UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40437 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dietrich A. SMITH	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 3 July 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 11th day of July, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **14 September 2024**.

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

[redacted]
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	3 July 2024

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 Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **14 September 2024**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 47 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: frederick.johnson.11@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 July 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
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Email: frederick.johnson.11@us.af.mil

9 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DIETRICH A. SMITH, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40437 (f rev) Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 9 July 2024.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	4 September 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 October 2024**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 110 days have elapsed. On the date requested, 150 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced o be reprimanded, to be reduced to the grade of E-1, to be confined for 14 months, and norably discharged. R. at 337; EOJ. The convening authority took no action on the

GRANTED
9 SEP 2024

findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested second enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
Email: frederick.johnson.11@us.af.mil

[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 4 September 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Office: (240) 612-4770
Email: frederick.johnson.11@us.af.mil

5 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DIETRICH A. SMITH, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40437 (f rev) Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 September 2024.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	4 October 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 November 2024**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 14 months, and to be dishonorably discharged. R. at 337; EOJ. The convening authority took no action on the

GRANTED
8 Oct 2024

findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested third enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
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[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 4 October 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: frederick.johnson.11@us.af.mil

7 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DIETRICH A. SMITH, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40437 (f rev) Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 October 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	4 November 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 December 2024**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 14 months, and to be dishonorably discharged. R. at 337; EOJ. The convening authority took no action on the

GRANTED
5 NOV 2024

findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Appellant is not currently confined.

Counsel is currently representing 28 clients; 14 clients are pending initial AOEs before this Court. Additionally, one client has a pending brief before the United States Court of Appeals for the Armed Forces (CAAF), and two other clients have pending supplements to their petitions for grant of review before the CAAF.[2] Twelve matters currently have priority over this case:

1) *United States v. Zhong*, ACM 40411, USCA Dkt. No. 25-0011/AF – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has

[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

[2] Since the filing of Appellant's last request for an enlargement of time, counsel completed his review of the eight-volume record of trial and prepared and filed a merits brief in *U.S. v. Rodgers*, ACM 40528; prepared and filed a 27-page supplement to the petition for grant of review to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; prepared and filed an eight-page supplemental reply brief in *U.S. v. Doroteo*, ACM 40363; petitioned the CAAF for a grant of review in *U.S. v. Zhong*, ACM 40411, USCA Dkt. No. 25-0011/AF; petitioned the CAAF for a grant of review in *U.S. v. Myers*, ACM S32749, USCA Dkt. No. 25-0012/AF; prepared and filed a 15-page reply brief in *U.S. v. Cadavona*, ACM 40476; prepared and filed a thirteen-page brief on behalf of appellant following redocketing in *U.S. v. Kershaw*, ACM 40455; reviewed approximately seventy percent of the five-volume record of trial in *U.S. v. Henderson*, ACM 40419; drafted a six-page response to the Government's motion for reconsideration in *U.S. v. Patterson*, ACM 40426; and participated in practice oral arguments for three additional cases. Additionally, counsel was off for the Columbus Day holiday and was on leave on 18–20 October 2024.

petitioned the CAAF for a grant of review and is drafting the supplement to the petition in this case.

2) *United States v. Myers*, ACM S32749, USCA Dkt. No. 25-0012/AF – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has petitioned the CAAF for a grant of review and is drafting the supplement to the petition in this case.

3) *United States v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF – The record of trial is nine volumes consisting of 14 prosecution exhibits, 16 defense exhibits, one court exhibit, and 47 appellate exhibits; the transcript is 896 pages. Undersigned counsel was recently detailed to this case and is reviewing the record in preparation for drafting a grant brief to the CAAF.

4) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has reviewed approximately seventy percent of the record of trial in this case.

5) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and one court exhibit; the transcript is 957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. York*, ACM 40604 – The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, 36 appellate exhibits, and one court

exhibit; the transcript is 847 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Banks*, ACM 24057 – The record of trial is seven volumes consisting of ten prosecution exhibits, 16 defense exhibits, and 30 appellate exhibits; the transcript is 985 pages. Undersigned counsel has begun reviewing the record of trial in this case.

8) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, 42 appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

9) *United States v. Harnar*, ACM 40559 – The record of trial is three volumes consisting of five prosecution exhibits, 14 defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 106 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

10) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 14 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel will need to conduct additional review of the record to prepare a brief on remand in this case.

11) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of 13 prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

12) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of 12 prosecution exhibits, 13 defense exhibits, five appellate exhibits, and one court

exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested fourth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
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CERTIFICATE OF FILING AND SERVICE

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Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	4 November 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 December 2024**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

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The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Appellant is not currently confined.

Counsel is currently representing 28 clients; 14 clients are pending initial AOEs before this Court. Additionally, one client has a pending brief before the United States Court of Appeals for the Armed Forces (CAAF), and two other clients have pending supplements to their petitions for grant of review before the CAAF.[2] Twelve matters currently have priority over this case:

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[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

[2] Since the filing of Appellant's last request for an enlargement of time, counsel completed his review of the eight-volume record of trial and prepared and filed a merits brief in *U.S. v. Rodgers*, ACM 40528; prepared and filed a 27-page supplement to the petition for grant of review to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; prepared and filed an eight-page supplemental reply brief in *U.S. v. Doroteo*, ACM 40363; petitioned the CAAF for a grant of review in *U.S. v. Zhong*, ACM 40411, USCA Dkt. No. 25-0011/AF; petitioned the CAAF for a grant of review in *U.S. v. Myers*, ACM S32749, USCA Dkt. No. 25-0012/AF; prepared and filed a 15-page reply brief in *U.S. v. Cadavona*, ACM 40476; prepared and filed a thirteen-page brief on behalf of appellant following redocketing in *U.S. v. Kershaw*, ACM 40455; reviewed approximately seventy percent of the five-volume record of trial in *U.S. v. Henderson*, ACM 40419; drafted a six-page response to the Government's motion for reconsideration in *U.S. v. Patterson*, ACM 40426; and participated in practice oral arguments for three additional cases. Additionally, counsel was off for the Columbus Day holiday and was on leave on 18–20 October 2024.

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5) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and one court exhibit; the transcript is 957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. York*, ACM 40604 – The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, 36 appellate exhibits, and one court

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12) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of 12 prosecution exhibits, 13 defense exhibits, five appellate exhibits, and one court

exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested fourth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 4 November 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	3 December 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 January 2025**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 200 days have elapsed. On the date requested, 240 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 14 months, and to be dishonorably discharged. R. at 337; EOJ. The convening authority took no action on the

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6 DEC 2024

findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Appellant is not currently confined. Undersigned Counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 30 clients; 16 clients are pending initial AOEs before this Court. Additionally, two clients have pending briefs before the United States Court of Appeals for the Armed Forces (CAAF).[2] Eleven matters currently have priority over this case:

1) *United States v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF – The record of trial is nine volumes consisting of 14 prosecution exhibits, 16 defense exhibits, one court exhibit, and 47 appellate exhibits; the transcript is 896 pages. Undersigned counsel has drafted a grant brief to the CAAF in this case.

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[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

[2] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 31-page supplement to the petition for grant of review to the CAAF and a four-page reply to the Government's answer in *U.S. v. Zhong*, ACM 40411, USCA Dkt. No. 25-0011/AF; prepared and filed a 20-page supplement to the petition for grant of review to the CAAF in *U.S. v. Myers*, ACM S32749, USCA Dkt. No. 25-0012/AF; reviewed approximately 20 percent of the five-volume record of trial in *U.S. v. Henderson*, ACM 40419; prepared and filed a five-page response to the Government's motion for reconsideration in *U.S. v. Patterson*, ACM 40426; reviewed the entirety of the seven-volume record of trial and prepared and filed a 45-page brief on behalf of appellant in *U.S. v. York*, ACM 40604; sat as second chair for outreach oral argument before this Court in *U.S. v. Menard*, ACM 40496; drafted a 35-page grant brief to the CAAF in *U.S. v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF; and participated in practice oral arguments for one additional case. Additionally, counsel was off for the Veterans Day and Thanksgiving holidays.

2) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has reviewed approximately 90 percent of the record of trial in this case.

3) *United States v. Manriquez*, ACM 40527 – The record of trial is five volumes consisting of three prosecution exhibits, one defense exhibits, 19 appellate exhibits, and two court exhibits; the transcript is 129 pages. Undersigned counsel is preparing a brief on two issues specified by this Court in this case.

4) *United States v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is drafting a grant brief to the CAAF in this case.

5) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and one court exhibit; the transcript is 957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, 42 appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Harnar*, ACM 40559 – The record of trial is three volumes consisting of five prosecution exhibits, 14 defense exhibits, six appellate exhibits, and two court

exhibits; the transcript is 106 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 14 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

9) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of 13 prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

10) *United States v. Banks*, ACM 24057 – The record of trial is seven volumes consisting of ten prosecution exhibits, 16 defense exhibits, and 30 appellate exhibits; the transcript is 985 pages. Undersigned counsel has begun reviewing the record of trial in this case.

11) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of 12 prosecution exhibits, 13 defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested fifth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 December 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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5 December 2024 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DIETRICH A. SMITH, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40437 (f rev) Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 December 2024.

[redacted]

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

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	2 January 2025

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 Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **11 February 2025**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 14 months, and to be dishonorably discharged. R. at 337; EOJ. The convening authority took no action on the

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6 JAN 2025

findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Appellant is not currently confined. Undersigned Counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 29 clients; 17 clients are pending initial AOEs before this Court. Additionally, one client has a pending brief before the United States Court of Appeals for the Armed Forces (CAAF).[2] Eight matters currently have priority over this case:

1) *United States v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel has drafted a grant brief to the CAAF in this case.
2) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and

[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

[2] Since the filing of Appellant's last request for an enlargement of time, counsel completed his review of the five-volume record of trial and prepared and filed a 17-page AOE in *U.S. v. Henderson*, ACM 40419; prepared and filed a 35-page grant brief to the CAAF in *U.S. v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF; prepared and submitted a two-page bullet background paper in response to the Government's request for The Judge Advocate General to certify the record to the CAAF in *U.S. v. Patterson*, ACM 40426; prepared and filed a motion to withdraw from appellate review in *U.S. v. Manriquez*, ACM 40527; drafted a 26-page grant brief to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; reviewed approximately 15 percent of the eight-volume record of trial in *U.S. v. Burkhardt-Bauder*, ACM 24011; and participated in practice oral arguments for three additional cases. Additionally, counsel was on leave on 24–29 December 2024 and was off for the New Year's Day holiday.

one court exhibit; the transcript is 957 pages. Undersigned counsel has begun reviewing the record of trial in this case.

3) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, 42 appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

4) *United States v. Harnar*, ACM 40559 – The record of trial is three volumes consisting of five prosecution exhibits, 14 defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 106 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 14 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

6) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of 13 prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Banks*, ACM 24057 – The record of trial is seven volumes consisting of ten prosecution exhibits, 16 defense exhibits, and 30 appellate exhibits; the transcript is 985 pages. Undersigned counsel has begun reviewing the record of trial in this case.

8) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of 12 prosecution exhibits, 13 defense exhibits, five appellate exhibits, and one court

exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested sixth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 January 2025.

Respectfully submitted,

[redacted]

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3 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DIETRICH A. SMITH, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40437 (f rev) Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 January 2025.

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

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	3 February 2025

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 Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 March 2025**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 262 days have elapsed. On the date requested, 300 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for 14 months, and to be dishonorably discharged. R. at 337; EOJ. The convening authority took no action on the

GRANTED
6 FEB 2025

findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Appellant is not currently confined. Undersigned Counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 33 clients; 19 clients are pending initial AOEs before this Court. Additionally, one client has an upcoming oral argument before the United States Court of Appeals for the Armed Forces (CAAF).[2] Nine matters currently have priority over this case:

1) *United States v. York*, ACM 40604 – The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, 36 appellate exhibits, and one court exhibit; the transcript is 847 pages. Undersigned counsel is drafting a reply to the Government's answer in this case.
2) *United States v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF – The record of trial is nine volumes consisting of 14 prosecution exhibits, 16 defense

[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

[2] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 26-page grant brief to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; reviewed approximately 65 percent of the eight-volume record of trial in *U.S. v. Burkhardt-Bauder*, ACM 24011; prepared and filed a 17-page reply brief to the CAAF in *U.S. v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF; assisted with preparing and filing a 44-page AOE in *U.S. v. Dawson*, ACM 24041; prepared and filed a six-page reply brief in *U.S. v. Henderson*, ACM 40419; began reviewing the seven-volume record of trial in *U.S. v. Haymond*, ACM 40588; and participated in practice oral arguments for three additional cases. Additionally, counsel was off for the National Day of Mourning for President Carter's state funeral and the Birthday of Martin Luther King, Jr. holiday.

exhibits, one court exhibit, and 47 appellate exhibits; the transcript is 896 pages. Undersigned counsel is preparing to present oral argument as lead counsel before the CAAF in this case on 26 February 2025.

3) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and one court exhibit; the transcript is 957 pages. Undersigned counsel has reviewed approximately 80 percent of the record of trial in this case, including all non-sealed materials.

4) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, 42 appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has begun reviewing the record of trial in this case.

5) *United States v. Harnar*, ACM 40559 – The record of trial is three volumes consisting of five prosecution exhibits, 14 defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 106 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 14 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

7) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of 13 prosecution exhibits, one defense exhibit, and seven appellate exhibits; the

transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Banks*, ACM 24057 – The record of trial is seven volumes consisting of ten prosecution exhibits, 16 defense exhibits, and 30 appellate exhibits; the transcript is 985 pages. Undersigned counsel has begun reviewing the record of trial in this case.

9) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of 12 prosecution exhibits, 13 defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested seventh enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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5 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DIETRICH A. SMITH, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40437 (f rev) Panel No. 1

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 February 2025.

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	6 March 2025

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 an eighth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 April 2025**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial [illegible]l. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced [illegible] to be reprimanded, to be reduced to the grade of E-1, to be confined for 14 months, and to be dishonorably discharged. R. at 337; EOJ. The convening authority took no action on the

GRANTED
10 MAR 2025

findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and 29 appellate exhibits; the transcript is 338 pages. Appellant is not currently confined. Undersigned Counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 36 clients; 21 clients are pending initial AOEs before this Court. Additionally, two clients have upcoming oral arguments, and one additional client has an upcoming petition for a grant of review, all before the United States Court of Appeals for the Armed Forces (CAAF).[2] Nine matters currently have priority over this case:

1) *United States v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is drafting a supplemental reply brief and preparing to present oral argument as lead counsel before the CAAF in this case on 19 March 2025.

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[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

[2] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a motion to remand in *U.S. v. Burkhardt-Bauder*, ACM 24011; conducted three practice oral arguments and presented oral argument as lead counsel before the CAAF in *U.S. v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF; reviewed approximately 15 percent of the seven-volume record of trial in *U.S. v. Haymond*, ACM 40588; prepared and filed a seven-page reply brief in *U.S. v. York*, ACM 40604; prepared and filed a 13-page reply brief to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; prepared and filed a 28-page answer to the CAAF in *U.S. v. Patterson*, ACM 40426, USCA Dkt. No. 25-0073/AF; and participated in ten practice oral arguments for four additional cases. Additionally, counsel was off for the Washington's Birthday holiday.

2) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel is preparing to petition the CAAF for a grant of review in this case.

3) *United States v. Patterson*, ACM 40426, USCA Dkt. No. 25-0073/AF – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel is preparing to present oral argument as lead counsel before the CAAF in this case.

4) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, 42 appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has reviewed approximately 20 percent of the record of trial in this case.

5) *United States v. Harnar*, ACM 40559 – The record of trial is three volumes consisting of five prosecution exhibits, 14 defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 106 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 14 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

7) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of 13 prosecution exhibits, one defense exhibit, and seven appellate exhibits; the

transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Banks*, ACM 24057 – The record of trial is seven volumes consisting of ten prosecution exhibits, 16 defense exhibits, and 30 appellate exhibits; the transcript is 985 pages. Undersigned counsel has begun reviewing the record of trial in this case.

9) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of 12 prosecution exhibits, 13 defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested eighth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 6 March 2025.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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7 March 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
	)	Before Panel No. 1
v.	)	No. ACM 40437 (f rev)
Staff Sergeant (E-5) **DIETRICH A. SMITH**, USAF, *Appellant.*	)	7 March 2025

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

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

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

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

KATE E. LEE, Maj, USAF
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1500 W. Perimeter Road, Suite 1190
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DSN: 612-4809

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 March 2025.

KATE E. LEE, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	3 April 2025

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 ninth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of thirty days, which will end on **12 May 2025**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 321 days have elapsed. On the date requested, 360 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial Vol. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced to be reprimanded, to be reduced to the grade of E-1, to be confined for fourteen [illegible], and to be dishonorably discharged. R. at 337; EOJ. The convening authority took no

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4 APR 2025

action on the findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and twenty-nine appellate exhibits; the transcript is 338 pages. Appellant is not currently confined. Undersigned Counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing thirty-six clients; twenty-one clients are pending initial AOEs before this Court. Additionally, one client has an upcoming oral argument before the United States Court of Appeals for the Armed Forces (CAAF).[2] Seven matters currently have priority over this case:

1) *United States v. Patterson*, ACM 40426, USCA Dkt. No. 25-0073/AF – The record of trial is eight volumes consisting of twelve prosecution exhibits, eight defense exhibits, two court exhibits, and seventy-five appellate exhibits; the transcript is 987 pages. Undersigned counsel is preparing to present oral argument as lead counsel before the CAAF in this case on 9 April 2025.

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[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

[2] Since the filing of Appellant's last request for an enlargement of time, counsel reviewed approximately five percent of the seven-volume record of trial in *U.S. v. Haymond*, ACM 40588; prepared and filed a thirteen-page supplemental reply brief, conducted three practice oral arguments, and presented oral argument as lead counsel before the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; conducted two practice oral arguments in *U.S. v. Patterson*, ACM 40426, USCA Dkt. No. 25-0073/AF; petitioned the CAAF for a grant of review and prepared and filed a twenty-seven-page supplement to the petition in *U.S. v. Cadavona*, ACM 40476, USCA Dkt. No. 25-0114/AF; assisted with preparing and filing an eighteen-page reply and an eight-page motion response in *U.S. v. Dawson*, ACM 24041; and reviewed approximately ninety-five percent of the three-volume record of trial in *U.S. v. Harnar*, ACM 40559. Additionally, counsel attended the CAAF wreath laying ceremony and reception on 25 March 2025.

2) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, forty-two appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has reviewed approximately twenty-five percent of the record of trial in this case.

3) *United States v. Harnar*, ACM 40559 – The record of trial is three volumes consisting of five prosecution exhibits, fourteen defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 106 pages. Undersigned counsel has reviewed approximately ninety-five percent of the record of trial in this case.

4) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is fourteen volumes consisting of fourteen prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

5) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of thirteen prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of twelve prosecution exhibits, thirteen defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Banks*, ACM 24057 – The record of trial is seven volumes consisting of ten prosecution exhibits, sixteen defense exhibits, and thirty appellate exhibits; the

transcript is 985 pages. Undersigned counsel has begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested ninth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	3 April 2025

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

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

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

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

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 April 2025.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
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(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	5 May 2025

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 tenth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of thirty days, which will end on **11 June 2025**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 353 days have elapsed. On the date requested, 390 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for fourteen months, and to be dishonorably discharged. R. at 337; EOJ. The convening authority took no

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8 MAY 2025

action on the findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and twenty-nine appellate exhibits; the transcript is 338 pages. Appellant is not currently confined. Undersigned Counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing thirty-eight clients; twenty-four clients are pending initial AOEs before this Court.[2] Five matters currently have priority over this case:

1) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, forty-two appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has reviewed approximately forty-five percent of the record of trial in this case.
2) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is fourteen volumes consisting of fourteen prosecution exhibits, four defense exhibits, and 169 appellate

[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

[2] Since the filing of Appellant's last request for an enlargement of time, counsel reviewed approximately twenty percent of the seven-volume record of trial in *U.S. v. Haymond*, ACM 40588; conducted a practice oral argument and presented oral argument as lead counsel before the United States Court of Appeals for the Armed Forces (CAAF) in *U.S. v. Patterson*, ACM 40426, USCA Dkt. No. 25-0073/AF; assisted with preparing and filing two motions in *U.S. v. Dawson*, ACM 24041; completed his review of the three-volume record of trial and prepared and filed a fifteen-page AOE in *U.S. v. Harnar*, ACM 40559; reviewed the two-volume record of trial and prepared and filed a motion to withdraw from appellate review in *U.S. v. Hatfield*, ACM S32791; and participated in three practice oral arguments for an additional case. Additionally, counsel was on leave on 18 and 26–29 April and 2–4 May 2025.

exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

3) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of thirteen prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

4) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of twelve prosecution exhibits, thirteen defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Banks*, ACM 24057 – The record of trial is seven volumes consisting of ten prosecution exhibits, sixteen defense exhibits, and thirty appellate exhibits; the transcript is 985 pages. Undersigned counsel has begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested tenth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 5 May 2025.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	7 May 2025

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's over-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 more than two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not yet begun reviewing the record of trial at this late stage of the appellate process.

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

KATE E. LEE, Maj, USAF
Appellate Government Counsel
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1500 W. Perimeter Road, Suite 1190
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DSN: 612-4809

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 May 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	3 June 2025

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 an eleventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of thirty days, which will end on **11 July 2025**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 382 days have elapsed. On the date requested, 420 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for fourteen months, and to be dishonorably discharged. R. at 337; EOJ. The convening authority took no

GRANTED
4 JUN 2025

action on the findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and twenty-nine appellate exhibits; the transcript is 338 pages. Appellant is not currently confined. Undersigned Counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing thirty-nine clients; twenty-three clients are pending initial AOEs before this Court.[2] Additionally, one client has an upcoming petition for a grant of review and supplement to the petition before the United States Court of Appeals for the Armed Forces (CAAF). Three matters currently have priority over this case:

1) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of thirteen prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has completed his review the record of trial in this case.

[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

[2] Since the filing of Appellant's last request for an enlargement of time, counsel completed his review of the seven-volume record of trial and prepared and filed a twelve-page AOE in *U.S. v. Haymond*, ACM 40588; assisted with preparing and filing two motions and a twenty-two page supplement to the petition for a grant of review before the CAAF in *U.S. v. Dawson*, ACM 24041, USCA Dkt. No. 25-0156/AF; completed his review on remand of the fourteen-volume record and prepared and filed a twenty-nine-page brief in *U.S. v. Driskill*, ACM 39889 (rem); completed his review of the four-volume record of trial in *U.S. v. Keilberg*, ACM 40601; prepared and presented a briefing for the Air Force Senior Defense Counsel Qualification Course; and participated in six practice oral arguments for two additional cases. Additionally, counsel was off for the Memorial Day holiday and attended the funeral service for CMSgt Swigonski at Arlington National Cemetery on 28 May 2025.

2) *United States v. York*, ACM 40604 – The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, thirty-six appellate exhibits, and one court exhibit; the transcript is 847 pages. Undersigned counsel is preparing to petition the CAAF for a grant of review in this case.

3) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of twelve prosecution exhibits, thirteen defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial, but additional counsel has been detailed to this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested eleventh enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	3 June 2025

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's over-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 more than two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not yet completed reviewing the record of trial at this late stage of the appellate process.

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

JOCELYN Q. WRIGHT, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 June 2025.

JOCELYN Q. WRIGHT, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant*.	)	No. ACM 40437 (f rev)
	)	4 June 2025

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)(B)(i) and Rules 3.1, 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, Appellant, Staff Sergeant Dietrich A. Smith, hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine Attachments 4 and 7 to Prosecution Exhibit 1, Appellate Exhibit XII, and Preliminary Hearing Officer (PHO) Exhibits 7–10 in Appellant's record of trial.

Facts

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 23 February 2023. In the course of the proceedings, the military judge admitted a stipulation of fact, which included seven attachments, as Prosecution Exhibit 1. R. at 256; Pros. Ex. 1. The military judge sealed two of the attachments, Attachments 4 and 7, because they contain contraband or other sexually explicit material. R. at 282. The military judge also sealed Appellate Exhibit XII, which contains contraband the Government asked

the military judge to consider in relation to a motion. R. at 32. Trial defense counsel had the opportunity to view Appellate Exhibit XII. R. at 30. Additionally, the PHO considered four exhibits that contained contraband. PHO Exs. 7–10; ROT Vol. 3, DD Form 457, *Preliminary Hearing Officer's Report*, 26 July 2021 at Continuation of Item 13a. The PHO concluded there was no basis to seal the exhibits because they would remain in the custody of the Air Force Office of Special Investigations (AFOSI). *Id.* at Continuation of Item 24, ¶¶ j(2)–(3). Both parties were allowed to review these PHO exhibits. *Id.* at Item 13a (stating that the accused was permitted to examine each of the PHO exhibits considered); PHO Exhibit 15 (indicating that the Government offered PHO Exhibits 7–10).

Appellant previously filed a consent motion to examine sealed materials. *United States v. Smith*, No. ACM 40437, Order, 11 March 2024. The Court discovered that Attachment 7 to Prosecution Exhibit 1 was a blank disk and remanded the record for correction. *Id.* When doing so, the Court determined that Appellant's motion was moot, but stated, "Appellant may again file a motion to view sealed materials after the case has been redocketed with this court." *Id.*

Law

Appellate counsel may examine materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial or defense counsel, and sealed, upon a colorable showing to the appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, the Manual for Courts-Martial, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct. R.C.M. 1113(b)(3)(B)(i).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation," perform

"reasonable diligence," and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance." Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b) (11 December 2018). These requirements are consistent with those imposed by the state bar to which counsel belongs.[1]

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel so detailed by The Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's "broad mandate to review the record unconstrained by appellant's assignments of error" does not reduce "the importance of adequate representation" by counsel; "independent review is not the same as competent appellate representation." *United States v. May,* 47 M.J. 478, 481 (C.A.A.F. 1998).

Analysis

The sealed materials consist of attachments to a prosecution exhibit, an appellate exhibit,

[1] Counsel of record is licensed to practice law in Georgia.

and four PHO exhibits,[2] all of which were "presented" and "reviewed" by the parties at trial or at the preliminary hearing. R.C.M. 1113(b)(3)(B)(i). It is reasonably necessary for Appellant's counsel to review these sealed materials for counsel to competently conduct a professional evaluation of Appellant's case and uncover all issues which might afford him relief. Because examination of the materials in question is reasonably necessary to the fulfillment of counsel's Article 70, UCMJ duties, and because the materials were available to the parties at trial or the preliminary hearing, Appellant has provided the "colorable showing" required by R.C.M. 1113(b)(3)(B)(i) to permit his counsel's examination of these sealed materials and has shown good cause to grant this motion.

The Government consents to both parties examining the sealed materials detailed above.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this motion and permit examination of the aforementioned sealed materials contained within the original record of trial.

[2] The record is unclear as to whether PHO Exhibits 7–10 are included in the Court's copy of the record of trial. The PHO seemingly declined to seal the exhibits based on a belief that they would remain in the custody of AFOSI, but PHO exhibits should be attached to the record of trial as part of the preliminary hearing report. *Compare* ROT Vol. 3, DD Form 457 at Continuation of Item 24, ¶ j(3) *with* R.C.M. 1112(f)(1)(A). It is clear from the PHO report that these exhibits contain contraband. ROT Vol. 3, DD Form 457 at Continuation of Item 24, ¶¶ j(2)–(3). Because they are contraband but should be included in the PHO report, PHO Exhibits 7–10 are included in this motion.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 4 June 2025.

Respectfully submitted,

[redacted]

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40437 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Deitrich A. Smith	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 4 June 2025, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials. Specifically, Appellant requests counsel for both parties be permitted to examine the following materials sealed by the military judge: Attachments 4 and 7 of Prosecution Exhibit (P.E.) 1, Appellate Exhibit (A.E.) XII, and Preliminary Hearing Officer (PHO) Exhibits 7–10. According to Appellant's motion these "materials were available to the parties at trial or the preliminary hearing." The Government consented to both parties examining the materials.

Upon review by the court, it was discovered that PHO Exhibits 7–10 are not included in the record. These exhibits are identified as "contraband material that were not attached to the PHO report and remain in the custody of [Air Force Office of Special Investigations]." Therefore, these exhibits are not available for appellate counsel to review and will be addressed in a separate order by the court.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i).

The court has considered Appellant's motion, the Government's consent, and this court's Rules of Practice and Procedure. The court finds Appellant's counsel has made a colorable showing that review of the sealed materials currently in the record—Attachments 4 and 7 of P.E. 1 and A.E. XII—is necessary to fulfill counsel's responsibilities.

Accordingly, it is by the court on this 10th day of June, 2025,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Attachments 4 and 7 of Prosecution Exhibit 1 and Appellate Exhibit XII.**

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

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

[redacted]
ROBERT DRIESSEN, Maj, USAF
Chief Commissioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40437 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Deitrich A. SMITH	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 4 June 2025, Appellant's counsel submitted a Consent Motion to Examine Sealed Materials, requesting to view Attachments 4 and 7 of Prosecution Exhibit (P.E.) 1, Appellate Exhibit (A.E.) XII, and Preliminary Hearing Officer (PHO) Exhibits 7–10. In response to this motion, this court granted the consent motion in part on 10 June 2025 authorizing both appellate defense counsel and appellate government counsel permission to examine Attachments 4 and 7 of P.E. 1 and A.E. XII.

Our review of the record revealed that PHO Exhibits 7–10 are missing from the record. On one place holding page it states as follows: "Contraband material – Per [paragraph 24.j.(3)] of DD Form 457, Exhibits 7–10 are contraband material that were not attached to the PHO report and remain in the custody of [Air Force Office of Special Investigations (AFOSI)]."*

"Whether a record is complete and a transcript is verbatim are questions of law that this Court reviews de novo." *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014) (citation omitted). A record of trial must include items listed in R.C.M. 1112(b)(1)–(9). A PHO report under Article 32, UCMJ, 10 U.S.C. § 832, to include its attachments, is not required content of a record of trial under R.C.M. 1112(b). However, the Government, through a court reporter, is required to attach certain items to a record of trial before a certified record is forwarded for appellate review. R.C.M. 1112(f). The PHO report is among those items the Government is required to attach to the record of trial

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* The PHO explains in paragraph 24.j.(2) of the DD Form 457, *The Preliminary Hearing Officer's Report*, that, during the hearing, he "reviewed the images contained on [Exhibits] 7–10," and then later reviewed them again at the AFOSI. The PHO further states in paragraph 24.j.(3), "[Exhibits] 7–10 contain contraband items and so they are not attached hereto. Those Exhibits remain in the custody of AFOSI—and shall remain there—and so there is no basis for me to seal those Exhibits."

when it is not used as an exhibit at trial. R.C.M. 1112(f)(1)(A). *See also* DAFI 51-201, *Administration of Military Justice*, ¶ 12.11 (24 Jan. 2024) (explaining assembly of PHO report, to include attachments).

Accordingly, it is by the court on this 10th day of June, 2025,

ORDERED:

Not later than **24 June 2025**, counsel for the Government shall **SHOW GOOD CAUSE** as to why this court should not remand the record of trial for insertion of PHO Exhibits 7–10, or to take other corrective action.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' ANSWER TO SHOW CAUSE**
v.	)	No. ACM 40437
Staff Sergeant (E-5) **DEITRICH A. SMITH**, United States Air Force *Appellant.*	)	Before Panel No. 1 24 June 2025

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

On 15 December 2022, Appellant was convicted, in accordance with his pleas, at a general court-martial by a military judge alone of one charge and one specification of possession of child pornography in violation of Article 134, Uniform Code of Military Justice. (R. at 306).

On 10 June 2025, this Court *sua sponte* directed the following: "Not later than **24 June 2025**, counsel for the Government shall **SHOW GOOD CAUSE** as to why this court should not remand the record of trial for insertion of [Preliminary Hearing Officer (PHO)] Exhibits 7–10, or to take other corrective action." (*Show Cause Order*, dated 10 June 2025).

Supplemental Statement of Facts

On 16 July 2021, the PHO conducted an Article 32 hearing in Appellant's case. (Record of Trial (ROT), Vol 3). The PHO published their report on 26 July 2021. (ROT, Vol 3, *DD Form 457*, dated 26 July 2021). Section 13.b. of the report indicated that not all items considered by the PHO were attached to the report. (Id.). The PHO explained in his report that PHO Exhibits 7-10 were contraband and so were "not attached hereto. Those Exhibits remain in custody at AFOSI – and shall remain there – and so there is no basis for me to seal those Exhibits." (*DD Form 457*, continuation of Item 24, para. j.3). The PHO stated that he examined

PHO Exhibits 7-10 while they were in AFOSI's custody. (*DD Form 457*, continuation of Item 24, para. m.(6)-(11), (15)). The PHO included e-mails exchanged between himself and counsel for the Government after the hearing in his report. (PHO Exhibits 17-18). Trial defense counsel did not object to the PHO's report or the exclusion of PHO Exhibits 7-10 within five days of receiving the report under Rules for Courts-Martial (R.C.M.) 405(l)(5). (ROT, Vol 3, *Area Defense Counsel's Receipt*, dated 7 September 2021).

Appellant offered a plea agreement to the Government on 5 December 2022. (App. Ex. XXVII). Within Appellant's plea offer, he waived the right to make any motions that may be waived under the rules. (Id.). When discussing this term during Appellant's guilty plea, trial defense counsel stated they had no additional motions to bring. (R. at 290). The military judge advised Appellant that he was giving up the right to make motions in his case, and that any motions that weren't made prior to the plea would be waived. (Id.). Appellant stated he understood. (Id.).

Standard of Review

"Whether a record is complete and a transcript is verbatim are questions of law that this Court reviews de novo." United States v. Davenport, 73 M.J. 373, 376 (C.A.A.F. 2014) (citation omitted). Whether an omission from a record of trial is "substantial" is a question of law reviewed de novo. United States v. Stoffer, 53 M.J. 26, 27 (C.A.A.F. 2000).

Law and Argument

Waiver

Appellant waived any issues regarding the PHO report. "An appellant who fails to object to defects in the preliminary hearing report before entering pleas forfeits such objection 'absent an affirmative waiver.'" United States v. Brierly, 2024 CCA LEXIS 505, at *27 (A.F. Ct. Crim.

App. Nov. 25, 2024) (quoting R.C.M. 905(b)(1) and 905 (e)(1)). There "are no magic words to establish affirmative waiver." United States v. Gutierrez, 64 M.J. 374, 377 (C.A.A.F. 2007) (*citing* United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999)). This Court instead looks to the record for evidence of a "purposeful decision." Id. (internal citations omitted).

At no point between 7 September 2021 and 15 December 2022 did trial defense counsel object or file a motion related to the exclusion of PHO Exhibits 7-10 under R.C.M. 905(b)(1) and 905(e)(1). While such a failure would ordinarily constitute forfeiture, R.C.M. 905(e)(1), Appellant then affirmatively waived his right to object or files motions with respect to the PHO report. First, Appellant agreed to waive all waivable motions as part of his plea agreement. (App. Ex. XXVII). Second, Appellant confirmed this waiver with the military judge on the record. (R. at 290). Third, when asked by the military judge during the guilty plea colloquy, trial defense counsel stated "[t]here [were] no additional motions that would be brought at this time." (Id.). Finally, Appellant stated he understood that his waiver might "preclude [the military judge] or any appellate court from having the opportunity to determine if [he was] entitled to any relief based upon what motion [he] might have brough." (R. at 291). These statements by trial defense counsel and Appellant are more than a "passive failure" to make a request or objection. United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999) (*citing* United States v. Strachan, 35 M.J. 362, 364 (CMA 1992)). These statements were "affirmative action" by Appellant and his trial defense counsel and constituted affirmative waiver under R.C.M. 905(e)(1). United States v. Mundy, 2 U.S.C.M.A. 500, 502 (1953).

No Substantial Omission

If this Court finds the issue was not waived but forfeited, it should apply the plain error analysis. United States v. Davis, 76 M.J. 224, 227 n.1 (C.A.A.F. 2017). Understanding that this

Court ordered the Government to show cause *sua sponte*, under a plain error analysis an appellant would ordinarily have the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant." Id. at 230. In the present case, whether there was error depends on whether the exclusion of PHO Exhibits 7-10 constituted a substantial omission. Stoffer, 53 M.J. at 27.

A substantial omission renders a record incomplete and raises a presumption of prejudice that the government must rebut. United States v. Henry, 53 M.J. 108, 111 (C.A.A.F. 2000) (*citing* United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as complete. Id. To determine whether a record is complete, "the threshold question is whether the omitted material was substantial, either qualitatively or quantitatively." Davenport, 73 M.J. at 377 (internal quotations omitted). This Court approaches what constitutes a substantial omission on a case-by-case basis. United States v. Abrams, 50 M.J. 361, 363 (C.A.A.F. 1999). Our superior court has found insubstantial omissions to include photographs of stolen property, the flier provided to the members, a member's written question, and an accused's personnel record. Henry, 53 M.J. at 111 (internal citations omitted). Examples of substantial omissions have included missing arguments regarding member challenges, an unrecorded sidebar on the admission of evidence, and evidence that was used to show an accused's *mens rea.* Id.

The exclusion of PHO Exhibits 7-10 from the record does not constitute a substantial omission and is not an error.

The preliminary hearing report does not contain *any* omissions because PHO Exhibits 7-10 were never attached to the PHO report. R.C.M. 405(l)(2) does not require the PHO to attach exhibits to the report. R.C.M. 405(l)(2)(C) says the PHO must include a summary of relevant

documentary evidence presented at the hearing, and R.C.M. 405(l)(2)(J) says the PHO "may consider any evidence admitted during the preliminary hearing" when describing their recommendation as to disposition of the charges and specifications. The rule does not specifically require all evidence considered by the PHO to be attached to the PHO report. By including a summary of PHO exhibits 7-10 and describing the rationale behind his probable cause determinations, the PHO complied with R.C.M. 405(l). (*DD Form 457*, continuation of Item 24, para. m.(6)-(15)).

Turning to Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, dated 18 January 2019, para. 7.7., the PHO was required to assemble their report in accordance with R.C.M. 405(l). Para. 7.7. then required the PHO to include DD Form 457 "and any attachments." AFI 51-201, Chapter 7, did not provide guidance on what should be attached to a PHO report beyond DD Form 457, the charge sheet and its attachments, the PHO appointment letter, and a copy of the hearing recording. (Id.).

The PHO checked "no" in Item 13b, indicating that he had *not* attached "each item considered, or a copy or recital of the substance or nature thereof" to his report. (*DD Form 457*, dated 26 July 2021). The PHO then specifically stated that because PHO Exhibits 7-10 were contraband, they were "not attached hereto. Those Exhibits remain in custody at AFOSI – and shall remain there – and so there is no basis for me to seal those Exhibits." (*DD Form 457*, continuation of Item 24, para. j.3). Counsel for both sides were in possession of the PHO report since at least 7 September 2021, and neither questioned this exclusion. Based on the PHO's language, all parties understood that the exhibits would not be attached to the report and could only be accessed at AFOSI. Pursuant to R.C.M. 1112(f)(1)(A) and that understanding, the Government attached the PHO report exactly as it existed on 26 July 2021: With PHO Exhibits

7-10 unattached and remaining in AFOSI's custody. There was no requirement under the rules of AFI 51-201 that the Government include documents in a ROT that were not made attachments to the PHO report. R.C.M. 1112(f)(1)(A); *see also* Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 18 January 2019, para. 7.7.

In the event this Court determines it was error to exclude PHO Exhibits 7-10 from the record of trial, it should find this to be an insubstantial omission. Compared to the examples in Henry, the exclusion of PHO exhibits aligns more closely with a flier, a court member question, or an accused's personnel record. 53 M.J. at 111. Unlike evidence used to prove an accused's *mens rea* or requests to admit evidence at trial, these exhibits had no quantitative or qualitative bearing on Appellant's court-martial. PHO Exhibits 7-10 are not "related directly to the sufficiency of the Government's evidence on the merits." Davenport, 73 M.J. at 377 (internal citations omitted). Appellant was convicted based on his Care inquiry, the stipulation of fact, and its attachments, which included 16 images, 2 videos, and 1 graphics interchange format (GIF) of child pornography. (Pros. Ex. 1) The stipulation of fact is included in the ROT, as is the transcript from 15 December 2022. (ROT, Vol 1 and 4). The attachments containing child pornography (*Stipulation of Fact*, dated 13 December 2022, Attachments 4 and 7) were ordered sealed by the military judge and this Court previously granted both government and defense appellate counsel access to the sealed material. (*Consent Motion Order*, dated 10 June 2025). Appellant was not convicted based on the files reviewed by the PHO. Appellant was convicted based on the images, videos, and gif of child pornography introduced at his trial on the merits and on his own admissions during the Care inquiry. (R. at 258-275). The absence of PHO Exhibits 7-10 does not create a quantitative or qualitative omission, and therefore their absence

should be considered insubstantial. Because the omission is insubstantial, Appellant has not suffered any prejudice under a plain error analysis.

This Court should not remand this case for correction because Appellant waived any issues with the PHO report. In the alternative, this Court should not remand this case because Appellant forfeited the issue and under a plain error analysis, either no omission exists or it was insubstantial and there is no prejudice to Appellant.

WHEREFORE, the United States respectfully requests this Court to decline to remand the record for correction.

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FOR

MARY ELLEN PAYNE
Associate Chief, Government
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CERTIFICATE OF FILING AND SERVICE

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TWELFTH)**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	1 July 2025

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 an twelfth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of thirty days, which will end on **10 August 2025**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 410 days have elapsed. On the date requested, 450 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for fourteen mon lishonorably discharged. R. at 337; EOJ. The convening authority took no

GRANTED

3 JULY 2025

action on the findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and twenty-nine appellate exhibits; the transcript is 338 pages. Appellant is not currently confined.

Major Johnson has begun reviewing the record of trial in *Smith*. He is currently representing forty-two clients; twenty-five clients are pending initial AOEs before this Court. Additionally, one client has an upcoming supplement to the petition for grant of review and another client has an answer brief, both before the United States Court of Appeals for the Armed Forces (CAAF). Five matters currently have priority over this case:

1) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 14 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel is drafting a reply brief in this case.
2) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of thirteen prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has reviewed the record of trial and begun drafting the AOE in this case.
3) *United States v. York*, ACM 40604, USCA Dkt. No. 25-0200/AF – The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, 36

[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

appellate exhibits, and one court exhibit; the transcript is 847 pages. Undersigned counsel has petitioned the CAAF for a grant of review and is drafting the supplement to the petition in this case.

4) *United States v. Kershaw*, ACM 40455, USCA Dkt. No. 25-0177/AF – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel is reviewing the Government's Brief in Support of the Certified Issue and preparing to draft an answer brief to the CAAF in this case.

5) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of twelve prosecution exhibits, thirteen defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Undersigned counsel has begun reviewing the record of trial, and additional counsel has been detailed to this case.

Since the last *Smith* EOT, Major Johnson began drafting the AOE in *U.S. v. Keilberg*, ACM 40601; petitioned the CAAF for a grant of review and began drafting the supplement to the petition in *U.S. v. York*, ACM 40604, USCA Dkt. No. 25-0200/AF; reviewed the Government's answer and prepared and filed a two-page reply brief in *U.S. v. Haymond*, ACM 40588; and reviewed the Government's answer and began drafting a reply brief in *U.S. v. Driskill,* ACM 39889 (rem). Additionally, he was off for the Juneteenth holiday.

Lt Col Wilson has also begun reviewing the record of trial in *Smith*. He is currently representing seven clients; three are pending initial AOEs before this Court. One matter currently has priority over this case:

s, No. ACM 40656 – 402 pages – presently on EOT 7 - The trial transcript is 88 long and the record of trial (ROT) is an electronic ROT, which is one volume of

GRANTED

3 JULY 2025

402 pages. There are five admitted Prosecution Exhibits, six Defense Exhibits, and one Appellate Exhibit. Appellant is not currently confined. Lt Col Wilson has reviewed the record and is drafting the AOE.

Through no fault of Appellant, undersigned counsel have been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested twelfth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

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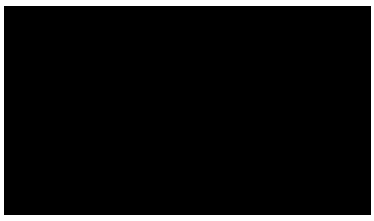
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 1 July 2025.

Respectfully submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	2 July 2025

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 450 days in length. Appellant's over 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 more than three-fourths of the 18-month standard for this Court to issue a decision, and any further delay would only leave about 3 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not yet completed reviewing the record of trial at this late stage of the appellate process.

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

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Appellate Government Counsel
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DSN: 612-4804

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 July 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
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Joint Base Andrews, MD
DSN: 612-4804

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40437 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dietrich A. SMITH	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

Appellant's case was docketed with this court originally on 21 March 2023. During this period, Appellant requested and was granted nine enlargements of time. Appellant requested a tenth enlargement of time, but this request was deemed moot when, on 11 March 2024, the court remanded Appellant's case to the Chief Trial Judge, Air Force Trial Judiciary, for correction of the record of trial.

Appellant's case was re-docketed with this court on 17 May 2024. Since re-docketing, Appellant has requested and received 12 additional enlargements of time. Currently, Appellant's brief is due 10 August 2025. On 25 July 2025, Appellant requested his thirteenth enlargement of time since re-docketing. Appellant requests an additional 30 days to file his brief, ending on 9 September 2025. If granted, that would mean Appellant has received a total of 22 enlargements of time.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and twenty-nine appellate exhibits; the transcript is 338 pages. Appellant has two military appellate defense counsel, both of whom have "begun" reviewing the record of trial. Neither counsel have indicated this will be their last request for an enlargement of time, nor have they indicated specifically why they have not completed review of the case to date. However, the court acknowledges appellate defense counsel's workload and relies on their statement that this case is second in line on their list of priorities.

The Government opposes the motion for the enlargement of time. Specifically, the Government notes that "[i]f Appellant's new delay request is granted, the defense delay in this case will be 480 days in length."

This court is mandated to process appeals in a timely manner. *See*, *e.g.*, *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006) ("Ultimately the timely management and disposition of cases docketed at the Courts of Criminal

Appeals is a responsibility of the Courts of Criminal Appeals."). In managing its own appellate practice, this court expects counsel to adhere to the fact that the court has this responsibility.

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

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

ORDERED:

Appellant's Motion for Enlargement of Time (Thirteenth) is **GRANTED**. Appellant shall file any assignments of error not later than **9 September 2025**.

Any future request for an enlargement of time may be looked upon unfavorably absent exceptional circumstances and will necessitate a status conference.

FOR THE COURT

[redacted]F

Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRTEENTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force,	)	No. ACM 40437 (f rev)
Appellant.	)	25 July 2025

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 an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of thirty days, which will end on **9 September 2025**. The record of trial was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 434 days have elapsed. On the date requested, 480 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for fourteen months, and to be dishonorably discharged. R. at 337; EOJ. The convening authority took no

action on the findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and twenty-nine appellate exhibits; the transcript is 338 pages. Appellant is not currently confined.

Major Johnson has begun reviewing the record of trial in *Smith*. He is currently representing thirty-five clients; twenty-one clients are pending initial AOEs before this Court. One matter currently has priority over this case:

1) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of twelve prosecution exhibits, thirteen defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Additional counsel has been detailed to this case, and counsel have drafted an AOE.

Since the last *Smith* EOT, Major Johnson prepared and filed a seven-page AOE in *U.S. v. Keilberg*, ACM 40601; prepared and filed a sixteen-page supplement to the petition for grant of review to the United States Court of Appeals for the Armed Forces (CAAF) in *U.S. v. York*, ACM 40604, USCA Dkt. No. 25-0200/AF; prepared and filed an eight-page reply brief in *U.S. v. Driskill,* ACM 39889 (rem); prepared and filed a motion to withdraw from appellate review in *U.S. v. Harnar*, ACM 40559 (f rev); and prepared and filed an eleven-page answer brief to the

[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

CAAF in *U.S. v. Kershaw*, ACM 40455, USCA Dkt. No. 25-0177/AF. Additionally, counsel was off for the Independence Day holiday and was on leave on 17–20 July 2025.

Lt Col Wilson has also begun reviewing the record of trial in *Smith*. He is currently representing seven clients; three are pending initial AOEs before this Court. One matter currently has priority over this case:

1. *Corliss*, No. ACM 40656 – 402 pages – presently on EOT 7 - The trial transcript is 88 pages long and the record of trial (ROT) is an electronic ROT, which is one volume of 402 pages. There are five admitted Prosecution Exhibits, six Defense Exhibits, and one Appellate Exhibit. Appellant is not currently confined. Lt Col Wilson has reviewed the record and is drafting the AOE.

Through no fault of Appellant, undersigned counsel have been unable to complete review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

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

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 25 July 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	28 July 2025

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 480 days in length. Appellant's over 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 more than three-fourths of the 18-month standard for this Court to issue a decision, and any further delay would only leave about 2 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not yet completed reviewing the record of trial at this late stage of the appellate process.

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

KATE E. LEE, Maj, USAF
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DSN: 612-4804

CERTIFICATE OF FILING AND SERVICE

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

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1500 W. Perimeter Road, Suite 1190
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel 1
Staff Sergeant (E-5), **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	28 August 2025

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

Assignments of Error

I.

WHETHER THE MILITARY JUDGE'S FAILURE TO ELICIT A FACTUAL BASIS FOR APPELLANT'S GUILTY PLEA TO THE SPECIFICATION AND CHARGE RENDERS APPELLANT'S PLEA IMPROVIDENT?

II.

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ADMITTING AND CONSIDERING IMPROPER EVIDENCE IN AGGRAVATION UNDER RULE FOR COURTS-MARTIAL 1001(b)(4)?

Statement of the Case

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, convicted Appellant, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. Tr.306; Entry of Judgment (EOJ), Feb. 23, 2023. The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for fourteen months, and dishonorable discharge. Tr. 337; EOJ. The convening

authority took no action on the findings or sentence.[1] Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, Feb. 6, 2023.

Statement of Facts

During Appellant's providence inquiry, the military judge went over the stipulation of fact with Appellant. Tr. 250-57. Among other things, the stipulation stated that Appellant's "possession of child pornography was of a nature to bring discredit upon the armed forces because such a crime would harm and lower the reputation of the service in public esteem." Pros. Ex. 1. Although the military judge engaged in a providency inquiry with Appellant after this, he did not ask Appellant any questions regarding this terminal element of Article 134, UCMJ. *See* Tr. 258-83. Nor did Appellant volunteer any statements regarding the element. *Id*. The military judge did explain to Appellant, though, that it was a necessary element of the offense and defined it. Tr. 261, 264.

The stipulation of fact did, however, contain, among other attachments, two attachments in the form of compact disks: Attachment 4 and Attachment 7. Pros. Ex. 1. Attachment 7 contained the thirteen images and one video that trial counsel proffered was the basis of the offense against Appellant. Tr. 251, 277. These fourteen pieces of media were proffered as the entirety of Appellant's unlawful contraband for which he was charged. Tr. 251. Attachment 4, on the other hand, was admitted as aggravating evidence. Tr. 277.

The media contained in Attachment 4 had been previously reviewed by an Air Force child

[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *Contrast* CADA, *with* Tr. 337. This error was likely predicated by an error in the Statement of Trial Results, which listed "adjudged forfeitures" as part of the sentence when the court adjudged no forfeitures. [cite Statement of Trial Results]. The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." EOJ at 3.

abuse pediatrician. Pros. Ex. 1, Attachment 5. The doctor could not make a determination that the people depicted in the images were under eighteen years old. *Id*. Further, the military judge reviewed Attachment 4 and found that the media did not contain child pornography. Tr. 282.

Neither the stipulation of fact nor the trial counsel explained how media that are lawful to possess would be aggravating evidence for a charge of possession of child pornography. *See* Tr. 277, Pros Ex. 1. The military judge, however, offered the following explanation to Appellant,

> So I will take into account Attachment 4 as aggravation evidence to contextualize the charged conduct. So to be clear here, [Appellant], looking at Attachment 4, these other images that the government ultimately didn't charge you with and you didn't plead guilty to, they're used as aggravation evidence to place into context the images that you did plead guilty to. So I'll use it to do things, like, look at, "Well, these are other images that were – with data at a particular time. Did that inform your intent in what you were looking at?" And, you know, how, you know, the types of material that you were generally interested in.

Tr. 333. The military judge then sentenced Appellant to, *inter alia*, fourteen months of confinement. Tr. 337.

Argument

I.

THE MILITARY JUDGE'S FAILURE TO ELICIT A FACTUAL BASIS FOR APPELLANT'S GUILTY PLEA TO THE SPECIFICATION AND CHARGE RENDERS APELLANT'S PLEA IMPROVIDENT.

Standard of Review

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The test for an abuse of discretion in accepting a guilty plea is whether the record shows a substantial basis in law or fact for questioning the plea. *United States v. Passut*, 73 M.J. 27, 29 (C.A.A.F. 2014).

Law and Analysis

Because the military judge wholly failed to elicit any facts from Appellant regarding the

terminal element of the offense during the providency inquiry, Appellant's plea is improvident and must be set aside.

Before accepting a guilty plea, a military judge must ensure that there is a factual basis for the accused's plea. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). A sufficient factual basis for a plea, in turn, requires *a sufficient factual basis for each element* of the offense for which the accused is pleading guilty. *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004). Additionally, "a military judge must elicit *actual facts* from an accused and not merely legal conclusions." *United States v. Moratalla*, 82 M.J. 1, 3 (C.A.A.F. 2021) (emphasis in original) (quoting *United States v. Price*, 76 MJ 136, 138 (C.A.A.F. 2017)).

A military judge's failure to obtain an adequate factual basis for a guilty plea constitutes an abuse of discretion. *Inabinette*, 66 MJ at 322. However, military judges are afforded significant deference on this point and are granted substantial leeway in conducting providence inquiries. *Moratalla*, 82 M.J. at 4. In determining whether a military judge abused his or her discretion, an appellate court applies the "substantial basis" test. *Inabinette*, 66 M.J. at 322. Specifically, the court asks "whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Id*..

Additionally, "[i]t is well established that the terminal element of the general article is an essential element of the offense." *United States v. Richard*, 82 M.J. 473, 476 (C.A.A.F. 2022) (internal quotation marks and citation omitted). "Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea." *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996) (citing *United States v. Terry*, 45 C.M.R. 216 (C.M.A. 1972)).

If an accused's guilty plea is not voluntary and knowing, "it has been obtained in violation

of due process and is therefore void." *Care*, 40 C.M.R. at 251. "[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *United States v. Byunggu Kim*, 83 M.J. 235, 238 (C.A.A.F. 2023) (alteration in original) (quoting *Care*, 40 C.M.R. at 251).

A. The military judge failed to establish a factual basis for the terminal element.

An Article 134, UCMJ, offense generally "has two elements: (1) a predicate act or failure to act, and (2) a terminal element." *United States v. Goings*, 72 M.J. 202, 207 (C.A.A.F. 2013) (citing *United States v. Medina*, 66 M.J. 21, 25 (C.A.A.F. 2008)). "The terminal element of an Article 134, UCMJ, offense may not be 'fairly implied' from nothing more than the language describing the alleged act or failure to act itself." *Id*. (quoting *United States v. Fosler*, 70 M.J. 225, 230-31 (C.A.A.F. 2011)). Additionally, alleged misconduct cannot be per se violative of the terminal elements of Article 134, UCMJ. *See Richard*, 82 M.J. at 478 ("The Government acknowledges that this Court has held that no misconduct can be considered per se prejudicial to good order and discipline[.]"). Indeed, the notion that proof of the act or omission referenced in the first element of an Article 134 offense somehow additionally proves the terminal element as well would result in the collapse of Article 134 into an unconstitutional single-element offense whereby any act or omission is an offense under the UCMJ.

In the instant case, the military judge completely failed to elicit any facts regarding Appellant's understanding of how or why Appellant's conduct was of a nature to bring discredit upon the armed forces. *See* Tr. 258-83. The only two mentions of "service discrediting" were (1) during the providency inquiry when the military judge explained that it was an element (Tr. 261), and in the stipulation of fact which stated "possession of child pornography was of a nature to bring discredit upon the armed forces because such a crime would harm and lower the reputation

of the service in public esteem." Pros. Ex. 1.

A bare conclusion contained in a single sentence in the stipulation is inadequate to establish a factual predicate for a plea. *See Moratalla*, 82 M.J. at 3. The United States Court of Appeals for the Armed Forces (CAAF) examined a similar situation, and reached the same conclusion, in *United States v. Sims*. 57 M.J. 419 (C.A.A.F. 2002). The appellant in *Sims* pleaded guilty to committing, among other offenses, an indecent act by touching the breasts of another soldier while alone in his unlocked barracks room. *Id*. at 420. The appellant entered into a stipulation of fact that said that the conduct was "indecent" because "there was a substantial risk that his activity could be discovered at any given time if someone had walked in on them," thus making his conduct open and notorious. *Id*. The CAAF held the stipulation to be inadequate to establish a factual predicate for the element of indecent. *Id*. at 422. Specifically, the CAAF said:

> We have noted appellant's stipulation that "there was a substantial risk that his activity could be discovered[.]" In our view, appellant's conclusory stipulation . . . is inadequate to establish a factual predicate for "open and notorious" sexual conduct. . . . Accordingly, there is a substantial basis for rejecting the plea as improvident, because appellant's responses and the stipulation of fact state only the conclusion that it was reasonably likely under these circumstances that appellant's act of touching [the soldier's breasts] would have been seen by others, but they do not provide the factual basis for that conclusion.

Id. (citations omitted).

Nor can the underlying misconduct itself be found to "imply" or "per se" establish the terminal element. *Medina*, 66 M.J. at 25; *Richard*, 82 M.J. at 478. Indeed, the notion that the underlying conduct per se establishes the terminal element of an Article 134, UCMJ, offense would result in the unconstitutional presumption of the terminal element. *Richard*, 82 M.J. at 479 ("The use of conclusive presumptions to establish the elements of an offense is unconstitutional because such presumptions conflict with the presumption of innocence and invade the province of the trier of fact") (quoting *Phillips*, 70 M.J. at 165).

B. Material prejudice to the substantial rights of Appellant

"Even if a guilty plea is later determined to be improvident, a reviewing court may grant relief only if it finds that the military judge's error in accepting the plea 'materially prejudice[d] the substantial rights of the accused.'" *Moratalla*, 82 M.J. at 4 (citing Article 45(c), UCMJ, 10 U.S.C. § 845(c)).

A military judge's erroneous acceptance of a guilty plea and the resulting erroneous finding of guilty for an act that does not constitute an offense itself materially prejudices an appellant's substantial rights. *See*, *e.g.*, *United States v. McCullough*, No. ARMY 20220376, 2024 CCA LEXIS 198, at *4 (A. Ct. Crim. App. Apr. 30, 2024); *see also United States v. Kibler*, 84 M.J. 603, 608 (A. Ct. Crim. App. 2024) (finding material prejudice to an appellant's substantial rights resulting from military judge's erroneous acceptance of a guilty plea "because appellant now stands improperly convicted of suffocating his spouse, and the sentence to confinement for that offense resulted in an additional 108 days of confinement"). In the instant case, the military judge's improper acceptance of an improvident plea resulted in Appellant's *only* criminal conviction, the deprivation of his liberty for fourteen months, and the lifelong stigma of a dishonorable discharge.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside his conviction.

II.

THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ADMITTING AND CONSIDERING IMPROPER EVIDENCE IN AGGRAVATION UNDER RULE FOR COURTS-MARTIAL 1001(b)(4).

Standard of Review

"Evidence that otherwise would be inadmissible under the Military Rules of Evidence may

sometimes be admitted at trial through a stipulation, if the parties expressly agree, if there is no overreaching on the part of the Government in obtaining the agreement, and if the military judge finds no reason to reject the stipulation 'in the interest of justice.'" *United States v. Clark*, 53 M.J. 280, 281-82 (C.A.A.F. 2000). Despite admission via stipulation of fact, otherwise inadmissible evidence is reviewed for plain error. *Id*. at 282.

Law and Analysis.

The military judge's admission and consideration of Attachment 4 to Prosecution Exhibit 1 as aggravating evidence pursuant to Rule for Courts-Martial (R.C.M.) 1001(b)(4) was plain error requiring Appellant to be resentenced.

"Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing *United States v. Rodriguez*, 60 M.J. 87, 88-89 (C.A.A.F. 2004)).

R.C.M. 1001(b)(4) provides:

> The trial counsel may present evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.

Aggravating "evidence must be 'directly relating' to the offenses of which the accused has been found guilty." *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). "This rule does 'not authorize introduction in general of evidence of . . . uncharged misconduct,'. . . *and* is a 'higher standard' than 'mere relevance.'" *Id*. (first alteration in original) (citations omitted). "The meaning of 'directly related' under R.C.M. 1001(b)(4)

is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted." *Id.* "Regarding the strength of the connection required between admitted aggravation evidence and the charged offense, [the CAAF] has consistently held that the link between the R.C.M. 1001(b)(4) evidence of uncharged misconduct and the crime for which the accused has been convicted must be direct as the rule states, and closely related in time, type, and/or often outcome, to the convicted crime." *Id*. at 281-82.

Attachment 4 to Prosecution 1 is a compact disc containing "3 images, 1 GIF, [and] 1 Video." Prosecution Exhibit 1. An Air Force child abuse pediatrician examined the media and was unable to render an opinion that the media contained minors. *See* Attachment 5 to Pros. Ex. 1. and Tr. 276, 277. The military judge reviewed the evidence and agreed with the pediatrician, stating, "Attachment 4 of the Stipulation of Fact will also be sealed in the Record of Trial as – *while not containing child pornography*, within the understanding as the parties have explained it contains sexually explicit material that's appropriate for sealing." Tr. 282 (emphasis added). Far from being "directly related" to the offense of possession of child pornography, these media are not even relevant to Appellant's charge. The government expert and the military judge both agree that the media do not contain child pornography. In other words, not only is possession of the media not unlawful, it is not even misconduct. Attachment 4 is a disc of legal-to-possess media that the trial counsel is bootstrapping to unlawful images in order to make Appellant appear more culpable than he is; Attachment 4 is in no way aggravating to the offense of possession of child pornography.

While it is correct that a military judge is presumed to know the law and follow it

correctly, that presumption is only valid in the absence of "clear evidence to the contrary." *Rodriguez*, 60 M.J. at 90 (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). In the instant case, the military judge specifically announced that he would "take into account Attachment 4 as aggravation evidence to contextualize the charged misconduct." Tr. 333. The judge then said that he would use this evidence "to do things, like, look at, 'Well, these are other images that were – with data at a particular time,'" and to decide if "that inform[ed] [Appellant's] intent in what [he was] looking at," as well as to determine "you know, how, you know, the types of material that [Appellant was] generally interested in." *Id*.

It is unclear how lawful images of pornography show the "context" for child pornography, or how they would illuminate Appellant's intent for possessing child pornography, or what "intent" the military judge found relevant as intent is not an element of the offense. Nor is it apparent how Appellant's "general interest" in lawful pornography would be "directly related" to possession of child pornography. Clearly, the military judge intended to, and did, misuse this alleged aggravation evidence; he is not entitled to any presumption to the contrary.

Although it is unknown exactly how the military judge used this improper evidence, he announced on the record that he was going to consider that irrelevant and unrelated evidence when determining Appellant's sentence. Thus, this Court should find that the military judge did exactly what he said he was going to do; he used improper and irrelevant media as evidence in aggravation for Appellant's offense, thus creating *some* negative impact on Appellant's sentence. Had it not been for this erroneously considered evidence, the military judge would likely have imposed less confinement. Normally, in such a

situation the requested relief would consist of a reassessment of the amount of confinement Appellant is to serve. However, Appellant has already been released from confinement. Thus, the only meaningful relief Appellant can be granted to offset his erroneous deprivation of liberty is to reduce the adjudged dishonorable discharge to a bad conduct discharge. *See United States v. Hilt*, 18 M.J. 604 (A.F.C.M.R. 1984) (finding the only meaningful relief for the appellant's erroneous posttrial deprivation of liberty was to disapprove the punitive discharge.).

WHEREFORE, Appellant respectfully requests this Honorable Court reassess his sentence and affirm a bad-conduct discharge in lieu of the adjudged dishonorable discharge.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 August 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) DIETRICH A. SMITH, USAF, *Appellant.*	)	UNITED STATES' MOTION FOR AN ENLARGEMENT OF TIME (FIRST) OUT OF TIME No. ACM 40437 (f rev) Panel No. 1 24 September 2025

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 7-day enlargement of time to respond in the above-captioned case. This is the United States' first request for an enlargement of time. The record of trial was docketed with this Court on 17 May 2024. As of the date of this request, 495 days have elapsed since docketing. The United States' brief is currently due 29 September 2025. If the enlargement of time is granted, the United States' response will be due on 6 October 2025, and 507 days will have elapsed since docketing. The two assignments of error involve one charge and specification that was resolved with a guilty plea, and a sentence to 14 months confinement and a dishonorable discharge. Appellant has already served his confinement sentence. The findings and sentence were approved by the convening authority. The transcript of the proceedings is 344 pages.

There is good cause for enlargement of time. Since Appellant filed his brief on 29 August 2025, and it was assigned to the undersigned shortly thereafter, the undersigned, an individual mobilization augmentee/reservist with a full-time job as an Assistant United States Attorney has been on emergency family sick leave through 9 September 2025. In the time period since, using inactive duty training (IDT) periods and maintaining her full-time civilian

work schedule, the undersigned has reviewed the record in its entirety, Appellant's brief, the charge sheet, the Entry of Judgment, and the plea agreement, including the stipulation of fact and its unsealed attachments. Additionally, the undersigned has conducted appropriate case law research and discussed the issues/planned response with the Associate Chief of the Government Trial and Appellate Operations Division.

This motion is filed out of time; there is good cause to grant it as, on 23 September 2025, the undersigned first became concerned about her ability to successfully draft a thorough response by the initial due date because of personal circumstances. Prior to this date, there was no reason to think the response brief could not be completed on time. The undersigned owns a property in Charleston, South Carolina, and there is a potential threat to the South Carolina coast from a tropical cyclone.[1] If the cyclone presents a greater threat in both strength and potential landfall near Charleston, the undersigned is making a tentative plan to travel to Charleston from her current permanent residence in Florida in order to ensure the home is as prepared for a hurricane as possible. Currently, that plan involves travel to Charleston around 27 – 29 September, which would inhibit undersigned counsel's ability to perform her planned IDT periods on those days, leaving little time to complete the United States' answer brief before the deadline. The forecast remains uncertain, thus the filing of this request for an enlargement of time.

In the event that the undersigned does not require travel, then the response brief will be filed as soon as possible.

---

[1] Currently identified as Invest 94L, with meteorologists recognizing the storm presents greater uncertainty in its forecast track and strength due to another system in the Atlantic - Humberto. Most forecasts/weather experts did not identify Humberto (then Invest 93L) and Invest 94L as potential threats to the U.S. East Coast until the morning of 23 September 2025.

The Air Force Appellate Operations Division (JAJG), as a whole, currently has 14 briefs with due dates pending at this Court and 3 briefs with pending due dates before CAAF. JAJG currently only has 6 active duty appellate attorneys, 1 active duty division chief, and one civilian associate chief. JAJG's director of operations, Lt Col Liabenow, was reassigned out of the office in August 2025 without a replacement, which means that JAJG has one less supervisory attorney to conduct supervisory review of briefs. Finally, two government appellate attorneys have been at temporary duty locations for the majority of the month of September. JAJG is leveraging undersigned counsel as Reserve support for this brief, and due to office workload, there is no other JAJG counsel who could file a brief sooner.

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

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40437 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dietrich A. SMITH	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

The Government's answer to Appellant's assignments of error brief was due on 27 September 2025—30 days from when Appellant filed his assignments of error brief on 28 August 2025. *See* JT. CT. CRIM. APP. R. 18(d).

On 24 September 2025, the Government submitted a Motion for Enlargement of Time (First) Out of Time requesting an enlargement for a period of seven days. Appellant notes that its "brief is currently due 29 September 2025," and that if an enlargement of time of seven days is granted, the requested enlargement would "be due on 6 October 2025." However, the Government's answer was due on 27 September 2025, and therefore the requested enlargement of seven days would expire on 4 October 2025. The Defense did not oppose this motion.

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

Accordingly, it is by the court on this 29th day of September, 2025,

ORDERED:

Government's Motion for an Enlargement of Time (First) Out of Time is **GRANTED IN PART**. Government shall file its answer not later than **4 October 2025**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

6 October 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) DIETRICH A. SMITH, USAF, *Appellant.*	)))))))))	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR No. ACM 40437 (f rev) Panel No. 1

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

UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) DIETRICH A. SMITH, USAF, *Appellant.*	)))))))))	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR No. ACM 40437 (f rev) Panel No. 1

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE'S FAILURE TO ELICIT A FACTUAL BASIS FOR APPELLANT'S GUILTY PLEA TO THE SPECIFICATION AND CHARGE RENDERS APPELLANT'S PLEA IMPROVIDENT?

II.

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ADMITTING AND CONSIDERING IMPROPER EVIDENCE IN AGGRAVATION UNDER RULE FOR COURTS-MARTIAL 1001(b)(4)?

STATEMENT OF THE CASE

The United States generally agrees with Appellant's statement of the case in his brief, dated 28 August 2025. In a General Court-Martial convened on 11-12 July and 15 December 2022, a military judge found Appellant, consistent with his plea, guilty of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ). (R. at 306; Entry of Judgment (EOJ), 23 February 2023.) In

exchange for his plea, the additional charge and specification for possession of obscene images of minors was dismissed. (EOJ.) The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for fourteen months, and to be dishonorably discharged from the service. (R. at 337; EOJ.)

STATEMENT OF FACTS

In March of 2020, the communication platform Discord submitted a Cyber Tipline Report to the National Center for Missing and Exploited Children (NCMEC) that a user on its platform had uploaded two images of suspected child pornography to the application. (Pros. Ex. 1, p. 2.) Discord identified the username as "MrE#9700," and provided the email address linked to the account, as well as the IP Address of the user. (Id.) NCMEC, in turn, used the IP Address to identify that the individual who had uploaded the images was located in Minot, North Dakota. (Id.) The Cyber Tipline report was forwarded to law enforcement in Minot, North Dakota. (Id.) A Special Agent with Homeland Security Investigations (HSI) determined that the IP Address was leased to an address in Minot and that Appellant lived at that address. (Id.) Another agent with the North Dakota Bureau of Criminal Investigation (NDBCI) determined that Appellant was the user of the Discord Account "MrE#9700," and the email address provided by Discord was an email address used by Appellant. (Id., p. 3.)

The Minot Air Force Base Office of Special Investigations (OSI) then initiated an investigation into Appellant in April of 2020, including obtaining and executing a search warrant at Appellant's residence. (Id.) A number of electronic devices were seized during the search, including an Apple iPhone, later identified as belonging to Appellant. (Id.) The DoD Cyber Crime Center (DC3) Cyber Forensics Laboratory (CFL) and local law enforcement performed

forensic examinations of the devices. (Pros. Ex. 1, p. 3).[1] DC3 reported that two of the devices contained images that could constitute child pornography. (Pros. Ex. 1, p. 3; Attachment 3.) The images were sent to an Air Force Child Abuse Pediatrician, Dr. Shelly Martin, who evaluated the images, but could not determine if the individuals depicted were less than 18 years old. (Pros. Ex. 1, Attachment 5.) In other words, the images were "age difficult." (Pros. Ex. 1, Attachments 4 & 5.) Dr. Martin stated that the images "were mostly of females engaging in sexual activity with males." (Pros. Ex. 1, Attachment 5.)

Separately, a forensic examiner performed a "GrayKey" extraction of the iPhone that belonged to Appellant. (Pros. Ex. 1, p. 3.) In reviewing the iPhone extraction, 14 files (13 images and 1 video) depicted minors engaging in sexually explicit conduct. (Id., p. 3-4.) These files represented the charged child pornography.

On 5 December 2022, Appellant entered into a pretrial agreement in which he agreed to plead guilty to one charge and one specification of wrongful possession of child pornography in exchange for dismissal of the additional charge and specification involving obscenity. (App. Ex. XXVII.) On 13 December 2022, Appellant also signed and agreed to a Stipulation of Fact. (Pros. Ex. 1.) The military judge was required to adjudge a dishonorable discharge, a minimum of 10 months and a maximum of 15 months of confinement. (App. Ex. XXVII.) Appellant also agreed, per the plea agreement, to "[w]aive all motions which may be waived under the Rules for Courts-Martial. (Id. at 1.)

Appellant agreed that the matters in the stipulation of fact were true and correct to the best of his knowledge and belief. (R. at 256.) In the stipulation of fact, Appellant agreed that his "possession of child pornography was of a nature to bring discredit upon the armed forces

[1] The Stipulation of Fact uses "CD3." (Pros. Ex. 1.)

because such a crime would lower the reputation of the service in public esteem." (Pros. Ex. 1, p. 4.)

The military judge informed Appellant, that "[if the judge] admit[ted] th[e] stipulation into evidence it [would] be used in two ways. First…to determine whether [Appellant was] in fact guilty of the offense to which [he'd] pled guilty. And second…[to] determin[e] an appropriate sentence. (R. at 253.) Appellant specifically stipulated "to the foundation, authentication, and admissibility of the attachments to [the] stipulation, and agree[d] to the use of [the] attachments for all purposes, including matters in aggravation…"

Prior to reviewing Attachment 4, which the parties agreed the Court could use as a matter in aggravation, the military judge gave the following explanation to Appellant.

> So to be clear here…looking at Attachment 4, these are other images that the government ultimately didn't charge you with and you didn't plead guilty to, they're used as aggravation evidence to place into context the images that you did plead guilty to...So I'll use it to do things, like, look at, 'Well, these are other images that were – with data at a particular time. Did that inform your intent in what you were looking at?' And, you know, how, you know, the types of material that you were generally interested in.
>
> You cannot be punished additionally for the aggravating circumstances. You're punished solely for the conduct of which you were convicted, but I use this to contextualize the images to which you've pled guilty.

(R. at 333-34.) Then, the military judge asked, "Defense counsel, do you object to my consideration of the aggravation evidence in that way?" After conferring with Appellant, defense stated, "No, your Honor." (Id.)

Care[2] *Inquiry*

During the Care inquiry, the military judge initially discussed the elements of the offense

[2] United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

with Appellant, including the terminal element:

> Staff Sergeant Smith, 'service discrediting conduct' is defined as conduct which tends to harm the reputation of the service or lower it in public esteem. I also advise you as a matter of law that service discrediting doesn't mean that any particular member of the public now finds the Air Force to be in lower esteem, but an objective member of the public fully informed of all of the circumstances – that it would tend to lower the esteem of the Armed Forces in their perspective.

(R. 264-65.)

The military judge then asked Appellant to explain why he believed he was guilty of the offense. The Appellant initially told the judge:

> in the spring of 2020…OSI agents and the local police knocked on my door. At the time, I had 13 pornographic images of minors and one video on my personal cell phone…The images depict females under the age of 18 performing sexual acts. For example, one image showed a minor with a penis in her mouth. The video depicts a young female performing oral sex on a male. The individuals appeared to be minors because of their appearance, size, lack of pubic hair, and undeveloped breasts.

(R. at 266.)

The military judge then asked Appellant where he obtained the images from. (R. at 267.) Appellant stated he found them on the Internet, "[t]hrough Google searches." (Id.) The Appellant went on, "I remember one website. It was called -- I'm sorry, it's a bit awkward to talk about…It's called 'Cum-on-Printed Pics.com.'" (R. at 268.) Appellant explained that he "wasn't necessarily looking specifically for [children under the age of 18 engaging in sexually explicit conduct]," but rather "everything taboo." (R. at 275.) However, Appellant admitted he saved the child pornography on his phone using the "photo vault" application that allowed the files to be "password-protected and encrypted." (R. at 270.) In Appellant's case, he saved the child pornography to a folder labeled with "a skull and cross bones," because he knew the contents of

the folder was "bad." (R. at 270-71.) The judge clarified, "So at the time you downloaded these images, did you think that the people were under the age of 18?" (R. at 274.) And, Appellant responded, "I did, Your Honor." (Id.)

The military judge reviewed the files the parties submitted constituted child pornography. (Pros. Ex. 1, Attachment 7; R. at 282). He then inquired whether "either side request[ed] additional inquiry on this specification." (R. at 283.) Neither the government nor defense requested additional inquiry into the factual basis for the plea. (Id.)

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ACCEPTING APPELLANT'S GUILTY PLEA, AND, EVEN IF HE DID, APPELLANT HAS FAILED TO DEMONSTRATE THE REQUIRED PREJUDICE.

Standard of Review

"[W]hen a plea of guilty is attacked for the first time on appeal, the facts will be reviewed in the light most favorable to the government." United States v. Arnold, 40 M.J. 744, 745 (A.F.C.M.R. 1994). This Court reviews a military judge's decision to accept a plea of guilty for an abuse of discretion. United States v. Forbes, 78 M.J. 279, 281 (C.A.A.F. 2019). This Court explained that an abuse of discretion, in the guilty plea context, "occurs only when the decision of the military judge is arbitrary, clearly unreasonable, or clearly erroneous." United States v. McAfee, 64 M.J. 675, 678 (A.F. Ct. Crim. App. 2007). And the abuse of discretion standard requires than a mere difference of opinion. United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014). Recently, our superior Court has reiterated this deferential standard – "We 'giv[e] broad discretion to military judge's in accepting [guilty] pleas.'" United States v. Navarro-Aguirre, 2025 CAAF LEXIS 614, at *20 (C.A.A.F. 24 July 2025) (internal citations omitted). When a

military judge decides there is a factual basis to accept a guilty plea an appellate court "will defer to [the military judge]'s discretionary decision so long as that decision was within a range of reasonable possible decisions." United States v. Holmes, 65 M.J. 684, 686 (N.M. Ct. App. 2007).

In reviewing the providence of a plea, a military judge abuses his discretion only when there is "a substantial basis in law and fact for questioning the guilty plea." United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008). A substantial basis is "whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's plea." Id. at 321. "[T]he military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo." Id. at 321. "[A]ppellant bears the burden of establishing that the military judge abused that discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." United States v. Phillips, 74 M.J. 20, 21-22 (C.A.A.F. 2015) (internal citation omitted).

A providence inquiry into a guilty plea must establish that the accused himself believes he is guilty and "the factual circumstances as revealed by the accused himself objectively support that plea." United States v. Higgins, 40 M.J. 67, 68 (C.M.A. 1994); *see also* United States v. Davenport, 9 M.J. 364, 366-67 (C.M.A. 1980) (explaining that an accused's admissions during a plea colloquy must establish a factual predicate to support his plea of guilty). In reviewing the providence of a guilty plea, this Court considers an appellant's colloquy with the military judge, as well as any inferences that may be reasonably drawn from it. United States v. Carr, 65 M.J. 39, 41 (C.A.A.F. 2007). A reviewing court must draw every reasonable inference from the evidence in favor of the prosecution. Navarro-Aguirre, CAAF LEXIS 614, at *20.

Finally, a plea of guilty "must be analyzed in terms of providence of his plea, not the sufficiency of the evidence." United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996.) "By pleading guilty, [an] appellant knowingly waived a trial of the facts as to that issue." Id. After all, "this is a guilty plea, folks." Id.

There is no requirement that witnesses be called or any independent evidence be produced to establish the factual predicate for the plea. Id. "The factual predicate is sufficiently established if 'the factual circumstances as revealed by the accused himself objectively support that plea…" Id. (citing Davenport, 9 M.J. at 366). Because a stipulation of fact is binding on the court-martial and may not be contradicted by the parties, we accept as true all of the *facts*, but not necessarily the *legal conclusions*, contained in the parties' stipulation. United States v. Simpson, 81 M.J. 33, 36 & n.3 (C.A.A.F. 2021); *see* Rule for Courts-Martial (R.C.M.) 811(e).

Even if a guilty plea is later determined to be improvident, a reviewing court may grant relief only if it finds that the military judge's error in accepting the plea "materially prejudice[d] the substantial rights of the accused." Article 45(c), UCMJ. United States v. Moratalla, 82 M.J. 1, 4 (C.A.A.F. 2021). Such a conclusion "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." United States v. Dawson, 50 M.J. 599, 601 (N.M.Ct. Crim. App. 1999); *see also* R.C.M. 910(j).

Law and Analysis

There exist strong arguments in favor of giving broad discretion to military judges in accepting pleas, not least because facts are by definition undeveloped in such cases. United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002). Indeed, as stated in Jordan, an accused might make a conscious choice to plead guilty in order to "limit the nature of the information that would otherwise be disclosed in an adversarial contest." Id. at 238–39. As a result, in

reviewing a military judge's acceptance of a plea for an abuse of discretion appellate courts apply a substantial basis test: Does the record as a whole show "'a substantial basis' in law and fact for questioning the guilty plea." United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991); Inabinette, 66 M.J. at 321–22.

Appellant contends that his guilty plea was improvident because the terminal element lacks a factual basis in the record. (App. Br. At 5.) This inadequacy allegedly results because the facts elicited from Appellant on the record do not constitute a factual basis for establishing Appellant's understanding of how or why his conduct was of a nature to bring discredit upon the armed forces. Although this portion of the Care inquiry and the Stipulation of Fact (Pros. Ex. 1) could have more specifically identified the facts that demonstrated Appellant's understanding, the facts admitted during the Care and the Stipulation of Fact do not provide a *substantial basis* in law or fact for questioning the plea.

First, Appellant focuses on the words "service discrediting" and notes these words were only uttered twice during the Care inquiry. (App. Br. at 5.) The record and stipulation of fact, though, provide ample facts to establish why Appellant's possession of child pornography was of a nature to bring discredit upon the armed forces due to its harm to the reputation of the armed services in the eyes of the public. First, as agreed to by Appellant through the Stipulation of Fact, this investigation began with a Cyber Tipline Report from Discord to NCMEC, demonstrating the involvement from the outset of non-military parties. The Cyber Tipline Report was then investigated by non-military law enforcement agents with the NDBCI and HSI. Once Appellant was identified as the subject, OSI became involved because Appellant was identified as a military member. OSI and local law enforcement arrived with a search warrant to

search his residence, ultimately resulting in the evidence that Appellant was in wrongful possession of child pornography.

Then, during the Care inquiry, Appellant told the military judge he obtained the unlawful files from the Internet and hid them on his phone for later use, using the "photo vault" app in a skull and cross bones folder because they were "bad." These facts were elicited after the military judge defined the meaning of "service discrediting conduct," which Appellant indicated he understood. As CAAF recently reiterated in Navarro-Aguirre, an appellate court "*is required* to draw reasonable inferences" from the statements an appellant makes in his plea inquiry, even if they are not "neatly tailored" to an element. 2025 CAAF LEXIS 614, at *26. (emphasis added). The reasonable inference of facts elicited during the Care inquiry supports that Appellant believed his possession of images of young females under 18 engaging in sexual acts, including one that he recalled performing oral sex on a male, would be damaging to the reputation of the military.

The case discussed by Appellant, United States v. Sims, 57 M.J. 419, 422 (C.A.A.F. 2002), demonstrates a situation where even every reasonable inference failed to establish facts from which the court could be convinced that sexual contact in a private bedroom could be considered "open and notorious" as required by Article 134, Indecent Acts. In other words, the plea was improvident because the facts were insufficient to establish the element of indecency. Id. This case is different because, unlike for indecency, there were no additional requirements for finding Appellant's conduct to be service discrediting. Either the conduct met the definition of service discrediting, or it did not. Appellant agreed that the conduct met the definition, and there is nothing else in the record that would create a substantial basis for questioning the guilty plea. The nature of the material he possessed, the way he obtained and saved the material, and

the way his conduct was discovered all support that his conduct was of a nature to lower the esteem of the military in the eyes of the public. Indeed, Appellant points to nothing in the record that actually undermines the service discrediting nature of the conduct and does not argue now that his conduct was not service discrediting.

Moreover, assuming that the military judge abused his discretion by not having Appellant identify why he believed an objective member of the public would hold the armed forces in lesser esteem due to his crime, Appellant has not demonstrated material prejudice to his substantial rights. Article 45(a), UCMJ shows that the focus of the providence inquiry is on whether an accused demonstrates an understanding of the guilty plea's meaning or effect, and Article 45(c) establishes that "[a] variance from the requirements of this article is harmless error if the variance does not materially prejudice the substantial rights of the accused."

Appellant asserts that there is *per se* prejudice here because the military judge allegedly accepted a guilty plea "for an act that does not constitute an offense." (App. Br. at 7.) Appellant is mistaken in the application of the cases he cites to the facts here.

In United States v. McCullough, 2024 CCA LEXIS 198, at *4 (A.Ct. Crim. App., 30 April 2024), the appellant presented a factual inconsistency between his Care inquiry and the stipulation of fact. During the Care inquiry into whether he was guilty of drunken physical control of a vehicle in violation of Article 113, UCMJ, the appellant "admitted only that he sat in his vehicle's passenger seat while drunk." Id. The Army Court of Criminal Appeals noted that "a scenario that would be legally insufficient to establish guilt in a contested case is similarly insufficient in a guilty plea. Id.[3] CAAF similarly found issue with a plea in which an appellant's

[3] This is the same reasoning the plea was improvident in Sims, 57 M.J. at 422, discussed above.

statements directly conflicted with the guilty plea in United States v. Saul, 2025 CAAF LEXIS 578 (CA.A.F. 21 July 2025).

In United States v. Kibler, 84 M.J. 603, 608 (A.C.C.A. 2024), the court found the plea legally insufficient because there were factual inconsistencies between the accused's statements and his plea. Specifically, the plea agreement at issue in Kibler provided appellant would plead to a violation of Article 128, as amended, which appeared to allege a violation of Article 128b(1) (violent offense against his spouse that resulted in her not being able to breathe normally). Id. at 607. However, during the Care inquiry, the military judge instructed appellant on the elements of Article 128b(5) (suffocation). Id. Then, appellant gave a factual basis that the Army Court of Criminal Appeals determined would have likely been sufficient for Article 128b(1), but were not sufficient to establish the legal definition of "suffocation" under Article 128b(5). Id. Ultimately, the conflict and inconsistencies led the court to conclude the appellant was improperly convicted of suffocating his spouse. Id. at 608. As has been reiterated by CAAF, "any ruling based on an erroneous view of the law [is] an abuse of discretion." Inabinette, 66 M.J. at 322 (citing United States v. Griggs, 61 M.J. 402, 406 (C.A.A.F. 2005); United States v. Wardle, 58 M.J. 156, 157 (C.A.A.F. 2003); and United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995)).

Appellant declares that there was material prejudice to his substantial rights because his plea resulted in his "*only* criminal conviction, the deprivation of his liberty for fourteen months, and the lifelong stigma of a dishonorable discharge." (App. Br. at 7.) (emphasis in original). Yet, the law makes clear that when addressing material prejudice to substantial rights in the context of a guilty plea, particularly where the complaint is that the military judge failed to elicit a sufficient factual basis, the court must view the plea in light of waiver of factual issues of guilt, not whether one was found guilty or sentenced to imprisonment and a dishonorable discharge (in

accordance with his plea agreement). A factual issue is exactly what is complained of in this case, and why there is absolutely no prejudice to Appellant. Not only are there facts from which the Court can conclude Appellant understood the terminal element, there is no credible argument that additional facts were unknown to Appellant that would undermine his understanding that his possession of graphic images of children being sexually abused by adults was service discrediting.

The military judge did not abuse his discretion in finding Appellant's plea provident, nor was there any material prejudice to Appellant's substantial rights, and his rightful conviction should be upheld.

II.

APPELLANT WAIVED REVIEW OF THIS ISSUE. THE MILITARY JUDGE ALSO PROPERLY ADMITTED THE EVIDENCE UNDER RCM 1001(b)(4).

Standard of Review

"A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." United States v. Mezzanatto, 513 U.S. 196, 201, (1995). However, "for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege.'" United States v. Suarez, _ MJ __ (C.A.A.F 2025) (citing United States v. Smith, 85 M.J. 283, 287 (C.A.A.F. 2024)); United States v. Sweeney, 70 M.J. 296, 303-04 (C.A.A.F. 2011)). "We review whether an appellant has waived an issue, a question of law, de novo." United States v. Givens, 82 M.J. 211, 215 (C.A.A.F. 2022). The voluntariness of a waiver is also reviewed de novo; voluntariness " 'is measured by reference to the surrounding circumstances.' " United States v. Hasan, 84 M.J. 181, 198 (C.A.A.F. 2024) (citation omitted). "When ... an appellant intentionally waives a known

right at trial, it is extinguished and may not be raised on appeal." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing United States v. Olano, 507 U.S. 725, 733 (1993)).

Under a forfeiture analysis, though, when the defense fails to object to admission of specific evidence, including sentencing evidence in aggravation, the issue is waived, absent plain error. United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008) (citing United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007); United States v. Powell, 49 M.J. 460, 463–65 (C.A.A.F. 1998) Rule for Courts–Martial (R.C.M.) 905(e)). The plain error standard is met when "(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." Maynard, 66 M.J. at 244. The burden is on Appellant to demonstrate all three prongs of the test are met. Id.

Law and Analysis

Prior to reviewing the evidence in aggravation, the military judge specifically addressed whether Appellant understood what was contained on Attachment 4 and how it would be used. (R. at 333-34.) Then, the military judge asked, "Defense counsel, do you object to my consideration of the aggravation evidence in that way?" After conferring with Appellant, the defense counsel stated, "No, your Honor." (Id.) The record clearly establishes Appellant voluntarily and intentionally did not object to the evidence. This is waiver.

Moreover, the admission of the evidence was proper. Evidence in aggravation is "evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4).

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Mil. R. Evid. 401. Relevant evidence is generally admissible. Mil. R. Evid. 402. The military

judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the court members, undue delay, wasting time, or needlessly presenting cumulative evidence. Mil. R. Evid. 403. United States v. Donoho, 2018 CCA LEXIS 545, at *20 (A.F. Ct. Crim. App. 19 November 2018).

> Evidence that otherwise would be inadmissible under the Military Rules of Evidence may sometimes be admitted at trial through a stipulation, if the parties expressly agree, if there is no overreaching on the part of the Government in obtaining the agreement, and if the military judge finds no reason to reject the stipulation "in the interest of justice."

United States v. Clark, 53 M.J. 280, 281–82 (C.A.A.F. 2000) (quoting United States v. Glazier, 26 M.J. 268, 270 (C.M.A. 1988)).

The now-objected-to evidence represented in Attachment 4 depicted individuals whose age could not be determined who were "mostly…females engaging in sexual activity with males." (Pros. Ex. 1, Attachment 5.) Appellant told the military judge during the Care that the child pornography images to which he was pleading guilty "depict females under the age of 18 performing sexual acts." (R. at 266.) And, as explained by the military judge, the aggravation evidence was not used to punish Appellant, but was used to contextualize the images of child pornography. The age difficult images further demonstrated Appellant's interest and intent to locating images of young females engaged in sexually explicit conduct.

This case is nearly analogous to the facts in Donoho, 2018 CCA LEXIS 545. In Donoho, the accused stipulated to the use of "aggravation" evidence that was attached to his stipulation of fact that consisted of "child erotica." Id. at *17-18. Like Appellant, the accused was convicted of possession of child pornography. Id. The "child erotica" involved images of children that the accused found in his searches for child pornography. Id. at *21. This Court agreed with the government that "[w]hile the images do not constitute child pornography, they d[id] constitute

evidence of the aggravating circumstances of [the accused's] possession…of child pornography because they demonstrate[d] [the accused's] clear intent to obtain erotic, or sexually suggestive, images of children, not adults." Id. at *21-22.

This Court further held:

> even if the 'child erotica' and other images that are not child pornography were not admissible as evidence in aggravation, we find no error. Otherwise inadmissible evidence may be admitted through a stipulation of fact. Clark, 53 M.J. at 281–82. Moreover, if a stipulation is unequivocal that the parties 'agree not only to the truth of the matters stipulated but that such matters are admissible in evidence against the accused, ... there can be no doubt as to the full agreement and understanding of the parties.' Glazier, 26 M.J. at 270. Appellant signed a stipulation that began with the phrase 'the following facts are true and admissible for any and all purposes.' Appellant understood and agreed to the military judge's use of the stipulation first to determine Appellant's guilt and second to determine an appropriate sentence. The 'child erotica' and other images that were referenced in that stipulation were found in Appellant's possession along with the child pornography he was convicted of possessing, and it was not overreaching for the Government to include them in the stipulation. *See* Clark, 53 M.J. at 281–82. Furthermore, there was no reason for the military judge to reject the stipulation and its references to and attachment of 'child erotica' and other images, and the judge did not abuse his discretion by not rejecting the stipulation 'in the interest of justice' or for any other reason.

Donoho, 2018 CCA LEXIS 545, at *22-23.

Just as there was no overreach by the government in including the child erotica in the Donoho case, there was no wrongdoing in submitting the age difficult images to the court-martial as part of Appellant's stipulation of fact. The stipulation of fact, which was signed after the date of the plea agreement, was reasonable given the facts and circumstances of Appellant's case.[4] In

[4] Usually, an accused has greater leverage to strike items from a stipulation of fact when it is signed after the convening authority assents to a plea agreement, since the convening authority is more limited by case law in his ability to withdrawal from the plea agreement than the accused.

fact, Appellant complains now that the images were "legal-to-possess media that the trial counsel…bootstrap[ed] to unlawful images." If the images were so non-offensive, then this Court can be even more convinced that they had no material prejudice to Appellant's substantial rights.

The military judge did not abuse his discretion in accepting the stipulation of fact and its attachments. He also explained that the aggravation evidence would not be used to punish Appellant, showing that the judge understood how the images could be used. Thus, there was no prejudice. Appellant has also failed to meet his burden to demonstrate error – and certainly has not shown plain error, or material prejudice to a substantial right. There is no reason for this Court to disturb the sentence to a dishonorable discharge, or otherwise, for his wrongful possession of child pornography.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court deny Appellant's claims and affirm the findings and sentence.

Respectfully submitted,

[redacted]
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CERTIFICATE OF SERVICE AND FILING

I certify that a copy of the foregoing was delivered to the Court, and to the Appellate Defense Division on this 6th day of October 2025, via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (E-5), **DIETRICH A. SMITH**, United States Air Force, *Appellant.*	)	**MOTION FOR ENLARGMENT OF TIME TO FILE REPLY BRIEF – OUT OF TIME** Before Panel No. 1 No. ACM 40637 (f rev) 9 October 2025

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

Pursuant to Rule 23.3(m)(2) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file a Reply to the Government Answer to Appellant's Assignment of Error (AOE). The Government filed its answer on 6 October 2025; Appellant's reply is, therefore, currently due on 13 October 2025. Appellant requests an enlargement of time to file a reply for a period of 30 days, which will end on **12 November 2025**. This case was docketed with this Court on 17 May 2024. From the date of docketing to the present date, 510 days have elapsed. On the date requested, 544 days will have elapsed.

On 11-12 July and 15 December 2022, a military judge sitting as a general court-martial at Minot Air Force Base, North Dakota, found Appellant guilty, consistent with his pleas, of one charge and one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 306; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 23 February 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for fourteen

GRANTED
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months, and to be dishonorably discharged. R. at 337; EOJ. The convening authority took no action on the findings or sentence.[1] ROT Vol. 1, Convening Authority Decision on Action – *United States v. SSgt Dietrich A. Smith*, 6 February 2023.

The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and twenty-nine appellate exhibits; the transcript is 338 pages. Appellant is not currently confined.

Pursuant to A.F. Ct. Crim. App. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel is currently assigned 7 cases. No cases are pending Assignments of Error before this Court. Undersigned counsel has one case pending a petition to the United States Supreme Court and two cases pending petitions and supplements to the Court of Appeals for the Armed Forces.

Counsel requests the additional time in order to thoroughly review and reply to the Government's Answer. Undersigned counsel is an Individual Mobilization Augmentee (IMA) in the Air Force Reserves. As of the filing of this motion, guidance from the Air Force Reserve Command during the government's lapse in appropriations is that neither Inactive Duty for Training days (IDTs) nor Annual Tour days (ATs) are allowed to be performed. Thus, until either the government is funded, or undersigned counsel is placed on a Military Personnel Appropriation (MPA) tour, undersigned counsel cannot work on this case. Additionally, it was, unfortunately, not possible for counsel to file this motion "in time" as the timing for the motion to be "in time"

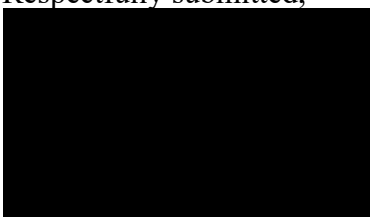
[1] The Convening Authority Decision on Action (CADA) stated the convening authority suspended the adjudged forfeitures, but no forfeitures were adjudged in this case. *See* EOJ at 3. This error was likely predicated by an error in the Statement of Trial Results which listed "adjudged forfeitures" as part of the sentence when the Court adjudged no forfeitures. *Id.* The military judge exercised his authority under Rule for Courts-Martial 1104(b)(2)(B)(ii) to correct the CADA and declared the provision suspending adjudged forfeitures a "legal nullity." *Id.*

to this Court is seven days (*see* AFCCA Rule 23.3(m)(1), and the timing for a Reply to this Court is also seven days. *See* AFCCA Rule 17(d). Thus, once the Government files an answer, any request for an extension of time to file a reply would necessarily be "out of time."

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

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

Respectfully submitted,



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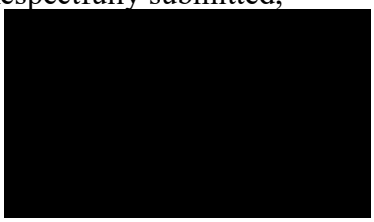
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 9 October 2025.

Respectfully submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF - OUT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	14 October 2025

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

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

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

[redacted]

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Joint Base Andrews, MD
DSN: 612-4804

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 14 October 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel 1
Staff Sergeant (E-5), **DIETRICH A. SMITH,** United States Air Force, *Appellant.*	)	No. ACM 40437 (f rev)
	)	7 November 2025

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

Appellant, Staff Sergeant Dietrich A. Smith, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Government's Answer, dated 6 October 2025. In addition to the arguments in his opening brief, filed on 28 August 2025, Appellant submits the following arguments for the issues listed below.

I.

THE MILITARY JUDGE'S FAILURE TO ELICIT A FACTUAL BASIS FOR APPELLANT'S GUILTY PLEA TO THE SPECIFICATION AND CHARGE RENDERS APELLANT'S PLEA IMPROVIDENT.

In its answer, the Government concedes that a basis exists to question Appellant's plea; they just do not believe that the basis is substantial. *See* Answer at 9 ("Although this portion of the *Care* inquiry and the Stipulation of Fact . . . could have more specifically identified the facts that demonstrated Appellant's understanding, the facts admitted during the *Care* and the Stipulation of Fact do not provide a *substantial basis* in law or fact for questioning the plea.) (emphasis in original). However, if the Government had put Appellant's argument into the proper context, the substantiality of the basis would have become apparent to it.

The Government's argument goes awry because it confuses facts that could be argued to support the terminal element, with Appellant's understanding of how facts allegedly prove the terminal element. As pointed out in Appellant's opening brief, a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *United States v. Byunggu Kim*, 83 M.J. 235, 238 (C.A.A.F. 2023) (citation omitted). The Government's after-the-fact arguments regarding how it interprets the facts of the case in a way that supports the terminal element is utterly beside the point. The amount of law enforcement personnel who investigated Appellant (Answer at 9), or how Appellant stored the media (Answer at 10) in no way establishes that Appellant *understood* how those facts established the terminal element.

While it is correct, as the Government points out, that reasonable inferences ought to be drawn from the facts of a guilty plea, the inferences the Government asks this Court to draw are not reasonable. *See* Answer at 10. The Government points to one half of *United States v. Navarro-Aguirre*, 2025 CAAF LEXIS 614 (C.A.A.F. 2025), to support its argument, without considering the other half of the case. *See* Answer at 10. In *Navarro-Aguirre* the appellant was charged with, among other offenses, wrongful use of Ambien. *Navarro-Aguirre*, 2025 CAAF LEXIS 614, at *1. Because the Government had "no direct evidence that [the appellant] engaged in the wrongful use of Ambien, it [urged the Court of Appeals for the Armed Forces (CAAF)] to consider what it characterize[d] as 'four key reasonable inferences' and then to affirm [the appellant's] conviction for wrongful use of Ambien." *Id*. at *15-16. The CAAF discussed each inference in turn and held, "[W]e are compelled to conclude that what the Government cites as 'four key reasonable inferences' would be better characterized as understandable—but not compelling—suspicions, speculations, and suppositions." *Id*. at *18. Indeed, as pointed out in

Navarro-Aguirre, the Government does not get "the benefit of *every potential* inference but rather, only those inferences reasonably and logically flowing from the other evidence adduced at trial." *Id*. at *18-19 (citation omitted). An "inference is unreasonable if it requires [the factfinder] 'to engage in a degree of speculation and conjecture that renders its findings a guess or mere possibility.'" *Id*. at *19.

To be clear, the underlying argument is that the military judge in the instant case failed to elicit facts to support that *Appellant understood* how his conduct allegedly discredited the service. In its Answer, the Government recognized this to be the argument. *See* Answer at 9 ("Although this portion of the *Care* inquiry and the Stipulation of Fact . . . could have more specifically identified the facts that demonstrated *Appellant's understanding*[.]") (emphasis added). So, it is difficult to reconcile this argument with the Government's Answer. There is nothing reasonable or logical about inferring Appellant's understanding about how the terminal element was met from facts regarding law enforcement involvement or media storage. At best it would be a speculative guess that law enforcement involvement and media storage shows that Appellant somehow understood his conduct to be service discrediting. Thus, this portion of the Government's argument must fail.

The Government then switches gears and argues that "there were no additional requirements for finding Appellant's conduct to be service discrediting. Either the conduct met the definition of service discrediting, or it did not." Answer at 10. This argument amounts to nothing more than an attempt to argue that conduct can be considered per se service discrediting. This argument has already been rejected by the CAAF and needs no further comment here. *See United States v. Richard*, 82 M.J. 473, 478 (C.A.A.F. 2022).

Lastly, the Government's argument that no prejudice resulted from the military judge's

failure to elicit Appellant's understanding of half of the offense is meritless. This is apparent given that the Government argues that "the law makes clear" that its position is correct without citing a single source of authority. Answer at 12. If the law was truly as clear as the Government states, then presumably the Government would have cited to some source for its argument.

However, the law, in fact, establishes a position contrary to the Government's argument. In *United States v. Jordan*, the CAAF held that the military judge's failure to establish the appellant's understanding of how the terminal element was met—beyond bare "yes, sir" responses to the military judge's questions—resulted in a "substantial basis in law and fact for questioning the guilty plea." 57 M.J. 236, 238-40 (C.A.A.F. 2002). Because of this, the CAAF set aside the appellant's finding of guilty. *Id*. at 240. In the instant case, the military judge did not even ask Appellant if he agreed that his conduct was service discrediting; the judge simply stated that service discrediting was an element, then moved past the element without discussing it with Appellant at all. If *Jordan*'s conclusory statements regarding the terminal element were insufficient, Appellant's complete lack of statements regarding the terminal element must also be insufficient.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside his conviction.

II.

THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ADMITTING AND CONSIDERING IMPROPER EVIDENCE IN AGGRAVATION UNDER RULE FOR COURTS-MARTIAL 1001(b)(4).

The Government's entire argument that Appellant waived this issue consists of a conclusory statement that because trial defense counsel failed to object to the military judge's consideration of the improper evidence, the trial defense counsel waived the issue. Answer at 14.

The Government performs no legal analysis, nor does it cite to any case in which a similar situation occurred. *Id*.

What the Government's conclusory statement fails to consider is that in order for a waiver to be valid, it must be knowing and intelligent. *United States v. Cooper*, 78 M.J. 283, 286 (C.A.A.F. 2019). "[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed consequences* of invoking it." *Id.* (emphasis in original). The nature of the right at issue in the instant case was created by Rule for Courts-Martial (R.C.M.) 1001(b)(4). R.C.M. 1004(b)(4) dictates that not just *any* aggravating evidence can be used against an accused; an accused has a right to only have his sentence affected by aggravating evidence that "directly relat[es] to or result[s] from the offenses of which the accused has been found guilty." *See* R.C.M. 1004(b)(4). While Appellant was given the opportunity to object to the evidence, there is nothing in the record to suggest that Appellant fully understood the nature of this right, especially given the military judge's confusing explanation as to how the evidence would be used. *See* Tr. 333 ("So I'll use [the evidence] to do things, like, look at, "Well, these are other images that were – with data at a particular time. Did that inform your intent in what you were looking at?" And, you know, how, you know, the types of material that you were generally interested in.) Thus, any alleged waiver was not knowing and intelligent.

The Government goes on to argue that since the evidence in question meets—in the Government's opinion—the requirements of Military Rule of Evidence (Mil. R. Evid.) 401 and 403, its admission was proper. Answer at 14. This confuses the gatekeeping roles of Mil. R. Evid. 401 and 403 with the gatekeeping role of R.C.M. 1004(b)(4). Evidence that may satisfy

Mil. R. Evid. 401 and 403 should still be excluded if it does not satisfy R.C.M. 1004(b)(4). Evidence could be considered relevant under the rules of evidence without being directly related to, or resulting from, the offense the accused has been found guilty. *See United States v. Gordan*, 31 M.J. 30, 36 (C.M.A. 1990) ("The standard for admission of evidence under [R.C.M. 1001] is not the mere relevance of the purported aggravating circumstances to the offense . . . Instead a higher standard is required, namely, the aggravating circumstances proffered must directly relate to or result from the accused's offense.").

WHEREFORE, Appellant respectfully requests this Honorable Court reassess his sentence and affirm a bad-conduct discharge in lieu of the adjudged dishonorable discharge.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 November 2025.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40437 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Dietrich A. SMITH	)	**CHANGE**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

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

ORDERED:

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

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

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

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner