, the military judge asked A1C Schindley, "even though the allegation in this case focuses from on or about 4 November 2022 to on or about 3 January 2022, you're admitting to me that you possessed it between 25 November 2021 up until 2 March 2022;" R. at 112. He further inquired into the number of times A1C Schindley viewed the image, asking "between 25 November 2021 when you first got it and 3 January 2022 when Specification 2 of the charge ends…How many times do you think you might have looked at it and accessed it?" *Id.*

During presentencing, the government presented (1) a stipulation of fact, (2) a photograph of C.K., and (3) a personal data sheet. Pros. Ex. 1-3. There was no disciplinary history to present as A1C Schindley did not get into trouble in his Air Force career beyond the charged offenses. There was no victim impact statement from C.K. During A1C Schindley's case, trial defense counsel presented a verbal unsworn statement. R. at 198-202.

During the sentencing argument, the government piggybacked off the themes highlighted by the military judge during the *Care* inquiry. The government argued that A1C Schindley was an adult "who manipulated a child for his sexual desire and gratification." R. at 203. The government attempted to justify this by focusing on aspects of their relationship that happened after the charged offenses. R. at 204. The

government also mischaracterized the facts to make it appear that A1C Schindley was the one who initiated the sexual conduct by stating "the accused planned his opportunity to have sex with a child." R. at 205. The government also stated that A1C Schindley "admits that children forming sexual relationships with adults causes lasting physical and mental harm to them." R. at 206-07. Trial defense counsel did not object during argument and the military judge did not intervene these lines of argument.

The government asked for a sentence of 180 days confinement and a bad conduct discharge. R. at 208. Trial defense counsel asked for a sentence of 90 days confinement. R. at 217. The military judge sentenced A1C Schindley to the following: (1) to be reprimanded, (2) reduction to E-1, (3) 180 days confinement for Specification 1 and 90 days for Specification 2 to run concurrently, and (4) a bad conduct discharge. R. at 223.

I.

THE MILITARY JUDGE VIOLATED A1C SCHINDLEY'S CONSITUTIONAL RIGHT TO REMAIN SILENT BY ASKING QUESTIONS BEYOND WHAT WAS NECESSARY TO ESTABLISH THE ELEMENTS OF THE OFFENSE DURING THE CARE INQUIRY.

Standard of Review

Whether a judge erred by exceeding the bounds of a guilty plea inquiry is reviewed under a plain error standard. *United States v. Miller*, 23 M.J. 837, 839 (C.A.A.F. 1987). Under a plain error analysis, the appellant must show that there was an error, that it was plain or obvious, and that it materially prejudiced a

substantial right. *United States v. Carpenter*, 51 M.J. 393, 396 (C.A.A.F. 1999). If there is a plain error is a constitutional error, the Government bears the burden of convincing the court beyond a reasonable doubt that the error did not prejudice the appellant. *Id.*

Law

The right against self-incrimination applies even during the penalty phase of a trial. *Estelle v. Smith*, 451 U.S. 454, 368-89 (1981). This applies in a military context as well regarding whether an accused is required to provide damaging information that has the potential to increase his sentence. "Certainly, the Manual for Courts-Martial does not contemplate that an accused, after he has been convicted, may be forced to provide damaging information relevant to his sentencing; an accused has the option of whether to make a statement – sworn or unsworn – or to remain silent." *United States v. Sauer*, 15 M.J. 113, 117 (C.M.A. 1983.)

The right to remain silent also applies during the *Care* inquiry. "The accused, in pleading guilty, waived his Fifth Amendment right to remain silent only to the extent necessary to establish his guilt and the providence of his plea. He did not agree to be a witness against himself in all other respects." *United States v. Miller*, 23 M.J. 837, 839 (C.G.C.M.R. 1987). When a judge departs from the proper scope of a plea inquiry "by asking the complained of questions for sentencing purposes to be so antithetical to the basic trial requirements that it affected the integrity and fairness of the judicial process and, thus, constituted plain error." *Id.* The bottom line is the providence inquiry may not be used as a tool by the military

judge or the Government to elicit responses that only serve to magnify the Government's case in aggravation. *United States v. Chambers*, 2006 CCA LEXIS 216 *3 (N.M. Ct. Crim. App. 3 Aug. 2006) (unpublished) citing *Sauer*, 15 M.J. at 114.

To find A1C Schindley guilty of the offense, the following elements are required: (1) he engaged in certain conduct, (2) that the conduct was indecent, and (3) under the circumstances the conduct was of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States* (2019 ed.)(MCM) pt. IV, ¶ 106b.

Analysis

The military judge committed plain error by asking questions in the *Care* inquiry that did not pertain to establishing a provident guilty plea but instead went toward aggravation evidence. In doing so, he violated A1C Schindley's right to remain silent. Since this is an error of constitutional dimensions, it is the government's burden to demonstrate beyond a reasonable doubt that such error is harmless. It is a burden they cannot meet.

A military judge can certainly ask follow-up questions to an accused to ensure that a guilty plea is provident. However, the military judge here went beyond that. Starting with Specification 1, A1C Schindley admitted the following in his statement of why he was guilty: (1) he had sex with C.K. that consisted of mutual oral sex and vaginal intercourse, (2) that prior to the relationship turning sexual he was aware of the age difference and was shocked but engaged in sexual activity, and (3) that it reflects poorly in the military for him to have sex with a 15-year-old when he was

almost 19. R. at 71-73. This covered the basic elements of the offense which are that (1) he engaged in certain conduct, (2) that the conduct was indecent, and (3) under the circumstances the conduct was of a nature to bring discredit upon the armed forces. It was certainly appropriate for the military judge to ask additional questions to ensure that the elements were met, and that the plea was provident but the questioning by the military judge went beyond that scope.

As a starting point, after A1C Schindley already told the military judge about the sexual acts, the military judge unnecessarily inquired into details by asking: (1) the precise nature of who penetrated who during the vaginal intercourse and what A1C Schindley penetrated C.K. with if it was him penetrating him, (2) asking A1C Schindley if he had an erection during the encounter, (3) whether A1C Schindley wore a condom, and (4) whether A1C Schindley ejaculated and if he ejaculated into the condom. R. at 77-78. These questions were already unnecessary and outside the bounds of establishing a provident plea. However, the military judge took things even further as the questioning went on.

Prior to the next line of questioning, the military judge conceded that A1C Schindley, "admitted to me a couple things that bear on the question of indecency" R. at 80, which was one of the elements of the offense. He still asked A1C Schindley what made the conduct indecent and A1C Schindley stated it was the age difference. *Id.* At that point, the elements were clearly met but the military judge continued to ask questions that were geared more toward aggravation. As an example, he asked A1C Schindley if he felt like he exploited the distinction in where he was in life compared to where she was in regard to their sexual relationship. R. at 81. There is

no requirement that A1C Schindley "exploit" C.K. to prove the elements of the offense. In fact, the evidence of the case demonstrates the opposite. There was no evidence that A1C Schindley exploited C.K. and the only one who initiated any sexual contact was C.K. The only reason the military judge would ask this question (after the elements of the offense were met) would be to search for aggravation evidence.

Unfortunately, the military judge's inappropriate line of questioning did not end there. After A1C Schindley on multiple occasions admitted that he knew his actions were wrong and unlawful despite having parental permission, the judge continued asking about that and even went as far as asking A1C Schindley if the parental permission made him "feel like it wasn't as much of sexual abuse of a child". R. at 84. This inference is again, one not supported by the evidence as there is no support for the notion that A1C Schindley sexually abused C.K.

The military judge then made a statement that sent a clear message to A1C Schindley that he had no choice but to answer the judge's question regardless of whether they were appropriate. Specifically, he said "I'm attacking these questions from different angles to ensure that we have a complete understanding of one another. It's why you're placed under oath. It's why I'm allowed to ask these questions. After consulting with your attorneys, you're allowed and encouraged to answer if you choose to maintain your plea." This is problematic for multiple reasons.

First, a *Care* inquiry is not designed for a military judge and an accused to "have a complete understanding" of each other. It's designed to establish the elements of the offense. "The accused, in pleading guilty, waived his Fifth Amendment right to remain silent *only to the extent necessary to establish his guilt*

and the providence of his plea. He did *not* agree to be a witness against himself in all other respects." *Miller*, 23 M.J. at 839. (emphasis added). The military judge either did not understand or knowingly went outside of the scope of what is required in a *Care* inquiry by requiring a "complete understanding" of one another. What is more problematic is the second part of the judge's statement by stating A1C Schindley is encouraged to answer if he wished to maintain his plea. Given the next line of questions, this sent the message to A1C Schindley that he had to be a witness against himself in every respect, even if the questioning went beyond establishing the providency of the plea.

The next question the military judge asks A1C Schindley what he thinks happens if children are treated as sexual objects by adults in society. R. at 86. Not only does this question grossly mischaracterize the facts of this case, it's outside the scope of what is necessary to establish a provident plea. In *United States v. Price*, 76 M.J. 136, 138 (C.A.A.F. 2017), the court was clear that there are "established parameters beyond which a military judge's questions must not fall in order to protect the rights of an accused who is pleading guilty." The court continued by noting that while sworn admissions made during a *Care* inquiry can be admissible for sentencing purposes as aggravation evidence, the use must be restricted if the military judge goes far afield during the inquiry. *Id.* at 139. As an example, the court cited uncharged conduct that is not closely connected with the offense that an accused is pleading guilty to. *Id.* The key is whether the questions are tethered to the specific conduct that an accused is pleading guilty to. This was not the case here. What happens in general if children are treated as sexual objects by adults in society has

nothing to do with whether A1C Schindley established a factual basis for the offense he is pleading guilty to (after all, only his specific conduct matters for that). A1C Schindley, believing he had no choice but to answer, responded by stating it can lead to mental and physical problems for children. *Id.*

The military judge's next line of questioning went directly toward victim impact (something notably absent from the case). He asked A1C Schindley to speculate what has been the consequence of this coming to light has been for C.K. R. at 87. A1C Schindley rightfully pointed out in response that he cannot answer that question because he was not sure. R. at 88. The military judge then asked if there had been some "fallout or separation" between A1C Schindley and C.K. *Id.* At this point, the military judge is attempting to elicit facts that happened well after the charged offense and has no bearing whatsoever on guilt. A1C Schindley's trial defense counsel attempted to intervene in order to end this line of questioning but the military judge continued by noting the following: (1) whether he talks to her or not somehow relates to service discrediting conduct if there are consequences and they were "foreseeable", (2) he's not positive how it would be beyond A1C Schindley's capacity to answer the question of whether or not there was some fallout or separation between them today, and (3) that he will not speak on it further and that if A1C Schindley can't answer the question he will take it under consideration when determining whether or not to accept his plea. R. at 88-89.

At this point, the military judge's questioning has gone off the rails. No longer is it about establishing the elements of an offense but about the status of their relationship well after the offenses occurred in some vague attempt to establish that

the offense was service discrediting. A1C Schindley answered multiple times why the offense itself was service discrediting and having him speculate as to victim impact based on the status of the relationship after it occurred made it so that he was forced to be a witness against himself for something outside of the elements of the offense. That is clearly prohibited. A1C Schindley ultimately answered the question noting that he is still in contact with her but that she never brought up anything that negatively impacted her. R. at 89.

While the *Care* inquiry for Specification 2 was not as egregious as Specification 1, it also contained its share of inappropriate inquiry from the military judge. These included multiple questions regarding how often A1C Schindley viewed the image both during and after the charged timeframe. This line of questioning was geared solely toward aggravation evidence. A1C Schindley was not charged with viewing the image. He was charged with possessing it and that offense was complete once he voluntarily received the image. It is also important to note that the military judge asked these questions after letting A1C Schindley know that if he did not answer all his questions, he would risk having his guilty plea rejected.

There is no question that the judge erred in how he handled the *Care* inquiry. The question before the court is whether it rose to the level of plain error. The answer is yes. The first question is whether the military judge's line of questioning went beyond what was necessary to establish a factual predicate for the charged offenses and forced A1C Schindely to effectively become a witness against himself in other respects. *See Miller*, 23 M.J. at 839. He did so in multiple ways: (1) by asking explicit details about the sexual acts that only served to magnify the government's case, (2)

asking A1C Schindley if he exploited the difference in where he was in life when having sex with C.K., (3) asking A1C Schindley if parental permission made it feel less like he was sexually abusing a child, (4) asking A1C Schindley a general question about what happens when adults view children as sexual objects, (5) asking A1C Schindley to speculate about non-existent victim impact, (6) asking A1C Schindley if he was still in contact with C.K. or had a separation, and (7) how often he viewed an image for which he was only charged with possession. These questions were unnecessary, asked A1C Schindley to speculate about matters he had no knowledge of, and served to magnify the government's case against him. The cumulative effects of these repeated questions that went outside the scope of the *Care* inquiry amounted to plain error.

The other aspect that makes this case amount to plain error was the coercive nature of the questioning from the military judge. There were multiple instances where A1C Schindley was understandably reluctant to answer an inappropriate question from the military judge. Perhaps if the military judge allowed him to remain silent in those instances, it could have alleviated some of the error. Instead, the military judge doubled down. On two occasions (including one where trial defense counsel intervened), the military judge hinted that he would not accept A1C Schindley's plea if he did not answer what were ultimately improper questions. In *Miller*, the military judge gave standard instructions about waiving the right to self-incrimination to answer his questions and the court held that in light of the inappropriate questions, that was enough to make the accused and his counsel believe they had no choice but to answer the questions. *Id.* at 839. In this case, the military

judge went outside the standard instructions and threatened A1C Schindley twice regarding whether or not he would accept his plea.

The facts above demonstrate that the military judge's error was plain and obvious, and it materially prejudiced a substantial right, which in this case is A1C Schindley's right to remain silent. This plain error is of a constitutional dimension. As a result, the government bears the burden of proving beyond a reasonable doubt that the error was harmless. *United States v. Jones,* 78 M.J. 37, 45 (C.A.A.F. 2018) *(citing United States v. Payne,* 73 M.J. 19, 25-26 (C.A.A.F. 2014)) ("When a constitutional issue is reviewed for plain error, the prejudice analysis considers whether the error was harmless beyond a reasonable doubt."). This is something they cannot do. First, there was significant information that came out during the *Care* inquiry in response to the military judge's inappropriate questions that would not have otherwise been in evidence. Examples of this include: (1) A1C Schindley's speculation as to what happens when adults view children as sexual objects, (2) the number of times he viewed a topless photo of C.K., (3) the explicit details of the sexual acts, and (4) the fact that he was still in contact with C.K. even after he was investigated and charged for the offenses. The first one is especially problematic as the government noted it in their sentencing argument, "[T]he accused admits that children forming sexual relationships with adults causes lasting physical and mental harm to them." R. at 207.

The military judge likely considered this inappropriate evidence when deciding the sentence as the *Care* inquiry is something that can be considered in deciding an appropriate sentence. The prejudice is also manifest in the ultimate sentence that

A1C Schindley received which was 180 days confinement and a bad conduct discharge, which was the maximum authorized under the plea agreement and the exact sentence the government asked for. Undersigned counsel will discuss more below why this was an unduly severe sentence, but this case was devoid of any aggravating evidence except for what the military judge gathered in the *Care* inquiry. The offenses involved a small age difference between A1C Schindley and C.K. and there is no evidence that the acts had a negative impact on her. In addition, A1C Schindley had no misconduct outside of this offense. Therefore, the government cannot meet its burden of demonstrating that the plain error was harmless beyond a reasonable doubt.

A1C Schindley took full responsibility for the offenses he pled guilty to. While it was certainly appropriate for him to give up his right to remain silent to establish a provident guilty plea, he did not agree to become a witness against himself in every other respect. Unfortunately, that did not happen in this case. The court should reassess the sentence considering these serious errors and set aside the bad conduct discharge portion.

WHEREFORE, A1C Schindley respectfully requests that this Honorable Court set aside the bad conduct discharge portion of his sentence.

II.

A1C SCHINDLEY'S SENTENCE WAS UNDULY SEVERE.

Standard of Review

This Court reviews sentence appropriateness *de novo* pursuant to its Article 66, UCMJ authority. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

"Congress has vested responsibility for determining sentence appropriateness in the Courts of Criminal Appeals. The power to review a case for sentence appropriateness, which reflects the unique history and attributes of the military justice system, includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001) (internal citations omitted). As the Court of Appeals for the Armed Forces has made clear, "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citations and internal quotations omitted). This provision "requires that the members of [the Courts of Criminal Appeals] independently determine, in every case within [their] limited Article 66, U.C.M.J., jurisdiction, the sentence appropriateness of each case [they] affirm." *Id*. at 384-85 (alterations in original) (citations and internal quotations omitted).

In determining sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Further, Courts of Criminal Appeals have the discretion to consider and compare other court-martial sentences when that court is

reviewing a case for sentence appropriateness and relative uniformity. *See United States v. Wacha*, 55 M.J. 266, 268 (C.A.A.F. 2001).

Analysis

A1C Schindley's sentence that includes 180 days confinement, and a bad conduct discharge is unduly severe when considering the nature and seriousness of the offense, his personal characteristics, and his record of service. *See Anderson*, 67 M.J. at 705.

Starting with the nature and seriousness of the offense, the offense is devoid of any aggravating factors. The most serious charge against A1C Schindley was Specification 1 where he had sex with C.K. when he was 18 years old, and she was 15 years old. R. at 74. If the incident happened 9 months later, it would not have even been a crime. In addition, both A1C Schindley and C.K. were similarly situated as the age difference between them is the same as a high school sophomore and someone who just recently graduated high school. A sentence of 180 days confinement and a bad conduct discharge may have been appropriate where there was a more significant age difference between A1C Schindley and C.K. or some other aggravating factor such as obstruction of the investigation. In this case, there was none of that.

First, A1C Schindley's relationship with C.K. was consensual and A1C Schindley received permission from her parents prior to dating. Pros. Ex. 1. A1C Schindley's mother also granted him permission. *Id.* Although parental permission is not a defense to the crime, it is certainly mitigation evidence as A1C Schindley was barely an adult himself when the crime occurred. Regarding both offenses, C.K. was the one who initiated the contact. Pros Ex. 1. She was the one who approached A1C

Schindley about having sex initially. R. 200. She was also the one who asked him if she could send him a "topless" photo and he agreed if she was comfortable with it. Pros Ex. 1. Ultimately, A1C Schindley had the responsibility to decline such offers, but the context is important in determining whether his sentence was unduly severe.

A second factor to consider is that there was no evidence of the relationship having a negative effect on C.K. For example, there was no victim impact statement and C.K. did not testify at sentencing. This indicates that the sexual relationship did not have a negative impact on her. The military judge however, appeared to misapprehend the offense by adding aggravation evidence to the offense during the CARE inquiry that was not present in the case. Undersigned counsel explained these errors in detail above and will not rehash them here. However, the errors the military judge committed in the CARE inquiry are also relevant for determining whether A1C Schindley's sentence was unduly severe. A1C Schindley should have been sentenced for what he did, not what the military judge incorrectly believed he did.

Finally, there was no evidence that A1C Schindley utilized his age or his Air Force status to manipulate C.K. into having a sexual relationship with her. As noted above, all the evidence points to C.K. being the one to initiate the sexual relationship. It is also noteworthy that they were in a monogamous romantic relationship prior to A1C Schindley joining the Air Force. If A1C Schindley used his position as a member of the Air Force or some power difference between the two to have a sexual relationship with C.K. perhaps 180 days confinement and a bad conduct discharge would be appropriate. But that is not the case.

The unduly severe sentence also fails to consider A1C Schindley's personal characteristics. A1C Schindley had a tremendously difficult childhood. He had an abusive father and stepmother who would beat him with hangers and bats, locked him in a closet for long periods of time and denied him food. R. at 198-99. Things were so bad that A1C Schindley ran away and found himself homeless at the age of 17. This type of situation is difficult for anyone to comprehend (much less overcome), especially as a teenager. Thankfully, he eventually moved past this stage of his life after reconciling with his mother. R. at 199.

It was three months after this reconciliation that he met C.K. and began a relationship with her. *Id.* He stated that what drew him to C.K. was that she made him feel like his life had value. R. at 200. In contrast to his father who treated him like "trash", C.K. made him feel like he was somebody and his life mattered. *Id.* Ultimately, A1C Schindley was a broken person through the abuse he suffered that was not his fault. Although it does not excuse his actions, it paints a picture of why he ended up in a sexual relationship with C.K. despite knowing it was against the law. This background is certainly mitigation evidence, but it does not appear to have been considered by the military judge. Based on the *Care* inquiry, it appeared the military judge had a different picture of A1C Schindley that was not supported by the evidence. This was likely why he gave A1C Schindley the maximum sentence he was permitted to give him under the plea agreement.

Finally, although A1C Schindley's military career was short, he had no misconduct outside of the charged offenses and his conduct after investigation was exemplary. The government's sentencing case was sparse and contained only the

stipulation of fact, the "topless" photograph of the victim and the PDS. This was because outside of this offense, A1C Schindley stayed out of trouble. What was even more important is that he took responsibility at the earliest moment possible. When confronted by AFOSI, he confessed his conduct and cooperated fully to include giving access to his social media profile and contact information for other witnesses. Pros. Ex. 1. He was not required to do any of that and had the legal right not to. However, he chose to cooperate fully, but his unduly severe sentence did not give appropriate weight to that.

His acceptance of responsibility did not end with AFOSI. It continued right after he had charges preferred against him. On 28 April 2022 AB Schindley had charges preferred. ROT Vol. 1, Charge Sheet. Two weeks later, on 13 May 2022, A1C Schindley waived his right to an Article 32 hearing. App. Ex. II. This was again something he was not required to do but he waived it anyway. But it did not stop there. A week later, A1C Schindley submitted a plea agreement that was signed by the convening authority on 24 May 2022. App. Ex. IV. Finally, he accepted responsibility by pleading guilty on 21 July 2022 and was sentenced the following day. ROT Vol. 1, Entry of Judgment.

The speed at which A1C Schindley accepted responsibility for his actions and resolved his case is significant. He had every right to slow down and weigh his options, but he chose to do the right thing. As a result, the case went from preferral to judgment in less than three months. It is difficult to imagine what more A1C Schindley could have done considering what he was facing. This conduct should have weighed in his favor when the military judge decided his sentence. It appears that it

did not as the military judge gave him the maximum sentence that he was allowed to give under the terms of the plea agreement.

Given the whole context of the nature and seriousness of the offense, the record of trial, and A1C Schindley's personal characteristics and record of service, his sentence was unduly severe. *Anderson*, 67 M.J. at 705. His conduct certainly required punishment but not 180 days confinement and a bad conduct discharge. A sentence of 90 days confinement (the low end of confinement authorized by the plea agreement) without a punitive discharge was a more appropriate sentence. Unfortunately, A1C Schindley already served his full sentence so the only relief he can get is on the punitive discharge. 180 days confinement was ultimately more than enough time to send the message to A1C Schindley that his conduct was inappropriate and warranted a serious consequence. Based on all the facts of this case, a punitive discharge on top of 180 days confinement is simply unduly severe. The court can correct that by reassessing A1C Schindley's sentence.

WHEREFORE, A1C Schindley respectfully requests that this Honorable Court set aside the bad conduct discharge portion of his sentence.

Respectfully submitted,

[redacted]
ABHISHEK S. KAMBLI, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 31 July 2023.

Respectfully submitted,

[redacted]
ABHISHEK S. KAMBLI, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

30 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman First Class (E-3) ELIJAH W. SCHINDLEY, USAF *Appellant.*	)))))))))	ANSWER TO ASSIGNMENTS OF ERROR ACM S32740 Panel No. 2

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

ISSUES PRESENTED

I.

WAS A1C SCHINDLEY'S RIGHT TO REMAIN SILENT VIOLATED WHEN THE MILITARY JUDGE INQUIRED INTO AGGRAVATION EVIDENCE DURING THE CARE INQUIRY?

II.

WAS A1C SCHINDLEY'S SENTENCE OF 180 DAYS CONFINEMENT AND A BAD CONDUCT DISCHARGE UNDULY SEVERE?

STATEMENT OF THE CASE

The United States generally accepts Appellant's Statement of the Case with the clarification that both specifications were charged as indecent conduct under Article 134, Uniform Code of Military Justice (UCMJ).

STATEMENT OF FACTS

In the opening moments of Appellant's court-martial, the military judge detailed the R.C.M. 802 conference held between him, the trial counsel, and Appellant's trial defense counsel prior to the start of the hearing. (R. at 9-19.) Specifically, the military judge highlighted issues with the two specifications that he felt would require added inquiry during a guilty plea if, in

fact, there would be a guilty plea. (R. at 14.) Particularly with Specification 2, the military judge mentioned the differences between "child erotica" and "child pornography" and that he "signaled to the parties that this was going be lengthy conversation that was required consistent with R.C.M. 910 when we came together, and I needed the accused oriented to those issues because I was going to, as I must being the military judge, rely on his understanding and his responses in determining whether or not there is a provident plea" to Specification 2. (R at 16-17.) The military judge continued:

> As an aid to the parties in orienting them to some of the issues that the Court had identified and some of the cases that the Court had relied upon in putting together tailored instructions and definitions for Specification 2 of the charge, I also gave them citations to different cases that we'll talk about as we move along here today. But I gave them some of the different cases that they may want to refer to so that they are oriented for my questioning and so the accused has the benefit of his counsel's advice on these matters.

(R. at 16.)

As part of his plea agreement, Appellant entered into a Stipulation of Fact. (Pros. Ex. 1.) In it, Appellant agreed that he intended to plead guilty to engaging in sexual acts with a minor and possessing a topless photo of a minor. The minor involved in both specifications was CK who was 15 years old during the charged timeframe. (Id.)

Per the Stipulation of Fact, Appellant and CK met in their hometown in Ohio. During the summer of 2021, the two began a romantic relationship that involved texting. A few weeks into the relationship, Appellant spoke to CV's parents about dating CK. Her parents agreed. (Id.)

Specification 1 states that Appellant engaged in sexual acts with a minor from between on or about 4 November 2021 and on about 3 January 2022. On 4 November 2022, CK, along with Appellant's mother and sister, attended Appellant's basic training graduation in San Antonio, Texas. (Pros. Ex. 1 at 2.) After Appellant told his mother that he wanted to have

sexual intercourse with CK, Appellant's mother left Appellant and CK alone in a hotel room so that could have sex. Appellant performed oral sex on CK, CK performed oral sex on Appellant, and the two had vaginal intercourse. At the time, CK was 15 years old, and Appellant was 18 years old. (Id.)

Also per the Stipulation of Fact, Appellant was aware of CK's age at the time of the sexual acts, and he knew that the sexual acts with CK were legally and morally wrong due to her age. The Stipulation of Fact continued, "These acts were indecent because sexual acts with a minor are grossly vulgar to common propriety and tended to excite [Appellant's] sexual desire. [Appellant] had no legal justification for engaging in sexual acts with [CK] and could have avoided doing so. [Appellant] was aware that sexual activity with [CK], a minor, harms the reputation of the service and lowers it in public esteem, and therefore was conduct of a nature to bring discredit upon the armed forces." (Id. at 2.)

The military judge then conversed with both the trial counsel and trial defense counsel regarding the use of the word "minor," which involves a person under 18, versus "child," which means a person under the age of 16. (R. at 47.) The military judge noted the age of consent for sexual conduct under the Uniform Code of Military Justice was 16 years old. (R. at 47-48.) Considering this, the military judge asked Appellant and his counsel, "is there any quarrel from the defense with this Court interpreting, where necessary to make sense of paragraphs 4, 5, and 6 [of the Stipulation of Fact], the phrasing 'minor' as 'child,' meaning a person under the age of 16?" (R. at 47.) Appellant's trial defense counsel responded, "No, Your Honor."

Specification 2 stated that Appellant committed indecent conduct by possessing a topless photo of a minor between on or about 4 November 2021 and on about 3 January 2022. Per the Stipulation of Fact, Appellant and CK communicated on various texting applications, including

Snapchat. (Pros. Ex. 1 at 2.) On 25 November 2021, CK asked Appellant if he would like to see a topless photo of her. Appellant responded that he would but only if CK was comfortable with sending one. The Stipulation of Fact describes the photo as follows:

> The photo depicts [CK] in a pair of New York Yankees athletic pants, pulled up past her belly button. [CK] is not wearing a top or bra. One of her breasts is fully visible, while her other breast is only partially in the frame. The photo appears to be a "selfie," or self-portrait photograph, taken by [CK]. This photograph was found during the Department of Defense Cyber Crime Center's analysis of an iPhone 8 belonging to [Appellant]. It appears in their extraction under the description "Report Item 2C" and file name "5005.jpg." The individual in the photo matches photos of [CK] obtained from her Instagram account [].

(Id. at 3.) The photo is at Prosecution Exhibit 2. (R. at 62.)

The Stipulation of Fact further stated that Appellant was aware of CK's age when he possessed the photo and that he was aware that possessing a topless photo of CK was legally and morally wrong due to her age. The Stipulation of Fact also stated that possessing the photo was indecent because the depiction of the breasts of a female minor is grossly vulgar to common propriety and tended to excite Appellant's sexual desire. (Pros. Ex. 1 at 3-4.)

The Stipulation of Fact also stated that on 2 March 2022, Appellant was interviewed by Air Force Office of Special Investigations (AFOSI) Special Agents (SAs) and admitted to the misconduct to which he was pleading guilty at this court-martial. (Id. at 4.)

After going through the Stipulation of Fact, the military judge then began the providence inquiry with Appellant. (R. at 68.) The military judge explained the elements of Specification 1, namely that Appellant engaged in sexual acts with a minor, that the conduct was indecent, and that the conduct was of a nature to bring discredit upon the armed forces. (R. at 69.) Appellant then detailed his relationship with CK and how the two had sex in a San Antonio hotel room after his basic training graduation. (R. at 71-72.) Appellant mentioned that CK brought a

condom, that the two performed oral sex on each other and then had vaginal intercourse. Appellant stated he "knew it would be viewed as wrong for a 19-year-old, especially one who serves in the military, to be in a relationship with a 15-year-old." (R. at 73.) Because of this, Appellant said he was "not honest with my friends in the Air Force about [CK's] age." (Id.) Appellant also stated that his "mom did warn me that I could get in trouble" for engaging in sexual acts with CK. (R. at 75.)

The military judge then asked for more precise information on the vaginal intercourse, asking "What happened," "Who penetrated who," "How did that occur," and "What did you penetrate her with if it was you penetrating her?" (R. at 77.) Appellant responded that he penetrated CK's vulva with his penis.

When the military judge asked for specifics on what Appellant meant by oral sex, Appellant stated, "it was my mouth making contact with her vulva" and "her mouth penetrating my penis." (R. at 78.) When asked to clarify that second part, Appellant restated, "My penis penetrated her mouth." The military judge then asked Appellant if he had an erection during the oral sex and if he ejaculated during oral sex. (Id.)

The military judge then turned to the indecency element, telling Appellant the following:

> you've admitted to me a couple things that bear on the question of indecency. I want to remind you again of what is required here. Your conduct, particularly engaging in these sexual acts, must be the form of immorality relating to sexual impurity, which is grossly vulgar, obscene, and repugnant to common propriety and tends to excite sexual desire or deprave morals with respect to sexual relations.

(R. at 79-80.) The military judge then asked Appellant why he felt his actions were indecent. Appellant responded, "Your Honor, it was her age that was - - would make it indecent conduct." (R. at 80.) Following up on Appellant using age as the reason his actions was indecent, the

military judge then asked, "Why do you think children are unable to give consent?" Appellant responded, "Your Honor, I believe there is the age of consent for those who are not -- they're not mature enough to make those kinds of decisions of what needs to be done or what -- what dictates of -- you know, what can be done because of their maturity level." (R. at 80-81.)

The military judge and Appellant then discussed how Appellant had graduated from high school and enlisted in the Air Force, before the military judge asked, "Do you think back to that moment and recognize the distinction between where you were in life and where she was?" (R. at 81.) Appellant replied, "Yes, Your Honor." The military judge then asked, "Do you feel like you exploited the distinction in where you were in life and where she was?" Appellant replied, "For myself, it was more of I wanted to respect -- it was her decision. Like she was the one who initiated, wanted to do it, but I should have ultimately said no to it since I was the adult and there was that age gap and there was the part where she was not of the age of consent; so I should have been the one who I should have stopped her right there instead of performing those acts." (R. at 81-82.)

Later, the military judge and Appellant had the following exchange:

> MJ: Do you agree with the idea that children cannot be trusted to make decisions related to sexual encounters with adults because of their age?
>
> Appellant: Yes, Your Honor.
>
> MJ: I explained to you "indecency" a few times. It needs to be grossly vulgar, obscene, and repugnant to common propriety, and it's got to tend to excite sexual desire or deprave morals with respect to sexual relations. What do you think happens if children are treated as sexual objects by adults in society?
>
> Appellant: Your Honor, may I have a moment to consult?
>
> [Appellant conferred with defense counsel.]

> Appellant: Your Honor?
>
> MJ: Yes?
>
> Appellant: I believe there either needs to be a line drawn where adults can't take advantage of children for the fact that it can lead to problems in the future with mental health, physical health. It can cause problems where the children will have an effect that will, you know, dictate their future from that point. So that's where we need to draw a line from where adults can do stuff with children.
>
> MJ: Do you agree that that tendency that you've just described in your own words also relates to the concern about this being conduct of a nature to bring discredit upon the armed forces?
>
> Appellant: Yes, Your Honor.
>
> MJ: I asked you that question before you just gave me that response that focused on treating children as sexual objects. I'm going to ask you something slightly different. Do you agree that those same concerns are raised by treating children as potential sexual partners?
>
> Appellant: Your Honor --
>
> MJ: The earlier question focused on the idea of treating children something worthy of sexual desire or interest. This next one is bringing them into a partnership or treating them as something like an equal partner, the law recognizes they cannot be. So my question is: Do you think those same kinds of concerns arise from treating children as people capable of becoming sexual partners with adults?
>
> Appellant: Yes, Your Honor.

(R. at 86-87.)

The military judge then asked Appellant what the consequence of his misconduct coming to light has had on CK. In doing so, the military judge explained to Appellant's trial defense counsel that the question "connects back to whether or not this is the kind of behavior that is of a nature to bring discredit upon the armed forces if there are consequences and those consequences were foreseeable." (R. at 87-88.) The military judge then asked Appellant if there had been any "fallout or separation" between he and CK since the sexual acts. (R. at 89.) Appellant

responded, "Your Honor, I have still been in contact with her and her family, and she has never brought up anything that's negatively impacted her. It's more of her worrying about all of that has happened with me with this process I've been going through, and her and her family have been worried for me. She has never brought up anything negative about herself." (Id.)

Based on Appellant's answer that CK had never brought up anything that has negatively impacted her based on their relationship, the military judge then asked Appellant, "What is it about your conduct that you believe was of a nature to bring discredit upon the armed forces? You had told me that it negatively impacts how the military is viewed by the public, but I'd like to hear more. Why would someone think less of the United States Air Force were they to understand these sexual acts that you engaged in?" (R. at 89-90.) Appellant then stated:

> Your Honor, where I've known, you know, those who have been in the service that I have told about, you know, with me and [CK], they have -- their mind of -- you know, the Air Force has changed. They don't want to be around me with who I am or the acts I've committed. So even then that's military members who are beside us who, you know, not -- already being affected by my actions. For those who are in the public, you know, for those who have put the military as a high esteem seen that there's someone in the service doing these acts, you know, having sexual acts with the children -- of the child, it was -- it would negatively impact their mindset of what the military brings in and who they allow still in their military.

(R. at 90.)

Later, the military judge explained the elements of Specification 2, namely that Appellant engaged in possessing a topless photo of a minor, that the conduct was indecent, and that the conduct was of a nature to bring discredit upon the armed forces. (R. at 95.) Appellant then detailed how he and CK continued their relationship after he arrived at Sheppard Air Force Base for technical school. The two usually communicated over Snapchat or iMessage. (R. at 105.) Appellant told the military judge that on 25 November 2021, CK suggested sending him a

topless photo, and he agreed so long as she did not feel pressure to send it. (R. at 106.) Appellant admitted that he received the photo at Prosecution 2 and that he "saved it in a hidden folder" because of CK's privacy and "because I understood it would create a legal issue." (Id.)

The military judge then asked Appellant additional follow-up questions based on Appellant's remarks detailed above. The military judge first asked, "How often did you look at this topless photo of the alleged victim between on or about 4 November 2022 and on or about 3 January 2022?" (R. at 110.) Appellant answered, "Your Honor, maybe once a month." (Id.) Appellant later said that over the charged timeframe, he looked at the photo "around two times." (R. at 113.)

The military judge than asked Appellant what "topless" meant to him, to which Appellant responded, "Your honor, with the absence of a shirt or bra or any coverings of the torso area of the body. (Id.) When the military judge asked what parts of CK's body were visible to Appellant in the photo, Appellant said, "Your Honor, you see a fully exposed breast, nipple, and then a breast that is partly in the frame." (Id.) The military judge then asked if Appellant "derive[d] sexual gratification from possessing this image?" (R. at 114.) Appellant replied, "Yes, Your Honor." (Id.) Appellant also agreed that was the purpose of CK sending him the photo and Appellant allowing her to send it. Appellant also agreed that he welcomed the image so long as CK was comfortable sending it. (Id.) Appellant also agreed that he could have deleted the photo if he had wanted to, but instead saved it in a hidden folder on his phone. (R. at 115.)

The military judge then asked Appellant why he believed it was indecent for him to possess the photo. Appellant responded as follows:

> Your Honor, I believe it's indecent because once again it is a child. They're under the age of 18. They don't have that full of consent of saying -- they can give that consent of my body out. I'm going to show it off, like disburse the image. That's something that – it's illegal for a reason that you need to be at least the age of 18 to be able to have pictures of -- like have images of nudity in your phone. So it's indecent because it's not – she's not of that age yet.

(Id.)

The military judge then asked Appellant, "Why is it so problematic to sexual relations and morals, with respect to sexual relations, that you possessed this image that is not child pornography but it falls in this different class? Why is that so grossly vulgar, obscene, and repugnant?" (R. at 116.) After consulting with his counsel, Appellant responded, "Even though it might not be child pornography, it's still -- she's still a child. I shouldn't be possessing those images. And even though the image was sent to, you know, raise that sexual intimacy because we were having that sexual relationship, it still adds to the fact of I should have not had that in my possession. And also the fact that I was hiding it and putting it in a hidden folder to even like add to the part of showing -- even though it's not child pornography, and so I was hiding it from others to see as if something that I'm putting aside to maybe not be found with it." (R. at 116-17.)

The military judge and Appellant then had the following exchange:

> MJ: You previously admitted to me that it was a crime for you to develop her as a sexual partner; is that right?
>
> Appellant: Yes, Your Honor.
>
> MJ: Do you believe that there's a connection between your possession of an image that was generated with the intent of maintaining sexual intimacy and the fact that that sexual intimacy was the product of a crime itself? Do you see a connection there?
>
> Appellant: Yes, Your Honor.

MJ: Is that something you thought about that essentially this image wouldn't exist were it not for you accomplishing the crime that you've admitted to in Specification 1 of the Charge?

Appellant: Your Honor, I believe that it did go with it for the fact that I did hide it just because I knew it was not right, for already we were having that relationship, that sexual relationship. And then her -- with the photo being that it maintained that sexual intimacy, it already adds to the part of it where it was illegal and that – that's for the reason why I hid it.

MJ: Do you agree with the idea that the degradation or the depraving of morals that we talked about with Specification 1 is in some ways demonstrated by the conduct that you're admitting to in Specification 2?

Appellant: Yes, Your Honor.

MJ: Explain that to me. How do you see that connection? Because you've agreed with it.

Appellant: Your Honor, I see the connection because it's still possessing those -- the child parts where there is a sexual nature to it. So it's more of if it was morally wrong to have that sexual relationship with her, it's going to be morally wrong to keep that going with the image that she sent.

MJ: And what spurred her to send you that image?

Appellant: Your Honor, it was for us being apart from each other. It was -- you know, before I went to basic training, we were together every day, always together with her family, and then two months away from each other. And then we -- you know, we saw each other during graduation. We had sexual intercourse. And then with that, I believe she had that -- we had that intimacy, that sexual interaction, where it could mess with her where she feels like she needs to keep that going, to keep the relationship moving.

MJ: Would you call the concept of a 15-year-old trying to maintain sexual intimacy with you, then 19 years old, would you call that grossly vulgar?

Appellant: Yes, Your Honor.

MJ: Would you say that's repugnant to common propriety?

Appellant: Yes, Your Honor.

MJ: Would you say that tends to excite sexual desire and deprave morals with respect to sexual relations?

Appellant: Yes, Your Honor.

(R. at 117-19.)

At no point during the plea inquiry did Appellant's trial defense counsel object to the military judge's questions to Appellant. The plea agreement also stated the military judge could sentence Appellant between 90 and 180 days for each of the specifications and that the sentences would run concurrently. (R. at 146-47.) The trial counsel argued for 180 days confinement for each specification and a bad-conduct discharge. (R. at 208.) The military judge sentenced Appellant to 180 days for Specification 1, 90 days for Specification 2, with each sentence to run concurrently, as well as a reduction to E-1, a reprimand, and a bad-conduct discharge. (R. at 223.)

Additional facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT COMMIT PLAIN ERROR DURING APPELLANT'S PLEA INQUIRY.

Standard of Review

This court normally reviews a military judge's decision to accept a guilty plea for an abuse of discretion. United States v. Finch, 73 M.J. 144, 148 (C.A.A.F. 2014). The appellant bears the burden of establishing that the military judge abused that discretion. United States v. Phillips, 74 M.J. 20, 21 (C.A.A.F. 2015).

However, in this instance, Appellant contends the military judge improperly elicited too much information during the plea inquiry. Since his trial defense counsel did not object to the military judge's questions during the plea inquiry, Appellant concedes the proper standard of review is plain error.[1] (App. Br. at 7-8.)

In order to prevail under a plain error analysis, an appellant must demonstrate that: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007).

Law

In United States v. Price, 76 M.J. 136 (C.A.A.F. 2017), our superior Court detailed the requirements of a military judge in accepting a guilty plea. For instance, the Court noted that in United States v. Weeks, it found that "it is an abuse of discretion if a military judge accepts a guilty plea without an adequate factual basis to support it." Price, 76 M.J. at 138 (*citing* Weeks, 71 M.J. 44, 46 (C.A.A.F. 2012.) Additionally, the Court highlighted that "R.C.M. 910(e) explicitly states: 'The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea.'" Price, 76 M.J. at 138. The Court noted that in United States v. Care it "imposed an affirmative duty on military judges, during providence inquiries, to conduct a detailed inquiry into the offenses charged, the accused's understanding of the elements of each offense, the accused's conduct, and the accused's willingness to plead guilty." Price, 76 M.J. at 138 (*citing* United States v. Perron, 58 M.J. 78, 82 (C.A.A.F. 2003); Care, 18 C.M.A. 535, 541-42, 40 C.M.R. 247, 253-54 (1969)). The Court also highlighted that in United States v. Negron, 60 M.J. 136, 143

[1] Appellant has not raised an ineffective assistance of counsel claim against his trial defense counsel.

(C.A.A.F. 2004), it "advised against and cautioned judges regarding the use of conclusions and leading questions that merely extract from an accused 'yes' or 'no' responses during the providency inquiry." Price, 76 M.J. at 138. The Court also stated that in United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002), it emphasized that a military judge must elicit actual facts from an accused and not merely legal conclusions. Price, 76 M.J. at 138.

The requirements on a military judge did not come without limitations, however. The Price Court stated that it has "also established parameters beyond which a military judge's questions must not fall in order to protect the rights of an accused who is pleading guilty." Price, 76 M.J. at 138. The Court cited to United States v. Holt, 27 M.J. 57, 60 (C.M.A. 1988), and its holding that "although sworn admissions made during a providence inquiry can be admissible for sentencing purposes as aggravating evidence, the use of such admissions is restricted if 'the military judge has ranged far afield during the providence inquiry,' such as when a military judge explores 'uncharged conduct [that] is not closely connected to the offense to which the accused has pleaded guilty.'" Price, 76 M.J. at 139. The Court also highlighted United States v. Irwin, 42 M.J. 479, 482 (C.A.A.F. 1995), where it reaffirmed Holt, but held in that case that the appellant's responses during the providence inquiry "did not 'range[] far afield' but, instead, were relevant as they directly described circumstances surrounding the offenses without venturing into unrelated matters." Price, 76 M.J. at 139.

Analysis

Here, Appellant claims that the military judge committed plain error in the course of the plea inquiry by eliciting too much information about the underlying offenses. Appellant claims the military judge "ask[ed] questions in the Care inquiry that did not pertain to establishing a provident guilty plea but instead went toward aggravation evidence." (App. Br. at 9.) Like the appellant in Price, Appellant here argues he was prejudiced because the military judge then used this added information when deliberating on Appellant's sentence. In Price, our superior Court stated its analysis of that appellant's argument, which mirrors Appellant's, "need not detain us long." Price, 76 M.J. at 139. Appellant's current argument should meet a similar fate.

Just as in Price, the full context of the plea inquiry between Appellant and the military judge shows "the military judge asked the questions now at issue in order to comply with the requirements of the Rules for Courts-Martial and this Court's precedent." *See* Price, 76 M.J. at 139. Specifically, just as in Price, the military judge was seeking additional information from Appellant in order to "satisfy [himself] that there [was] a factual basis for the plea," R.C.M. 910(e), and to fulfill his "*affirmative duty* ... to conduct a detailed inquiry into ... the accused's conduct." *See* Perron, 58 M.J. at 82 (emphasis added) (*citing* Care, 18 C.M.A. 541-42, 40 C.M.R. at 253-54). Here, the military judge referenced repeatedly R.C.M. 910 and his duty to ensure there was a factual basis for Appellant's plea. (R. at 15, 102, 132, 156.)

Furthermore, a review of the questions, of which Appellant now complains for the first time, show they do not "run afoul of applicable case law regarding the permissible scope of such inquiries." *See* Price, 76 M.J. at 139. For instance, Appellant complains that the military judge asked for specifics about the oral sex and vaginal intercourse between Appellant and CK. (App. Br. at 3, 10, *citing* R. at 77-78.) However, the military judge's questions were necessary based

on Appellant's earlier broad statement that he and CK "performed oral sex on me," "I performed oral sex on her, and then we had vaginal intercourse." (R. at 72.) The military judge asking more specific questions, to include what Appellant meant by "oral sex," and how both the oral sex and vagina intercourse was performed (to include asking specifically how Appellant penetrated CK), was entirely relevant to the elements of the offense. The questions were certainly "closely connected" to the offenses to which Appellant was pleading guilty, and they did not "range[] far afield." Holt, 27 M.J. at 60. There was no plain error in these questions.

Appellant next takes issue with the military judge's questions to Appellant about a child's ability to give consent, his exploitation of CK's young age, and the impact on children who were treated by sexual objects by adults. (App. Br. at 4, 10-11, *citing* R. at 80-87.) However, a review of these questions in the context of the entire inquiry shows they came as follow-up questions after the military judge asked Appellant why he felt his actions were "indecent," which was an element of the offense. (R. at 79-80.)

Here, the military judge was required to conduct a detailed inquiry into the offenses and Appellant's understanding of the elements, including the definition of indecent. *See* Care, 18 C.M.A. at 541-42. For the indecent element, this meant ensuring Appellant not only knew the definition of indecent, but was also able to explain why his conduct was grossly vulgar, obscene, and repugnant to common propriety and tends to excite sexual desire or deprave morals with respect to sexual relations. Based on this requirement, the military judge's questions during this exchange were entirely appropriate.

Moreover, these follow-up questions with which Appellant now finds fault were based on answers provided by Appellant himself that necessitated additional discussion with the military judge. Specifically, the military judge asked Appellant, "Why was this indecent, in your own

words, [Appellant]?" (R. at 80.) Appellant responded, "Your Honor, it was her age that was - - would make it that indecent conduct." (Id.)

It was this answer by Appellant that led the military judge to rightly follow up and have Appellant explain why CK's age played into Appellant's belief that his conduct was indecent. Thus, the military judge asking, "Why do you think children are unable to give consent," asking Appellant why he could have exploited CK based on the difference in his age and CK's age, and asking, as a broader concept related to indecency and children's ages, for Appellant's thoughts on the effects on children who are treated as sexual objects by adults in society, was perfectly reasonable considering Appellant's "her age" answer to the military judge's initial indecency question. (R. at 81-87.) Not only where these questions related to the indecency element of the offense (as well as the service discrediting element), they were also necessitated by Appellant's own answer to the military judge as to why his conduct was indecent – CK's age. Again, these questions were "closely connected" to the offenses to which Appellant was pleading guilty, and they did not "range[] far afield." Holt, 27 M.J. at 60. There was no plain error in these questions.

Next, Appellant claims the military judge erred because he told Appellant that they have to "have a complete understanding of one another." (App. Br. at 11.) However, a review of that exchange between Appellant and the military judge occurred due to the military judge seeing a potential conflict between Appellant's answers and the Stipulation of Fact. (R. at 85.) Here, the military judge was merely resolving a conflict and ensuring he and Appellant had a "complete understanding" as to what Appellant was telling the military judge and ensuring it did not conflict with the previously admitted Stipulation of Fact. There was also no error here.

Next, Appellant pivots and argues that the military judge's "coercive nature" somehow pressured him to answer the military judge's questions or else he might not be about to "maintain his plea." (App. Br. at 12, 15.) Yet, a review of the military judge's questions and statements shows there were no threats or insinuations by the military judge to Appellant. In context, the military judge's comments were not "threats" to not accept the plea, but instead was the military judge making the legally sound point that he could not accept a guilty plea unless Appellant was able to explain why he was, in fact, guilty.

Moreover, this Court in Price highlighted that "an accused retains the right to withdraw from a guilty plea in a timely manner if he or she believes a military judge's questions are objectionable," or, "[i]n the alternative, an accused can resolutely and respectfully decline to answer specific questions posed by a military judge, although this action may cause the military judge to decide not to accept the guilty plea." Price, 76 M.J. 136, 139, n 3. Just as in Price, Appellant did neither. Further, neither he nor his counsel ever objected to any questions. Finally, even after the plea inquiry was complete, Appellant affirmed to the military judge that he was pleading guilty of his own free will, and free of any threat or force. (R. at 187.)

Appellant then turns to the military judge asking Appellant about the "fallout or separation" between him and CK. (App. Br. at 13, *citing* R. at 88.) Here, a review of the interaction shows the military judge was trying to elicit from Appellant why he believed the conduct was service discrediting. To the military judge, whether or not CK and Appellant were still together or had separated connected to whether Appellant's behavior was of a nature to bring discredit upon the armed forces. The military judge's clear intent on this "discredit upon the armed forces" element is evident here considering that once Appellant answered that CK had not felt any negative consequences, the military judge then immediately asked Appellant to explain,

since there were no negative consequences to CK, what exactly about his conduct that made it of a nature to bring discredit to the armed forces. (R. at 89-90.) Again, these questions were directly related to an element at issue and did not amount to plain error.

Finally, Appellant claims the judge erred with regard to Specification 2 by asking Appellant how he viewed the image of CK. (App. Br. at 14.) Appellant feels this is plain error because he was charged with possessing the image, not viewing it. However, yet again, Appellant has failed to show how these questions were so "far afield" from the offenses to amount to plain error. Here, the questions were "closely connected" to the offenses to which Appellant was pleading guilty and provided the military judge a sense of *how* he possessed the photos. Moreover, the military judge's questions here went to the purpose for which Appellant possessed the image (so he could view this topless 15-year-old to gratify his sexual desires), which went squarely to whether Appellant's conduct was indecent. There is no plain error here.

In Price, our superior Court recognized the "proper boundaries for questions by a military judge during a providence inquiry" were "quite broad." Price, 76 M.J. at 139. Moreover, the Court noted the "the substantial deference we show military judges when they decide which facts to elicit during a providence inquiry in order to establish a factual basis for a guilty plea." Price, 76 M.J. at 139, *citing* United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008). Combining this Court's plain error review with this "substantial deference" to the "quite broad" boundaries of a military judge, Appellant has failed to meet his burden.

Yet, even if this Court were to determine that the military judge "ranged far afield" or his questions were not closely connected to the offenses, Appellant has failed to show prejudice or that relief is warranted. While Appellant now asks this Court for the windfall relief to set aside his well-deserved bad conduct discharge, there is no basis to conclude that the additional facts

obtained from Appellant either increased Appellant's sentence exposure or caused the military judge to increase the punishment he otherwise would have imposed in this case, especially the with regard to the bad conduct discharge. Regardless of the additional facts, Appellant's sentence exposure, one he specifically negotiated for within his plea agreement, remained the same. As for the sentence that was adjudged, Appellant admitted to having oral and vaginal sex with a 15-year-old in a hotel room mere hours after graduating from basic training at Lackland Air Force Base. Moreover, Appellant possessed a topless image of this 15-year-old. Under those factual circumstances, a sentence of 180 days confinement and a bad-conduct discharge was anything but harsh and the facts admitted by Appellant alone, regardless of the additional questions, warranted his punishment. Accordingly, this Court should deny Appellant's claim and affirm his sentence.

II.

APPELLANT'S APPROVED SENTENCE IS ENTIRELY APPROPRIATE.

Standard of Review

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

Law

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988). This Court should affirm sentences it finds correct in law and fact and determines, based on the entire record, should be approved. Article 66(d), UCMJ. This Court also has the power to disapprove a mandatory minimum sentence. United States v. Kelly, 77 M.J. 404, 408 (C.A.A.F. 2018).

In order to determine the appropriateness of the sentence, this Court must consider: (1) the particular appellant, (2) the nature and seriousness of the offense, (3) the appellant's record of service, and (4) all matters contained in the record of trial. United States v. Amador, 61 M.J. 619, 626 (A.F. Ct. Crim. App. 2005) (*citing* United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982); United States v. Alis, 47 M.J. 817, 828 (A.F. Ct. Crim. App. 1998)).

This determination is separate from an act of clemency, i.e., treating an accused with less rigor than he deserves due to a consideration of mercy. The service appeals courts are not authorized to engage in exercises of clemency. Healy, 26 M.J. at 396; *see also* United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999).

Analysis

Convicted of engaging in sexual acts with a 15-year-old and possessing a topless photo of her, Appellant claims his rightfully-deserved sentence to 180 days confinement and a bad conduct discharge is inappropriately severe. (App. Br. at 19.) Appellant believes his offenses against this child are somehow "devoid of any aggravating factors" because of the "small age difference" between him and CK, because his relationship with CK was "consensual," and because it was CK "who initiated the contact." (App. Br. at 17, 19.)

Appellant is mistaken. Appellant's sentence is entirely appropriate. Looking at the facts and circumstances of his crimes, as well as Appellant personally, a sentence to 180 days confinement and a bad conduct discharge is deserved. As described by Appellant himself during his plea inquiry, Appellant had oral sex and vaginal intercourse with a 15-year-old mere hours after he graduated from basic training. Here, Appellant invited this 15-year-old to attend his graduation on Lackland Air Force Base and then immediately took her to a downtown hotel room to have sex with her, even asking his mother and daughter to leave them alone in the

process. Then later, he willingly possessed a topless photo of this 15-year-old that he then placed in a hidden folder on his phone because he knew it broke the law.

Moreover, the confinement sentence that Appellant now claims is "unduly severe" was within the very confinement term Appellant negotiated in his plea agreement. Notably, the military judge at trial specifically asked Appellant if he wished to enter into this specific portion of his plea agreement. (R. at 148.) Appellant replied, "Yes, Your Honor." (Id., *see also* R. at 184.)

Still, Appellant now claims the confinement sentence and his rightfully deserved bad conduct discharge are "unduly severe" and asks this Court for the windfall of disapproving his bad conduct discharge. (App. Br. at 19, 23.) This Court should decline his invitation.

Surprisingly, Appellant supports his argument by blaming CK, a child, for his actions. In his brief, Appellant states, "Regarding both offenses, CK was the one who initiated the contact." (App. Br. at 19.) Appellant also says CK "was the one who approached [Appellant] about having sex initially," and "was also the one who asked him if she could send him a 'topless' photo." (Id. at 20.) While Appellant at least acknowledges that he "had the responsibility to decline such offers," he mistakenly believes that CK's actions mitigate his conduct.

Appellant next claims his relationship with CK was "consensual." Yet, during his plea inquiry, Appellant stated his actions were indecent because CK had not reached the age of consent. (*See* R. at 115.) Again, Appellant's argument is misplaced.

Next, Appellant attempts to downplay his actions by stating the there was only a "small age difference" between he and CK. (App. Br. at 17.) Appellant states that if "the incident happened 9 months later, it would not have even been a crime." (Id. at 19.) Here again, Appellant attempt to lighten his crime is unconvincing. Appellant here notably did not wait

"nine months" to pursue a sexual relationship with a 15-year-old. In fact, it appears Appellant waited less than nine *hours* after his basic training graduation to take this 15-year-old to a downtown hotel room and have oral and vaginal sex with her.

Moreover, while Appellant states that his sentence "may have been appropriate where there was a more significant age difference between" he and CK, he fails to recognize that the convening authority would have likely been less inclined to enter into a lenient 180-day maximum confinement term if Appellant had pursued and had sex with an even younger child.

All things considered, Appellant's sentence amounts to a lawful and legally supportable sentence. Evaluating the facts and circumstances in the record of Appellant's case, the seriousness of his offenses, his service record, his particular character and rehabilitative potential, and in consideration of the entire record, this Honorable Court should leave his entire sentence undisturbed.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

[redacted]

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
[redacted]

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


CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 30 August 2023 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force


IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **ELIJAH W. SCHINDLEY,** United States Air Force *Appellant*	)	**APPELLANT'S CONSENT MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF** Before Panel No. 2 No. ACM S32740 30 August 2023

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

Pursuant to Rule 23.3(m)(1) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file a reply to the Government's Answer. The reply is currently due **6 September 2023**. Appellant requests an enlargement for a period of 7 days, which will end on **13 September 2023.** The record was docketed with this Court on 6 October 2022. From the date of docketing to this present date, 328 days have elapsed. On the date requested, 342 days will have elapsed from the date this case was docketed.

The appellant was sentenced to a reprimand, reduction to E-1, 180 days confinement and a bad conduct discharge for one charge and two specifications of indecent conduct in violation of Article 134, UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 8 appellate exhibits; the transcript is 234 pages. Appellant is not currently confined. The Government filed its answer with this Court on 12 September 2022. Undersigned counsel has pre-approved leave from 16 September 2022 until 20 September 2022 and will be unable to work on the Reply brief during that time.

Additional time is needed for undersigned counsel to fully review the Answer and provide a Reply. Thus, good cause exists for this seven-day delay.

Further, A1C Schindley was specifically informed of his right to timely appeal, was consulted regarding this enlargement of time, and agrees with this enlargement of time. The government does not oppose this motion.

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

//signedASK30Aug23//
ABHISHEK S. KAMBLI, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division, AF/JAJA
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 30 August 2023.

//signedASK30Aug23//
ABHISHEK S. KAMBLI, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division, AF/JAJA
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Panel No. 2
Airman First Class (E-3) **ELIJAH W. SCHINDLEY** United States Air Force *Appellant*	)	No. ACM S32740 13 September 2023

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

Appellant, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's answer on 30 August 2023 (hereinafter Answer). Appellant stands on the arguments in his initial brief, filed on 31 July 2023 (hereinafter AOE) and in reply to the Answer, submits additional arguments for the issues listed below.

ARGUMENT

I.

THE MILITARY JUDGE VIOLATED A1C SCHINDLEY'S CONSITUTIONAL RIGHT TO REMAIN SILENT BY ASKING QUESTIONS BEYOND WHAT WAS NECESSARY TO ESTABLISH THE ELEMENTS OF THE OFFENSE DURING THE *CARE* INQUIRY.

The Government relies wholly on *United States v. Price*, 76 M.J. 136 (C.A.A.F. 2017) in its argument but that case is distinguishable from the instant case. In that case the military judge stuck closely to what was required to establish a factual basis for the offense while in this case the military judge clearly went into the realm of aggravation evidence. The *Price* case is distinguishable because the line of questioning at issue was oriented towards avoiding conclusory answers and thereby added relevant specificity to the charged conduct. *Id.* at 139.

Looking at whether the questions asked by the military judge were "closely connected," *id.* (quoting *United States v. Holt*, 27 M.J. 57, 60 (C.M.A. 1988)), to the charged offenses, the Court found that military judge's questions seeking to quantify the divers occasions of drug use and distribution, as well as whether drug distribution was for a fee, to which the appellant pleaded guilty. *Id.* at 137-39. A similar avoidance of conclusory responses like "at least two times" is not what happened here. *Id.* at 138.

In A1C Schidley's case, the military judge stated he was targeting the elements but repeatedly ventured into impropriety. As an example, the military judge asked A1C Schindley at one point whether parental permission made it feel less like he was sexually abusing a child. R. at 84. In another instance, he asked A1C Schindley what happens when adults view children as sexual objects. R. at 86. Finally, he asked A1C Schindley about victim impact and whether he was still in contact with C.K. after the offense. R. at 87-88. The problem with this questioning is they were not "closely connected" to the charged offenses because (1) A1C Schindley did not "sexually abuse" a child, (2) what happens generally when adults view children as sexual objects is irrelevant to A1C Schindley's individual conduct, and (3) this case had no evidence of victim impact. This was not trying to nail down the facts of the charged offenses. Most of this line of questioning was geared toward aggravation evidence and victim impact which are not appropriate in a guilty plea inquiry. *See United States v. Chambers*, NMCCA 200500329, 2006 CCA LEXIS 216 at *3 (N.M. Ct. Crim. App. 3 Aug. 2006) (unpub. op.) (*citing United States v. Sauer*, 15 M.J. 113, 114 (C.M.A. 1983)).

Focusing primarily on whether, in light of *Price*, the military judge's questioning elicited "too much" information from A1C Schindley, the Government's Answer brief neglects the constitutional importance of the military judge electing to seek a different kind of evidence

altogether. Answer at 13*, Price*, 76 M.J. at 139. Indeed, the military judge's questioning was far from "closely connected" to the conduct at issue. In doing so, the military judge violated A1C Schindley's right to remain silent. *Sauer*, 15 M.J. 114. That is the appropriate prism to view the military judge's actions.

The other key error in the Answer is the incorrect standard for prejudice if A1C Schindley demonstrated plain error. The Answer states that A1C Schindley failed to show prejudice. Answer at 19. The Answer ignores the fact that this plain error is of a constitutional dimension because it goes directly toward A1C Schindley's right to remain silent. Because of that, it is the government that bears the burden of proving beyond a reasonable doubt that the error was harmless. *United States v. Carpenter*, 51 M.J. 393, 396 (C.A.A.F. 1999). In addition, the Answer merely makes conclusory statements that because of the offense, A1C Schindley would have gotten the same sentence regardless. Answer at 20. This is again, not the correct standard and the Answer does not even attempt to meet the government's burden of demonstrating that the error was harmless beyond a reasonable doubt. That is because the error was not harmless beyond a reasonable doubt. As noted in the AOE, the government used answers that A1C Schindley gave in response to inappropriate questions to bolster its argument. The military judge also likely considered those facts in his ultimate sentence. Therefore, the government cannot meet its burden.

WHEREFORE, A1C Schindley respectfully requests that this Honorable Court set aside the bad conduct discharge portion of his sentence.

II.

A1C SCHINDLEY'S SENTENCE WAS UNDULY SEVERE.

The sentence was unduly severe when applying all the *Anderson* factors. In determining sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted). The Answer relies entirely on the offenses that A1C Schindley pled guilty to in its argument that the sentence was not unduly severe. That is not a proper application of the law. By doing that the Answer ignores two major aspects of the Answer that were raised regarding the sentence's severity: (1) A1C Schindley's difficult childhood that included being physically abused and homeless and (2) his strong acceptance of responsibility for his actions throughout the process. In focusing solely on the offenses A1C Schindley pled guilty to, the Answer ignores the law which requires more to be considered.

The Answer argues that by A1C Schindley citing extenuation evidence that he "blames" C.K. for the offenses. *Id.* That is not the case. A1C Schindley admitted he broke the law because C.K. could not legally consent. However, just as it would have been an aggravating factor if A1C Schindley was the one who initiated the sexual conduct or coerced C.K. into doing it, it is also extenuating that he did not. The Answer conflates what is required to prove the offense with extenuation evidence. Similarly, the fact that the age difference was small is certainly extenuation. A 3-year age difference is extenuating in a way that a 5-year, 10-year, or 15-year age difference would not be. Ultimately the Answer relies on conclusory statements about the offenses A1C Schindley pled guilty to in order to argue the sentence was not unduly severe. That is not the legal standard and as a result its argument fails. A1C Schindley's

conduct when considering the entire record of trial, A1C Schindley and his record of service did not warrant 180 days confinement and a bad conduct discharge.

WHEREFORE, A1C Schindley respectfully requests that this Honorable Court set aside the bad conduct discharge portion of his sentence.

Respectfully submitted,

[redacted]

ABHISHEK S. KAMBLI, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 13 September 2023.

Respectfully submitted,

[redacted]
ABHISHEK S. KAMBLI, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]