IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FIRST)**
	)	
v.	)	Before Panel No. 2
	)	
Airman	)	No. ACM 40333
JAKALIEN J. COOK,	)	
United States Air Force	)	27 October 2022
Appellant	)	

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **4 January 2023**. The record of trial was docketed with this Court on 6 September 2022. From the date of docketing to the present date, 50 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 27 October 2022.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

31 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAKALIEN J. COOK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40333 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 October 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK,** United States Air Force *Appellant*	)	No. ACM 40333 28 December 2022

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 an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **3 February 2023**. The record of trial was docketed with this Court on 6 September 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 14 February 2022, at a general court-martial convened at the Davis-Monthan Air Force Base, Arizona, Appellant was found guilty, consistent with his pleas, of one charge and specification of Article 86, Uniform Code of Military Justice (UCMJ); one charge and specification of Article 87b, UCMJ; and one charge and specification of Article 112a, UCMJ. He was found guilty, inconsistent with his pleas, of one charge and one specification of Article 134, UCMJ; one charge and specification of Article 81, UCMJ; and one charge and specification of Article 131b, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 20 April 2022. The military judge sentenced Appellant to reduction to the rank of E-1, forfeiture of all pay and allowances, 27 months' confinement and a dishonorable discharge. *Id.* The military judge credited Appellant with 155 days' of pretrial confinement credit. *Id.* The convening authority

took no action on the findings and approved the sentence in its entirety. ROT Vol. 1, *Convening Authority Decision on Action,* 21 March 2022. Appellant is currently confined at the Naval Consolidated Brig in Charleston, SC.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 28 December 2022.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

29 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAKALIEN J. COOK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40333 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 29 December 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK,** United States Air Force *Appellant*	)	No. ACM 40333 27 January 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 March 2023**. The record of trial was docketed with this Court on 6 September 2022. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 14 February 2022, at a general court-martial convened at the Davis-Monthan Air Force Base, Arizona, Appellant was found guilty, consistent with his pleas, of one charge and specification of Article 86, Uniform Code of Military Justice (UCMJ); one charge and specification of Article 87b, UCMJ; and one charge and specification of Article 112a, UCMJ. He was found guilty, inconsistent with his pleas, of one charge and one specification of Article 134, UCMJ; one charge and specification of Article 81, UCMJ; and one charge and specification of Article 131b, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 20 April 2022. The military judge sentenced Appellant to reduction to the rank of E-1, forfeiture of all pay and allowances, 27 months' confinement and a dishonorable discharge. *Id.* The military judge credited Appellant with 155 days' of pretrial confinement credit. *Id.* The convening authority

took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action,* 21 March 2022. Appellant is currently confined at the Naval Consolidated Brig in Charleston, SC.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 27 January 2023.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

30 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAKALIEN J. COOK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40333 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK,** United States Air Force *Appellant*	)	No. ACM 40333 24 February 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **4 April 2023**. The record of trial was docketed with this Court on 6 September 2022. From the date of docketing to the present date, 171 days have elapsed. On the date requested, 210 days will have elapsed.

On 14 February 2022, at a general court-martial convened at the Davis-Monthan Air Force Base, Arizona, Appellant was found guilty, consistent with his pleas, of one charge and specification of Article 86, Uniform Code of Military Justice (UCMJ); one charge and specification of Article 87b, UCMJ; and one charge and specification of Article 112a, UCMJ. He was found guilty, inconsistent with his pleas, of one charge and one specification of Article 134, UCMJ; one charge and specification of Article 81, UCMJ; and one charge and specification of Article 131b, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 20 April 2022. The military judge sentenced Appellant to reduction to the rank of E-1, forfeiture of all pay and allowances, 27 months' confinement and a dishonorable discharge. *Id.* The military judge credited Appellant with 155 days' of pretrial confinement credit. *Id.* The convening authority

took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action*, 21 March 2022. Appellant is not currently confined.

Undersigned counsel is currently assigned 16 cases, with 11 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Ten cases have priority over the present case:

1. *United States v. Arroyo,* ACM 40321: The trial transcript is 154 pages long and the record of trial is comprised of three volumes containing three prosecution exhibits, 20 defense exhibits, 26 appellate exhibits, and one court exhibit. Counsel has reviewed the record of trial and the Assignments of Error is near completion.
2. *United States v. Cabuhat, Jr.*, ACM 40191: Oral argument was ordered on three issues in this case and is scheduled for 22 March 2023.
3. *United States v. Walker,* ACM S32737: The trial transcript is 90 pages long and the record of trial is comprised of three volumes containing four prosecution exhibits, eight defense exhibits, three appellate exhibits, and zero court exhibits.
4. *United States v. Edwards,* ACM 40349: The trial transcript is 1505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit.
5. *United States v. Greene-Watson,* ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit.
6. *United States v. Emerson,* ACM 40297: The trial transcript is 255 pages long and the

record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits.

7. *United States v. Dugan*, ACM 40320: The trial transcript is 225 pages long and the record of trial is comprised of four volumes containing six prosecutions exhibits, 22 defense exhibits, 10 appellate exhibits, and zero court exhibits.
8. *United States v. Milla*, ACM 40307: The trial transcript is 210 pages long and the record of trial is comprised of five volumes containing three prosecutions exhibits, nine defense exhibits, 22 appellate exhibits, and zero court exhibits.
9. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits.
10. *United States v. Henderson*, ACM 40338: The trial transcript is 634 pages long and the record of trial is comprised of five volumes containing 18 prosecution exhibits, six defense exhibits, 36 appellate exhibits, and two court exhibits.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 24 February 2023.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

27 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAKALIEN J. COOK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40333 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK,** United States Air Force *Appellant*	)	No. ACM 40333 27 March 2023

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

Pursuant to Rule 23.3(m)(3) and (4) 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 30 days, which will end on **4 May 2023**. The record of trial was docketed with this Court on 6 September 2022. From the date of docketing to the present date, 202 days have elapsed. On the date requested, 240 days will have elapsed.

On 14 February 2022, at a general court-martial convened at the Davis-Monthan Air Force Base, Arizona, Appellant was found guilty, consistent with his pleas, of one charge and specification of Article 86, Uniform Code of Military Justice (UCMJ); one charge and specification of Article 87b, UCMJ; and one charge and specification of Article 112a, UCMJ. He was found guilty, inconsistent with his pleas, of one charge and one specification of Article 134, UCMJ; one charge and specification of Article 81, UCMJ; and one charge and specification of Article 131b, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 20 April 2022. The military judge sentenced Appellant to reduction to the rank of E-1, forfeiture of all pay and allowances, 27 months' confinement and a dishonorable discharge. *Id.* The military judge credited Appellant with 155 days' of pretrial confinement credit. *Id.* The convening authority

took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action,* 21 March 2022. Appellant is not currently confined.

Undersigned counsel is currently assigned 15 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Eight cases have priority over the present case:

1. *United States v. Arroyo,* ACM 40321: The Answer was filed in this case today, 27 March 2023. Counsel is reviewing the Answer and will be drafting the Reply, which is due Monday, 3 April 2023.
2. *United States v. Walker,* ACM S32737: The trial transcript is 90 pages long and the record of trial is comprised of three volumes containing four prosecution exhibits, eight defense exhibits, three appellate exhibits, and zero court exhibits. Counsel has started review of the Record of Trial in this case and will begin writing the Assignment(s) of Error after the review is complete.
3. *United States v. Edwards,* ACM 40349: The trial transcript is 1505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit.
4. *United States v. Greene-Watson,* ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit.
5. *United States v. Emerson,* ACM 40297: The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven

defense exhibits, 27 appellate exhibits, and zero court exhibits.

6. *United States v. Dugan*, ACM 40320: The trial transcript is 225 pages long and the record of trial is comprised of four volumes containing six prosecutions exhibits, 22 defense exhibits, 10 appellate exhibits, and zero court exhibits.
7. *United States v. Milla*, ACM 40307: The trial transcript is 210 pages long and the record of trial is comprised of five volumes containing three prosecutions exhibits, nine defense exhibits, 22 appellate exhibits, and zero court exhibits.
8. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 27 March 2023.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

28 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAKALIEN J. COOK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40333 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40333**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jakalien J. COOK	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

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

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

ORDERED:

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

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK,** United States Air Force *Appellant*	)	No. ACM 40333 27 April 2023

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

Pursuant to Rule 23.3(m)(3) and (4) 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 30 days, which will end on **3 June 2023**. The record of trial was docketed with this Court on 6 September 2022. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 14 February 2022, at a general court-martial convened at the Davis-Monthan Air Force Base, Arizona, Appellant was found guilty, consistent with his pleas, of one charge and specification of Article 86, Uniform Code of Military Justice (UCMJ); one charge and specification of Article 87b, UCMJ; and one charge and specification of Article 112a, UCMJ. He was found guilty, inconsistent with his pleas, of one charge and one specification of Article 134, UCMJ; one charge and specification of Article 81, UCMJ; and one charge and specification of Article 131b, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 20 April 2022. The military judge sentenced Appellant to reduction to the rank of E-1, forfeiture of all pay and allowances, 27 months' confinement and a dishonorable discharge. *Id.* The military judge credited Appellant with 155 days' of pretrial confinement credit. *Id.* The convening authority

took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action*, 21 March 2022.

The trial transcript is 639 pages long and the record of trial is comprised of 11 volumes containing 28 prosecutions exhibits, 10 defense exhibits, 48 appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 16 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Seven cases have priority over the present case:

1. *United States v. Edwards*, ACM 40349: The trial transcript is 1505 pages long and the record of trial is comprised of 12 volumes containing 37 prosecution exhibits, 38 defense exhibits, 70 appellate exhibits, and one court exhibit. Counsel is currently reviewing the record of trial and drafting the Assignment of Errors brief.
2. *United States v. Greene-Watson*, ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit.
3. *United States v. Flores*, ACM 40294: The petition for grant of review is due to the CAAF on 7 June 2023.
4. *United States v. Emerson*, ACM 40297: The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits.
5. *United States v. Dugan*, ACM 40320: The trial transcript is 225 pages long and the record

of trial is comprised of four volumes containing six prosecutions exhibits, 22 defense exhibits, 10 appellate exhibits, and zero court exhibits.

6. *United States v. Milla*, ACM 40307: The trial transcript is 210 pages long and the record of trial is comprised of five volumes containing three prosecutions exhibits, nine defense exhibits, 22 appellate exhibits, and zero court exhibits.
7. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 27 April 2023.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

1 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAKALIEN J. COOK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40333 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 May 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK,** United States Air Force *Appellant*	)	No. ACM 40333 25 May 2023

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

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

On 14 February 2022, at a general court-martial convened at the Davis-Monthan Air Force Base, Arizona, Appellant was found guilty, consistent with his pleas, of one charge and specification of Article 86, Uniform Code of Military Justice (UCMJ); one charge and specification of Article 87b, UCMJ; and one charge and specification of Article 112a, UCMJ. He was found guilty, inconsistent with his pleas, of one charge and one specification of Article 134, UCMJ; one charge and specification of Article 81, UCMJ; and one charge and specification of Article 131b, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 20 April 2022. The military judge sentenced Appellant to reduction to the rank of E-1, forfeiture of all pay and allowances, 27 months' confinement and a dishonorable discharge. *Id.* The military judge credited Appellant with 155 days' of pretrial confinement credit. *Id.* The convening authority

took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action*, 21 March 2022.

The trial transcript is 639 pages long and the record of trial is comprised of 11 volumes containing 28 prosecutions exhibits, 10 defense exhibits, 48 appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 17 cases, with 10 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Undersigned counsel recently filed the Brief on Behalf of Appellant in *United States v. Edwards* (ACM 40349) and the Reply Brief in *United States v. Walker* (ACM S32737). There are then five cases before this Court with priority over the present case:

1. *United States v. Greene-Watson*, ACM 40293: The trial transcript is 536 pages long and the record of trial is comprised of 11 volumes containing 21 prosecution exhibits, 12 defense exhibits, 46 appellate exhibits, and one court exhibit. Counsel has reviewed the record of trial and will return to drafting the Assignments of Error after finishing the draft of the Supplement to the Petition for Grant of Review in *United States v. Flores*, ACM 40294.
2. *United States v. Emerson*, ACM 40297: The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven defense exhibits, 27 appellate exhibits, and zero court exhibits.
3. *United States v. Dugan*, ACM 40320: The trial transcript is 225 pages long and the record

of trial is comprised of four volumes containing six prosecutions exhibits, 22 defense exhibits, 10 appellate exhibits, and zero court exhibits.

4. *United States v. Milla*, ACM 40307: The trial transcript is 210 pages long and the record of trial is comprised of five volumes containing three prosecutions exhibits, nine defense exhibits, 22 appellate exhibits, and zero court exhibits.

5. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 25 May 2023.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

30 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAKALIEN J. COOK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40333 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40333**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jakalien J. COOK	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 25 May 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 31st day of May, 2023,

ORDERED:

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

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK** United States Air Force *Appellant*	)	No. ACM 40333 26 June 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **2 August 2023**. The record of trial was docketed with this Court on 6 September 2022. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 14 February 2022, at a general court-martial convened at the Davis-Monthan Air Force Base, Arizona, Appellant was found guilty, consistent with his pleas, of one charge and specification of Article 86, Uniform Code of Military Justice (UCMJ); one charge and specification of Article 87b, UCMJ; and one charge and specification of Article 112a, UCMJ. He was found guilty, inconsistent with his pleas, of one charge and one specification of Article 134, UCMJ; one charge and specification of Article 81, UCMJ; and one charge and specification of Article 131b, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 20 April 2022. The military judge sentenced Appellant to reduction to the rank of E-1, forfeiture of all pay and allowances, 27 months' confinement and a dishonorable discharge. *Id.* The military judge credited Appellant with 155 days' of pretrial confinement credit. *Id.* The convening authority

took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action*, 21 March 2022.

The trial transcript is 639 pages long and the record of trial is comprised of 11 volumes containing 28 prosecutions exhibits, 10 defense exhibits, 48 appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 18 cases, with 9 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 7 in this case, undersigned counsel has filed a Motion to Withdraw from Appellate Review and Motion to Attach in *United States v. Milla* (ACM 40307); a Response to the Government's Motion to Dismiss in *United States v. Cooley* (ACM 40376); the Petition and Supplement to the Petition for Grant of Review in *United States v. Flores* (ACM 40294); a Motion for Leave to File a Responsive Pleading in *United States v. Cooley* (ACM 40376); and a Brief on Behalf of Appellant in *United States v. Greene-Watson* (ACM 40293). Undersigned counsel also had scheduled and approved leave starting

Additionally, the Government filed an Answer in *United States v. Edwards* (40349) and undersigned counsel and her civilian co-counsel are currently coordinating to determine if a Reply Brief will be filed by the deadline of Friday, 30 June.

There are then three cases before this Court with priority over the present case:

1. *United States v. Emerson*, ACM 40297: The trial transcript is 255 pages long and the record of trial is comprised of four volumes containing seven prosecutions exhibits, seven

defense exhibits, 27 appellate exhibits, and zero court exhibits. Counsel filed a Consent Motion to Examine Sealed Material on 30 May 2023, which was granted on 9 June 2023. Counsel subsequently reviewed the sealed material on 15 June 2023. Counsel anticipates completing review of the record of trial tomorrow and will begin drafting the Assignments of Error. Additionally, counsel notes that Monday and Tuesday, , are a Family Day and Holiday.

2. *United States v. Dugan*, ACM 40320: The trial transcript is 225 pages long and the record of trial is comprised of four volumes containing six prosecutions exhibits, 22 defense exhibits, 10 appellate exhibits, and zero court exhibits. Reservist co-counsel has been recently assigned and has begun review of the record of trial.
3. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

28 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAKALIEN J. COOK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40333 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 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.

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (NINTH)**
	)	
v.	)	Before Panel No. 2
	)	
Airman (E-2)	)	No. ACM 40333
JAKALIEN J. COOK	)	
United States Air Force	)	26 July 2023
Appellant	)	

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 30 days, which will end on **1 September 2023**. The record of trial was docketed with this Court on 6 September 2022. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 14 February 2022, at a general court-martial convened at the Davis-Monthan Air Force Base, Arizona, Appellant was found guilty, consistent with his pleas, of one charge and specification of Article 86, Uniform Code of Military Justice (UCMJ); one charge and specification of Article 87b, UCMJ; and one charge and specification of Article 112a, UCMJ. He was found guilty, inconsistent with his pleas, of one charge and one specification of Article 134, UCMJ; one charge and specification of Article 81, UCMJ; and one charge and specification of Article 131b, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 20 April 2022. The military judge sentenced Appellant to reduction to the rank of E-1, forfeiture of all pay and allowances, 27 months' confinement and a dishonorable discharge. *Id.* The military judge credited Appellant with 155 days' of pretrial confinement credit. *Id.* The convening authority

took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action,* 21 March 2022.

The trial transcript is 639 pages long and the record of trial is comprised of 11 volumes containing 28 prosecutions exhibits, 10 defense exhibits, 48 appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 23 cases, with 12 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 8 in this case, undersigned counsel has filed the Brief on Behalf of Appellant in *United States v. Emerson* (ACM 40297). Undersigned counsel currently has scheduled and approved leave

Additionally, the Government filed an Answer in *United States v. Greene-Watson* (ACM 40293) on 21 July 2023 and the Reply Brief is due this Friday, 28 July 2023. Finally, on 20 July 2023, the Court of Appeals for the Armed Forces (CAAF) granted an issue for review in *United States v. Flores* (ACM 40294) with a brief due on or before 21 August 2023.

There are then two cases before this Court with priority over the present case:

1. *United States v. Dugan*, ACM 40320: The trial transcript is 225 pages long and the record of trial is comprised of four volumes containing six prosecutions exhibits, 22 defense exhibits, 10 appellate exhibits, and zero court exhibits. Reservist co-counsel and undersigned counsel have completed review of the record of trial and are currently finalizing the Assignments of Error, which is due to this Court on Monday, 31 July 2023.

2. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

27 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAKALIEN J. COOK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40333 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 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 will have 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. In addition, 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.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 July 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40333**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jakalien J. COOK	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

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

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

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **1 September 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time may necessitate a status conference.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (TENTH)**
	)	
v.	)	Before Panel No. 2
	)	
Airman (E-2)	)	No. ACM 40333
JAKALIEN J. COOK	)	
United States Air Force	)	23 August 2023
Appellant	)	

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 30 days, which will end on **1 October 2023**. The record of trial was docketed with this Court on 6 September 2022. From the date of docketing to the present date, 351 days have elapsed. On the date requested, 390 days will have elapsed.

On 14 February 2022, at a general court-martial convened at the Davis-Monthan Air Force Base, Arizona, Appellant was found guilty, consistent with his pleas, of one charge and specification of Article 86, Uniform Code of Military Justice (UCMJ); one charge and specification of Article 87b, UCMJ; and one charge and specification of Article 112a, UCMJ. He was found guilty, inconsistent with his pleas, of one charge and one specification of Article 134, UCMJ; one charge and specification of Article 81, UCMJ; and one charge and specification of Article 131b, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 20 April 2022. The military judge sentenced Appellant to reduction to the rank of E-1, forfeiture of all pay and allowances, 27 months' confinement and a dishonorable discharge. *Id.* The military judge credited Appellant with 155 days' of pretrial confinement credit. *Id.* The convening authority

took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action,* 21 March 2022.

The trial transcript is 639 pages long and the record of trial is comprised of 11 volumes containing 28 prosecutions exhibits, 10 defense exhibits, 48 appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 23 cases, with 13 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 9 in this case, undersigned counsel has filed the Reply Brief on Behalf of Appellant in *United States v. Greene-Watson* (ACM 40293), the Brief on Behalf of Appellant in *United States v. Dugan* (ACM 40320), and the Grant Brief in *United States v. Flores* (ACM 40294) with the Court of Appeals for the Armed Forces (CAAF). Of note, there is a scheduled Family Day on and is on . Undersigned counsel then currently has scheduled and approved leave . Undersigned counsel also has two Reply Briefs due to this Court in *United States v. Emerson* (ACM 40297), calculated as being due 20 September 2023, and in *United States v. Dugan* (ACM 40320), calculated as being due 30 September 2023. Additionally, on 27 July 2023, the CAAF granted an issue for review in *United States v. Guihama* (ACM 40039) with a brief, after an extension of time request, due on or before 27 September 2023. Finally, the Reply Brief in *United States v. Flores* (ACM 40294) is due to the CAAF on or before 30 September 2023.

There are then two cases before this Court with priority over the present case:

1. *United States v. Douglas*, ACM 40324: The trial transcript is 777 pages long and the record of trial is comprised of five volumes containing 11 prosecution exhibits, 13 defense exhibits, 56 appellate exhibits, and zero court exhibits. Undersigned counsel filed a consent motion to view sealed material on 19 July 2023 and viewed the sealed material on 2 August 2023. Undersigned counsel has begun review of the record of trial and drafting of the assignment of errors.
2. *United States v. Henderson*, ACM 40338: The trial transcript is 634 pages long and the record of trial is comprised of five volumes containing 18 prosecution exhibits, six defense exhibits, 36 appellate exhibits, and two court exhibits. Undersigned counsel has prioritized *Henderson* over this case given the appellant in *Henderson* is currently confined and the Appellant in this case is not. The Consent Motion to Examine Sealed Materials in *Henderson* was granted by this Court on 9 August 2023. Undersigned counsel has yet to review the sealed materials.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

THIS SPACE INTENTIONALLY LEFT BLANK

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 23 August 2023.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

24 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAKALIEN J. COOK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40333 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant 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 one 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 will have consumed over 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. In addition, 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.

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40333**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jakalien J. COOK	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 23 August 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion. Counsel for Appellant stated two matters had priority over the subject case.

In Appellant's Motion for Enlargement of Time (Ninth), counsel for Appellant stated two matters had priority over the subject case. In our order dated 28 July 2023 granting that motion, we stated that "any further requests for an enlargement of time may necessitate a status conference."

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 25th day of August, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **1 October 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time where the subject case has not moved to a higher priority will necessitate a status conference.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK** United States Air Force *Appellant*	)	No. ACM 40333 15 September 2023

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Appellant has released undersigned counsel due to her congested docket. Major Matthew Blyth has been detailed substitute counsel in undersigned counsel's stead and will file his notice of appearance within 10 days pursuant to Rule 12.4. Counsel have completed a thorough turnover of the record and Maj Blyth is available to start review of the record immediately.

Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

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

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel

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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 15 September 2023.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

26 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAKALIEN J. COOK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40333 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant 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 one 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 will have consumed over 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. In addition, 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.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40333**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jakalien J. COOK	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 15 September 2023, Appellant's counsel, Major Heather Caine, requested to withdraw as counsel in the above-captioned case. Appellant's counsel stated that this request was due to a "congested docket;" the Appellant does not object to the withdrawal; and provisions have been made for continued representation in that Major Matthew Blyth has been detailed to represent Appellant, and "is available to start review of the record immediately." *See* JT. CT. CRIM. APP. R. 12(b).

On 22 September 2023, Appellant's newly detailed counsel, Major Blyth, submitted a Motion for Enlargement of Time (Eleventh) requesting an additional 30 days to submit his assignments of error, which would set a new deadline of 31 October 2023. Major Caine did not sign this motion. On 26 September 2023, the Government entered opposition to Appellant's motion, stating if "Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's over one year-long delay practically ensures this [c]ourt will not be able to issue a decision that complies with our superior Court's appellate processing standards."

Appellant's case was docketed on 6 September 2022. The record of trial consists of 28 prosecution exhibits, 10 defense exhibits, 48 appellate exhibits, and 639 transcript pages.

Due to Major Caine's request to withdraw from Appellant's case at such a late stage of the appellate review process, and Major Blyth's recent separation from active duty from the Air Force and his transition into the reserves, on 27 September 2023, the court held a status conference to discuss the progress of Appellant's case. Senior Civilian Counsel for the Appellate Defense Counsel Division, Ms. Megan Marinos, Major Caine, and Major Blyth represented Appellant, and the Associate Chief for the Appellate Government Counsel Division, Ms. Mary Ellen Payne, represented the Government. Major Blyth ex-

plained that he began review of Appellant's case, was working on the assignments of error brief and would be consulting with Appellant on the draft, and explained that he did not intend to seek another enlargement of time. However, in response to the court's questions regarding his status as a reserve officer, assigned to the Appellate Defense Counsel Division, and the possibility of a government shutdown, Major Blyth was unable to state with certainty that his current reserve duty would be funded during a government shutdown, should that occur. He expressed that he would prefer to provide additional information to the court once he had clarity on the status of his orders. Therefore, it is the court's position that withdrawal of Major Caine would not be prudent at this time.

Accordingly, it is by the court on this 28th day of September, 2023,

ORDERED:

Appellant's Motion for Withdrawal of Appellate Defense Counsel, Major Caine, is **DENIED**.

Appellant's Motion for Enlargement of Time (Eleventh) is **GRANTED**. Appellant shall file any assignments of error **not later than 31 October 2023**.

It is further ordered:

Any subsequent motions for enlargement of time shall include a statement as to: (1) whether Appellant was advised of his right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

31 October 2023

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee,

v.

JAKALIEN J. COOK,
Airman, USAF
Appellant

Before Panel No. 2

No. ACM 40333

BRIEF ON BEHALF OF APPELLANT

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Counsel for Appellant

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ASSIGNMENTS OF ERROR

I.

WHETHER AMN COOK'S CONVICTION FOR TRANSPORTING ALIENS UNLAWFULLY IN THE UNITED STATES IS FACTUALLY SUFFICIENT.

II.

WHETHER THE CONSPIRACY SPECIFICATION FAILS TO STATE AN OFFENSE BECAUSE IT DOES NOT ALLEGE CONSPIRACY TO COMMIT AN OFFENSE UNDER THE UCMJ.

III.

WHETHER AMN COOK'S CONVICTION FOR CONSPIRACY TO TRANSPORT ALIENS UNLAWFULLY IN THE UNITED STATES IS FACTUALLY SUFFICIENT.

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED A MOTION TO DISMISS BASED ON THE GOVERNMENT'S DEPORTATION OF WITNESSES TO THE ALLEGED OFFENSES.

V.

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VI.

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VII.

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VIII.

WHETHER AMN COOK'S SENTENCE IS INAPPROPRIATELY SEVERE.

IX.

WHETHER AMN COOK'S SENTENCE TO CONFINEMENT FOR CHARGE I AND CHARGE II VIOLATE THE MAXIMUM PUNISHMENT FOR EACH OFFENSE.

X.

WHETHER THE CONVENING AUTHORITY FAILED TO PROVIDE REASONING FOR DENYING AMN COOK'S REQUEST FOR DEFERMENT OF REDUCTION IN RANK AND FORFEITURES.

XI.

WHETHER AMN COOK IS ENTITLED TO *MORENO* RELIEF BECAUSE OF THE 200-DAY DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT. ALTERNATIVELY, WHETHER AMN COOK IS ENTITLED TO SENTENCE RELIEF UNDER *TARDIF* AND *GAY*.

XII.

WHETHER AMN COOK WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

XIII.[1]

WHETHER AMN COOK'S CONVICTION FOR OBSTRUCTION OF JUSTICE IS FACTUALLY AND LEGALLY SUFFICIENT.

XIV.

WHETHER AMN COOK'S CONVICTIONS FOR TRANSPORTING ALIENS AND CONSPIRACY TO TRANSPORT ALIENS ARE LEGALLY INSUFFICIENT.

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[1] Assignments of error (AOEs) XIII and XIV are raised in the appendix pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

INTRODUCTION

This case presents the highly unusual prosecution of an Airman for violating and conspiring to violate 8 U.S.C. § 1324, which prohibits, among other things, transporting aliens who are in the United States unlawfully. But novelty is not necessarily a good thing. The military's lack of familiarity with these offenses and their prosecution led to numerous errors, as demonstrated below.

STATEMENT OF THE CASE

On 14 February 2022, at a general court-martial convened at Davis-Monthan Air Force Base (AFB), Arizona, Appellant was found guilty, consistent with his pleas, of one specification of absence without leave (AWOL) in violation of Article 86, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 886; one specification of breaching restriction in violation of Article 87b, UCMJ, 10 U.S.C. § 887b; and one specification of marijuana use in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[2] (R. at 172; Entry of Judgment (EOJ), 20 Apr. 2022.) He was found guilty, contrary to his pleas, of one specification of transporting aliens who were in the United States unlawfully in violation of clause 3 of Article 134, UCMJ, 10 U.S.C. § 934; one specification of conspiracy to transport aliens in violation of Article 81, UCMJ, 10 U.S.C. § 881; and one specification of obstructing justice in violation of Article 131b, UCMJ, 10 U.S.C. § 931b. (R. at 589; EOJ.) The military judge sentenced Appellant to reduction to the rank of E-1, forfeiture of all pay and allowances, 27 months'

[2] Unless otherwise noted, all references to the UCMJ, the Military Rules of Evidence (Mil. R. Evid.), and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*].

confinement, and a dishonorable discharge. (R. at 638–39.) The military judge credited Amn Cook with 155 days of pretrial confinement credit. (R. at 639.) The convening authority took no action on the findings, denied requested deferments of reduction in grade and forfeitures, and approved the sentence in its entirety. (Convening Authority Decision on Action, 21 Mar. 2022.)

STATEMENT OF FACTS

Background and Guilty Plea

Amn Jakalien Cook followed his mother and father into active duty with the Air Force. (DE J.) In the face of the COVID-19 pandemic and related leave restrictions that kept him separated from his close-knit family, he chose to use marijuana. (R. at 621.) At a court-martial, Amn Cook pleaded guilty to divers uses of marijuana. (R. at 163–68.) Additionally, he pleaded guilty to absence without leave when he failed to arrive for work on time (R. at 142–52) and breaching restriction for leaving base to receive medical treatment. (R. at 153–60.)

QM's Money Troubles

Amn Cook lived in the dorms with QM; they became close friends, continuing the friendship after QM was discharged and continued to reside in the local area. (R. at 311, 621.) QM had money troubles after his discharge: his fiancé was pregnant, he had just gotten fired from his job at Target, and he was looking for any work he could find. (R. at 499, 509.) He posted on Snapchat that he was looking for any kind of work—"it doesn't matter"—because the baby was coming and "I [was] like, money, money, money, I need to have this money so she didn't struggle like I did." (R. at 503.) An unknown person contacted QM through Snapchat and offered him "easy

money" to drive people. (*Id.*) QM would receive $500 for each person transported. (R. at 502.)

A Sunday Drive Transformed: QM Was "About to Make Some Money"

On Sunday, 22 August 2023, QM, who liked to travel, texted Amn Cook and asked if he "want[ed] to do something?" (R. at 311, 408.[3]) They initially planned on visiting Phoenix, which is northwest of Davis Monthan AFB. (R. at 311.) Amn Cook, whose car was undergoing a diagnostic at a local Firestone to determine if he could drive it back to Florida in anticipation of his drug-based discharge, had rented a car from the Tucson Airport and extended the rental through 23 August 2022. (R. at 316, 410; PE 2 at 9:50–10:20.) It was a white sport utility vehicle (SUV). (PE 17 at 1.)

Amn Cook and QM drove south to the town of Sierra Vista before taking QM's fiancé to Phoenix to drop her off. (R. at 311, 407, 409.) They returned to Sierra Vista later in the day, went to the mall, and then ended up in a town called Bisbee. (R. at 407.) QM then said to Amn Cook: "I'm about to make some money." (*Id.*) Calls began coming into QM's phone from random numbers that said "no caller ID" and QM began texting frequently. (*Id.*; PE 18 File 1 at 12:09-12:26.) Amn Cook did not receive any of these calls or texts and was mainly using his phone for music. (PE 2 at 7:40-7:53.)

[3] The facts here are drawn from interviews with Amn Cook (PE 2, 18) and QM (DE A). Where available, this brief references the transcript of where those exhibits were played in open court. Where the transcript says "inaudible," this brief uses the timestamp from the exhibits. Additionally, only part of PE 18 was played in open court, thus more citations are to the actual exhibit, rather than the transcript.

To Amn Cook's Surprise, Five People Appear and Enter the Vehicle

QM and Amn Cook were driving down a dirt road somewhere south of Sierra Vista when they stopped at a stop sign. (R. at 407.) A man in gray spoke with QM, then the man opened the trunk and people entered the car, with three going into the back seat of the SUV. (R. at 407.) The man in gray, who did not enter the vehicle, yelled, "Dale, Dale, Dale," meaning "go on." (PE 18 File 1 at 8:20-9:00.) In addition to the three in the back seat, two more entered the trunk, unbeknownst to Amn Cook. (*Id.* at 9:20-9:40.) In Amn Cook's words, "I literally just sat forward. I didn't know what he was doing." (R. at 407.) QM recounted that Amn Cook said, "Why the fuck is they ducking?" (R. at 501.) Amn Cook further explained that he had no idea what QM was planning, pointing out that he was wearing only a t-shirt, shorts, and slippers, and was just "along for the ride." (PE 18 File 1 at 9:40-10:15.) Amn Cook was not aware of how much QM would make. (*Id.* at 10:40-10:50.) Amn Cook described his thought process as it was happening: He did not believe QM would "do something like that" because they were on the main roads and "still passing like border patrol troopers and things like that." (R. at 411.)

Sergeant CM, who worked investigations for Arizona Department of Public Safety, received a tip about a light-colored SUV that took "bodies . . . from the desert" and departed the area. (R. at 274.) Between 2200 and 2300 hours, he located the vehicle, identified it as a rental with California licenses plates, and followed the SUV for approximately two miles before pulling it over because it failed to fully stop at a stop light before turning right. (R. at 275–76, 279.) When he approached, QM was driving and Amn Cook was the passenger. (R. at 276–77.) Sergeant CM explained

that the five others in the car had a "very distinctive smell" of one who has not showered for several days. (R. at 278.) Sergeant CM then called border patrol. (R. at 279.) Another responding officer noted that the immigrants wore camouflage and had carpet shoes on, which is placed over regular shoes and leaves no "foot sign." (R. at 326–27.) QM admitted to the officers that there was a firearm in the center console that he kept for protection. (R. at 335; DE A at 27:30-28:25.)

The Government introduced evidence from various forms prepared about each of the five immigrants. Field processing forms from the Department of Homeland Security indicated only their names, birthdates, and time of apprehension. (PE 4.) Two of the five immigrants had an Alien File (A-File), indicating had some interaction with the immigration system. (R. at 351.) One of the immigrants had an A-File indicating she was removed from the country weeks after the apprehension at issue here. (R. at 352, 355; PE 5.) Another immigrant had a court hearing in 2017 and was thereafter removed to Mexico. (PE 6, 7, 8, 9.)

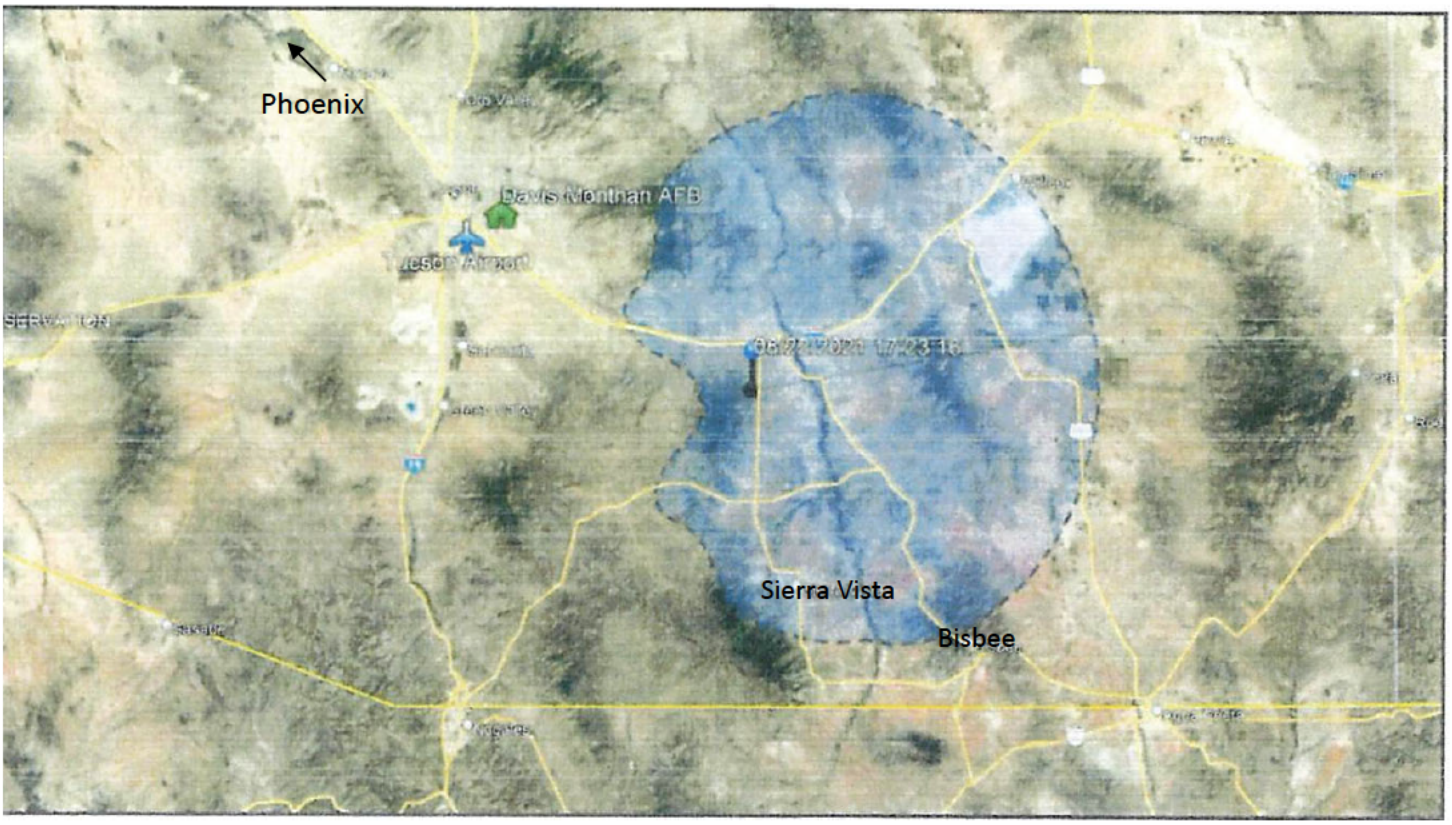
Amn Cook consented to an interview early the next morning with Homeland Security Investigations (HSI). Portions of this interview were admitted as Prosecution Exhibit 2. At a key moment of the interview, an agent asks if Amn Cook knew the passengers were "here illegally." (R. at 317.) According to the transcript, Amn Cook said, "Well, kind of, yeah, but I didn't look in the back." (*Id.*) However, the transcription is incorrect. Amn Cook seems to say, though hard to hear, "Once I pulled over, kind of, yeah, but I didn't look in the back." (PE 2 at 12:32-12:43.) Amn Cook submitted to another interview, this time with Security Forces, the following

day on 24 August 2021. Portions of this interview were admitted as Prosecution Exhibit 18. As explained above, Amn Cook denied any advance knowledge of QM's plan.

CL, an investigator with Security Forces, stated that he could not find Amn Cook's car at three local Firestones. (R. at 429.) He also stated that he could not perform an extraction of the data from Amn Cook's phone because it was factory reset. (R. at 430.) Investigator CL submitted a preservation request to T-Mobile for cell location and call history data for Amn Cook's phone. (R. at 434.)

At the court-martial, JR, a digital forensic expert, testified for the Government to analyze the T-Mobile data. (R. at 449, 454.) The data showed that QM called Amn Cook at approximately 1100 on 22 August 2022. (R. at 460; AE XXXII at 4; PE 21.) Based on subsequent calls to Amn Cook's phone, JR testified that the phone was heading down Interstate 10 to the east at 1411 hours (AE XXXII at 8; R. at 460–61), then was south near Sierra Vista at 1536 hours. (R. at 461; AE XXXII at 10.) At 1723, the phone was heading back towards Davis Monthan AFB along the same route. (R. at 461–62.) At 1914 hours, Amn Cook's phone was northwest of Davis Monthan AFB between the base and Phoenix. (AE XXXII at 16; R. at 463.) At 1943, the phone was back near Davis Monthan AFB. (AE XXXII at 21; R. at 463.) The next data point, at 2331 hours, was far south near the location of Amn Cook's arrest. (R. at 464; AE XXXII at 24, 26.)

The following image from Appellate Exhibit XXXII shows a picture of the broader area to help orient the Court, with text added to clarify place names and directions.



The Government never asked JR to examine QM's phone or to identify any numbers that called Amn Cook (other than QM). (R. at 475–76.) JR did not recall any international numbers calling Amn Cook's phone. (R. at 475.) He acknowledged that the phone location data showed the phone going north and away from Tucson in the direction of Phoenix, and then later coming back south down I-10 towards Tucson. (R. at 477.) While there was no data from Phoenix directly, JR explained that this was possible if the phone was not used for messaging or calls during that period. (R. at 480.)

Other facts necessary to resolve the AOEs are provided below.

ARGUMENT

I.

AMN COOK'S CONVICTION FOR TRANSPORTING ALIENS UNLAWFULLY IN THE UNITED STATES IS FACTUALLY INSUFFICIENT.

Standard of Review

Neither this Court nor the Court of Appeals for the Armed Forces (CAAF) has set forth the standard of review under the revisions to Article 66, UCMJ, 10 U.S.C. § 866 (2021), applicable to this case.[4] Amn Cook asserts the standard of review for factual sufficiency should remain de novo despite these statutory changes explained below. *Cf. United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law and Analysis

1. This Court maintains robust factual sufficiency review despite changes to Article 66, UCMJ.

This Court may consider the factual sufficiency of a conviction "upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ (2021). Upon such showing, this Court may weigh controverted questions of fact with "appropriate deference" to "the fact that the trial court saw and heard the witnesses and other evidence" and "to findings of fact entered into the record by the military judge." Article 66(d)(1)(B)(ii), UCMJ (2021). This Court may

[4] *See* William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021, Pub. L. 116-283, § 542, 134 Stat. 3388, 3612–13 (2021) (setting the effective date of changes to Article 66, UCMJ, to require that every offense occur after the date of the law's enactment, which was 1 January 2021).

provide relief where it is "clearly convinced that the finding of guilty was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ (2021).

Amn Cook will make the requisite showing of deficiency below. While Article 66, UCMJ, has changed to require affirmative steps from an accused on appeal, the changes do not hollow out factual sufficiency review. However, the statutory changes do raise several questions. The first question relates to the "appropriate deference" to the factfinder. The prior version of factual sufficiency review required CCAs to evaluate the evidence "recognizing that the trial court saw and heard the witnesses." Article 66(d), UCMJ (2018). This is a distinction without a meaningful difference. This Court has always shown deference to the fact that it does not hear the witnesses. The statutory revision adds "and other evidence," but this means little because non-testimonial evidence is fully captured in the record of trial—it is only the nuances of trial testimony that could escape full comprehension on appellate review.

The second question is whether this Court is "clearly convinced" that the finding was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ (2021). The prior version of Article 66(d), UCMJ, empowered the Courts of Criminal Appeals (CCAs) to approve findings that are "correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d), UCMJ (2019). The Court of Military Appeals interpreted this language to require that members of a CCA "are themselves convinced of the accused's guilty beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324–25 (C.M.A. 1987). However, neither the old nor the new statute explicitly requires the CCAs believe the accused's guilt beyond

a reasonable doubt. This flows from case law alone. Where the standard is as yet undetermined by the CAAF, this Court should hesitate before interpreting revisions to strip an accused of a key substantive aspect of an appeal. Where this Court is not convinced beyond a reasonable doubt that evidence is sufficient, this should suffice to clearly convince this Court that the finding was against the weight of the evidence.

In short, the statutory revisions should not meaningfully affect the standard of review in this case with the exception of the requirement that Amn Cook make a specific showing of deficiency. But even if this Court interprets the burden on appellants as greater than under the prior version of Article 66, UCMJ, Amn Cook still prevails.

2. Prosecuting under 8 U.S.C. § 1324 for transporting aliens is a novelty for which the military was ill prepared.

The Government used clause 3 of Article 134, UCMJ, to charge Amn Cook with violating 8 U.S.C. § 1324 by transporting aliens who were unlawfully in the United States either knowing their status, or with reckless disregard for their legal status. (Charge Sheet, ROT Vol. 1.) The military judge described the elements of the offense as follows:

> 1. That on or about 22 August 2021, within the State of Arizona, the accused knowingly transported or moved [the five immigrants: MFL, ONA, POM, TMV, and ONC] to help them remain in the United States illegally;
>
> 2. That the individuals transported or moved were aliens;
>
> 3. That the individuals transported or moved were not lawfully in the United States;

> 4. That the accused knew or acted in reckless disregard of the fact that the individuals transported or moved were not lawfully in the United States; and
>
> 5. That the charged federal statute, 8 U.S.C. § 1324, is an offense not capital.[5]

(R. at 541.) This differs from the way some federal courts frame the elements. One contrary example follows:

> To sustain a conviction under this section, the government must prove that (1) the defendant transported or attempted to transport an alien within the United States, (2) the alien was in the United States illegally, (3) the defendant knew of or recklessly disregarded the fact that the alien was in the United States illegally, and (4) the defendant acted willfully in furtherance of the alien's violation of the law.

United States v. Silveus, 542 F.3d 993, 1002 (3rd Cir. 2008).

The military judge instructed the members that Amn Cook acted in "reckless disregard" if: (1) he was "aware of facts from which a reasonable inference could be drawn that the alleged alien was in fact an alien in the United States unlawfully"; and (2) he "actually draws that inference." (R. at 541.) This definition of reckless disregard correctly tracks federal law. *See United States v. Rodriguez*, 880 F. 3d 1151, 1160–62 (9th Cir. 2018) (finding error where the district court only instructed on the first part of the definition).

This brief will analyze the factual sufficiency by focusing on deficiencies within each element.

---

[5] The military judge took judicial notice that the offense is not capital, and Amn Cook does not challenge it here. (AE XXVII; R. at 301–02.)

a. The trial did not address whether Amn Cook "acted willfully in furtherance of" the immigrants' unlawful status.

The members were never confronted with the element—drawn from the language of the statute itself—that the transportation must occur "in furtherance of" the unlawful presence in the United States. 8 U.S.C. § 1324(a)(1)(A)(ii). This "in furtherance of" language is absent from the entire record of trial. Instead, the military judge merged it into the first element of the offense, which required knowing transportation "to help [the immigrants] remain in the United States illegally." (R. at 541.) How did this happen? It appears the trial counsel took model jury instructions from the Ninth Circuit and everyone went along with it. (AE XLVII.) But this misses an important doctrinal split among the circuit courts about the interpretation of § 1324(a)(1)(A)(ii).

In *United States v. Davidson*, the district court laid out the disagreements among the circuits about the meaning of the "in furtherance of" language. 1:07-CR-204 (LEK), 2010 U.S. Dist. LEXIS 17239 (N.D.N.Y. 19 Feb. 2010). It explained that the Eighth and Ninth Circuits employ a "direct and substantial relationship" test that looks at the overall impact of the transportation. *Id.* at *24–25 (citing *United States v. Moreno*, 561 F.2d, 1321, 1323 (9th Cir. 1977); *United States v. Velasquez-Cruz*, 929 F.2d 420 (8th Cir. 1991)). The Sixth Circuit employs an intent-based approach that requires a "specific intent of supporting the alien's illegal presence." *United States v. 1982 Ford Pick-Up*, 873 F.2d 947, 951 (6th Cir. 1989). The Fifth Circuit employs a hybrid of the two but held the intent element indispensable. *See United States v. Merkt*, 764 F.2d 266, 271–72 (5th Cir. 1985). The Seventh Circuit looks broadly at

facts and circumstances, *United States v. Parmelee*, 42 F.3d 387, 391 (7th Cir. 1994), while the Tenth Circuit similarly looks at any relevant evidence in assessing the element. *United States v. Barajas-Chavez*, 162 F.3d 1285, 1289 (10th Cir. 1999).[6] In applying these tests, the circuits differ on whether the principal question is the accused's intent or "merely the effect" of the travel. *Davidson*, 2010 U.S. Dist. LEXIS 17239, at *26.

When assessing sufficiency, this Court should not accept the Eighth and Ninth Circuit's approach, embodied in the instructions here, that looks only at the effect. To do so would mean that not only was the military prosecuting an unfamiliar offense involving an unfamiliar body of law, but it chose the least favorable interpretation of the law to apply to Amn Cook's case. Instead, this Court should view the element as requiring proof that Amn Cook intended to further the immigrants' unlawful status. *See Merkt*, 764 F.2d at 272. "In other words, the government must prove that the defendant specifically intended by means of the transportation to advance or assist the alien's violation of law, not merely that the effect of the transportation was to allow the alien to remain in the United States." *United States v. Moreno-Duque*, 718 F. Supp. 254, 259 (D. Ver. 1989). But that is precisely how the military judge framed the issue: helping them remain in the United States illegally. (R. at 541.) Because the words "in furtherance of" were absent from the entire trial, the factfinder was

[6] *See also United States v. Khalil*, 857 F.3d 137, 139–40 (2nd Cir. 2017) (reciting, but not approving or disapproving, the district court's instruction that "[i]n order to establish this element, the government must prove that the defendant knowingly and intentionally transported the alien in furtherance of the alien's unlawful presence in the United States").

never required to make the requisite finding of Amn Cook's purpose in transporting the immigrants, if any.

To be clear, this is not a challenge to the instructions; the Defense waived that issue. But the Defense cannot waive the substantive elements of an offense. Because an element of the offense is lacking in this court-martial, the findings for Specification 1 of Charge II are factually insufficient.

b. The Government failed to prove Amn Cook's purpose.

The evidence fails to demonstrate Amn Cook's purpose, if any, for the transportation. QM's purpose—unstated at the time—cannot substitute for Amn Cook's. If he did not share in QM's purpose of furthering the immigrants' unlawful status, the conviction is factually insufficient.

The difficulty of proving Amn Cook's state of mind is immaterial. The Fifth Circuit, when addressing the failure of instructions to address the "in furtherance of" element, explained that the Government's burden remains high to prove intentional action. *Merkt*, 764 F.2d at 272. "No matter how difficult it may be to establish the defendant's state of mind, the government must prove this portion of its case, like every other element of the alleged crime, beyond a reasonable doubt. The government's problems of proof do not warrant an instruction that removes one of the essential elements of the offense from the jury's consideration." *Id.*

The Government had to admit in its closing argument that circumstantial evidence provided much of its case. (R. at 551.) It layered assumption upon assumption to argue Amn Cook's guilt. But this Court can look through the fog and recognize the evidence itself fails.

The Government martialed potent evidence against a person they were not prosecuting—QM. The evidence established that QM was desperate for money, reached out to make money any way he could via Snapchat, got in contact with an unknown person to make "easy money" by transporting people for $500 per person. (R. at 499, 502–03, 509.) He approached Amn Cook to go traveling around the area on 22 August 2021. (R. at 311, 408.) The Government at trial made much of Amn Cook renting the car after QM contacted him on 22 August, but this ignores that Amn Cook had already rented the car the day before. (R. at 552; PE 17 at 1.) No evidence shows Amn Cook had a role in planning or executing the unlawful transportation.

It was only when QM said "I'm about to make some money" that Amn Cook had any idea that something was afoot. (R. at 407.) QM began vigorously texting (R. at 411); despite the Government obtaining all of the location and phone use data from Amn Cook, it could not establish that *any* of these contacts occurred through Amn Cook.[7] Amn Cook's interviews demonstrate his lack of intent: he "didn't know what [QM] was doing" (R. at 407); when the immigrants entered the car, Amn Cook said, "Why the fuck is they ducking?" (R. at 501); he did not believe QM would do anything like that because they were "still passing . . . border patrol troopers and things like that" (R. at 411); and he arrived for a supposedly dangerous smuggling operation wearing shorts and slide-off sandals. (PE 18 File 1 at 9:40-10:15.) Even the

[7] It is unclear why the Government did not seek similar records from QM's cellphone company or why QM did not testify at trial.

Government's purportedly damning statement from Amn Cook—his response of "yeah, kind of" when asked if he knew the immigrants were their illegally—cuts the other way on this point. (R. at 317.) The actual statement is "Once I pulled over, kind of, yeah." (PE 2 at 12:32-12:43.) What this means is that Amn Cook had zero indication of what was happening until the moment immigrants entered the SUV. The evidence fails to show that Amn Cook was aware of any payment scheme, where the immigrants were going, what their status was, or any other indicators that he willfully transported the immigrants "in furtherance of" of their unlawful status.

An innocent bystander lacks the intent to transport an immigrant "in furtherance of" their unlawful presence. *United States v. Esparza*, 876 F.2d 1390 (9th Cir. 1989) provides an example. In *Esparza*, border patrol agents stopped a convoy including a moving van and a Dodge van; in the moving van were 48 aliens unlawfully in the United States. *Id.* at 1391. A border patrol agent testified it was common to have separate "lead" and "load" vehicle traveling together. *Id.* The Dodge van appeared to have guided the moving van onto a freeway. *Id.* Esparza was a front-seat passenger in the Dodge. *Id.* The driver of the moving van testified that he was travelling with the driver of the Dodge. *Id.* Blankets typically used in moving furniture were found in the Dodge. *Id.* The Government charged Esparza with both conspiracy and transporting illegal aliens, similar to the charges against Amn Cook here. *Id.* at 1391. Esparza also had a prior conviction for transporting illegal aliens. *Id.* at 1393.

The Ninth Circuit found both the conspiracy and the transporting illegal aliens convictions *legally* insufficient. *Id.* With regard to the transportation conviction, the court found the Government presented no evidence that Esparza participated in transporting, that he knew illegal aliens were in the moving van, or "acted willfully in furtherance of the violation of any law." *Id.*

Despite the obvious distinction that Esparza could not see the aliens while Amn Cook could, these cases contain strong parallels. The Government's case, aside from circumstantial evidence of dubious import, relied on Amn Cook's presence in the SUV. He was there, the argument goes, therefore he must have been a willing participant. But conviction on this charge requires more. "No matter how difficult it may be to establish the defendant's state of mind, the government must prove this portion of its case." *Merkt*, 762 F.2d at 272. The evidence failed to show Amn Cook's advance role in planning or affirmative steps to assist QM once QM hatched his plot. There was not even much time between the pickup and their apprehension—the responding agent left a traffic stop, quickly located the SUV, and pulled it over within two miles. (R. at 274–76.) In *Esparza*, a swarm of circumstantial evidence—including prior conviction for the exact same thing—could not overcome the paucity of evidence about Esparza's willful participation in the offenses. So too here.

The Government failed its burden to show Amn Cook willfully transported aliens who were unlawfully in the United States in furtherance of their unlawful presence.

3. The Government failed to establish that the five immigrants were aliens in the United States unlawfully.

The Government also had to demonstrate both that the people in the vehicle were aliens and that they were in the United States unlawfully. But the evidence falls short here, too.

The Government relied on little more than speculation and stereotype. One of the five immigrants was removed from the United States in September 2021 after the events here. (PE 5.) The Government assumes that she was removed because of her unlawful status at the time of Amn Cook's involvement, but the form does not confirm this; it includes those who are deportable because of violation of the Visa Waiver Pilot Program. (PE 5 (citing Section 237 of the Immigration and Nationality Act).) This form was not adequately explained at trial and uncertainties abound. The removal weeks later does not establish causation. The second immigrant had an A-File and was removed in 2017. (PE 6, 7, 8, 9.) But we know nothing of the intervening events or change in status, only that they were once unlawfully in the United States. Moreover, because the Government deported the immigrants who would have provided additional evidence, we do not know what other reasons—such as seeking asylum—might have motivated their actions.

With this inconclusive evidence discarded, what remains is speculation—the location of the arrest, carpet shoes, odor, and the assumptions that flow therefrom. But this is insufficient evidence to support a conviction. These elements also fail.

4. Amn Cook neither knew nor acted in reckless disregard of their immigration status.

As explained, the evidence that the people entering the car were aliens unlawfully in the United States was minimal. And this plays into whether Amn Cook knew, or acted in reckless disregard, of their immigration status. As to knowledge, after-the-fact documentation of their status offers little assistance in establishing Amn Cook's state of mind. From his perspective, the SUV stopped on the side of the road and five random people got into the vehicle. No evidence establishes that he received any information from them confirming their status. While certainly an inference was possible based on the location and circumstances, the Government relies on weak evidence that Amn Cook, in fact, drew that inference. When asked if he knew the people were in the country illegally, the transcript suggests he said, "Yeah, kind of." (R. at 317.) But what he actually said was "when I pulled over, yeah, kind of." (PE 2 at 12:32-12:43.) This suggests he had no suspicions or knowledge until the moment they pulled over.

The timeframe is important here. It is not as though they were transporting people from the border to Chicago, with various stops along the way or opportunity to process what was occurring. Instead, there seems to be only a short period between the time when QM picked up the immigrants and the time they were stopped. The primary argument is that Amn Cook did not willfully act in furtherance of unlawful presence in the United States. But regarding reckless disregard of their immigration status, the dynamic nature of the situation and short window to process makes it

questionable that he even had time to do anything about the situation, had he chosen to do so.

5. Conclusion

The evidence here fails on multiple elements. The Government's case, resting as it did on flimsy circumstantial evidence, failed to prove that Amn Cook willfully acted in furtherance of unlawful immigration status. Or that he knew they were aliens. Or that he knew they were there unlawfully. Or that he acted in reckless disregard of their unlawful status. As a consequence, this Court should be clearly convinced that the conviction for violating 8 U.S.C. § 1324 by way of clause 3 of Article 134 is against the weight of the evidence.

WHEREFORE, Amn Cook respectfully requests this Honorable Court set aside the finding for Specification 1 of Charge IV.

II.

THE CONSPIRACY SPECIFICATION FAILS TO STATE AN OFFENSE BECAUSE IT DOES NOT ALLEGE CONSPIRACY TO COMMIT AN OFFENSE UNDER THE UCMJ.

Additional Facts

The Specification of Additional Charge I, charged under Article 81, UCMJ, alleges that Amn Cook did:

> Conspire with [QM] and unknown conspirators to commit an offense under the [UCMJ], to wit: transporting [MFL; OJA; POM; TMV; and ONC] within the United States by means of passenger vehicle, knowing or in reckless disregard that they were aliens that entered the United States in violation of law, in violation of 8 United States Code § 1324, an offense not capital, and in order to effect the object of the conspiracy, the said [QM] and Airman Jakalien J. Cook, did secure a rental vehicle, drive the vehicle near the US-Mexico border, and transported the aforementioned aliens in violation of law.

(Charge Sheet, ROT Vol. 1.)

Standard of Review

Whether a specification fails to state an offense is a question of law which this Court reviews de novo. *United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (citing *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)).

Law and Analysis

Due process requires that "[t]o prepare a defense, the accused must have notice of what the government is required to prove for a finding of guilty . . . [and] [t]he *charge sheet* provides the accused" such notice. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (emphasis added).

"[A] flawed specification first challenged after trial . . . is viewed with greater tolerance than one which was attacked before findings and sentence." *Turner*, 79 M.J. at 403 (emphasis removed) (citing *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986)). Post-trial challenges view the specification with "maximum liberality." *United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990). Even under this deferential standard, the conspiracy specification fails to state an offense. The reason is simple: the Government charged Amn Cook with conspiracy to violate 8 U.S.C. § 1324, which is not an offense under the code. *See* Article 81, UCMJ ("Any person subject to this chapter who conspires with any other person to commit an offense under this chapter . . . .").

The Government charged Amn Cook under Article 81, UCMJ, with conspiring directly to violate 8 U.S.C. § 1324, *not* conspiracy to violate § 1324 through the vehicle of Article 134, UCMJ. At baseline, it is questionable whether the Government could

use Article 81, UCMJ, to charge conspiracy for the violation of any federal law simply by framing it as a conspiracy to violate clause 3 of Article 134, UCMJ. Conspiracy's scope is already alarming without the Air Force pushing the boundaries. Counsel has located no cases directly addressing the permissibility of charging conspiracy to commit federal offenses through clause 3 of Article 134, UCMJ, and only a few related cases.[8]

But the specification here is worse than that: it does not even purport to charge conspiracy to violate § 1324 through the mechanism of Article 134, UCMJ. If the Government seeks to incorporate the entire body of federal law under the umbrella of conspiracy, it would at least have to do so through a vehicle that the Code might permit: Article 134, UCMJ. And in this case, it was even more straightforward because 8 U.S.C. § 1324 *already* contains a conspiracy provision for the conduct charged in the case. 8 U.S.C. § 1324(a)(1)(A)(v)(i). Instead, the Government chose the novel route of charging a conspiracy to violate 8 U.S.C. § 1324 through Article 81, UCMJ, despite the law not being an "offense under this chapter." The specification fails to state an offense.

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[8] *See, e.g., United States v. Bradwa*, No. ACM 36665, 2007 CCA LEXIS 199, at *5–6 (A.F. Ct. Crim. App. 31 May 2007) (unpub. op.) (addressing conspiracy to commit money laundering under a federal statute in a guilty plea context, but failing to provide information on how the specification was charged); *United States v. Bishop*, NMCCA 201000464, 2011 CCA LEXIS 160, at *3–4, *8–9 (N.M. Ct. Crim. App. 13 Sep. 2011) (unpub. op.) (setting aside conspiracy specification for sale of stolen policy because such conduct was not proscribed under the code; the dissenting judge noted that such conduct was prohibited under federal law).

The appropriate remedy for failure to state an offense is to dismiss "unless the Government can demonstrate that this constitutional error was harmless beyond a reasonable doubt." *Turner*, 79 M.J. at 403–04 (citing *United States v. Humphries*, 71 M.J. 209, 213 n.5 (C.A.A.F. 2012)). The deficiency here is not harmless beyond a reasonable doubt because Amn Cook stands convicted of an offense that does not exist: Article 81, UCMJ conspiracy to directly violate federal law. The Government bears the risk of its chosen charging mechanism. *See United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021) (noting the Government's complete discretion over the charge sheet and that, consequently, the Government bears the risk of its decisions). The specification is fatally defective, even when viewed with "maximum liberality."

WHEREFORE, Amn Cook respectfully requests this Honorable Court set aside and dismiss the Specification of Additional Charge I.

III.

AMN COOK'S CONVICTION FOR CONSPIRACY IS FACTUALLY INSUFFICIENT.

Standard of Review

The standard of review is the same as AOE I, *supra*.

Law and Analysis

The law for factual sufficiency is identical to AOE I, *supra*.

As charged, a conspiracy under Article 81, UCMJ, required the Government to prove: (1) that Amn Cook entered into an agreement with QM and unknown co-conspirators to transport by passenger vehicle five people within the United States, knowing or in reckless disregard that they were aliens present in violation of the law;

and (2) that "while the agreement continued to exist" and while Amn Cook "remained a party to the agreement," Amn Cook or QM performed one or more overt acts in furtherance of the conspiracy, namely "(a) secured a rental vehicle; (b) drove the vehicle near the US-Mexico border; and (c) transported the aforementioned aliens in violation of law." *MCM*, pt. IV, ¶5.b.(1); R. at 542. While the agreement need not take on any specific form, the agreement must exist at the time or before the charged overt act. *MCM*, pt. IV, ¶5.c.(4). The Government must prove beyond a reasonable doubt that the agreement encompassed every element of the offense. *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1019 (29 Feb. 2020).

Here, the Government failed to present sufficient proof either that the agreement occurred, or that it encompassed every element of the charged offense. This deficiency of proof should leave this Court clearly convinced that his conviction for conspiracy is against the weight of the evidence.

On the first point, the Government relied chiefly on supposition and assumption to prove an agreement exists. Granted, the conduct of the parties *may* show an agreement. But the Government's efforts here fell short. The evidence from QM and Amn Cook's interviews does not reflect any agreement. Instead, the Government stretched the limited proof at its disposal to create the impression of agreement. This is not enough. One of the Government's efforts was to suggest a phone call between QM and Amn Cook on 22 August 2023 indicated an agreement because they rented the car approximately 90 minutes later. (R. at 552.) But this gets the dates wrong—Amn Cook had *already* rented the car the day before this phone

call. (PE 17 at 1.) While QM was present at the rental, this is unsurprising for two friends who were "like brothers." (R. at 510.) What followed, at least in argument, was a good summation of the Government's case: looking backwards in time from the moment of arrest and aligning the pieces to suggest there must have been an agreement. (R. at 553–60.)

The contrary evidence powerfully rebuts the Government's speculative reliance on flimsy circumstantial evidence. In both QM and Amn Cook's statements, there is no indication that Amn Cook knew, *in advance*, what would happen on that desert road. Indeed, what the Government treated as damning evidence—that Amn Cook said "yeah, kind of" when asked if he knew they were illegal—falls apart when the correct transcription is used. (R. at 317, 559.) Amn Cook said, "[W]hen I pulled over, yeah, kind of." (PE 2 at 12:32-12:43.) What this means is that up until the moment he pulled over, he was not aware of QM's plan. There was no agreement. Amn Cook sitting in the car shocked at what was happening does not constitute an agreement, either.

The paucity of evidence on the agreement highlights the second point. Even if there was some type of agreement, the agreement must encompass each element of the target offense. *Benchbook*, at 1019. At the moment the agreement was formed, Amn Cook would have had to agree to participate in the willful transportation of aliens in furtherance of their unlawful status. The evidence simply does not show this agreement. To reach the contrary conclusion relies on the complete disbelief of QM and Amn Cook's evidence presented at trial. "But disbelief alone cannot prove

either his knowledge of the conspiracy or his participation in it." *United States v. Cloughessy*, 572 F.2d 190, 191 (9th Cir. 1977). In *Cloughessy*, the appellant drove a casual acquaintance and another person to a location where the two men negotiated the sale of heroin to undercover agents. *Id.* at 190–91. While the two men were at the negotiation, the appellant followed another undercover agent. *Id.* at 191. On these facts, the Ninth Circuit held his conduct, which "may give rise to some suspicion he knew something was up," was insufficient and reversed. *Id.* "Mere casual association with conspiring persons is not enough." *Id.* (citations omitted).

The Government relied on assumptions heaped upon circumstantial evidence to convict Amn Cook of conspiracy. But the failure to demonstrate agreement is fatal to the case. Without the agreement, there is little more than guilt by association, which is impermissible. *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir 1980). Even if Amn Cook did not object once the immigrants entered the SUV, "the existence of an opportunity to join a conspiracy, or simple knowledge, approval of, or acquiescence in the object or purpose of the conspiracy, without an intention and agreement to accomplish a specific illegal objective, is not sufficient to make one a conspirator." *Id.* (citations omitted). Amn Cook was present, but he did not conspire. His conviction for conspiracy is against the weight of the evidence, and this Court should hold the conviction factually insufficient.

WHEREFORE, Amn Cook respectfully requests this Honorable Court set aside the Specification of Additional Charge I.

IV.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED A MOTION TO DISMISS BASED ON THE GOVERNMENT'S DEPORTATION OF FIVE WITNESSES TO THE ALLEGATIONS.

Additional Facts

After apprehension, the five immigrants in the SUV, along with QM and Amn Cook, were taken to the local Customs and Border Patrol (CBP) office. (AE XLIV at 2.) The patrol agent in charge (PAIC) at the CBP office decides whether to refer the case for prosecution or essentially end the case by non-referral. (*Id.*) If the case is referred for prosecution, suspected aliens are interviewed in recorded statements as material witnesses. (R. at 36.) The PAIC here declined to pursue prosecution of QM or Amn Cook, and thus the suspected aliens were neither interviewed nor deposed. (AE XLIV at 2.) Following apprehension and after processing Amn Cook and QM, a Border Patrol agent called the Air Force to provide notice. (R. at 30.)

On 19 January 2022, the Defense requested production of the five immigrants; at that point they had been deported and the Government denied the request. (AE XLIV at 2.) The Defense filed parallel motions to produce the five immigrants as witnesses and to dismiss for loss of evidence. (*Id.* at 1; AE VI, VIII.)

On 17 February 2022, the military judge denied the motions. (AEs XXII, XLIV.) Regarding the deported witnesses, the military judge concluded that they were not property classified as lost evidence; rather, it presented more of a witness production issue. (AE XLIV at 6.) As for witness production, the military judge ruled there was no indication that the witnesses possessed any exculpatory information,

would testify about Amn Cook's involvement, or would provide details to support a viable defense theory. (*Id.* at 7.) Finally, he denied the motion to dismiss based on Fifth and Sixth Amendment[9] violations because the defense failed to meet the standard for deported witnesses set forth in *United States v. Valenzuela-Bernal*, 458 U.S. 858, 861 (1982). (*Id.* at 7–8.)

Standard of Review

This Court reviews a military judge's rulings on production of witnesses, failure to abate proceedings under R.C.M. 703(e)(2), and motions to dismiss for abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000); *United States v. Warda*, __ M.J. __, 2023 CAAF LEXIS 687, at *15 (C.A.A.F. 29 Sep. 2023); *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). A military judge abuses his or her discretion when: "(1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record; (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge fails to consider important facts." *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022) (internal citations omitted).

Law and Analysis

The military judge made three errors in denying witness production and the motion to dismiss.

[9] U.S. CONST. amends. V, VI.

First, he erroneously concluded that R.C.M. 703(e)(2) on lost or destroyed evidence was inapplicable. (AE XLVI at 6.) But R.C.M. 703(e)(2) and *Valenzuela-Bernal* are not mutually exclusive. R.C.M. 703(e)(2) provides:

> [A] party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

It applies not just to lost evidence, but also when evidence is not subject to compulsory process, as in this case. *Valenzuela-Bernal*, by contrast, relates to requirements rooted in the Fifth Amendment's Due Process Clause and the Compulsory Process Clause of the Sixth Amendment. 458 U.S. at 872–73. The two are not the same. *See United States v. Simmermacher*, 74 M.J. 196, 201 (C.A.A.F. 2015) (explaining that then-R.C.M. 703(f)(2) does not incorporate constitutional due process standards).

The distinction matters because *Valenzuela-Bernal* imposes a higher burden upon the accused to show bad faith in the deportation decision. *See, e.g.*, *United States v. Medina-Villa*, 567 F.3d 507, 517–18 (9th Cir. 2009) (interpreting *Valenzuela-Bernal* to require a dual showing of bad faith and prejudice). This error means the military judge failed to fully analyze the motion. He abused his discretion when he ruled while laboring under an incorrect view of the law.

Second, the military judge erred in applying *Valenzuela-Bernal* to this case. In *Valenzuela-Bernal*, the appellant was indicted for transporting an alien illegally in the United States, "one Romero-Morales." 458 U.S. at 860. There were two other

passengers in the car, both of whom identified Valenzuela-Bernal as the driver, and both of whom were deported to Mexico and thus unavailable for trial. *Id.* at 861. Romero-Morales, however, was detained to provide evidence that Valenzuela-Bernal transported an illegal alien in violation of 8 U.S.C. § 1324(a)(2). *Id.* As a starting point, *Valenzuela-Bernal* is distinguishable on the facts because, unlike here, a witness was available to testify to the same thing as the deported witnesses.

Valenzuela-Bernal set forth a two-part test described as follows:

> the defendant must make an initial showing that the Government acted in bad faith *and* that this conduct resulted in prejudice to the defendant's case. To prevail under the prejudice prong, the defendant must at least make "a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses."

United States v. Dring, 930 F.2d 687, 693–94 (9th Cir. 1991) (quoting *Valenzuela-Bernal*, 458 U.S. at 873). On the first point, the military judge erred when he found no bad faith. Even if the CBP made an initial non-referral decision using normal procedures, this case was abnormal. Amn Cook was in the Air Force, and CBP knew that. They quickly made a notification to the Air Force. Why else would they notify the Air Force unless they recognized there might be an interest in prosecution of the offenses? If so, the only sensible step would be to detain the five immigrants as material witnesses and, at a minimum, record interviews with them. But CBP chose not to do this, and as a result potentially valuable evidence disappeared.

The military judge also erred in finding no prejudice from the deportation. He concluded that the Defense had not demonstrated the immigrants' testimony would

be material and favorable. (AE XLVI at 7.) Although he acknowledged that *Valenzula-Bernal* applies a lower standard to the defense burden of materiality, 458 U.S. at 871, he failed to apply that lower standard. He stated the immigrants' testimony would "have likely been detrimental," but this was conclusory given the facts before him. (AE XLVI at 7.) There is a good reason the Supreme Court applies a lower standard—an accused cannot interview the deported witness to establish what they know. On the facts here, there are a number of things that the immigrants could have discussed: who was in charge, who was sending messages, how Amn Cook reacted when they came into the car, whether Amn Cook was assisting or passive, or anything else they were told that would indicate Amn Cook had a role QM's plan. In a case that turned out to have significant weaknesses, such testimony could have proven critical. Instead, Amn Cook lost his right to compulsory process under the Sixth Amendment and due process under the Fifth Amendment.

Finally, the military judge abused his discretion in denying the motion to compel production of the witnesses for the same reasons listed above. The military judge relied on *Valenzuela-Bernal* to deny relief, but, as explained above, his understanding was incomplete and he did not appropriately relax the burden on Amn Cook to demonstrate the materiality of the witnesses' testimony.

In sum, the military judge abused his discretion in multiple ways: by using incorrect legal principles, by applying "correct legal principles to the facts in a way that is clearly unreasonable," and by failing "to consider important facts." *Rudometkin*, 82 M.J. at 401. The result was clearly to Amn Cook's detriment, as a

proper decision would have dismissed or abated the proceedings, depending on whether the military judge acted under R.C.M. 703(e)(2) or constitutional principles under *Valenzuela-Bernal*.

WHEREFORE, this Honorable Court should set aside the findings for Specification 1 of Charge IV and the Specification of Additional Charge I.

V.

OMISSION OF THE GOVERNMENT'S CLOSING ARGUMENT SLIDES—INCLUDING THE UNKNOWN VIDEOS PLAYED TO THE MEMBERS—NECESSITATES REMAND FOR CORRECTION.

Additional Facts

Appellate Exhibit XL is supposed to be a copy of the PowerPoint slides the Government used during closing argument. (R. at 537.) Instead, it contains Defense Exhibit A. As part of the closing slides, the Government played video clips ten times during the closing argument. (R. at 553–56, 559, 562.) For nine of those clips, the transcript says the video is inaudible. (R. at 553–56, 559.)

Standard of Review

Whether a record of trial is incomplete or not substantially verbatim is reviewed de novo. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law and Analysis

The record of trial is "the very heart of the criminal proceedings and the single essential element to meaningful appellate review." *United States v. Credit*, 4 M.J. 118, 119 (C.M.A. 1977). A complete record of proceedings is required for every court-martial in which the sentence adjudged includes "a sentence of death, dismissal,

discharge, confinement for more than six months, or forfeiture of pay for more than six months." Article 54(c)(2), 10 U.S.C. § 854(c)(2). A complete record shall include "[e]xhibits . . . and any appellate exhibits." R.C.M. 1112(b)(6).

The threshold question is whether the "omitted material was substantial, either qualitatively or quantitatively." *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (citations omitted). "Omissions are quantitatively substantial unless the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness." *Id.* (internal punctuation and citations omitted).

A substantial omission in a record of trial raises a presumption of prejudice to an appellant, which the Government must rebut. *Id.* (citations omitted). "Moreover, since in military criminal law administration the Government bears responsibility for preparing the record of trial, it is fitting that every inference be drawn against the Government with respect to the existence of prejudice because of an omission." *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981) (citation omitted).

In this complex case, the Government had to tie together numerous loose threads during its closing argument. Nine of the video clips it used are uncertain. Even though argument is not evidence, for appellate defense counsel to scrutinize trial counsel's argument, it is crucial to know what evidence the trial counsel put before the members to assess the propriety of the argument. This is impossible without a copy of the closing slides. Amn Cook asserts this omission is substantial. But this Court need not resolve that question immediately: it may remand to the

Chief Trial Judge to resolve the omission. If the exhibit is located, Amn Cook may ask this Court to supplement existing assignments of error, or add a new assignment of error, based on the contents of the slides.

WHEREFORE, Amn Cook respectfully requests this Honorable Court provide remand to correct the record. Amn Cook also demands speedy appellate review.

VI.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED THE GOVERNMENT TO INTRODUCE ONE OF THE IMMIGRANT'S CRIMINAL HISTORY AGGRAVATION EVIDENCE.

Additional Facts

During presentencing, the Government sought to introduce Prosecution Exhibit 28, an I-213 form containing criminal history for OJA, one of the five immigrants in the vehicle. (R. at 604.) The defense objected to the exhibit as improper aggravation evidence and on relevance grounds. (R. at 605.) The military judge ruled as follows:

> The court does find this to be evidence in aggravation of the crime as it directly relates to or results from the crime specifically. It is evidence that appears to show that one of the individuals the accused was transporting had a criminal history that is directly related to or resulting from his criminal, the accused's crime of transporting that illegal alien. The court has conducted an MRE 403 balancing test and finds that probative value is not substantially outweighed by any danger of unfair prejudice in this case. The court will put this document and the testimony in the proper context, recognizing that severity or lack thereof of criminal behavior and how long ago it occurred [o]n this date on this particular form. However, this court will give this evidence and testimony the weight it deserves. It is admissible as aggravation evidence.

(R. at 608.)

Standard of Review

This Court reviews "a military judge's decision to admit evidence for an abuse of discretion." *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019) (quoting *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)).

Law and Analysis

R.C.M. 1001(b)(4) permits the government to admit evidence in aggravation "directly relating to or resulting from the offenses of which the accused has been found guilty." The evidence must also pass a balancing test under Mil. R. Evid. 403. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007).

One of the five immigrants in the SUV, OJA, had prior driving under the influence convictions from 2003, 2009, and 2016. (PE 28.) OJA was in custody and then deported after QM and Amn Cook were apprehended. (AE XLVI at 2.) Amn Cook could not possibly have known of OJA's convictions. Their relationship to the actual offenses is marginal at best. At most, the argument would be that Amn Cook's actions allowed someone with a criminal history to commit further crimes. But this fails because OJA was in custody and then deported. Moreover, the notion of using the criminal history of a person transported to amplify the gravity of the offense is problematic. Prosecution Exhibit 28 is skeletal in its details. We can know little about what actually happened with those offenses.

This feeds directly into the military judge's flawed Mil. R. Evid. 403 analysis. Even if it fell into the bucket of aggravation evidence, the probative value is minimal. Against this, the danger of unfair prejudice is potent. If the military judge felt it was

admissible, he likely felt the offense was worsened because of the perception that Amn Cook transported someone with a criminal history.

This Court considers four factors when deciding whether an error substantially influenced an appellant's sentence: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *United States v. Edwards*, 82 M.J. 239, 247 (citing *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018)).

The Government had a basic sentencing case, while the Defense presented a picture of a resilient young man with a strong support system. As to the materiality and quality of the evidence, Amn Cook concedes that, standing alone, it would not be enough to move the needle on prejudice. But this Court should consider the military judge's erroneous admission of the evidence given the numerous other issues with the sentencing proceedings.

WHEREFORE, Amn Cook respectfully requests this Honorable Court set aside the sentence.

VII.

THE MILITARY JUDGE AND THE PARTIES INCORRECTLY CALCULATED THE MAXIMUM PUNISHMENT, TRIPLING AMN COOK'S PUNITIVE EXPOSURE. THIS ERROR REQUIRES SETTING ASIDE THE SENTENCE.

Additional Facts

When discussing maximum confinement for offenses, the trial counsel stated that the maximum punishment for Charge IV, Specification 1 was 25 years, or five years per immigrant. (R. at 597.) Although not specifically discussed, presumably

the same calculation occurred for conspiracy to commit the transporting aliens offense. (R. at 597–98.) In total, they calculated the maximum confinement as 57 years and two months. (R. at 598.) Defense counsel concurred. (*Id.*)

Standard of Review

"The maximum punishment authorized for an offense is a question of law, which [this Court reviews] de novo." *United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011) (citations omitted). In the absence of an objection by trial defense counsel, a military judge's determination of the maximum punishment is reviewed for plain error. *See United States v. St. Blanc*, 70 M.J. 424, 430 (C.A.A.F. 2012). To prevail under plain error analysis, an appellant must show (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008) (quotations and citations omitted).

Law and Analysis

The following table summarizes the military judge's and parties' agreed maximum confinement.

Charge and Specification	Article	Maximum Confinement
Charge I, Specification	86 (AWOL)	1 month
Charge II, Specification	87b (Breach of Restriction)	1 month
Charge III, Specification	112a (Marijuana Use)	2 years
Charge IV, Specification 1	134 (Transporting Aliens)	25 years
Additional Charge I, Specification	81 (Conspiracy to Transport Aliens)	25 years
Additional Charge II, Specification	131b (Obstructing Justice)	5 years
Total		**57 years, 2 months**

MCM, pt. IV, ¶¶ 5.d.(1), 10.d.(2)(a), 13.d.(3), 50.d.(1)(b), 83.d.; R.C.M. 1003(c)(1)(B)(ii).

Under the statute, the maximum punishment for transporting aliens is five years "for each alien." 8 U.S.C. § 1324(a)(1)(B), (a)(1)(B)(ii). Conspiracy's maximum confinement is defined by the underlying offense, thus would also be five years. *MCM*, pt. IV, ¶ 5.d.(1). The military judge and parties multiplied five aliens by the maximum punishment and reached 25 years per specification. But this misconceives how these offenses are charged.

The Government could have charged the transportation of each alien separately. Had it done so, the maximum punishment would have been 50 years for the 8 U.S.C. § 1324 offenses. But it did not. This is little different than the Government charging divers occasions in a single specification.

Three federal and one military case demonstrate that the military judge erred here. In *United States v. Salazar-Villarreal*, 872 F.2d 121, 121–22 (5th Cir. 1989), the appellant transported 24 aliens in the vehicle, and he was indicted on four counts of transporting aliens. However, he pleaded guilty to a single count of transporting illegal *aliens* within the United States. *Id.* The Fifth Circuit stated that the maximum punishment was five years' confinement. *Id.* at 122. Second, in *United States v. Hilario-Hilario*, 529 F.3d 65, 69 (1st Cir. 2008), an 8 U.S.C. § 1324 case involving bringing aliens into the United States (rather than transporting), the indictment alleged that the defendants "placed in jeopardy the lives of the aliens, approximately eighty-seven (87) aliens." At issue was whether the maximum punishment was five years (because he acted as an aider and abettor) or ten years (as

principal). *Id.* at 75. Third, in *United States v. Ramirez-De Rosas*, 873 F.2d 1177, 1178 (9th Cir. 1989), the defendant pleaded guilty to illegal transportation of aliens when he engaged in a high-speed chase with four aliens in a van. The court stated that "[t]he maximum sentence provided for by statute is incarceration for five years (60 months). 8 U.S.C. § 1324(a)." *Id.*

One aspect of federal sentencing absent here is the guidelines. They provide further insight into charging. Federal courts take into account the total number of aliens involved in the offense and apply a sentence enhancement for large numbers of aliens. *See United States v. Williams*, 610 F.3d 271, 292–93 (5th Cir. 2010) (reviewing a case where the district court imposed a sentence enhancement because the appellant transported over 100 aliens for financial gain, resulting the statutory maximum sentence of 10 years' confinement). Federal sentencing guidelines would have protected Amn Cook from the military judge's miscalculation.

Although rarely prosecuted in the military, one case does address the analogous punishment. In *United States v. Spykerman*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) addressed the maximum punishment as follows: "Specifically, he was charged with two specifications of conspiring to transport aliens for financial gain and one specification of the substantive offense of transporting alien*s* for financial gain. Had he been indicted by a grand jury and subsequently convicted in civilian federal court, each offense would carry a maximum term of imprisonment of 10 years." 81 M.J. 709, 732 (N.M. Ct. Crim. App. 2021) (emphasis added) (citing 8 U.S.C. § 1324(a)(1)(B)(i)). Even though the specification on

transporting involved multiple aliens, the maximum punishment would only be for a single specification.[10]

The maximum punishment should have been as follows:

Charge and Specification	Article	Maximum Confinement
Charge I, Specification	86 (AWOL)	1 month
Charge II, Specification	87b (Breach of Restriction)	1 month
Charge III, Specification	112a (Marijuana Use)	2 years
Charge IV, Specification 1	134 (Transporting Aliens)	5 years
Additional Charge I, Specification	81 (Conspiracy to Transport Aliens)	5 years
Additional Charge II, Specification	131b (Obstructing Justice)	5 years
Total		**17 years, 2 months**

The military judge committed plain and obvious error in the miscalculation. That these offenses are unfamiliar does not excuse the error. The military judge issued by far the strongest sentences for the 8 U.S.C. § 1324 offenses. When he did so, he misconceived the statutory maximum to Amn Cook's prejudice. Additionally, as explained in the next assignment of error, this error led the military judge to issue a sentence wildly out of step with a normal sentence for this type of offense.

WHEREFORE, Amn Cook respectfully requests this Honorable Court set aside the sentence and reduce his confinement.

[10] The punishment is 10 years per count, rather than 5 years, because it was for financial gain, which doubles the penalty. 8 U.S.C. § 1324 (a)(1)(B)(i).

VIII.

AMN COOK'S SENTENCE IS INAPPROPRIATELY SEVERE.

Additional Facts

The military judge sentenced Amn Cook to 24 months' confinement for both the transporting and conspiracy to transport specifications, served concurrently with six months' confinement for the obstruction of justice specification. (R. at 638–39.) The guilty plea offenses totaled three months' confinement (each of the guilty plea sentences running concurrently with each other). (*Id.*) The total confinement terms for the litigated and guilty plea offenses ran consecutively, for a total of 27 months' confinement. (*Id.*) Amn Cook challenges only the 24-month sentences for the transporting and conspiracy to transport specifications.

Standard of Review

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

Law and Analysis

This Court still reviews sentences for appropriateness. Article 66(d)(1)(A), UCMJ (2021). Considerations include "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted). "The breadth of the power granted to the [CCAs] to review a case for sentence appropriateness is one of the unique and longstanding features of the [UCMJ]." *United States v. Hutchison*, 57 M.J. 231, 233 (C.A.A.F. 2002) (citations omitted). This Court's role in reviewing sentences under

Article 66(d) is to "do justice," as distinguished from the discretionary power of the convening authority to grant mercy. *See United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998).

Amn Cook's sentence is inappropriately severe considering: (1) the military judge's misunderstanding of the maximum punishment for the 8 U.S.C. § 1324-based offenses; (2) the sentences typically adjudged for this type of offense; (3) his involvement in the offenses; and (4) his rehabilitative potential.

First, the military judge labored under a mistaken understanding of the maximum punishment at issue for the most serious offenses. This likely led to the harsh sentence adjudged here.

Second, reflecting a deep misunderstanding of sentencing for this type of offense, Amn Cook's sentence far exceeds the norm for federal sentencing as well as comparable military cases. As a starting point, the level of their offense was such that CBP did not even refer the case for prosecution. While the military is fully within its rights to prosecute the case, it is noteworthy that the civilians felt the offense was of a very low magnitude.

"The power to review a case for sentence appropriateness, which reflects the unique history and attributes of the military justice system, includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001). "In making a sentence appropriateness determination, [CCAs] are required to examine sentences in closely related cases and permitted, but not required, to do so in other cases." *Anderson*, 67

M.J. at 705 (citing *United States v. Wacha*, 55 M.J. 266, 267–68 (C.A.A.F. 2001)). While this Court is certainly not required to compare sentences in this case, it makes much more sense than most cases because of the novelty of the offenses. A review of what is typical can inform what is appropriate.

The following cases are illustrative of federal sentencing on comparable offenses:

- *United States v. Chavez-Palacios*, 30 F.3d 1290 (10th Cir. 1994). The appellant was convicted by a jury of two counts of unlawfully transporting aliens and aiding and abetting the same. *Id.* at 1292. He received four month's confinement, and unsuccessfully appealed because he desired further reduction under the guidelines as a "minor participant." *Id.* at 1294–96. Federal sentencing guidelines provide for reduction or increase of a sentence based on various aggravating or mitigating factors. *Id.* at 1294–95.

- *United States v. Palomares-Alcantar*, 406 F.3d 966 (8th Cir. 2005). The appellant received an 18-month sentence for transporting 20 aliens from Phoenix, Arizona to Chicago, Illinois, in a van with bald tires and only two seatbelts. *Id.* at 966–67. He received guidelines enhancements because of the number of aliens and the creation of a risk of substantial injury. *Id.*

- *United States v. Bateman*, 258 Fed. Appx. 625 (5th Cir. 2007) (per curiam). The appellant received an 18-month sentence for transporting 19 aliens in the sleeper compartment of his tractor-trailer, which had no safety restraints and was extremely hot, yielding a guidelines enhancement. *Id.* at 625–26.

- *United States v. Rodriguez*, 630 F.3d 377 (5th Cir. 2011) (per curiam). The appellant received an 18-month sentence for transporting five aliens in an SUV. *Id.* at 378–79. The district court had applied a guidelines enhancement for reckless endangerment because of the state of the vehicle and a U-turn performed over an interstate median. *Id.* at 378–80. The appellate court found the guidelines enhancement unjustified and remanded for resentencing. *Id.* at 383.

Though rarely prosecuted in the military, the following military cases further demonstrate the sentence here is excessive, both for the term of confinement and the dishonorable discharge.

- *Spykerman*, 81 M.J. 709. The appellant was charged with two specifications of conspiracy to transport aliens for financial gain and one specification of transporting aliens. He pleaded guilty and received 98 days' confinement and a bad-conduct discharge. *Id.* at 722, 732.

- *United States v. Villagomez-Garcia*, No. 202000269, 2021 CCA LEXIS 642 (N.M. Ct. Crim. App. 29 Nov. 2021) (per curiam) (unpub. op.). Appellant pleaded guilty to one specification of transporting unlawful aliens in violation of 8 U.S.C. § 1324, charged through Article 134, UCMJ. *Id.* at *2. He coordinated with another Marine to "give people rides" in exchange for $500 and was apprehended with three aliens in his vehicle. *Id.* at *1–3. He received six months' confinement and a bad-conduct discharge. *Id.* at *1.

- *United States v. Rodriguez*, NMCM 9901345, 2000 CCA LEXIS 77 (N.M. Ct. Crim. App. 7 Mar. 2020) (unpub. op.). Appellant pleaded guilty to transporting aliens and conspiracy based on multiple instances of transporting aliens to various locations in California for $350 or $500 per person, sometimes detouring through Camp Pendelton, a Marine base. *Id.* at 3–5 & n.3. He received five months' confinement and a bad-conduct discharge. *Id.* at *1.

- *United States v. Fuentes*, NMCM 9401669, 1996 CCA LEXIS 464 (N.M. Ct. Crim. App. 29 May 1996) (unpub. op.). Appellant was convicted at a litigated special court-martial of transporting aliens by the same charging scheme as this case. *Id.* at *1. He was stopped at a Camp Pendelton checkpoint with four aliens who were later returned to Mexico. *Id.* at *4–5. He was sentenced to three months' confinement and a bad-conduct discharge. *Id.* at *1.

- *United States v. Johnson*, No. 202000227, 2021 CCA LEXIS 370 (N.M. Ct. Crim. App. 28 Jul. 2021) (unpub. op.). The appellant broke COVID restrictions to drive three undocumented aliens in exchange for $500. *Id.* at *2–3 He pleaded guilty and received a bad-conduct discharge and 180 days' confinement. *Id.* at *1.

Third, even if one credits all the Government's evidence, was still the lesser participant in any alleged scheme.

Fourth, Amn Cook put on a strong sentencing case that showed his rehabilitation potential. Amn Cook was the son of two servicemembers, his mother, TC, is a retired master sergeant. (DE J; R. at 609.) In his unsworn statement, he noted that he pleaded guilty for Charges I-III, but not for the other offenses. (DE J.)

Still, he recognized that if he was found guilty it was not because of his circumstances; his parents raised him with values and he was ashamed to let them down. (*Id.*) At the time of trial, he had already spent 155 days in pretrial confinement, with a change to "reflect and invest[] in self-development." (*Id.*) He also highlighted his family's suffering awaiting the trial. (*Id.*) TC moved from Florida to Tucson to support him, even though she was not allowed to see him with regularity. (R. at 93.)

Both TC and Amn Cook's father, AC, testified live during presentencing. His mother explained his childhood moving from base to base, living on base, playing sports—"just the life of a military child." (R. at 611.) She "never had any problems" with Amn Cook, who was always respectful. Certainly if the Government had rebuttal evidence to demonstrate otherwise, it would have used it here. TC came to visit him every Sunday in pretrial confinement for an hour, which was all she was allowed. (R. at 613.) She explained his resilience through the process. (R. at 614.) She said that she and AC would support him "by any means necessary." (R. at 614.) AC testified that they supported him from the first moment he got in trouble. (R. at 618.) He encouraged his son that this situation, at so early a time in Amn Cook's life, need not define him. (R. at 619.) AC believed in Amn Cook's rehabilitation potential and explained Amn Cook's excitement to begin school in the next chapter of his life. (R. at 620.) With so committed a family, Amn Cook had a solid place to return home and a springboard to move on and rehabilitate. Instead, the military judge imposed confinement and a dishonorable discharge unjustified for the offense and the offender.

WHERFORE, Amn Cook respectfully requests this Honorable Court set aside his sentence, reduce confinement, and lower the dishonorable discharge to a bad-conduct discharge.

IX.

AMN COOK'S SENTENCE TO CONFINEMENT FOR CHARGE I AND CHARGE II VIOLATE THE MAXIMUM PUNISHMENT FOR EACH OFFENSE.

Additional Facts

Amn Cook pleaded guilty to absence without leave, breach of restriction, and marijuana use in violation of Articles 86, 87, and 112a, UCMJ. (Charge Sheet, ROT Vol. 1; R. at 135.) There was no plea agreement. The military judge calculated the maximum punishment for these offenses at two years and two months of confinement. (R. at 168.) The military judge sentenced Amn Cook to two months' confinement for absence without leave, three months' confinement for breaking restriction, and three months' confinement for marijuana use. (R. at 638.) These three offenses ran concurrently with each other, but consecutively with the other convicted offenses in the case. (R. at 638–39.) The Defense did not challenge the sentence.

Standard of Review

The standard of review is the same as AOE VIII.

Law and Analysis

When acting as the sentencing authority, a military judge must specify a term of confinement for each offense. Article 56(c)(2), UCMJ, 10 U.S.C. § 856(c)(2). "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." Article 56(a), UCMJ. The

maximum confinement for absence without leave lasting under three days is one month. *MCM*, pt. IV, ¶ 10.d.(2)(a). The maximum confinement for breaking restriction is also one month. *Id.* ¶ 13.d.(3).

The military judge issued confinement in excess of the maximum outlined in the *MCM*. This Court cannot approve a sentence that is not correct in law. *United States v. Bennett*, No. ACM S32722, 2023 CCA LEXIS 293, at *14 (A.F. Ct. Crim. App. 14 Jul. 2023). In *Bennett*, this Court recently encountered a similar situation where the adjudged sentence for absence without leave exceeded the maximum punishment. *Id.* at *15. This Court provided relief by only approving the confinement up to the maximum for the offense. *Id.* at *16. If this Court does not provide relief to Amn Cook through the errors assigned above, it should nonetheless only approve the permissible amount of confinement for absence without leave and breach of restriction.

WHERFORE, Amn Cook respectfully requests this Honorable Court approve no more than one month of confinement each for Charge I and Charge II.

X.

THE CONVENING AUTHORITY FAILED TO PROVIDE REASONING FOR DENYING AMN COOK'S REQUEST FOR DEFERMENT OF REDUCTION IN RANK AND FORFEITURES.

Additional Facts

On 7 March 2022, Amn Cook requested the convening authority defer his reduction in grade and forfeitures of pay until entry of judgment. (Submission of

Matters, ROT Vol. 6, 7 Mar. 2022.[11]) The convening authority denied both requests without explanation. (Convening Authority Decision on Action, 21 May 2022.)

Standard of Review

This Court reviews a convening authority's decision on a deferment request for an abuse of discretion. *See United States v. Sloan*, 35 M.J. 4, 6 (C.M.A. 1992) (citing R.C.M. 1103), *overruled on other grounds, United States v. Dinger*, 77 M.J. 447 (C.A.A.F. 2018).

Law and Analysis

R.C.M. 1103(d)(2) states that when an appellant petitions the convening authority to defer forfeitures, "[t]he [appellant] shall have the burden of showing that the interests of the [appellant] and the community in deferral outweigh the community's interests in imposition of the punishment on its effective date." Factors to consider, "where applicable," include:

> the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused's character, mental condition, family situation, and service record.

Id. The convening authority's action on the request must be in writing and provide the reasons for the action. *Id.*; *Sloan*, 35 M.J. at 7.

[11] Defense counsel made a request for the convening authority to reduce Amn Cook's confinement because of his cooperation with civilian authorities in the investigation of others involved. (*Id.*)

The convening authority failed to articulate any rationale for denying Amn Cook's reasonable request to defer forfeitures and reduction in grade. This was error. Amn Cook's case is especially compelling because he provided substantial assistance to investigators. (Submission of Matters at 2.) Though the convening authority denied the request for confinement reduction, the convening authority could nonetheless provide the relatively minor relief afforded by a deferment. This Court should remand for the convening authority to provide the proper treatment of a valid deferment request.

WHEREFORE, Amn Cook respectfully requests this Honorable Court remand for the convening authority to provide a rationale for denying Amn Cook's deferment request.

XI.

AMN COOK IS ENTITLED TO *MORENO* RELIEF BECAUSE OF THE 200-DAY DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT. ALTERNATIVELY, AMN COOK IS ENTITLED TO SENTENCE RELIEF UNDER *TARDIF* AND *GAY*.

Additional Facts

Amn Cook's court-martial concluded on 18 February 2022. (R. at 639.) Transcription completed on 28 July 2022—160 days later. (Court Reporter's Chronology at 6, ROT Vol. 6.) This Court docketed the case on 6 September 2023, 200 days after the court-martial concluded.

Standard of Review

This Court has the de novo power and responsibility to disapprove any portion of a sentence that it determines, on the basis of the entire record, should not be approved. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Whether an appellant has been deprived of his due process right to speedy appellate review is a question of law reviewed de novo. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law and Analysis

Amn Cook is entitled to sentence relief from this Court because the Government violated his due process right to speedy appellate review; even if this Court were to find no prejudice from the due process violation, he is nevertheless entitled to relief under *Gay*, *Tardif*, and *Toohey*.[12]

Convicted servicemembers have a due process right to timely review and appeal of courts-martial convictions. *Moreno*, 63 M.J. at 135. Presumptive prejudicial delay occurs in three scenarios: (1) the action of the convening authority is not taken within 120 days of the completion of trial; (2) the record of trial is not docketed by the service Court of Criminal Appeals within 30 days of the convening authority's action; or (3) appellate review is not completed and a decision is not rendered by a CCA 18 months after docketing. 63 M.J. at 142. This Court also adapted *Moreno*'s benchmark standards for the new post-trial processing scheme. *See*

[12] *United States v. Gay*, 74 M.J. 736 (A.F. Ct. Crim. App. 2015), *aff'd* 75 M.J. 264 (C.A.A.F. 2016); 57 M.J. 219; *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006).

United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (applying the aggregate *Moreno* standard of 150 days from the day an appellant was sentenced to the docketing of the case with the CCA to determine presumptively unreasonable delay).

The initial inquiry starts with the presumption of unreasonable post-trial delay. The 200-day delay between the 18 February 2022 announcement of sentence and the 6 September 2022 docketing with this Court amply exceeds the 150-day limit from *Livak*. As an additional point, the Government provided an incomplete ROT to this Court at docketing. *See* AOE V, *supra*. The Government cannot use an incomplete record to defeat the presumption of unreasonable post-trial delay. To do so would allow the Government "timely" docket case by simply submitting a blue cover sheet absent any R.C.M. 1112 requirements, fully knowing it will have the opportunity to fix the record later. The true delay in this case should be based on how long it takes the Government to docket a correct record of trial.

A presumption of unreasonable post-trial delay triggers a four-part analysis. *Moreno*, 63 M.J. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). They include: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id*. Prejudice considers "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired."

Id. at 138–39 (citations omitted). The CAAF "expect[s]" the CCAs to "document the reasons for delay" and "exercise [] institutional vigilance." *Id*. at 143. Once a presumptive delay or facially unreasonable delay triggers the analysis, the factors are balanced with no single factor being required and none being dispositive. *Id*. at 136 (citations omitted).

The *Barker* factors weigh in favor of Amn Cook. The total length of delay—200 days plus the time it takes to docket a corrected ROT—is not yet cemented, as no one is certain when this Court will issue its decision. But if this Court agrees that an incomplete ROT does not toll the *Moreno* clock, the delay is attributable entirely to the Government. Amn Cook has not yet demanded speedy appellate review but does so here. As to prejudice, Amn Cook's ability to defend himself at a potential retrial is hampered as more time passes. He has challenged each of his litigated convictions, and there are avenues for relief here that could yield a rehearing. Amn Cook already had to endure a trial without the testimony of either QM or the five immigrants from the SUV. The addition of faded memories to the already-dated case makes his defense only more difficult. Amn Cook has shown sufficient prejudice to warrant relief under *Moreno*.

Even if this Court concludes otherwise on prejudice, Amn Cook is still entitled to post-trial relief. *See Tardif*, 57 M.J. at 225; *Gay*, 74 M.J. at 744. The factors for *Tardif* relief include:

> (1) How long did the delay exceed the standards set forth in [Moreno]; (2) What reasons, if any, has the [G]overnment set forth for the delay? Is there any evidence of bad faith or gross indifference to the overall post-trial processing of this case?; (3) Keeping in mind that our goal

> under Tardif is not to analyze for prejudice, is there nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay?; (4) Has the delay lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline?; (5) Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation?; and (6) Given the passage of time, can this court provide meaningful relief in this particular situation?

Gay, 74 M.J. at 744 (semicolons added). These factors favor Amn Cook. First, the 200 days far exceeded the 150 days authorized from the announcement of sentence to docketing a complete record of trial. Second, there is no discernable reason why the Government could not make the deadline here. As articulated above, the reasons for delay also weigh in Amn Cook's favor. To the extent the prejudice analysis above did not persuade the Court, at the very least, there is still "some evidence of harm"—the diminution of evidence from this already two-year-old case. Next, providing sentencing relief will have no impact on good order and discipline and will not lessen the disciplinary effect of the sentence.

On the issue of institutional neglect, docketing incomplete records of trial is not a new concern for this Court. Indeed, the frequency of such incomplete records is disturbing and disconcerting.[13] At a certain point, which has now been surpassed, an

[13] *See United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. 11 Sep. 2023) (remand order); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. 1 Aug. 2023) (remand order); *United States v. Manzano Tarin*, No. ACM S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. 27 Jun. 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. 15 Jun. 2023) (remand order); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Gammage*, No. ACM S32731, 2023 CCA LEXIS 240 (A.F. Ct. Crim. App. 5 Jun. 2023) (remand order); *United States v. Goodwater*, No.

appellant should get relief—in part—to motivate the Government to do its job correctly in preparing a full record of trial the first time.

Finally, *Toohey* relief—based on a delay so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system—can only be fully considered when this Court evaluates a fact not currently known to Appellant: the amount of time that elapsed from 6 September 2022 until this Court issues an opinion. 63 M.J. at 362–64.

WHEREFORE, Appellant respectfully requests this Honorable Court grant sentencing relief by disapproving an appropriate amount of confinement and downgrading the dishonorable discharge to a bad-conduct discharge.

ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. 31 May 2023) (remand order); *United States v. Irvin*, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim. App. 12 May 2023) (remand order); *United States v. Valentin-Andino*, 83 M.J. 537, 544 (A.F. Ct. Crim. App. 2023) (remanding because of audio issue); *United States v. Lake*, No. ACM 40168, 2022 CCA LEXIS 706 (A.F. Ct. Crim. App. 7 Dec. 2022) (remand order); *United States v. Fernandez*, No. ACM 40290, 2022 CCA LEXIS 668 (A.F. Ct. Crim. App. 17 Nov. 2022) (remand order); *United States v. Stafford*, No. ACM 40131, 2022 CCA LEXIS 654 (A.F. Ct. Crim. App. 8 Nov. 2022) (remand order); *United States v. Lampkins*, No. ACM 40135, 2020 CCA LEXIS 500 (A.F. Ct. Crim. App. 25 Oct. 2022) (remand order); *United States v. Romero-Alegria*, No. ACM 40199, 2022 CCA LEXIS 558 (A.F. Ct. Crim. App. 22 Sep. 2022) (remand order); *United States v. Payan*, No. ACM 40132, 2022 CCA LEXIS 242 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Cooper*, No. ACM 40092, 2022 CCA LEXIS 243 (A.F. Ct. Crim. App. 28 Apr. 2022) (remand order); *United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. 17 Mar. 2022) (unpub. op.); *United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43 (A.F. Ct. Crim. App. 20 Jan. 2022) (unpub. op.) (requiring second remand for noncompliance with initial remand order), *United States v. Goldman*, No. ACM 39939 (f rev), 2022 CCA LEXIS 511 (A.F. Ct. Crim. App. 30 Aug. 2022) (remand order); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10 (A.F. Ct. Crim. App. 6 Jan. 2022) (unpub. op.); *United States v. Daley*, No. ACM 40012, 2022 CCA LEXIS 7 (A.F. Ct. Crim. App. 5 Jan. 2022) (unpub. op.).

XII.

AMN COOK WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

Additional Facts

Amn Cook elected trial by officer and enlisted members. (R. at 14.) Amn Cook's panel consisted of eight members, and the military judge instructed them that "[t]he concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty." (R. at 246, 577.) It is unknown whether the members convicted Amn Cook by a unanimous verdict.

Standard of Review

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original). Thus, as CAAF has explained, when an appellant fails to object at trial to an error of constitutional dimension that was not yet resolved in his favor at the time of his trial, the "error in the case is forfeited rather than waived." *See Tovarchavez*, 78 M.J. at 462. In such circumstances, military appellate courts review for plain error, but "the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." *Id*. (internal quotations omitted).

Law and Analysis

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-

unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at 1551. Following *Ramos*, Amn Cook was entitled to a unanimous verdict on three bases: (1) under the Sixth Amendment because unanimity is part of the requirement for an impartial jury, and because it is central to the fundamental fairness of a jury verdict: (2) under the Fifth Amendment's Due Process Clause; and, (3) under the Fifth Amendment's Equal Protection Clause.

There is no way of knowing whether a nonunanimous verdict secured any or all of Amn Cook's convictions. But that is a problem for the Government, not Amn Cook. Where constitutional error is at hand, the Government bears the burden of proving harmlessness beyond a reasonable doubt. And, because there is no way of knowing the vote count (especially since the Rules for Courts-Martial explicitly preclude the members from being polled), the Government cannot meet this already onerous burden. *See* R.C.M. 922(e); *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("It is long-settled that a panel member cannot be questioned about his or her verdict . . . .").

Amn Cook recognizes that the CAAF's recent decision in *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), binds this Court. However, he continues to raise the issue in anticipation of further litigation on the matter. *See United States v. Martinez*, No. ACM 39973, 2022 CAAF LEXIS 212 (A.F. Ct. Crim. App. 6 Apr. 2022) (unpub. op.), *pet. filed*, *Martinez v. United States*, Dkt. No 23-242, 8 Sep. 2023.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the litigated findings and set aside the sentence.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

APPENDIX

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

XIII.

AMN COOK'S CONVICTION FOR OBSTRUCTION OF JUSTICE IS FACTUALLY AND LEGALLY INSUFFICIENT.

Additional Facts

For the general narrative, Amn Cook incorporates the facts in Assignment of Error I in the main brief.

Sergeant CM had no recollection of Amn Cook using, or not using, his phone. (R. at 287.) A border patrol agent seized Amn Cook's phone. (R. at 330; PE 3.) During his interview with Security Forces, Amn Cook provided his PIN to investigators—"0000." (R. at 415.) Security Forces attempted to extract data from the phone, but it could not because the phone was factory reset. (R. at 430.)

The Government digital forensics expert, JR, testified that there are two ways to achieve such a reset. First, a user may enter a menu of the phone and choose to delete everything on the phone. (R. at 469–70; AE XXXV.) This method takes approximately 15 minutes. (R. at 471.) A second method is to incorrectly input the pin 10 times; a user may or may not have set up the feature to reset the phone after 10 failed attempts. (R. at 468.) After the fifth attempt a "cool down period" is imposed, increasing with each failed attempt, such that by the last attempt the "cool down" is 60 minutes. Overall, it takes 81 minutes to reset the phone this way. (R. at

471.)

Standard of Review

The standard of review is provided in the main brief in AOE I.

Law and Analysis

This conviction rests on one piece of evidence: JR's testimony that it takes 81 minutes to reset the phone. But he expressed less-than-total confidence in his answer on the operating system at issue. (R. at 467.) He stated "I believe" when describing which version of the operating system ran on Amn Cook's iPhone. This matters because JR *never examined his phone*. Not having examined his phone, and simply guessing at the applicable operating system, is an insufficient foundation to testify on the crucial issue: how long would it have taken for Amn Cook to reset his phone? It appears the members credited the 81-minute answer, as this seemingly suggests he could not have reset the phone by accident and must have used factory reset through the phone's menu.

Even with the phone access data, the Government did not show with sufficient certainty when the phone was deleted. If JR's speculation is wrong on the timing, it becomes much more likely that a nervous young man, knowing that his friend QM is going to be in serious trouble, input the wrong code repeatedly. After all, it was a new phone (R. at 415), so he may well have entered his old pin.

For these reasons, the conviction is against the weight of the evidence, and this Court should set aside the conviction for obstruction of justice. Furthermore, the evidence is legally insufficient to convict.

WHEREFORE, Amn Cook respectfully requests this Honorable Court set aside the Specification of Additional Charge II.

XIV.

AMN COOK'S CONVICTIONS FOR TRANSPORTING ALIENS WHO WERE UNLAWFULLY IN THE UNITED STATES AND CONSPIRACY TO TRANSPORT ALIENS ARE LEGALLY INSUFFICIENT.

Standard of Review

Legal sufficiency is reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)).

For the reasons discussed in the main brief in Assignments of Error I and II, Amn Cook's convictions for transporting aliens and conspiracy to transport aliens are legally insufficient. No reasonable factfinder could conclude that the Government met its burden to prove beyond a reasonable doubt.

WHEREFORE, Amn Cook respectfully requests this Honorable Court set aside the findings for the Specification of Charge IV and the Specification of Additional Charge I, and the sentence.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 31 October 2023.

MATTHEW L. BLYTH, Maj, USAFR
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION TO EXCEED PAGE LIMIT**
v.	)	Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK** United States Air Force *Appellant*	)	No. ACM 40333 31 October 2023

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

Pursuant to Rules 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to file his Assignments of Error in excess of this Court's 50-page limit.

Appellant's brief exceeds the page limit by 9 pages. This was a mixed-plea case involving novel charging to incorporate the federal offense of unlawful transportation of aliens under 8 U.S.C. § 1324. The transcript is 639 pages and the record contains 86 exhibits. Appellant challenges the factual sufficiency of several specifications, which requires extensive factual recitation. Overall, Appellant raises fourteen issues (two personally). Given the complexity of the trial and the number of assignments of error, exceeding the page limit is necessary to sufficiently apprise this Court of Appellant's issues.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
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1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee,	) **CONSENT MOTION FOR ENLARGEMENT OF TIME (FIRST)(CORRECTED)**
v.	) Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK**, USAF Appellant.	) No. ACM 40333
	) 28 November 2023

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

The United States hereby withdraws its previous Consent Motion for Enlargement of Time and substitutes this motion in its place. The United State miscalculated the original due date as 5 December instead of the correct due date of 6 December 2023.

Pursuant to Rule 2.3(m)(5), the United States respectfully requests a 10-day enlargement of time to respond in the above-captioned case. This case was docketed with the Court on 6 September 2022. Since docketing, Appellant has been granted 10 enlargements of time. Appellant filed his brief with the Court on 31 October 2023 with a motion to exceed the page limit. The motion to exceed the page limit was granted on 6 November 2023. This is the United States' first request for an enlargement of time. As of the date of this request, 448 days have elapsed. The United States' response in this case is currently due on 6 December 2023. If the enlargement of time is granted the United States' response will be due on 16 December 2023, and 466 days will have elapsed since docketing.

There is good cause for the enlargement of time in this case. This was a mixed plea case involving novel charging to incorporate the federal offense of unlawful transportation of aliens

under 8 U.S.C. § 1324. The transcript is 639 pages, and the record contains 86 exhibits. Appellant raised fourteen assignments of error. Appellant's counsel has been consulted and consents to the enlargement of time.

In responding to these assignments of error the United States has had to reach out the base and trial counsel for declarations to support its position. Lastly, the undersigned counsel is also assigned to argue In re HVZ before the Court of Appeals for the Armed Force on 5 December 2023. Preparation for the oral argument has required extra time, since undersigned counsel did not write the brief in HVZ and has had to familiarize himself with the case. Undersigned counsel has reviewed the record of trial in this case and begun drafting the brief. This case is undersigned counsel's second priority after the HVZ oral argument.

Due to the current workload in the Air Force Appellate Operations Division, there is no attorney who could complete this brief sooner, especially since undersigned counsel has already reviewed the record and begun drafting the brief.

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

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CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

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

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee,	)	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
	)	Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK**, USAF Appellant.	)	No. ACM 40333
	)	18 December 2023

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

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UNITED STATES, Appellee,	)	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	
	)	Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK**, USAF Appellant.	)	No. ACM 40333
	)	30 November 2023

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

ISSUES PRESENTED

I.

WHETHER APPELLANT'S CONVICTION FOR TRANSPORTING ALIENS UNLAWFULLY IN THE UNITED STATES IS FACTUALLY SUFFICIENT

II.

WHETHER THE CONSPIRACY SPECIFICATION FAILS TO STATE AN OFFENSE BECAUSE IT DOES NOT ALLEGE CONSPIRACY TO COMMIT AN OFFENSE UNDER THE UCMJ.

III.

WHETHER APPELLANTS CONVICTION FOR CONSPIRACY TO TRANSPORT ALIENS UNLAWFULLY IN THE UNITED STATES IS FACTUALLY SUFFICIENT.

IV.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED A MOTION TO DISMISS

BASED ON THE GOVERNMENT'S DEPORTATION OF WITNESSES TO THE ALLEGED OFFENSES.

V.

WHETHER OMISSION OF THE GOVERNMENT'S CLOSING ARGUMENT SLIDES—INCLUDING THE UNKNOWN VIDEOS PLAYED TO THE MEMBERS—NECESSITATES REMAND FOR CORRECTION.

VI.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED THE GOVERNMENT TO INTRODUCE ONE OF THE IMMIGRANT'S CRIMINAL HISTORY AS AGGRAVATION EVIDENCE.

VII.

WHETHER THE MILITARY JUDGE AND THE PARTIES INCORRECTLY CALCULATED THE MAXIMUM PUNISHMENT, TRIPLING AMN COOK'S PUNITIVE EXPOSURE.

VIII.

WHETHER APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE.

IX.

WHETHER APPELLANT'S SENTENCE TO CONFINEMENT FOR CHARGE I AND CHARGE II VIOLATE THE MAXIMUM PUNISHMENT FOR EACH OFFENSE.

X.

WHETHER THE CONVENING AUTHORITY FAILED TO PROVIDE REASONING FOR DENYING APPELLANT'S REQUEST FOR DEFERMENT OF REDUCTION IN RANK AND FORFEITURES.

XI.

WHETHER APPELLANT IS ENTITLED TO MORENO RELIEF BECAUSE OF THE 200-DAY DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT. ALTERNATIVELY, WHETHER AMN COOK IS ENTITLED TO SENTENCE RELIEF UNDER TARDIF AND GAY.

XII.

WHETHER APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

XIII.

WHETHER APPELLANT'S CONVICTION FOR OBSTRUCTION OF JUSTICE IS FACTUALLY AND LEGALLY SUFFICIENT.

XIV.

WHETHER APPELLANT'S CONVICTIONS FOR TRANSPORTING ALIENS AND CONSPIRACY TO TRANSPORT ALIENS ARE LEGALLY INSUFFICIENT.

STATEMENT OF CASE

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

STATEMENT OF FACTS

On the evening of 22 August 2022, several miles from the U.S. - Mexico border, Sergeant CM from the Arizona Department of Public Safety (DPS), Border Strike Force Bureau, received a report that a light-colored sports utility vehicle (SUV) was stopped on a desert road, and that "bodies" ran from the desert and entered the vehicle. (R. at 268, 274.) The report stated that the SUV headed east and then north. (R. at 274.) Sergeant CM searched for and eventually located the SUV; he then proceeded to pull it over when it "rolled" through a red light. (R. at 275.) When Sergeant CM approached the SUV with his handheld flashlight; he noticed a male

driver and passenger and three bodies in the back seat who appeared "disheveled, tired and acting as if they were sleeping." (R. at 276.) Sergeant CM also noticed a "musty, dirty, sweaty smell" coming from the SUV. (R. at 277.) Based on these observations, Sergeant CM contacted dispatch and requested they sent border patrol support. (Id.)

Agents from the department of Homeland Security later questioned the driver and passenger of the SUV; the driver was identified as QM and his passenger was identified as Appellant. (R. at 498-499.) During his interview QM stated that he and Appellant became friends while they were both in the Air Force and that both of them were initially stationed together at Davis Monthan Air Force Base, Arizona. (R. at 499, 510.) QM separated from the Air Force on 4 June 2021, but remained in Arizona and remained close to Appellant. (R. at 311, 510, 621.) QM described his relationship with Appellant as "brothers." (R. at 510.)

QM initially stated that he was exploring the area and that he opted not to use his GPS system to get home. (R. at 500.) He stated that he drove down a dirt road and was going slow because of some potholes and it was only then that he saw some individuals on the side of the road. (Id.) Because it was dark, he decided to give the individuals a ride. (Id.) When the agents indicated that they did not believe his story and that they were deciding whether they were going to charge QM, he changed his story. (R. at 500-502.) QM then stated that he had arranged the pick-up of the individuals on the side of the road and that he was supposed to be compensated for the transportation. (R. at 501-502.)

QM explained that approximately one week earlier on 14 August 2021, that he made a post on Snapchat that he was looking to make money and was looking for a job. (R. 503.) Shortly thereafter QM received a message from an unknown individual offering him "easy

money." (Id.) The individual stated that QM would pick up some Mexicans and drive them and that QM would make five hundred dollars per individual that he picked up. (Id.)

Appellant had approximately one week left before he was being discharged from Air Force and moving back to Florida. (R. at 311, 316.)

On 21 August 2022 Appellant reserved and picked up a Jeep SUV from Enterprise Rental at the Tucson International Airport. (Pros. Ex. 12 at 1.) Appellant and QM picked up the SUV at the rental agency, but Appellant was the individual who signed for and paid for the Jeep. (Pros. Ex. 17 at 1-2.) Both Appellant and QM had their own vehicles. (R. at 515.)

On 22 August 2022 Appellant and QM met up in the afternoon and drove from Tucson to Sierra Vista, and then to Phoenix, Arizona to drop off QM's girlfriend. (R. at 311.) After dropping off QM's girlfriend, Appellant and QM traveled back to Sierra Vista, Arizona. (Id.) QM and Appellant would take turns driving the vehicle. (R. at 503.) During the drive to Sierra Vista, QM's iPhone would ring on the Apple car play with no caller identification. (R. at 317.)

Appellant and QM arrived in the vicinity of Sierra Vista, Arizona at approximately 2230 hours on 22 August 2023. (R. at 276.) At some point they turned off the main road and traveled on to a dirt road. (R. at 501, 513.) They stopped the vehicle and a man in gray spoke with QM; then the man opened the trunk and people entered the car, with three going into the back seat of the rental. (R. at 407.) The man in gray, who did not enter the vehicle, yelled, "Dale, Dale, Dale," meaning "go on." (Pros. Ex. 18 File 1 at 8:20-9:00.) In addition to the three in the back seat, two more entered the trunk. (Id. at 9:20-9:40.)

Before Sergeant CM pulled over Appellant and QM, he ran their license plates and determined that the vehicle they were driving was a rental. (R. at 275–76, 279.) Sergeant CM later testified that in his experience, individuals who transport illegal aliens often use rental

vehicles because if they are caught with the illegal aliens then the rental vehicle will be seized and not their own personal vehicle. (R. at 275.)

When the border patrol agent arrived, he noticed that the individuals in the vehicle were wearing camouflage clothing and had "carpet shoes." (R. at 326.) The border patrol agent later explained that carpet shoes are fabricated from a type of "carpet" material and placed over the wearer's existing shoe; illegal aliens wear carpet shoes when they cross the border so as to not leave any footprints. (R. at 327.)

A search of the rental vehicle revealed a Glock .45 caliber firearm, a 33-round magazine, and 15 rounds of ammunition. (R. at 327.) A later search of Appellant's dorm room revealed the case for the Glock and a sticker with a serial number matching the Glock in the rental vehicle. (R. at 430.)

When agents from the department of Homeland Security interviewed Appellant, he stated that rented the SUV because his vehicle was broken and at a Firestone receiving a diagnosis so that he could drive the vehicle to Florida. (R. at 316.) Appellant later clarified that his vehicle was not broken, but that it had been at Firestone for about a week, and he could not get to it. (R. at 410.) Special Agents from Air Force Office of Special Investigations (AFOSI) went to all the Firestones in the area surrounding Tucson and were unable to find any evidence Appellant had taken his vehicle to a Firestone. (R. at 429.)

Law enforcement seized Appellant's iPhone but were unable to gather any information from the phone because it had been factory reset. (R. at 430) Law enforcement also requested to see QM's phone but discovered that his phone had also been factory reset. (R. at 414, 508.)

At trial the Government introduced evidence from various forms prepared about each of the five immigrants. Field processing forms from the Department of Homeland Security

indicated only their names, birthdates, and time of apprehension. (Pros. Ex. 4.) Two of the five immigrants had an Alien File (A-File), indicating they had some interaction with the immigration system. (R. at 351.) One of the immigrants had an A-File indicating she was removed from the country weeks after the apprehension at issue here. (R. at 352, 355; Pros. Ex 5.) Another immigrant had a court hearing in 2017 and was thereafter removed to Mexico. (Pros. Ex. 6, 7, 8, 9.)

Other facts necessary to resolve the AOEs are provided below.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR TRANSPORTING ALIENS UNLAWFULLY IN THE UNITED STATES IS FACTUALLY SUFFICIENT.

Standard of Review

Despite the changes to Article 66, UCMJ, the Government concurs with Appellant that the standard of review for factual sufficiency should remain de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). This Court should affirm the findings unless it is clearly convinced that the finding of guilt was against the weight of the evidence. Article 66(d)(1)(B)(iii), UCMJ.

Law

The factual sufficiency standard in the revised Article 66 statute has altered this Court's review from taking a fresh, impartial look at the evidence requiring this Court to be convinced of guilt beyond a reasonable doubt, to a standard where an appellant has the burden to both raise a specific factual issue, and to show that his or her conviction is against the weight of the evidence admitted at trial. United States v. Harvey, 83 M.J. 685, 693 (N.M. Ct. Crim. App. 2023). Thus,

Congress has implicitly created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty. Id.

This Court must first determine if an appellant has made a specific showing of a deficiency in proof. Article 66(d)(1)(B)(i). If an appellant makes this showing, this Court should weigh the evidence in a deferential manner to the result at trial; and if this Court is clearly convinced that, when weighed, the evidence (including the testimony) does not support a conviction, it may set it aside. Harvey, 83 M.J. at 693. This Court should not apply a "beyond a reasonable doubt" standard because to do so would be inconsistent with a plain reading of the statue. *See* Id. It would also be inconsistent with the required deference to the fact that the trial court saw and heard the witnesses and other evidence; and deference to the findings of fact entered into the record by the military judge. Article 66(d)(1)(B)(ii).

Accordingly, this Court should not apply a beyond a reasonable doubt standard; and this Court should affirm the finding of guilt unless it is clearly convinced that it was against the weight of the evidence.

Analysis

1. The military judge properly instructed the members with regard to the elements of a violation of 8 U.S.C. 1324 and did not omit a substantive element.

At the conclusion of findings portion of the trial, the military judge instructed the members that in order to find Appellant guilty of a violation of 8 U.S.C. 1324, they must be convinced beyond a reasonable doubt of the following elements:

> 1. That on or about 22 August 2021, within the State of Arizona, the accused knowingly transported or moved M F - L , O N -A , P O -M , T M -V , and O D N -C to help them remain in the United States illegally;
>
> 2. That the individuals transported or moved were aliens;

> 3. That the individuals transported or moved were not lawfully in the United States;
>
> 4. That the accused knew or acted in reckless disregard of the fact that the individuals transported or moved were not lawfully in the United States; and
>
> 5. That the charged federal statute, 8 U.S.C. 1324, is an offense not capital.

(R. at 541)

Appellant asserts that the military judge failed to instruct the members with regard to the specific language included in the statute in that the transportation of the illegal aliens had to be "in furtherance of such violation of the law."[1] (App. Br. at 15-16.) Appellant argues that in omitting this language, the military judge failed to instruct on a "substantive element" of the offense. (Id.) He did not.

The military judge properly instructed the members regarding the elements necessary to support a conviction under 8 U.S.C. § 1324(a)(1)(A)(ii). While the instructions did not include the language "in furtherance of such violation of law," the instructions required the members find that Appellant transported the aliens "to help them remain in the United States illegally." (R. at 541.) This language properly captured the statutory requirement that Appellant transported the aliens in furtherance of such violation of the law and is taken directly from the Ninth Circuit's instructions for violation 8 U.S.C. § 1324(a)(1)(A)(ii). *See* S3 Modern Federal Jury Instructions-Criminal 7.2 (2023). Reliance on these instructions is neither unreasonable nor

[1] 8 USC § 1324(a)(1)(A)(ii) provides that any person who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law shall be punished as provided in subparagraph (B).

surprising; 8 U.S.C. § 1324 is a federal crime and it was geographically tried in the jurisdiction of the Ninth Circuit. (R. at 3.)

The Ninth Circuit has found that the term "in furtherance of" means furthering, advancing, or *helping* forward. *See* United States v. Irons, 31 F.4th 702, 707 (9th Cir. 2022) (emphasis added). The Tenth Circuit reached a similar conclusion and found that terms "helping" and "in furtherance of" are synonymous; and therefore, the fact that the military judge in Appellant's case instructed the members with the language "help[ed] them remain in the United States illegally" is consistent with the "in furtherance of" language in the statute. United States v. Barajas-Chavez, 162 F.3d 1285, 1288 (10th Cir. 1999); *see also* United States v. Barajas-Montiel, 185 F.3d 947, 953-954 (9th Cir. 1999) (finding that the [model instructions for the Ninth Circuit] required the jury find that appellant had the specific intent to further the alien's illegal presence in the United States).

Therefore, the military judge did not omit a substantive element of the offense when he instructed the members that they must find that Appellant transported the aliens "to help them remain in the United States illegally."

2. Appellant's transportation of the illegal aliens was done in furtherance of maintaining the aliens' illegal presence in the United States

Appellant asserts that in failing to instruct on the "in furtherance of" language, the military judge missed a doctrinal split amongst the circuit courts regarding the interpretation of 8 U.S.C. § 1324. (App. Br. at 14.) Appellant assets that some federal circuits require that the government show that an appellant specifically intended to further the immigrant's unlawful status while other circuits employ a "direct and substantial relationship" test that looks at the overall impact of the transportation. (Id. at 15.) Appellant suggests that the factual sufficiency of his

conviction depends on the approach adopted by this Court. (Id.) It does not. Regardless of the circuit this Court looks to for guidance and its interpretation of the "in furtherance of" language, Appellant's conviction is factually sufficient.

Appellant first tries to push all the blame on QM, stating that Appellant did not share QM's purpose in furthering the aliens' unlawful status. (App. Br. at 16.) However, significant circumstantial evidence shows otherwise. *See* United States v. King, 78 M.J. 218 (C.A.A.F. 2019) (citations omitted) (the government may prove intent via circumstantial evidence). The entire crime was predicated on Appellant's rental of the SUV. (Pros. Ex. 12 at 1-3.) The significance of the rental was revealed by the Department of Public Safety (DPS) officer who testified that rental vehicles were commonly used so that if a smuggler were caught the rental vehicle would be seized and not their own vehicle. (R. at 275.) Despite Appellant's claim that his own vehicle was at Firestone, investigators were unable to verify this fact claim after visiting all the local Firestones. (R. at 316, 429.) This fact suggested that Appellant's vehicle was not in the shop and that the rental was used as a precautionary measure so that his own vehicle would not be seized if he were caught. Appellant's rental of the vehicle and its use supported a finding that he was aware of the criminal plan when he rented the SUV and intended to help the illegal aliens remain in the United States.

Appellant's relationship with QM and the amount of time they spent together on the day they were caught by authorities also supported a finding that Appellant was an active participant in helping the aliens remain in the United States. QM described their relationship as "brothers." (R. at 510.) This suggests a close relationship in that they would not keep secrets from one another and that they would tell each other about what was going on in their lives. It also suggested that they would help one another. On the day they were apprehended, they had spent a

considerable amount of time alone together in the vehicle. Appellant and QM drove from Tucson to Sierra Vista, to Phoenix and then back to Sierra Vista. (R. at 311.) Throughout the drive, approximately eight times, QM's iPhone would ring on the Apple car play with no caller identification. (R. at 317.) That Appellant had no idea what was going on is not credible; it is far more likely that Appellant and QM discussed transportation of the illegal aliens during their multi-hour drive alone together.

Appellant's comparison of himself to an innocent bystander is misplaced. (App. Br. at 18.) Any credibility of this comparison evaporated when the sun set and the two were driving in the desert on a dirt road in the middle of nowhere at 2200 hours on a Sunday evening. (R. at 276.) Given that Appellant had rented the vehicle, it is implausible to find that he did not know what was going on or question QM as to where they were going. Appellant was financially responsible for the rental, and common sense suggests that Appellant would either know where they were going or ask questions. Lastly, the fact that both QM and Appellant were able to factory reset their phones after they were apprehended by authorities suggested that there was incriminating evidence on Appellant's phone, and the two were working together. (R. at 414, 430.)

The evidence supported a finding that Appellant was aware of the criminal plan to transport illegal aliens. Once this determination was made, Appellant was guilty regardless of the jurisdiction or circuit prosecuting the crime. He and QM picked up five stranger illegal aliens from the bushes in the middle of the desert wearing camouflage, "carpet shoes," and who smelled as if they had not taken a shower in days. (R. at 277, 326-327.) There is also evidence that QM expected to be paid $500 per alien transported. (R. at 501-502.) There is no evidence Appellant told the aliens to get out of the vehicle or objected to their presence. Accordingly,

circumstantial evidence supported a finding that Appellant was aware of the criminal plan and intended to help the aliens remain in the United States.

Under the Ninth Circuit approach, there must be a "direct and substantial relationship" between the transportation provided by Appellant and the furtherance of the alien's illegal presence in the United States in order to violate 8 USC 1324. United States v. Moreno, 561 F.2d 1321, 1323 (9th Cir. 1977). The transportation needs to be more than "incidentally connected" to the furtherance of the violation of the law. Id.

Here, the transportation provided by Appellant had a direct and substantial relationship to the alien's illegal presence in the United States. The evidence supported a finding that the aliens had just recently crossed the border and were taking steps to avoid border authorities by wearing camouflage clothing and "carpet" shoes that would cover their tracks. (R. at 326.) The aliens appeared "disheveled," tired, and as if they had not showered in days. (R. at 277.) In this state, the aliens were vulnerable to the environmental elements and subject to being apprehended by border authorities. Appellant's transportation was directly related to helping them remain in the United States but was also essential to their wellbeing. This is distinguishable from a situation in which the aliens were integrated into society and the transportation could be considered routine, such as a trip to the grocery store or to work. Instead, in this situation, the fact they were picked up in the middle of the desert supported that the aliens were on the initial part of their journey to the United States, and any assistance provided was all the more significant. Therefore, because the transportation has a direct and substantial relationship to the alien's presence in the United States, Appellant would be guilty of "helping" them remain in the United States under the approach employed by the Ninth Circuit.

Appellant urges this Court to adopt the approach used in United States v. Merkt, 764 F.2d 266 (5th Cir. 1985) (requiring that the transportation be done with the specific intent of supporting the alien's illegal purpose). (App. Br. at 15) However, Appellant's situation is distinguishable from Merkt where there was evidence that the transportation was done in order to assist the illegal aliens in obtaining asylum – a legal status. Merkt at 272. Here there was no evidence or testimony that suggested any proper or legal purpose of the transportation. When provided an opportunity to explain his actions Appellant did not assert that he was assisting the aliens in obtaining a legal status, such as asylum. Instead, the evidence supports a finding that Appellant had the specific intent of supporting the illegal alien's purpose of remaining in the United States. There is no evidence Appellant demanded that they leave the vehicle, and as stated above, the aliens were in a precarious situation in which they were seeking refuge from the desert environmental elements and evading border patrol. Accordingly, Appellant would be guilty of "helping" the aliens remain in the United States under the approach employed by the Fifth Circuit.

Appellant's situation is also distinguishable from the Sixth Circuit's application of the intent-based standard he requests. In 1982 Ford Pick-up, the Sixth Circuit carved out an exception for transportation that was "quite innocent," in that it was done merely to permit an individual to maintain his existence. United States v. 1982 Ford Pick-up, 873 F.2d 947, 951 (6th Cir. 1989). The court gave considerable weight to the fact that there was no financial remuneration for helping the passengers and that the illegal aliens were also friends, relatives, and co-workers. Id. However, in this case there is no evidence Appellant knew or had ever seen the illegal immigrants before they climbed into the back seat and trunk of his vehicle. And the transportation from the desert, in the middle of the night, was for financial remuneration. (R. at

499, 502–03, 509.) Unlike the situation in 1982 Ford Pick-up, Appellant's actions in accepting strangers in his vehicle for financial remuneration supported a finding that such transportation was done with the specific intent to help the illegal aliens remain in the United States. Accordingly, Appellant would be guilty of "helping" the aliens remain in the United States under the approach employed by the Sixth Circuit.

The result is the same under the Seventh and Tenth Circuits. In determining whether Appellant had the intent to further the illegal immigrant's presence in the United States the Seventh Circuit looks to the facts and circumstances surrounding the case; some relevant considerations include whether there was compensation and whether the illegal aliens were friends, co-workers or merely human cargo. United States v. Parmelee, 42 F.3d 387, 391 (7th Cir. 1994). Here, again, there is evidence Appellant, or at a minimum QM, accepted compensation for the transportation, and there is no evidence to suggest the immigrant were anything more than human cargo to the Appellant. The analysis is the same under the Tenth Circuit, but in that circuit, the court does not consider profit, motive, or close relationship and only focuses on the transportation and whether it will help or advance with the alien's continued illegal presence in the United States. Barajas-Chavez, 162 F.3d at 1288. Thus, there is no reason to believe the result would be any different under the standards used by the Seventh and Tenth Circuits. Appellant would be guilty of helping the aliens remain in the United States under the approaches adopted by the Seventh and Tenth Circuits.

Appellant's reliance on Esparza and his assertation that he was an "innocent bystander" is misplaced. *See* United States v. Esparza, 876 F.2d 1390 (9th Cir. 1989). Appellant acknowledged the most significant distinction, in that in Esparza, the appellant was traveling in a different vehicle than the illegal immigrants and did not know that there were illegal immigrants

in the other vehicle. (App. Br. at 19.) In this case Appellant was in the front passenger seat of the vehicle he rented while the illegal immigrants were in the trunk and in the back seat. (R. at 276-278.) Unlike in Esparza, he was fully aware of the circumstances in which he was participating; the vehicle was at maximum capacity with five illegal aliens in the back seat and truck compartment. Moreover, in Esparza, the appellant did not own or rent the vehicle as did Appellant in this case. In short, without the use of Appellant's rental vehicle there would have been no transportation at all. Appellant's participation in this case exceeded that of an "innocent bystander."

Appellant attempts to distance himself when he asserts that he only knew something was afoot, when QM said "I'm about to make some money" or that all the cellphone contacts only occurred between QM and an unknown smuggler. (App. Br. 17-18.) He also attaches significance to the fact that he stated, "Why the fuck is they ducking?" when the aliens entered the vehicle. (Id.) First, given the fact that QM was in desperate need of money, it is hard to believe that he would not have mentioned or discussed his scheme with Appellant during their multi-hour car drive. (R. at 503) At $500 per alien, QM stood to make more money in one night than he earned all month. (R. at 501-502.) Common sense suggests that this information is something that QM would have shared with a person he considered a "brother." (R. at 510.) Moreover, given the fact that Appellant only had one week left in the Air Force before being discharged, it follows that Appellant would also be interested in an alternate source of income. (R. at 311, 316.) These facts support a finding that they were working together because they both needed the money. Second, it does not make sense that the smuggler would text both QM and Appellant. Appellant was seated next to QM and there was no need for multiple text messages when QM could easily relay the information from the smuggler to Appellant.

Appellant's comment as to why the aliens were ducking, is likely related to a concern that someone was watching their actions. If the aliens found it necessary to duck, it suggests that they were ducking to hide from nearby authorities. As a result, the question is circumstantial evidence that the Appellant is concerned about getting caught. Lastly, the presence of a firearm and ammunition in the vehicle suggested that Appellant was aware that there was some risk in this transportation operation. (R. at 327,430.) In short, significant circumstantial evidence supports a finding that Appellant not only knew about the plans to transport the illegal aliens but was also an active participate in the operation.

In sum, regardless of the approach taken by any of the circuits cited by Appellant, there is sufficient evidence to establish that Appellant's transportation of the illegal immigrant was to help them or to further illegal presence in the United States. Accordingly, this Court should affirm Appellant's conviction because Appellant has failed to make a specific showing of a deficiency in proof and that his conviction is against the weight of evidence admitted at trial.

3. Sufficient evidence established that the five immigrant-aliens were in the United States unlawfully.

Sufficient evidence supported a finding that the individuals Appellant transported were in the United States unlawfully. The circumstances of their apprehension, including the location and their condition, support a finding that the individuals were in the United States unlawfully. Appellant picked up five stranger-illegal aliens from the bushes in the middle of the desert on a dirt road, on a Sunday night, wearing camouflage, "carpet shoes," and who smelled musty and dirty. (R. at 276-277, 326-327.) A border patrol agent testified that the carpet shoes are fabricated from a type of carpet material and placed over their exiting shoes; illegal aliens wear carpet shoes when they cross the border so as not to leave any footprints. (R. at 327.)

There was no other reasonable explanation advanced as to why these individuals were wearing camouflage other than they were trying not to be noticed by border patrol. Similarly, the fact that they were wearing carpet shoes also supported a finding that they were trying to evade apprehension. The fact that they were within miles of the border between the United States and Mexico and the fact that they all had Hispanic sounding names suggest that they were from Mexico. And their hygiene suggested that they had just walked a great distance. This evidence alone is sufficient to support a finding that the individuals were in the United States illegally. There is no other reasonable explanation as to why they would be wearing camouflage and running around the desert in the middle of the night in close proximity to the border.

In addition to this circumstantial evidence, the Government introduced evidence from various forms prepared about each of the five immigrants that was consistent with a finding that they were unlawfully in the United States. Field processing forms from the Department of Homeland Security indicated only their names, birthdates, and time of apprehension. (Pros. Ex. 4.) Two of the five immigrants had an Alien File (A-File), indicating had some interaction with the immigration system. (R. at 351.) This supported that those two immigrants were not U.S. citizens. One of the other immigrants had an A-File indicating she was removed from the country weeks after the apprehension at issue here, which supports that she was in the United States illegally. (R. at 352, 355; Pros. Ex 5.) Another immigrant had a court hearing in 2017 and was thereafter removed to Mexico. (Pros. Ex. 6, 7, 8, 9.) This evidence, combined with the circumstances of their apprehension, support a finding that the aliens were unlawfully in the United States.

Accordingly, this Court should affirm Appellant's conviction because Appellant has failed to make a specific showing of a deficiency in proof and that his conviction is against the weight of evidence admitted at trial.

4. Sufficient evidence established that Appellant either knew or acted in reckless disregard of their immigration status.

Sufficient evidence supported a finding that Appellant knew or acted in a reckless disregard of the alien's immigration status. Appellant cannot put his head in the sand and claim that he did not know that the individuals entering his vehicle were illegal aliens. As discussed above, their clothing, condition, and geographic location all support a finding that he either knew of their immigration status or acted in reckless disregard of it.

Appellant spent hours with QM leading up to their collection and transportation of the illegal aliens. (R. at 311.) It is unreasonable to assume that Appellant would not have questioned QM as to why they were driving in the desert on a dirt road in the middle of the night. (R. at 501, 513.) If Appellant did not question QM before they picked up the aliens, or refused to turn his head once they were in the vehicle, this is enough evidence to support finding that he acted in a reckless disregard to their immigration status. However, this evidence, combined with the fact that both Appellant and QM both factory-reset their phones, and carried a firearm and ammunition support a finding that Appellant knew about the plan from its inception and was trying to hide his footprints. (R. at 414, 430, 508.) Accordingly, this Court should affirm Appellant's conviction because Appellant has failed to make a specific showing of a deficiency in proof and that his conviction is against the weight of evidence admitted at trial.

Conclusion

In sum, Appellant's conviction for transporting aliens unlawfully in the United States is factually sufficient. Sufficient evidence supports a finding that Appellant was aware of the plan to transport the illegal aliens and intended to further the aliens' illegal presence in the United States. Appellant spent the better part of a day in a car he rented with QM before driving into the desert in the middle of the night down a dirt road near the border where they picked up five illegal aliens who they had never met, wearing clothing designed to evade capture by border patrol. Appellant has failed to identify any deficiencies in proof. Even if this Court were to find that Appellant identified a deficiency in proof, this Court should not be clearly convinced that the finding of guilty was against the weight of evidence admitted at trial. Accordingly, this Court should affirm his conviction.

II.

THE CONSPIRACY SPECIFICATION STATES AN OFFENSE BECAUSE IT ALLEGED EITHER EXPRESSLY OR BY NECESSARY IMPLICATION EVERY ELEMENT OF AN OFFENSE UNDER THE UCMJ.

Standard of Review

The question of whether a specification fails to state an offense is a question of law which the Court reviews de novo. United States v. Turner, 79 M.J. 401, 402 (C.A.A.F. 2020).

Law

When an accused servicemember is charged with an offense at court-martial, each specification will be found constitutionally sufficient only if it alleges, "either expressly or by necessary implication," "every element" of the offense, "so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy." Turner, 79 M.J.

at 403 citing United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994) (internal quotation marks omitted) (quoting R.C.M. 307(c)(3)).

When a charge and specification are first challenged at trial, the court will read the wording narrowly and will only adopt interpretations that hew closely to the plain text. Turner, 79 M.J. at, 402. Hewing closely to the plain text means the court will consider only the language contained in the specification when deciding whether it properly states the offense in question. Id. However, a flawed specification first challenged after trial is viewed with greater tolerance than one which was attacked before findings and sentence. Id. Under the latter scenario, the specification will be viewed with maximum liberality.

If a specification fails to state an offense, the appropriate remedy is dismissal of that specification unless the Government can demonstrate that this constitutional error was harmless beyond a reasonable doubt. United States v. Humphries, 71 M.J. 209, 213 n.5 (C.A.A.F. 2012).

Analysis

The conspiracy specification stated an offense because it alleged either expressly or by necessary implication every element of an offense under the UCMJ; it provided Appellant with notice of the offense for which he had to defend against.

The specification alleged that Appellant conspired with "[QM]" to commit an offense and continued to describe the offense as "transporting [MFL; OJA; POM; TMV; and ONC] within the United States by means of passenger vehicle, knowing or in reckless disregard that they were aliens that entered the United States in violation of law, in violation of 8 United States Code § 1324, an offense not capital" (*Entry of Judgment*, ROT Vol. 1 at 2.) The specification also included the overt act in that Appellant "did secure a rental vehicle, drive the vehicle near the US-Mexico border, and transported the aforementioned aliens in violation of law." Id.

The details contained in this specification are sufficient to place Appellant on notice with what he must defend against because it included the agreement, the United States Code implicated [8 USC § 1324], the activity and the overt acts. In short there are no further facts or law necessary to put Appellant on further notice of what he must defend against. The only language arguably missing from the specification is the fact the subject offense [8 USC § 1324] is incorporated into the UCMJ under Article 134, Clause 3. However, the specification also included the language "offense not capital." (*Entry of Judgment*, ROT, Vol. 1 at 2.) This language is required to be included when charging a federal offense under Article 134, Clause 3. Article 134. This is evidence that when the specification was drafted, it was done with the intent that 8 USC § 1234 be incorporated into the UCMJ through Article 134. There can be no other explanation for including the words "offense not capital" in the specification, other than to signal that Appellant was being charged with a conspiracy to commit a violation of Article 134, Clause 3. As a result, the specification complies with Article 134, Clause 3 charging requirements, and there is nothing missing from the subject specification that could have put Appellant on greater notice of the charged offense.

Even assuming there was an error in the way the conspiracy specification was charged, Appellant has suffered no prejudice, and such error is harmless beyond a reasonable doubt. Turner, 79 M.J. at 403–04 (citing United States v. Humphries, 71 M.J. 209, 213 n.5 (C.A.A.F. 2012)). Appellant argues that the error is not harmless because Appellant stands convicted of the crime. (App. Br. at 25.) However Appellant has failed to articulate how the specification failed to put him on notice, or how he would have changed his defense strategy if the specification had specifically noted that the conspiracy was commit an Article 134 offense.

Finally, Appellant questions whether the government can use Article 81 to charge conspiracy for the violation of any federal law. (App. Br. at 23-24) However, Appellant fails to point to any authority or case that would prohibit this practice and at the same time acknowledges that the conspiracy has a broad scope. (App. Br. at 24.) Notably, the subject offense [8 USC § 1324] also allows for the prosecution of anyone who engages in any conspiracy to commit its prescribed acts. *See* 8 USC § 1324(a)(1)(A)(v). The government therefore could have charged this specific section of the subject offense through Article 134, Clause 3 without the need to rely on Article 81. As a result, in this case, the use of Article 81 did not represent a departure from what is chargeable under federal law and did not expand Appellant's criminal liability beyond that of any other individual.

Conclusion.

The conspiracy specification properly stated an offense because it alleged a violation of a federal crime that required an overt act. While the specification does not explicitly state that the federal crime is being incorporated through Article 134, the specification includes the language "an offense not capital." As a result, there is no further required law or facts to put Appellant on notice of the crime for which he was charged. Appellant also suffered no harm or prejudice because he failed to demonstrate how the specification could have put him on better notice or how he would have changed his defense strategy.

III.

APPELLANTS CONVICTION FOR CONSPIRACY TO TRANSPORT ALIENS UNLAWFULLY IN THE UNITED STATES IS FACTUALLY SUFFICIENT.

Standard of Review

The standard of review is the same as AOE I, *supra.*

Law and Analysis

The law for factual sufficiency is the same as AOE I, *supra.*

Sufficient evidence supports a finding that Appellant conspired with QM to transport aliens unlawfully in the United States. Under Article 81, UCMJ, conspiracy requires: "(1) That the Appellant entered into an agreement with one or more persons to commit an offense under the code; and (2) That, while the agreement continued to exist, and while the Appellant remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy." Article 81, UCMJ. That Appellant rented the vehicle is well established. (Pros. Ex. 17.) That the illegal aliens were transported is addressed in AOE I above. The only remaining issue with this assignment of error is the agreement between Appellant and QM.

Conspiracy need not be in any particular form or manifested in any formal words, rather it is sufficient if the agreement is merely a mutual understanding among the parties. United States v. Harman, 68 M.J. 325, 327 (C.A.A.F. 2010). The existence of a conspiracy may be established by circumstantial evidence, including reasonable inferences derived from the conduct of the parties themselves. Id.

Appellant has failed to demonstrate any deficiency of proof and even acknowledged that the conduct of the parties may show an agreement. (App. Br. at 26.) The conduct of the parties in this case established the existence of an agreement. First, when they were apprehended, they both took steps to factory reset their phone and provided the same explanation to why it had happened [entering the passcode too many times]. (R. at 414, 430, 508.) QM stated to investigators that he had "PTSD" from when military authorities searched his phone in the past. (R. at 504.) This fact supports a finding that both QM and Appellant were aware that if they

were caught, their phones would be seized. And if they wanted to claim ignorance, they would have to reset their phones to delete any incriminating conversations. Therefore, this coordinated conduct is evidence of a criminal agreement required for conspiracy.

Second, Appellant rented a vehicle even when his car was not broken. (R. at 410.) It makes no sense that he would rent a vehicle when his was not broken, and he was pending discharge from the military. (R. at 3111, 316) In other words, he was going to be unemployed in a couple of weeks, and it would make more sense for him to use his own vehicle and not spend nearly $400 on the rental (Pros. Ex. 17 at 3.) This evidence, combined with the fact that smugglers often use rental vehicles, so that their own personal vehicle is not seized, also supports finding that Appellant and QM planned this operation days before they were apprehended. (R. at 275.)

The presence of a firearm in the vehicle is also indicative of some forethought about the risks and planning involved in the operation. (R. at 327, 430.) The firearm and ammunition were not something that they simply maintained in their vehicle – in the trunk for example. Instead, Appellant affirmatively delivered the firearm to the rental vehicle for protection from the unknown illegal aliens or the smuggler orchestrating the operation.

Lastly, the fact that QM considered Appellant his "brother," the amount of time they spent together on the day of their apprehension, and the circumstance of their apprehension support a finding that there was a criminal agreement. (R. at 510.) As stated above it is unreasonable to assume that they would not discuss this matter given the fact that they had spent nearly the entire day together and shared a close relationship. Appellant allowed QM to drive them into the desert in the middle of the night without objection. This evidence supports a finding that QM was aware of the plan and an active participant. The most compelling piece of

evidence is that Appellant did not object to pulling over on the side of the road and allowing the illegal aliens to enter his vehicle. Appellant could have demanded that the vehicle depart without its unknown passengers. Instead, Appellant waited until there were illegal aliens in the back seat and two in the trunk. The strongest form of protest could have been to depart the vehicle himself, share his location with a friend, and wait for another someone to pick him up. Instead, Appellant remained in the vehicle and a party to the illegal agreement.

Appellant asserts that any evidence of an agreement between the parties is negated when the correct transcription is used with the statement "When I pulled over, yeah, kind of." (App. Br. at 27.) Appellant suggests that this statement means he did not know in advance that QM was going to pick up illegal aliens. (Id.) It does not. As stated above, Appellant would have had to put blinders on not to see or know what was going on. Common sense suggests that anyone in his situation [in the desert in the middle of the night on a road covered in potholes] would inquire as to what was going on. (R. at 500.) Additionally, the evidence supports a finding that Appellant was not being forthcoming with the investigators when he made that statement. The fact that Appellant factory reset his phone just before it was seized supports a finding that he did not want investigators to know the content of any conversation he had with QM and that he had a motive to lie to investigators. As a result, Appellant's self-serving statement does nothing to diminish the surrounding circumstantial evidence.

Appellant also states that the fact that he rented the vehicle on 21 August, the day before he picked up the vehicle with QM, somehow negates the existence of an agreement between the two. (App. Br. at 17.) It does not. There is no other reasonable explanation as to why Appellant would rent a vehicle for approximately $400 when both he and QM already owned vehicles. (Pros. Ex. 17 at 3; R. at 515.) That there was an agreement between the two is further supported

by the fact that the vehicle was primarily used for the benefit of QM in that they drove his girlfriend from Tucson to Phoenix. (R. at 311.) This fact supports a finding that the issue of the rental car was discussed before 22 August and that it was part of their plan to transport aliens when Appellant rented it on 21 August.

Appellant's attempt to analogize United States v. Cloughessy, 572 F2.d 190, 191 (9th Cir. 1977) fails. In Cloughessy, the appellant was a driver who drove a casual acquaintance and another person to a location where they negotiated the sale of heroin to undercover agents. Id. at 190–91. The court found that a "mere casual association with conspiring persons in not enough." Id. The crime in Cloughessy was not the transportation per se but instead the sale of heroin to the undercover agents. In this case, the transportation was the crime; and without Appellant's assistance in renting the vehicle, the crime of transportation would not have been possible.

Conclusion

There is sufficient evidence to support Appellant's conviction of conspiracy. While there is no direct evidence of a verbal agreement, Appellant's conduct with his co-conspirator demonstrated that they were operating with a common purpose when they pulled over in the middle of the desert and allowed the illegal aliens to enter their vehicle. Appellant has failed to demonstrate any deficiency of proof or that his conviction was clearly against the weight of the evidence admitted at trial Accordingly, this Court should affirm his conviction.

IV.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED A MOTION TO DISMISS BASED ON THE GOVERNMENT'S DEPORTATION OF WITNESSES TO THE ALLEGED OFFENSES.

Additional Facts

On 24 January 2022, trial defense counsel petitioned the court to compel the production of the five alleged illegal aliens as witnesses at trial. (App. Ex. VI.) On 31 January 2023 the Government responded and opposed the defense motion and asserted that the defense had not met its burden and established that the witnesses were relevant and necessary under R.C.M. 703(b)(1). (App. Ex. VII.)

After the illegal aliens were apprehended at the border, a border patrol agent conducted an "immigration inspection" of the five aliens and determined that they were citizens of Mexico, had crossed the border illegally, and none had the proper documentation to enter the United States. (App. Ex. VI at 2.) At some point after the apprehension, the patrol agent in charge declined to prosecute Appellant or QM. (Id.) As a result, the five suspected illegal aliens were not deposed or interviewed about the offenses prior to their deportation from the United States. (App. Ex. XLIV at 2.)

Upon learning of Appellant's military affiliation, one of the Customs and Border Patrol (CBP) officers contacted the Air Force. (Id.)

Beginning at the outset of COVID-19, CBP began a routine practice of quickly evaluating the facts of their initial apprehensions and making an immediate decision whether or not to pursue prosecution. (Id.) This practice was employed to avoid prolonged detention of the suspected illegal aliens in order to lessen the transmission of COVID-19 in their facilities. (Id.)

As a routine practice of CBP, if a decision was made not to prosecute, CBP would not conduct any follow-on interviews of the principals or non-citizens. (Id.) Instead, CBP would release the U.S. citizen offenders and begin the deportation process for the non-citizens. (Id.)

The requested witnesses were deported from the United States prior to defense or government interviews occurring prior to the start of trial. (Id.)

The military judge denied the defense motion to compel the production of the alien witnesses because it had failed to demonstrate that the requested witnesses would provide relevant and necessary testimony if produced in the court-martial. (Id. at 7.) The military judge found that there was no indication that any of the requested witnesses possessed any exculpatory information in the case or could provide any testimony relevant to the Appellant's level of participation in the offense. (Id.)

The military judge analyzed the defense motion under the 5th and 6th Amendments to the U.S. Constitution and the standard set out in United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). (Id.) The military judge found that the deportation of the witnesses was not done in bad faith and also that the deportation did not prejudice Appellant's case.

Standard of Review

This Court reviews a military judge's rulings on production of witnesses, failure to abate proceedings under R.C.M. 703(b)(1), and motions to dismiss for abuse of discretion. United States v. McElhaney, 54 M.J. 120, 126 (C.A.A.F. 2000).

Law and Analysis

1. Denial of defense motion did not result in a violation of Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment

The military judge did not abuse his discretion when he denied the defense motion to compel the production of the alien witnesses for trial. The mere fact that the Government deports a witness is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment; a violation of these provisions requires some showing that the testimony would be both material and favorable to the defense. United States v. Valenzuela-Bernal, 458 U.S. 858, 872-873 (1982). Appellant has failed to provide any showing that the testimony from the deported witnesses would have been both material and favorable to his defense.

Appellant asserts that the immigrants could have discussed who was in charge, who was sending messages, how Appellant reacted when they came into the car, whether Appellant was assisting or passive, or anything else they were told that would indicate Appellant had a role in the plan. (App. Br. at 33.) First, it is speculative whether the witnesses could have provided any or all of this information. Further, such information would not have been material or favorable to Appellant. First, only the aliens in the back seat would have any vantage point to see what was going on in the front of the vehicle. It is unlikely the individuals in the trunk would be able to describe anything. This is especially true because they were only in the vehicle for a short period – some two miles before they were pulled over. (R. at 275–76, 279.) Second, even if they could see Appellant or QM text, it is highly unlikely they would have any idea as to the content of the text message, a source, or a recipient. Appellant states that they could testify about how he reacted when they entered the car. (App. Br. at 33.) Notwithstanding that Appellant could

have testified to these facts, there is no proffer that his reaction would be material or favorable in any way. Lastly, Appellant states that the witnesses could testify as to whether he was "assisting" or "passive." (Id.) Again, it is not clear how this is material because other than driving Appellant's rented car there was no other proffered action taking place in the vehicle. The bottom line is there was no theory advanced as to how such testimony would either be favorable or result in a different outcome at trial.

On the contrary, such testimony would likely have been detrimental to the defense. Border patrol made an initial determination that the aliens were citizens of Mexico, had just recently illegally crossed the border, and lacked the proper documentation to legally stay in the United States. (App. Ex. VI at 2.) Thus, if these aliens were to have testified, the Government would have been in a better position to firm up its case-in-chief with direct evidence of their illegal status rather than circumstantial evidence. There is no indication that this testimony would be favorable or material to the defense case.

While the inability to interview a deported may lessen the requirement to provide a detailed description of their lost testimony, it does not absolve Appellant of the duty to make some showing of materiality. Valenzuela-Bernal, 458 U.S. at 873. Sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact. Id. *citing* Giglio v. United States, 405 U.S. 150, 154 (1972). Contrary to Appellant's assertion, that the military judge failed to "relax the burden" on Appellant; the military judge articulated in his ruling that he applied the lower standard (considering Appellant did not have an opportunity to interview the witnesses) for the Appellant to establish that the witness testimony would be material and favorable to the case . (App. Ex. XLIV at 6.) However, even applying this lower standard, Appellant was unable to

advance any theory as to how such testimony could be material and favorable to the defense. Appellant failed to make that showing to the military judge and he fails to do so before this Court.

In addition to demonstrating that the testimony would be material and favorable, Appellant must also prove bad faith by the government to establish a violation of the Due Process Clause [of the Fifth Amendment] when potentially useful evidence has not been preserved. United States v. Medina-Villa, 567 F.3d 507, 517-518 (9th Cir. 2009); United States v. Damra, 621 F.3d 474, 485-490 (6th Cir. 2010); United States v. Chaparro-Alcantara, 226 F.3d 616, 623-624 (7th Cir. 2010) Appellant has failed to do so. There is no evidence of bad faith on the part of the Government. There is no evidence that the government purposely deported these witnesses to damage or undermine Appellant's case. Congress has determined that prompt deportation constitutes an effective method for curbing the enormous flow of illegal aliens across the southern border. Valenzuela-Bernal, 458 U.S. at 864. The detention of alien eyewitnesses imposes substantial financial and physical burdens upon the Government, not to mention the human cost to potential witnesses who are incarcerated though charged with no crime. Id. at 865. The prompt deportation of the witnesses in this case is indicative of this policy and the government's response to the immigration issue at the southern border and not part of a plan to undermine Appellant's case. Moreover, in this case there is evidence that the rapid decision-making process and resulting deportation was done to lessen the impact of COVID-19 by reducing the number of individuals in confinement. (App. Ex. XLIV at 2.) There was no evidence that the deportations were done for any other reason or that these deportations were designed to damage Appellant's case.

Appellant asserts that when the border patrol agents notified the Air Force of Appellant's that they were then obligated to record the witness's statement. (App. Br. at 32.) This did not create the affirmative obligation to record the statements because there was no way that the border patrol agents would know if the Air Force was going to prosecute this case. Presumably, at the time the Air Force was notified, Air Force officials did not know if the case was going to be prosecuted. Against this backdrop, following normal border patrols procedures and deporting the aliens was reasonable and not indicative of bad faith. Accordingly, Appellant has failed to establish bad faith on the part of the government.

Appellant has failed to demonstrate that the alien witnesses would provide material or favorable testimony for Appellant. In fact, as discussed above, the opposite is likely true. Appellant has also failed to demonstrate any bad faith on the part of the government. Therefore, the military judge did not abuse his discretion when he denied the motion to compel witness production under the 5th and 6th Amendments to the U.S. Constitution.

2. The military judge properly analyzed and denied the defense witness production request under R.C.M 703(b)(1)

In addition to an analysis under the 5th and 6th Amendments to the Constitution, the military judge also properly analyzed Appellant's witness request under R.C.M. 703(b)(1). The military judge did not abuse his discretion when he determined that the defense had failed to demonstrate that requested witnesses would provide *relevant and necessary* testimony in the court-martial if produced for trial testimony. (App. Ex. XLIV at 7) (emphasis added).

R.C.M. 703(b)(1) provides in part that "[E]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary…" R.C.M. 730(b)(1).

Evidence is relevant if it has any tendency to make a fact more or less probably than it would be without the evidence; and the fact of consequence in determining the action. Mil. R. Evid 401.

The discussion to R.C.M. 703(b)(1) provides that "[R]elevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." R.C.M. 703(b)(1) and its Discussion.

Factors to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits or the sentencing portion of the case; whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as depositions, interrogatories, or previous testimony…Timeliness of the request may also be a consideration when determining whether production of a witness is necessary. United States v. McElhaney, 54 M.J. 120, 127 (C.A.A.F. 2000)

The military judge correctly determined that the defense failed to establish that the testimony from the requested witnesses would be "relevant and necessary." (App. Ex. XLIV at 7.) As stated above, the defense has failed to articulate any theory of relevance and merely states that there are a "number of things that the immigrants could have discussed." (App. Br. at 33.) What Appellant fails to articulate is how any of this potential testimony could be relevant or necessary to their case. For example, if one of the immigrants made the claim that he or she was in the United States legally and that the deportation was improper, that would be relevant and material to the Appellant's case because it would impact the government's ability to prove its case. However, the opposite is true. The immigrant official stated that they were citizens of

Mexico, that they had just crossed the border, and had no documentation that would allow them to stay in the United States. (App. Ex. VI at 2.) Thus, the immigrants' testimony could only help the government's case and Appellant has failed to articulate any theory under which their testimony is relevant and necessary. Accordingly, the military judge properly applied R.C.M. 703(b)(1) and denied the defense motion for production of the witnesses.

Lastly, Appellant asserts that the military judge made an error when he determined R.C.M. 703(e)(2) was inapplicable. (App. Br. at 31.) He did not. The military judge considered R.C.M. 703(e)(2) and found that it was inapplicable because that Rule related to evidence and not witness testimony. (App. Ex. XLIV at 6.) Instead, and as discussed above, he applied R.C.M. 703(b)(1) because it applied to witness testimony and is entitled "Right to witnesses." R.C.M. 703(b)(1). One the other hand, the military judge did not apply R.C.M. 703(e) because it is entitled "Right to evidence." R.C.M. 703(e). As a result, the military judge considered both provisions of the Rules for Courts Martial and applied the correct rule.

Notably, there is no indication that the military judge's ruling would be any different had he applied R.C.M. 703(b)(3). That provision provides that a party:

> is not entitled to the presence of a witness who is unavailable within the meaning of Mil R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness's presence of shall abate the proceedings, unless the unavailability of the witness is the fault of or cold have been prevented by the requesting party.

R.C.M. 703(b)(3).

In this case, the military judge ruled that Appellant failed to establish that the witness testimony was "relevant and necessary." (App. Ex. XLIV at 6.) If Appellant cannot establish such testimony is "relevant and necessary" to an issue in the case, Appellant will also

undoubtedly fail to demonstrate that the testimony is "of such central importance" to an issue in the case. Therefore, even if the judge applied R.C.M. 703(b)(3) standard to a witness production issue, the result would have been the same, and the military judge would have properly denied the motion.

Conclusion

In sum, the military judge did not abuse his discretion when he denied the defense motion to compel the production of the alien witnesses. Appellant failed to demonstrate the witnesses would be relevant and necessary under R.C.M. 703(b)(1) and also failed to show that the testimony would have been material and favorable to him under the 5th and 6th Amendments to the U.S. Constitution. Appellant also failed to demonstrate any bad faith on the part of the Government to interfere Appellant's case. Accordingly, this Court should find that the military judge did not abuse his discretion and affirm Appellant's conviction.

V.

THE OMISSION OF GOVERNMENT'S CLOSING ARGUMENT SLIDES, INCLUDING THE UNKNOWN VIDEOS, IS NOT A SUBSTANTIAL OMISSION AND DOES NOT RAISE A PRESUMPTION OF PREJUDICE.

Additional Facts

The Government's closing argument contained a PowerPoint presentation. (Major Johua Joyce Declaration, 20 November 2023.) The Government discovered that the presentation was not included in the record of trial when Appellant filed its assignment of errors. The Government has not been able to locate a copy of this presentation.

The presentation contained audio clips from Defense Exhibit A and Prosecution Exhibit B. (Id.) The presentation also contained images from various prosecution exhibits and references to the instructions provided by the military judge. (Id.) The closing slides did not contain any

image or audio that had not already been introduced at trial. (Id.) Trial counsel has searched his files but cannot locate a copy of the closing PowerPoint presentation. (Id.) Defense counsel made no objection to the Government's closing argument or PowerPoint presentation. (R. at 537.)

Standard of Review

Whether the record of trial (ROT) is incomplete is a question of law that the Court reviews de novo. United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general court-martial that results in a punitive discharge or more than six months of confinement. Article 54(c)(2). Appellate courts understand that inevitably records will be imperfect, and therefore review for substantial omissions. *See* United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982). A substantial omission renders a record incomplete and raises a presumption of prejudice that the Government must rebut. Henry, 53 M.J. at 111 (*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. A substantial omission may not be prejudicial if the appellate courts are able to conduct an informed review. United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001); *see also* United States v. Morrill, ARMY 20140197, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App. 31 October 2016) (unpub. op.) (finding the record "adequate to permit informed review by this court and any other reviewing authorities") (citations omitted).

Analysis

The omission of the closing argument PowerPoint presentation is an insubstantial omission to the record of trial and does not raise a presumption of prejudice that the Government must rebut. First, the military judge instructed the members that the arguments of counsel were not evidence. (R. at 550.) Second, while there may be portions of the transcript that are noted as inaudible, the audio clips came directly from the prosecution and defense exhibits which were admitted into evidence and at the disposal of the members while they deliberated. (Major J J Declaration, 20 November 2023.)

As a result, the omission of the slides and audio clips "were not related directly to the sufficiency of the Government's evidence on the merits." *See* Lashley, 14 M.J. at 6. Instead, all the evidence, both defense and prosecution, had already been admitted and provided to the members. Most notably, the closing slides were only a recitation of the images and instructions that had already been admitted and provided. This is not the case where the Government digitally re-created a crime scene or used other advanced software to form a demonstrative aid. The court members had already seen the evidence included in the presentation and its placement in the argument was done to highlight certain pieces of evidence. Additionally, there was no objection during the Government's closing argument, neither to the slide nor to the actual argument itself. (R. at 537.) Therefore, any objection to the slides is affirmatively waived and as a result he omission of this appellate exhibit is not a substantial omission that raises a presumption of prejudice. Moreover, even assuming the omission was substantial, Appellant has not articulated how he has been prejudiced by the missing slides.

Conclusion

In sum, the PowerPoint presentation was composed entirely of admitted defense and prosecution exhibits and instructions from the military judge. No new evidence or novel demonstrative aids were included in the presentation. Its omission in the record of trial is not substantial, does not raise an inference of prejudice. Accordingly, this Court should not remand this case for further proceedings.

VI.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE ALLOWED THE GOVERNMENT TO INTRODUCE ONE OF THE IMMIGRANT'S CRIMINAL HISTORY AS AGGRAVATION EVIDENCE.

Additional Facts

During presentencing the Government introduced, over defense objection, a form I-213, Record of Deportable Alien, as Prosecution Exhibit 28, as evidence in aggravation related to one of the illegal aliens Appellant transported. (Pros. Ex. 28; R. at 607-608.) The record provided the criminal history for Mr. O N -A . (Pros. Ex. 28.) The criminal record stated that N -A had been convicted three times in the United States for "Driving Under Influence Liquor" in 2003, 2009, and 2017. (Id.) N -A received confinement for 30 days, 120 days, and 90 days for the respective convictions. (Id.) The defense objected to the exhibit as improper aggravation evidence and on relevance grounds given the dates of the convictions. (R. at 605.) The military judge provided the following reason for overruling the defense objection:

> The court does find this to be evidence in aggravation of the crime as it directly relates to or results from the crime specifically. It is evidence that appears to show that one of the individuals the accused was transporting had a criminal history that is directly related to or resulting from his criminal, the accused's crime of transporting that illegal alien. The court has conducted an MRE 403 balancing test

> and finds that probative value is not substantially outweighed by any danger of unfair prejudice in this case. The court will put this document and the testimony in the proper context, recognizing that severity or lack thereof of criminal behavior and how long ago it occurred [o]n this date on this particular form. However, this court will give this evidence and testimony the weight it deserves. It is admissible as aggravation evidence.

(R. at 608.)

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion." United States v. Frost, 79 M.J. 104, 109 (C.A.A.F. 2019) (internal quotation marks omitted) (quoting United States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2002)).

Law and Analysis

The military judge properly considered the illegal alien's criminal record as evidence in aggravation as it directly related to the charge for which Appellant was found guilty. This evidence was aggravating because Appellant did not merely help an illegal immigrant with no criminal record remain in the United States, but instead helped someone who had repeatedly received convictions for driving under the influence of alcohol. R.C.M.1001(b)(4) states that "[t]rial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." "[T]he meaning of 'directly related' under R.C.M. 1001(b)(4) is partly a function of how strong a connection the aggravating evidence has to the offenses for which appellant has been convicted." United States v. Beehler, 2022 CCA LEXIS 84, *10-11 (AF. Ct. Crim App. 2022) *citing* United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007) (the connection "must be direct as the rule states, and closely related in time, type, and/or often outcome, to the convicted crime") Helping an individual with a criminal record, as compared to helping someone with no criminal record, remain in the United States illegally can be an aggravating circumstance that is directly

connected to the subject offense. In this particular it is aggravating because the crimes for which the individual was convicted put the public at risk. And, based on the number of convictions and the terms of confinement, there is some indication that he could re-offend and place the public at risk again. This was not a one-time conviction, or a conviction for a crime only again the alien's person. Therefore, helping this person remain in the United States illegally, as opposed to helping someone with no criminal record or propensity was aggravating.

That Appellant may have been unaware of the alien's criminal record or the fact that the alien was summarily deported is irrelevant and does nothing to change the fact that this was evidence in aggravation. (See App. Br. at 37.) Appellant knew that the alien was in the United State illegally and had therefore not been vetted by immigration authorities. Appellant had no idea about the backgrounds of the individuals he helped and turned a blind eye to any threat that these individuals might pose to the United States. Appellant concedes that it would be aggravating if Appellant helped an alien with a criminal history remain in the United States who then committed further crimes. (App. Br. at 37.) Appellant then asserts that the documentation of the offenses is "skeletal" in details. (Id.) However, Appellant ignores the fact that this specific criminal history is indicative of someone who has a propensity to drive drunk and is undeterred by confinement. (Pro. Ex. 28). The evidence showed three convictions over a 14-year period for driving under the influence of alcohol and that confinement for up to 120 days was not sufficient to deter him re-offending. (Id.) Appellant should not be able to exclude this aggravating evidence simply because immigration officials were able to deport the alien before he committed another crime. Rather, the fact that he was deported should be considered together with this evidence such that it is provided the appropriate weight – as the military judge did in this case. (R. at 608.)

Appellant also asserts that the military judge's Mil. R. Evid. 403 analysis was flawed. (App. Br. at 37.) This is not the case. The military judge carefully weighed the evidence and found that the probative value was not outweighed by unfair prejudice. (R. at 608.) Here the probative value was high because it demonstrated that Appellant paid little regard to who he helped remain in the United States, and that in the case of N , he helped someone with a history of driving under the influence remain in the country. The prejudicial effect of the evidence was minimal because there was no evidence that N had harmed anyone. Thus, the military judge properly weighed the probative value of this evidence.

Lastly, even if it was error to admit this evidence, its admission did not substantially influence Appellant's sentence. In making this determination, the following factors are considered: 1) the strength of the Government's case; 2) the strength of the defense case; 3) the materiality of the evidence in question; and 4) the quality of the evidence in question." *See* United States v. Edwards, 82 M.J. 239, 247 (C.A.A.F. 2018). In this case, the government had a significant sentencing case. Appellant's military record included and unfavorable information file with an Article 15 for prior marijuana use and a vacation for additional misconduct – both of which preceded the subject offenses. (Pros. Ex. 26.) The defense case included five-character letters, an unsworn statement and one exhibit of photographs. (Def. Ex. D-I)

The quality of the aggravating evidence was high because a witness laid the foundation for it and was able to explain the document. (R. at 603.) However, its materiality was not so high as to cause prejudice because the case was heard by military judge alone; he indicated that he would put the evidence in context, considering the severity or lack thereof and how long ago the offenses occurred. (R. at 608.) Given these comments by the military judge and the context

of the government's sentencing case, the admission of this testimony and evidence did not substantially influence Appellant's sentence.

Conclusion

In sum, the military judge did not abuse his discretion when he admitted the testimony and documentary evidence regarding the criminal history of one of the illegal aliens Appellant helped remain in the United States. Accordingly, this Court should affirm the military judge's sentence.

VII.

THE MILITARY JUDGE AND THE PARTIES CORRECTLY CALCULATED THE MAXIMUM PUNISHMENT FOR TRANSPORTING AND CONSPIRACY TO TRANSPORT ILLEGAL ALIENS.

Additional Facts

Trial counsel stated that the maximum punishment for Charge IV, Specification 1 was 25 years – five years for each alien. (R. at 597.) Trial counsel and the military judge cited 8 U.S.C. [1324] (a)(1)(B) (2) as authority for the maximum punishment. (Id.) In total, the parties calculated the maximum confinement as 57 years and two months. (R. at 598.) Defense counsel did not object to this calculation. (Id.)

Standard of Review

The maximum punishment authorized for an offense is a question of law, which the Court reviews de novo. *See* United States v. Ronghi, 60 M.J. 83, 84-85 (C.A.A.F. 2004). The failure of the trial defense counsel to object to the military judge's determination of the maximum sentence at trial constituted waiver and therefore this Court reviews for plain error. United States v. Powell, 49 M.J. 460 (C.A.A.F. 1998). Plain error occurs when there is error that is clear or

obvious which "materially prejudices the substantial rights of the accused." United States v. Avery, 52 M.J. 496, 498 (C.A.A.F. 2000).

Law and Analysis

Trial counsel and the military judge correctly calculated the maximum punishment for Charge IV, Specification 1 (transportation under 8 U.S.C. 1324) and Additional Charge I and its Specification (conspiracy to commit 8 U.S.C. 1324). (*Entry of Judgment,* 18 February 2022, ROT, V.. 1.) However, even if this court finds that the maximum punishment was erroneously calculated, the error was not plain and obvious because there existed a factual basis to calculate a maximum of 50 years of confinement. Moreover, any error did not materially prejudice a substantial right. Appellant has failed to assert the material prejudice of a substantial right and the sentence he received was a fraction of what was authorized by trial counsel's calculation and of what he asserts the maximum penalty should have been.

1. The military judge and trial counsel properly calculated the sentence.

This maximum punishment calculated by the military judge and trial counsel is consistent with the plain reading of the federal statute. The statute provides that person who violates 8 U.S.C. § 1324 by transporting an illegal alien, *shall for each alien in respect to whom such a violation occurs*, be fined under title 18, U.S.C., imprisoned not more than 5 years, or both. 8 U.S.C. § 1324(a)(1)(B)(ii) (emphasis added.) In drafting this statute "Congress made clear that penalties for violating § 1324(a)(1) *could be* multiplied by the number of aliens involved." United States v. Sanchez-Vargas, 878 F.2d 1163, 1168 (9th Cir. 1989) (emphasis added). Therefore, multiplying the number of identified aliens in the charge and specification times the length of confinement [five years] is consistent with a plain reading of the statute. *See* United

States v. Schell, 72 M.J. 339, 343 (C.A.A.F. 2013) (citations omitted) (unless the text of a statue is ambiguous, the plain language will control unless it leads to an absurd result).

The text of this statute is not ambiguous, and its application does not lead to an absurd result. The specification identified five illegal aliens, by name, who were transported in violation of 8 U.S.C. § 1324. (*Entry of Judgment,* 18 February 2022, ROT, V. 1.) There is no evidence that members found Appellant guilty by exceptions and substitutions with respect to any of the charges or specification. (Id.) Instead, the members found Appellant guilty of illegal transporting all five illegal aliens in violation of 8 U.S.C. § 1324. Therefore, because Appellant was found guilty of transporting five illegal aliens, the maximum punishment was correctly calculated at 25 years.

The maximum punishment for Additional Charge I and its Specification is also properly calculated at 25 years. Any person who is found guilty of conspiracy shall be subject to the maximum punishment authorized for the offense that is the object of the conspiracy. Article 81, UCMJ. In this case, the offense that is the object of the conspiracy is 8 U.S.C. § 1324. (*Entry of Judgment,* 18 February 2022, ROT, V. 1.) The conspiracy charge also listed out the same five illegal aliens who were included in Charge IV, Specification 1. (Id.) Therefore, the proper maximum punishment for the conspiracy specification was also 25 years.

Accordingly, when trial counsel and the military judge calculated the 25-year maximum sentence for a violation of 8 U.S.C. § 1324 and a 25-year maximum sentence for conspiracy to violate 8 U.S.C. § 1324, they did so in accordance with the plain language of the statute. The combined 50-year maximum is not error.

2. Assuming error, such error is not plain and obvious because there existed a factual basis to calculate a maximum of 50 years of confinement.

If this Court finds that the calculation of the maximum sentence was error, such error was not plain and obvious because there existed a factual basis to calculate a combined 50 years of confinement for the subject specification. The factual basis is that Appellant was found guilty of transporting and conspiring to transport five illegal aliens. (*Entry of Judgement*, 18 February 2022, ROT, V. 1.) As discussed above, the combined sentence under a plain reading of the statute would be ten years per alien.

Appellant concedes this point in that the combined maximum punishment for transporting and conspiring to transport illegal aliens is 50 years, but states that in order to reach that number the Government would have had to charge each offense separately. (App. Br. at 40.)

Appellant cited no binding authority for this charging requirement. Instead, Appellant points to three federal cases and one Navy-Marine Corps case to support his position. (Id.) These cases do not provide direct support for Appellant's position but are instead indicative of a the completely different system used by the federal courts, namely the federal sentencing guidelines. These Guidelines are inapplicable to courts-martial and Appellant's case.

In this case, trial counsel looked to 8 U.S.C. § 1324 to determine the maximum sentence and his inquiry ended there. (R. at 597.) In the federal cases cited by Appellant, the federal sentencing guidelines, and the sentencing ranges all but supersede the statute. Indeed, as demonstrated below, the guidelines have effectively limited the sentence a federal court may impose because applying the maximum sentence in the statute would in almost all cases exceed the federal sentencing guidelines. And while possible, a departure from the sentencing guidelines requires that the court state its reasons for the departure, and the sentence imposed

must be reasonable in light of the articulated rationale. United States v. Salazar-Villarreal, 872 F.2d 121, 122 (5th Cir. 1989). On the other hand, the MCM imposes no such requirement to consult the federal sentencing guidelines and therefore, the sentences imposed, and their maximum punishments are done in accordance with the federal statute its procedures.

The application of the federal sentencing guidelines has effectively eliminated a federal court's ability to multiple number of aliens transported by five years because doing so would exceed the sentencing guidelines in almost all cases. For example, in Salazar-Villarreal, appellant transported 24 illegal aliens but pled guilty to one count of transporting illegal aliens. Id. at 122. And while the court indicated that the maximum penalty for a violation of 8 U.S.C. § 1324 was five years confinement, the real issue before the court was whether the federal sentencing guidelines had been properly applied. Id. Appellant was sentenced to three years confinement, but the sentencing guidelines set a sentencing range of only *four to ten months* if the appellant had no criminal history. Id. (emphasis added). Similarly, in United States v. Ramirez-De Rosas, 873 F.2d 1177, 1178 (9th Cir. 1989), the appellant pled guilty to the illegal transport of four aliens and the court indicated that the maximum penalty for a violation of 8 U.S.C. § 1324 was five years confinement. Id. at 1178. Again, the real issue before the court was whether the federal sentencing guidelines had been properly applied. Id. The sentencing guidelines again provided a sentence range of zero to four months, but appellant received 30 months of confinement. Id.

Had the federal court calculated the maximum punishment in either of the above cases, or in any cases cited by Appellant, by multiplying the number of illegal aliens by five years, such calculation would have exceeded the federal sentencing guidelines. Indeed, the federal sentencing guidelines have effectively limited the transportation of one illegal alien from five

years, as articulated in the statute, to zero to four months, as determined in the table of sentences. *See* 18 U.S.C.S. Appx § 2L1.1. However, the limitations imposed by the federal sentencing guidelines are absent from the practice before courts-martial. And therefore, even if the sentence calculation in this case was done in error, it was not plain and obvious and instead based on a plain reading of the statute and the facts.

Appellant also cites United States v. Spykerman, 81 M.J. 709 (N.M. Ct. Crim. App. 2021) in support of his argument that the sentence should be limited to five years. (App. Br. at 41.) However, the court in Spykerman provided little analysis as to how it reached its maximum sentence calculation and only stated that this would be the maximum sentence in federal court. Id. at 732. Notably, the court did not address the plain language of 8 U.S.C. § 1324 or how the federal sentencing guidelines impact that statutory interpretation. As a result, this Court should not look to the Navy-Marine Corps case for guidance absent this specific analysis.

Lastly, even if this Court finds that the sentence was calculated in error, such error did not materially prejudice a substantial right of Appellant. Appellant concedes that the maximum punishment for transporting the aliens and the conspiracy to transport aliens was 10 years. (App. Br. at 42.) Appellant's sentence of 24 months for each specification, ordered to run concurrently, is a fraction of the authorized sentence. (*Entry of Judgment*, 18 February 2022, ROT, V. 1.) And while Appellant asserts that the federal sentencing guidelines would have helped him, that is not the case. The presence of a firearm during the commission of the offense results in a federal sentencing level of 18. 18 U.S.C.S. Appx § 2L1.1. The range of confinement for a level 18 offense is 27 to 33 months. *See* 18 U.S.C.S. Ch. FIVE, Pt. A.

Accordingly, any error did not materially prejudice a material right because the adjudged sentence is a fraction of that advanced by Appellant, and while not applicable, consistent with the federal sentencing guidelines Appellant cites.

Conclusion

In sum, trial counsel and the military judge did not error when they calculated 50 years as the maximum punishment for the transportation of five illegal aliens and the conspiracy to commit the same. This calculation was based on a plain reading of the statute. However, even if this was error, such error was not plain and obvious given the impact the federal sentencing guidelines have on this offense. Appellant has failed to demonstrate the prejudice of a substantial right. Accordingly, this Court should affirm the sentence.

VIII.

APPELLANT'S SENTENCE IS APPROPRIATE

Additional Facts

The military judge sentenced Appellant to 24 months' confinement for both the transporting and conspiracy to transport specifications, served concurrently with six months' confinement for the obstruction of justice specification. (R. at 638–39.)

Standard of Review

This Court reviews sentence appropriateness de novo. United States v. Rodriguez, 2023 CCA LEXIS 68, *1 (A.F. Ct. Crim. Rev. 2023).

Law

This Court "may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1)(A), UCMJ. A court evaluates sentence appropriateness by "considering the particular appellant, the nature and seriousness of the offenses, the appellant's

record of service, and all matters contained in the record of trial." United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citations omitted).

Courts of Criminal Appeals have the "discretion to consider and compare other courts-martial sentences when ... reviewing a case for sentence appropriateness and relative uniformity." United States v. Wacha, 55 M.J. 266, 267 (C.A.A.F. 2001). In making a sentence appropriateness determination, Courts of Criminal Appeal are required to examine sentences in closely related cases and permitted, but not required, to do so in other cases. Id. CAAF has prescribed a three-step analysis for resolving sentence disparity challenges: (1) whether the cases are "closely related" (e.g., co-actors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared); (2) whether the cases resulted in "highly disparate" sentences; and (3) if the requested relief is not granted in a closely related case involving a highly disparate sentence, whether there is a rational basis for the differences between or among the cases. United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999); *see also* United States v. Durant, 55 M.J. 258 (C.A.A.F. 2017). The defense carries the burden as to the first two steps in the analysis, but if the defense meets that burden, the burden then shifts to the Government for the third step. United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001).

Analysis

Appellant's concurrent sentences of 24 months of confinement for transporting illegal aliens and 24 months for conspiracy to transport illegal aliens is appropriate.

This sentence is appropriate regardless of trial counsel and the military judge's calculation of the maximum punishment. As discussed in AOE VII, Appellant received only a fraction of the maximum sentence calculated by the military judge and similarly a fraction, albeit

slightly larger one of what Appellant asserts that the maximum punishment should be. (App. Br. at 42.) Even if the federal sentencing guidelines were applied, there is support for this sentence given the aggravating circumstances in the case, namely Appellant's possession of a firearm. *See* 18 U.S.C.S. Appx § 2L1.1. The mere possession of a firearm increases the sentencing range to 27 to 33 months. *See* 18 U.S.C.S. Ch. FIVE, Pt. A. As a result, a sentence of 24 months, served concurrently, is not inconsistent with the federal sentencing guidelines and persuasive evidence that Appellant's sentence is not inappropriately severe.

While Appellant has cited numerous federal and some military cases that deal with the same subject matter, Appellant has failed to demonstrate that any of these cases are "closely related" to his case and that this Court is required to review them. Lacy, 50 M.J. at 288. Moreover, on their face, the cited cases raise significant concerns as to their reliability for a meaningful comparison in this case.

The federal cases cited are distinguishable, dated, and such small sampling that they cease to be useful to Appellant's case. Of the four federal cases cited, the most recent is from 2011. (App. Br. at 45.) None of the cases involved Air Force or military members. (Id.) And such a sampling may be misleading given the fact that the Department of Justice likely charges and prosecutes a far greater number of these types of cases.

Similarly, this Court should not look to the cases from the Navy-Marine Corps Court of Criminal Appeals. First, two of the five cases from the are more than 20 years old and should and should raise similar concerns with the dated federal cases. (App. Br. at 46.) Second, all but one of the military cases is distinguishable for the simple fact that the appellants pled guilty to the charged offenses. (Id.) A plea of guilty is a mitigating factor that may have been part of the difference between Appellant's case and the military cases that he cited. *See* R.C.M. 1001(g)(1).

Finally, unlike Appellant's cases, there is lack of discussion of the aggravating and mitigating evidence in these cases that would allow this Court to make a meaningful comparison. Accordingly, this Court should not consider the cases from the Navy Marine Court of Criminal Appeals.

The Court should, on the other hand, consider this particular Appellant, the nature and seriousness of the offenses, his record of service, and all matters contained in the record of trial." Bare, 63 M.J. at 714. Contrary to Appellant's assertion, evidence of his rehabilitative potential was not strong. (App. Br. at 46.) His military record revealed that he received non-judicial punishment for the wrongful use of marijuana on divers occasions well before the transportation of the illegal immigrants. (Pros. Ex. 23.) His record revealed that the suspended punishment for the non-judicial punishment was vacated, again before the transportation of the illegal aliens. (Id.) And, on the heels of this vacation action is when he engaged in illegal transportation and conspiracy to transport illegal aliens. (*Entry of Judgment*, 18 February 2022, ROT, V. 1.) Therefore, instead of recognizing the crimes that he committed and attempting to reform/rehabilitate himself, Appellant chose to rent a vehicle to be used in the transportation of illegal aliens. *See* (Pros. Ex. 12.) And while Appellant may try to distance himself from the illegal transportation of illegal aliens, the entire criminal operation was predicated on him renting the vehicle. Without the rental there would be no transportation and no crime. That these things happened in such close succession and the fact that the crime would not have occurred but for Appellant's participation suggest a poor potential for rehabilitation.

In addition, there was no mitigating evidence presented suggesting that the transportation was for friends or family who happened to be illegal aliens, or that the transportation bordered on "incidental transportation" to aliens already in the United States. On the contrary, this

transportation was for co-conspirator financial gain in that QM stood to profit $500 per alien transported. (R. at 501-502.) Appellant had never met the illegal aliens and had no idea who he was allowing into the country. Indeed, he managed to facilitate the entry of an illegal alien who had already received multiple convictions for driving under the influence of alcohol and nearly two hundred days of confinement. (Pro. Ex. 28) Additionally, common sense indicates that the transportation was critical to facilitating the illegal aliens' presence in the United States in the sense that the transportation was in close proximity to the border, and the illegal aliens needed assistance with evading borders patrol. This is not the situation where the transportation was far from the border and for illegal aliens who had already established themselves in the United States. Lastly, Appellant knew that there was risk associated with this operation in that he found it necessary to bring a firearm and ammunition with him. (R. at 327, 430) Accordingly, the aggravating evidence outweighs the mitigating evidence in this case and supports the adjudged sentence.

Conclusion

In sum, Appellant's concurrent sentences to 24 months for transporting illegal aliens and conspiring to transport illegal aliens is appropriate regardless of the any maximum sentence calculated by trial counsel or the military judge. Appellant has failed to establish that the cited cases are "closely related" such that this Court is required to consider them. Additionally, all cases cited are either dated or distinguishable such that they should not be considered by this Court. Lastly, the record of trial supports a finding that Appellant's sentence is appropriate. Accordingly, this Court should affirm the military judge's sentence.

IX.

APPELLANT SUFFERED NO PREJUDICE WHEN THE MILITARY JUDGE ISSUED A SENTENCE TO CONFINEMENT FOR CHARGE I AND CHARGE II THAT EXCEEDED THE MAXIMUM AUTHOIZED CONFINEMENT FOR EACH OFFENSE.

Additional Facts

Appellant pleaded guilty to the Specification of Charge I, Absence Without Leave, the Specification of Charge II, Breach of Restriction, and the Specification of Charge III, Wrongful use of Marijuana, in violation of Articles 86, 87, and 112a, UCMJ respectively. (*Charge Sheet*, Vo1. 1; R. at 135.) After the military accepted Appellant's guilty pleas, trial counsel stated that the maximum punishment for the crimes to which the Appellant pleaded guilty was two years and two months confinement. (R. at 168.) Defense counsel agreed with this calculation. (Id.)

At the conclusion of trial, the military judge sentenced Appellant to two months confinement for the violation of Article 86, two months for the violation of Article 87, and three months for the violation of Article 112a. (R. at 638.) These sentences to confinement for these offenses ran concurrently. (Id.) Appellant did not object to the sentence.

Standard of Review

The standard of review is the same as AOE VIII.

Law and Analysis

The military judge sentenced Appellant to confinement in excess of that which is authorized by the President for Articles 86 and 87, UCMJ. However, Appellant did not object to the sentence at trial and therefore, Appellant must show that this error materially prejudiced a substantial right. United States v. Harcrow, 66 M.J. 154, 158 (C.A.A.F. 2008) (quotations and citations omitted). It did not.

The maximum confinement for absence without leave, lasting under three days, is one month. Article 86, UCMJ.. The maximum confinement for breaking restriction is also one month. Article 87, UCMJ. . The military judge sentenced Appellant to two months and three months for these offenses respectively. (R. at 638.) The punishment for these offenses exceeded that which a court-martial may direct for these specific offenses. See Article 56(a). The military judge also sentenced Appellant to three months confinement for his violation of Article 112a. (R. at 683.) This sentence to confinement was within the limits of that authorized for a violation of Article 112a because such a violation carries a maximum length of confinement of two years. Article 112a. The military judge ordered that the confinement for all three (offenses, absent without leave, breaking restriction, and drug use) run concurrently. (R. at 638.) Therefore, because these sentences ran concurrently, the sentence for drug abuse overshadowed both the sentence for absent without leave and breaking restriction. In other words, the military judge's order, that these three sentences run concurrently, effectively eliminated the sentence to confinement for the absent without leave and the breaking restriction offenses.

Therefore, the extra confinement error did not materially prejudice a substantial right of the Appellant. This is because his exposure to confinement, with or without the specifications of absent without leave and breaking restriction, is exactly the same – three months. However, this Court should only approve one month of confinement for the specifications of absent without leave and breaking restriction offenses. This is consistent with the maximum punishments articulated in the Manual for Courts-Martial.

Conclusion

In sum, Appellant has failed to demonstrate how this error materially prejudiced a substantial right. Accordingly, this Court should affirm the overall sentence to confinement

while respectively reducing the confinement for absent without leave and breaking restriction to one month.

X.

THE CONVENING AUTHORITY'S DID NOT ABUSE HIS DISCRETION OR MATERIALLY PREJUDICE A SUBSTANTIAL RIGHT OF APPELLANT WHEN HE FAILED TO PROVIDE THE REASONING FOR HIS DENIAL OF APPELLANT'S REQUEST FOR DEFERMENT OF REDUCTION IN RANK AND FORFEITURES.

Additional Facts

On 7 March 2022 Appellant provided a "Submission of Matters" to the convening authority. (*Submission of Matters,* 7 March 2022, ROT, Vol. 6 at 1.) Through counsel and pursuant to RCM 1109(c)(5)(c) and (e), Appellant requested that the adjudged reduction of rank be "suspended, remitted, reduced." (Id. at 2.) In support of his request, Appellant asserted that allowing him to save some money would allow him to have his basic needs met when he is released from confinement. (Id.) Appellant also stated he was currently engaged in discussions with the U.S. Attorney's office to provide favorable information with regard to the alien smuggling charge. (Id.) A proffer letter, attached to the submission of matters and addressed to an Assistant U.S. Attorney, provided the name of an individual, "Chino," who offered to pay Appellant and QM to transport illegal aliens. (Id. at 4.) The proffer letter indicated that "Chino" worked as a barber and had contacted QM with instructions to transport illegal aliens on the day Appellant and QM were apprehended by government authorities. (Id.)

If the convening authority were to take no action on the adjudged forfeitures, Appellant requested that the convening authority defer his reduction in rank and automatic forfeitures until the military judge signed the entry of judgment in his case. (Id. at 2.)

On 21 March 2022, the convening authority approved Appellant's sentencing in its entirety. (*Convening Authority Decision on Action,* ROT, Vol. 1.) The convening authority denied the requested deferment of the reduction in grade and the deferment of the automatic and adjudged forfeitures. (Id.) The convening authority indicated that he considered the matters submitted by Appellant and consulted his staff judge advocate; however, no reasons for the denials were included in the decision. (Id.)

Standard of Review

This Court reviews a convening authority's decision on a deferment request for an abuse of discretion. *See* R.C.M. 1103(d)(2); United States v. Sloan, 35 M.J. 4, 6 (C.M.A. 1992).

Law

In a case in which the accused requests deferment, the accused shall have the burden of showing that the interests of the accused and the community in deferral outweigh the community's interests in imposition of the punishment on its effective date. R.C.M. 1103(d)(2) Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include, where applicable:

> the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused's character, mental condition, family situation, and service record.

Id.

When a convening authority acts on an accused's request for deferment of all or part of an adjudged sentence, the action must be in writing and must include the reasons upon which the action is based. Sloan, 35 M.J. at 6-7. (C.M.A. 1992).

Even when there is error in the convening authority's action on a deferment request, relief is only warranted if an appellant makes a colorable showing of possible prejudice. United States v. Brown, 54 M.J. 289, 292 (C.A.A.F. 2000); *see also* United States v. Eppes, No. ACM 38881, 2017 CCA LEXIS 152, at *41-43 (A.F. Ct. Crim. App. 21 Feb. 2017) (unpub. op.) ("[T]he convening authority's error [in summarily denying a request to defer forfeitures] does not entitle appellant to relief unless it materially prejudices his substantial rights."). "Absent credible evidence that a convening authority denied a request to defer punishment for an unlawful or improper reason, an erroneous omission of reasons in a convening authority's denial of a deferment request does not entitle an appellant to relief." United States v. Zimmer, 56 M.J. 869, 874 (A. Ct. Crim. App. 2002).

Analysis

The convening authority's failure to include the reasons for his denial of Appellant's deferment request was error; however, since this error did not materially prejudice Appellant's substantial rights, Appellant is not entitled to relief.

Appellant failed to demonstrate that deferral of his adjudged reduction in rank and forfeitures outweighed the community's interests in imposition of the punishment on its effective date. *See* R.C.M. 1103(d)(2). The primary reason Appellant advanced for the deferment of forfeitures and reduction in rank was so that he could have some money when he was released from confinement. (*Submission of Matters,* 7 March 2022, ROT, Vol. 6 at 2.) This argument is not persuasive and does not demonstrate material prejudice to Appellant's substantial rights

because this same argument could be advanced for any individual facing forfeitures and confinement.

The requested deferment of automatic forfeitures is designed to assist Appellant's dependents; however, Appellant had none. (Pro. Ex. 22.) See R.C.M. 1103 Discussion.

> Forfeitures resulting by operation of law, rather than those adjudged as part of a sentence, may be waived for six months or for the duration of the period of confinement, whichever is less. The waived forfeitures are paid as support to dependent(s) designated by the convening authority. When directing waiver and payment, the convening authority should identify by name the dependent(s) to whom the payments will be made and state the number of months for which the waiver and payment shall apply. In cases where the amount to be waived and paid is less than the jurisdictional limit of the court, the monthly dollar amount of the waiver and payment should be stated. Reductions in grade resulting by operation of law may not be deferred.

R.C.M. 1103 Discussion.

Accordingly, Appellant did not suffer any prejudice when the Convening Authority did not approve his request for deferment of automatic forfeiture or automatic reduction in grade because he had no dependents and reductions in grade resulting by operation of law may not be deferred.

There is no evidence that Appellant's proffer of support to the United States Attorney was substantial or that it justified deferment of a forfeitures or reduction in rank. The only support Appellant provided was that of a barber named "Chino" who allegedly solicited him to transport the illegal aliens. (*Submission of Matters*, 7 March 2022, ROT, Vol. 6 at 4.) There is no evidence Appellant provided any further support, testified, or if "Chino" was ever prosecuted or even questioned. There is also no evidence that the trial counsel who prosecuted the case supported any leniency in Appellant's case. As a result, Appellant's minimal assistance did not justify deferment of his adjudge forfeitures or reduction in rank.

The factors under R.C.M 1103(d)(2) that are relevant to Appellant's situation include the effect of deferment on good order and discipline in the command, Appellant's character, mental condition, family situation, and service record. See R.C.M. 1103(d)(2). There is no indication that approving the deferment would have a positive impact on good order and discipline and nothing was asserted by Appellant to this effect. Nor do his character, mental condition, or service record support the deferment. Appellant had a previous Article 15, a vacation action, and an unfavorable information file. (Pros. Ex. 26.) Lastly, there is no evidence that the denial was unlawful or done for an improper purpose. Instead, the most likely reason for the denial was that Appellant failed to provide any substantive reason to grant the request.

Conclusion

In sum, Appellant has failed to demonstrate that the convening authority's denial of his requests for deferment and his failure to include the reasons was an abuse of discretion. Appellant failed to meet his burden that any deferment was justified and has failed to demonstrate how either the denial or the failure to provide the reasons for the denial materially prejudiced a substantial right of Appellant. Accordingly, this Court should affirm his convictions.

XI

APPELLANT IS NOT ENTITLED TO MORENO RELIEF BECAUSE OF THE 200-DAY DELAY BETWEEN ANNOUNCEMENT OF SENTENCE AND DOCKETING WITH THIS COURT WAS REASONABLE UNDER THE CIRCUMSTANCES.

Additional Facts

Appellant was sentenced on 18 February 2022. (R. at 638-639.) Immediately after the court martial, the detailed court reported was unable to begin transcription due to outstanding

post-trial requirements for United States v. Schable and ongoing transcription for a board of inquiry. (Lt Col J W , Declaration, dated 25 November 2023).

The court reporter requested assistance from JAT but no other reporters were available to provide assistance. (Id.) By May 2022, the military justice team at Davis Monthan and court reporter realized it would be impossible to complete the transcript and thus the record of trial before the Moreno date because of three general courts-martial scheduled for June 2022-United States v. Scott, United States v. Jacob, and United States v. Taylor. (Id.)

In late May 2022 the Davis Monthan staff judge advocate contacted N R. G and Company to explore the possibility of contracting to complete a portion of the transcript. (Id.) It took approximately one week for N R G and Co to review the Air Force transcript requirements and confirm their ability to prepare a transcript. (Id.) However, the company stated it would take 30 days to prepare the transcript. (Id.) By 10 June 2022, the wing approved funding for the transcription services and the audio was sent to the company on 13 June 2022. (Id.) The court reporter maintained a chronology documenting her progress with the transcript and was able to attest to the transcript on 28 July 2022, 160 days after the announcement of sentence. (*Court Reporter Attestation*, ROT, Vol. 6.) The next two weeks were spent copying and assembling the record of trial which, in total, consisted of 11 volumes and 639 pages of transcription. (*Moreno Timeline,* ROT, Vol. 6). The record of trial was mailed from the base on 15 August 2022. (Id.)

The case was docketed with this Court on 6 September 2022. A total of 200 days elapsed between the conclusion of Appellant's court-martial and his case being docketed with this Court. Since the case was docketed with this Court, Appellant has requested ten enlargements of time to file his assignments of error. All were opposed by the Government but granted by this Court.

These enlargements of time have resulted in 390 days elapsing before Appellant filed his Assignments of Error with this Court.

Standard of Review

This Court reviews de novo an appellant's entitlement to relief for post-trial delay. United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) *citing* United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law

In Moreno, the CAAF established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision over 18 months after the case is docketed with the court. Moreno at 63 M.J. at 142-143. Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633. Now, this Court applies an aggregate standard threshold: 150 days from the day the appellant was sentenced to docketing with this Court. Id. When evaluating whether a case has been docketed within the appropriate timeframe, this Court has not required the ROT to be complete and without errors to stop the clock. United States v. Muller, No. ACM 39323 (rem), 2021 CCA LEXIS 412 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.).

When a case does not meet one of the above standards, the delay is presumptively unreasonable and a test to review claims of unreasonable post-trial delay evaluates (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice. Moreno, 63 M.J. 135 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). All four factors are considered together and "[n]o single factor is required for

finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

In order to find a due process violation when there is no prejudice under the fourth Barker factor, a court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). In United States v. Tardif, CAAF determined that an appellant may be entitled to relief under Article 66, UCMJ, because it allows courts of criminal appeals "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' . . . if it deems relief appropriate under the circumstances." Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002) (citation omitted). The existence of post-trial delay does not necessitate relief; instead, appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225.

Analysis

Applying Livak, there is a facially unreasonable delay. From the conclusion of trial to the docketing of Appellant's case with this Court, 200 days passed, which is more than the 150 days for a threshold showing of facially unreasonable delay. Since there is a facially unreasonable delay, this Court must assess whether there was a due process violation by considering the four Barker factors. Analyzing each of the Barker factors, Appellant is not entitled to relief for post-trial delay because there are reasonable explanations for the delay, and Appellant suffered no prejudice.

1. Length of the delay

This factor weighs in favor of Appellant. While the length of the delay in this case is not "egregious," it is more than the 150-day benchmark outlined in Livak. *Cf.* United States v. Van Vliet, 2010 CCA LEXIS 279 (A.F. Ct. Crim. App. 23 August 2010) (unpub. op.) (finding 951-day delay "egregious" and "outrageous").

But even in cases where the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case, courts have not awarded sentence relief. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.") Even though the delay is presumptively unreasonable, it does not end the inquiry. The delay alone is not sufficient to justify relief—it merely triggers a due process analysis.

2. Reasons for the delay

This factor weighs in the Government's favor. The Government provided detailed and specific reasons for the delay in every aspect of post-trial processing. (Lt Col J W , Declaration, dated 25 November 2023); (*Court Reporter Chronology*, ROT, Vol. 6.) During this delay the court report was tasked with three other general courts-martial and a board of inquiry. (Declaration Lt Col W) When the legal office realized it might not meet the Moreno deadline, the staff judge advocate secured a private firm to assist with the transcription. (Id.) There are no significant delays in the chronology in which the court reporter was not diligently working on another case, and she was able to attest to the transcript on 28 July 2022. (*Court Reporter Chronology*, ROT, Vol. 6.) Moreover, there is no evidence of any "deliberate attempt to delay the trial in order to hamper the defense." Barker, 407 U.S. at 531. On the contrary, the

largest period of inaction was 21 days (from 23 February to 14 March 2023) when the court reporter was encumbered with the transcript for a board of inquiry. (Id.) There is no evidence of negligence or the legal office sitting on its hands.

Furthermore, this was a complex case. It was a fully litigated, four-day case with members. Appellant's case involved nine specifications including conspiracy and assimilation of federal law, motion practice, expert testimony, and testimony from state and federal law enforcement agencies. (*Entry of Judgement*, ROT, Vol. 1 at 1-2; R. at 16, 268, 306, 335, 366, 450) The transcript was 639 pages in length and the ROT consisted of 11 volumes of material. Notably, "[t]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Id. This is not an ordinary street crime. Appellant even admits that this type of crime is rarely prosecuted in the military and could only point to one case that had made it to sentencing. (App. Br. at 41.) Instead, this is a complex case involving multiple pieces of evidence and parties and the reasons for the delay cut in the Government's favor.

Appellant asserts that the post-trial processing clock is still ticking since the record is missing trial counsel's PowerPoint slide presentation that he used during findings. (App. Br. at 53.) At the outset, no objection was made during trial counsel's closing argument and the Government reached out to trial counsel who indicated that the presentation contained no new or additional demonstrative evidence. (Declaration of Major J .) Also, as this Court explained in Muller, the "CAAF has not articulated that a record must be complete to forestall a presumption of post-trial delay." 2021 CCA LEXIS, at *14. In Muller, Appellant's only EPR, a sentencing prosecution exhibit, was missing from the ROT. Id. at *7. This Court found that the failure to include the exhibit "was not shown to be anything other than simple negligence." Id. at

*14-15. Relying on the fact that the omission was not "intentional, much less deliberate," this Court found "no facially unreasonable delay." Id. at *15. In that regard, the Court distinguished Muller from cases where the Government docketed "[a] plainly deficient record," deliberately omitting evidence on which it relied to convict. United States v. Bavender, No. ACM 39390, 2019 CCA LEXIS 340, at *67, *68 n.28 (A.F. Ct. Crim. App. 23 August 2019) (unpub. op.). Accepting Appellant's argument that the delay in this case is still accruing post-docketing because of a missing exhibit could incentivize appellants to delay bringing incomplete records to the Court's attention.

While it is the Government's responsibility to compile a complete record of trial, here, like Muller, there is no evidence of ill intent in regard to the missing exhibit. On the contrary, the missing exhibit simply seems a matter of inattention to detail. While the Government is ultimately responsible for timely post-trial processing, the fact that this presentation was no more than a compilation of previously admitted evidence cuts in favor of the Government.

3. Appellant's request for speedy post-trial processing

This factor favors the Government. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (quoting Barker, 407 U.S. at 528). Appellant concedes he did not make a post-trial demand for speedy trial until he filed this brief. (App. Br. at 54.) Furthermore, he did not assert his right to speedy post-trial processing to the convening authority. (*Submission of Matters*, 7 March 2022, ROT, Vol. 6.)

4. Prejudice

This factor favors the Government. The CAAF has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in case of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.

Appellant only raises one type of prejudice—his ability to defend himself at a potential retrial. (App. Br. at 54.) He points to the potential of faded memories and the age of the case. (Id.) However, the evidence against Appellant is well preserved and not as vulnerable to the passage of time as in a case that hinges on the memory and testimony of a single victim or witness. Indeed, the evidence that Appellant rented the car is verified by CCTV images and a rental receipt. (Pros. Ex. 17.) There are pictures of the firearm and ammunition recovered from his vehicle. (Pros. Ex. 11-15.) There are videos of the interviews with Appellant and QM wherein they both admit that they somehow factory reset their phones. (Pros. Ex. 2; Def. Ex. 2.) Lastly, the circumstances of his apprehension, with the five illegal immigrants in camouflage and wearing "carpet shoes," come from multiple witnesses to include a member from the Arizona Department of Public Safety, Border Patrol, and the Department of Homeland Security. (R. at 268, 306, 325, 384.) The Government's case did not hinge on the testimony or memory of a single witness, but instead a gaggle of law enforcement officials who participated in this case. Therefore, the risk of prejudice to Appellant with the passage of time is low to non-existent. Prejudice, then, weighs in the Government's favor.

This Court should conclude that the delay in Appellant's case was not so egregious as to impugn the fairness and integrity of the military justice system. A delay like the one in this case is not severe enough to taint public perception of the military justice system. It did not involve years of post-trial delay like in Moreno (over four years), Toohey (over six years), and Bush (over seven years). Furthermore, "there is no indication of bad faith on the part of any of the Government actors." Anderson, 82 M.J. at 88. Instead, when it determined that transcription of the case would be delayed, the Government actively took steps to rectify the problem by outsourcing the transcription outside of the Government.

Appellant is not Entitled to Toohey Relief

Appellant is not entitled to relief under Toohey. There is nothing so egregious about the delay that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system. United States v. Toohey, 63 M.J. 353, 362. This finding is supported by many of the same reasons articulated under the above Moreno analysis. Most notably there is no evidence that the delay was caused by purposeful neglect or that the government ignored timely processing requirements. Unlike in Toohey, the delay in this case is justifiable given the caseload at the base and the measures taken to expedite the processing of this record. Moreover, until this filing of the assignment of error, there is no evidence Appellant asserted his right to a speedy review. Accordingly, the delay in this case would not adversely affect the public's perception of the fairness and integrity of the military justice system.

Appellant Is Not Entitled to Tardif Relief

Appellant argues that, even if not entitled to relief pursuant to Moreno, the delay in this case still entitles him to some unspecified relief. In Tardif, the Court of Appeals for the Armed Forces recognized that an appellate court may "grant relief for excessive post-trial delay without

a showing of 'actual prejudice' . . . if it deems relief appropriate under the circumstances." 57 M.J. at 224. However, this authority to grant appropriate relief is "for unreasonable and unexplained post-trial delays." Id. at 220. Relief is not required, but the court may "tailor an appropriate remedy, if any is warranted, to the circumstances of the case." Id. at 225. Further, relief under Article 66 "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Id.

In deciding whether to invoke Article 66, UCMJ, to grant relief as a "last recourse," this Court laid out a non-exhaustive list of factors to be considered, including: (1) How long the delay exceeded the standards set forth in Moreno; (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case; (3) Whether there is some evidence of harm (either to the appellant or institutionally) caused by the delay; (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline; (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing; and (6) Given the passage of time, whether the court can provide meaningful relief. United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015).

The delay in this case does not meet any one of the non-exhaustive Gay factors. Providing sentence relief without a showing of actual prejudice in this case would not be meaningful. It would amount to an appellate windfall which is not consistent with justice or good order and discipline, given the seriousness of the charges of which Appellant was convicted and the absence of governmental bad faith. Further detracting from his argument, Appellant requested ten enlargements of time to file his appeal, resulting in an additional 390 days of delay

from docketing the case with this Court until filing his assignments of error. To the extent that Appellant was "prejudiced" by the post-trial processing delay, he was arguably more prejudiced by his own delay in filing an appeal.

On the issue of "institutional neglect," Appellant points to the docketing of an incomplete record of trial and suggests that this Court should grant relief – in part – to motivate the Government to do its job. (App. Br. at 55-56.) However, such an action would do little to change the post-trial processing of courts-martial because there is no evidence that the omission of the appellate exhibit was intentional or the result of gross negligence. The only reasonable conclusion is that its omission was the result of simple negligence, and Appellant has failed to articulate any resulting prejudice or how granting any relief would be consistent the Gay factors. Accordingly, this Court should not grant any relief based on the timeliness of the Government post-trial processing.

Conclusion

In sum, while the delay between the conclusion of trial and the docketing of this case raises a presumption of unreasonable delay, an inquiry into the reasons for such delay and any potential prejudice support a finding that the Government diligently processed this novel case and that any delay did not prejudice Appellant. Moreover, there is no evidence that granting relief under Tardif or Gay would serve to remedy any institutional neglect. Something that is not present in this case. As a result, this Court should not grant any relief based upon the Government post-trial processing.

XII.

THE UNITED STATES DID NOT VIOLATE APPELLANT'S SIXTH OR FIFTH AMENDMENT RIGHTS IN NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURTS-MARTIAL.

Standard of Review

The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (citing United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members as such. (R. at 246, 577.) Appellant argues, in light of the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 57-58). In Ramos, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. Ramos, 140 S. Ct. at 1396-97. The Court further held that the Fourteenth Amendment incorporated this right to criminal proceedings at the state level. Id. at 1396-97. The Supreme Court did not state that this interpretation extended to military courts-martial.

Our Superior Court recently addressed the applicability of Ramos to courts-martial in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023). It rejected the same claims Appellant raises now. The Sixth Amendment right to a jury trial does not apply to courts-martial and therefore there is no requirement that a verdict be unanimous in courts-martial. Id. at 295. The court found that a non-unanimous verdict did not run afoul of the Due Process Clause's

requirement that the government prove the defendant's guilt beyond a reasonable doubt. Id. at 299. The court also concluded that such a verdict was consistent with the protections under the Equal Protection Clause. Id. at 301.

Conclusion

This Court should apply our Superior Court's guidance under Anderson and deny Appellant's requested relief.

XIII.[2]

APPELLANT'S CONVICTION FOR OBSTRUCTION OF JUSTICE IS FACTUALLY AND LEGALLY SUFFICIENT.

Additional Facts

An Arizona Department of Public Safety (DPS) officer pulled over Appellant and QM on 22 August 2023 at approximately 2246 hrs. (R. at 275.) The DPS officer suspected that the individuals in the vehicle were illegal immigrants because they appeared and smelled as if they had traveled through the desert and crossed the border. (R. at 279.) In Appellant's and QM's presence, the DPS officer called for border patrol support. (R. at 281.)

On 23 August 2022 at 0035 hours, a Department of Homeland Security Officer seized Appellant's iPhone (PE. 2.) Investigators were unable to extract any information from the seized phone because it had been factory reset. (R. at 430.)

A forensic analysis of the T-Mobile data associated with Appellant's iPhone demonstrated that Appellant's iPhone had received calls throughout the day on 22 August 2023. (R. at 463-464.) The last call Appellant's iPhone was able to connect/receive was on 22 August 2023 at 2331 hours. (R. at 464.) The first call made to the iPhone that did not connect was at

2 Raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

0025 hours on 23 August 2023. (R. at 465.) After this call, there were approximately 25 additional calls made to Appellant's iPhone, but none of the calls were able to connect. (Id.) At trial, an expert in digital forensics opined that one of the reasons no further calls could connect after 2331 hours is because the iPhone had been reset. (R. at 465.) The expert explained that the iPhone could be manually reset or that a reset could have occurred by entering the passcode incorrectly 10 times. (R. at 468-469.) If the iPhone was reset due to the incorrect pin being entered, it would take 1 hour and 21 minutes to reset. (R. at 468.) This is because after the user inputs an incorrect pin there are "timeouts" in which the user has to wait a certain number of minutes before they can attempt to re-enter the pin. (Id.) If using the "reset" function, a reset would take approximately 15 minutes. (R. at 471.)

When questioned by Security Forces Investigators about his iPhone Appellant stated:

> They [Homeland Security Investigators] told us they wanted to see our phones, but my phone was programed to, you do it ten times and it erases, so they thought I erased it. Right when the trooper pulled up, I had the phone in my hand and he told me to turn it over, not to touch it or nothing,

(R. at 414.)

Appellant the told the Security Forces investigators that his passcode was "0000." (Id.) When investigators tried to analyze Appellant's iPhone, they discovered that his phone had been factory reset. (R. at 430.)

When Homeland Security Investigators questioned QM about his phone, they also discovered that his phone had been reset. (R. at 508.) QM stated that his phone was in his pocket and that after the password is entered incorrectly ten times it resets itself. (Id.)

Standard of Review

The standard of review is provided in the main brief in AOE I.

Law and Analysis

In this case there is sufficient evidence Appellant wrongfully deleted the contents of his phone with an intent to impede the due administration of justice in the case involving himself, when Appellant had reason to believe that there were or would be criminal proceeding pending.

Appellant had reason to suspect that there would be criminal proceedings pending against him. He and QM had just been pulled over by a DPS officer and the officer radioed for border patrol support. (R. at 281.) This is evidence that Appellant knew that the DPS officer was not going to release them but instead referred the matter to the border patrol authorities. Border patrol would likely discover the occupants in the vehicle were illegal immigrants and an investigation into Appellant's conduct would likely ensue. At that point, it is reasonable to assume Appellant could likely foresee a scenario where law enforcement would look through the contents of his phone.

Appellant focuses on the fact that the forensic expert at trial had less than total confidence in his answer concerning the phone's operating system when he stated "I believe" when describing which version of the operating system ran on Appellant's phone. (App. Br. App. at 2). However, the most important fact supporting the obstruction of justice specification has little to do with the operating system on the phone, but rather the fact that the phone was factory reset in the first place. This fact alone supports the finding that Appellant tried to impede or obstruct the investigation that was unfolding before him. Appellant does not contest this fact.

The significance of the 81 minutes to reset a phone via incorrect passcode attempts is that it supported a finding that Appellant purposely used the factory reset function on his phone vice entering the password incorrectly 10 times. If using the incorrect passcode to reset the iPhone, Appellant would have had to wait a fixed number of minutes between attempts to enter the

passcode – these waiting periods total 81 minutes. (R. at 468.) There was not enough time between the last call received at 2331 hours and when the phone was seized at 0035 hours for the phone to reset based on an incorrectly entered passcode. (R. at 464.)

Eighty-one minutes aside, common sense also supports a finding Appellant purposely reset his phone. Appellant argues that he may have mistakenly entered his passcode multiple times because he was nervous. (App. Br. at 2.) This is highly unlikely. First, the passcode was "0000" – a passcode that is nearly impossible to forget. Second, even if the passcode were different, Appellant would have had ten attempts to correctly enter the passcode over a period of 81 minutes. This would allow him enough time to calm down and get it right. This is especially true given the fact that the data associated with the phone showed that the phone had been used/accessed throughout the day. Finally, the fact that his co-conspirator also factory reset his phone suggested that this activity was a premeditated course of action to execute if law enforcement apprehended them. The resets were not done by accident, but rather by design to impede or obstruct the unfolding investigation into his conduct. It defies logic that both Appellant and QM would accidentally factory reset their phones at the same time.

Conclusion

In sum, sufficient evidence supports a finding Appellant wrongfully deleted the contents of his phone with an intent to impede the due administration of justice in the case involving himself, when Appellant had reason to believe that there were or would be criminal proceeding pending. Appellant has failed to demonstrate a deficiency in proof or that his conviction was clearly against the weight of the evidence admitted at trial. A reasonable finder of fact could have found that all elements of the charge and its specification beyond a reasonable doubt. Accordingly, this Court should affirm this charge and its specification.

XIV. [3]

APPELLANT'S CONVICTIONS FOR TRANSPORTING ALIENS AND CONSPIRACY TO TRANSPORT ALIENS ARE LEGALLY INSUFFICIENT.

Standard of Review

Issues of legal sufficiency are reviewed de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

See AOE I & II for the element of transporting and conspiracy to transport aliens.

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

Analysis and Conclusion

For the reasons discussed in Assignments of Error I and III, a reasonable finder of fact could have found all the elements for transporting and conspiracy to transport an alien beyond a

3 Raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

reasonable doubt. Accordingly, this court should affirm the findings for the charges and specifications of transporting and conspiracy to transport an alien.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division via electronic means on 18 December 2023.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman (E-2) **JAKALIEN J. COOK**, USAF *Appellant.*	)))))))))	UNITED STATES MOTION TO ATTACH DOCUMENT Before Panel No. 2 No. ACM 40333 18 December 2023

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to this motion:

- Appendix A – Maj J J Declaration, dated 20 November 2023, (1 page);
- Appendix B – Lt Col J W Declaration, dated 27 November 2023, (1 page);

Appellant argues in Assignment of Error V that the Government failed to include a copy of the PowerPoint slides used for its closing argument in Appellate Exhibit XL. (App. Br. at 34.) Instead, Appellate Exhibit XL contains a copy of Defense Exhibit A. (Id.) Appellant asserts that this omission is substantial because there are audio portions of the exhibit that were unable to be transcribed; and that exhibit is necessary to know what evidence the trial counsel put before the members to assess the propriety of the argument. (App. Br. at 35.) At trial, trial defense counsel received a copy of the slides and stated that he had no objection to them. (R. at 537) Trial defense counsel did not object at any time during the Government's closing argument.

The attached declaration from Major J is responsive to Appellant's query about the evidence that was put before the members in the PowerPoint slides during his closing argument. The declaration from Major J affirms that no new or additional evidence was included in the

PowerPoint slides and that the entirety of the presentation was derived from images and audio from prosecution exhibits, defense exhibits, and instructions from the military judge. The declaration also indicates that Major J was unable to locate a copy of the appellate exhibit in his files.

In Assignment of Error XI, Appellant asserts he is entitled to relief because of the 200-day delay between the announcement of sentence and docketing with this Court. (App. Br. at 51.) The attached declaration from Lt Col W is responsive to this assignment of error because it is directly related to the reasons for the delay. Lt Col W served as the staff judge advocate at Davis Monthan during Appellant's trial and describes the office workload, the lack of additional Air Force court reporters, and his efforts to expedite the processing of the record of trial. These facts are not automatically included in a record of trial but are relevant to the reasons for the delay.

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)).

In this case, Appellant is asserting that the omission of the closing PowerPoint slides is a substantial omission because he does not know what evidence was placed before the members. (App. Br. at 35) The declaration from Major J effectively ends this speculation by confirming that no new evidence was offered or shown to the members during his argument.

Similarly, when the delay between the announcement of sentence and docketing exceeds 150 days, the reasons for the delay must be explored. United States v. Livak, 80 M.J. 631, 633

(A.F. Ct. Crim. App. 2020). The declaration from Lt Col W is directly related to the reasons for the delay. Accordingly, since Appellant is allowed to raise these issues, the attached documents are relevant and necessary to provide full context so this Court can address Appellant's assignments of error.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Documents.

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MARY ELLEN PAYNE
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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 18 December 2023.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF**
v.	)	Before Panel No. 2
Airman (E-2) **JAKALIEN J. COOK** United States Air Force *Appellant*	)	No. ACM 40333
	)	21 December 2023

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

Pursuant to Rule 23.3(m)(1) and (4) 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, filed on 18 December 2023. This Court granted a motion to exceed the page limit today, 21 December 2023. Appellant requests an enlargement of time for a period of eight days, which will end on **5 January 2024**. The record of trial was docketed with this Court on 6 September 2022. From the date of docketing to the present date, 471 days have elapsed. On the date requested, 486 days will have elapsed. Counsel withdraws the previously filed motion of the same name because of an incorrect date in the caption.

On 14 February 2022, at a general court-martial convened at the Davis-Monthan Air Force Base, Arizona, Appellant was found guilty, consistent with his pleas, of one charge and specification of Article 86, Uniform Code of Military Justice (UCMJ); one charge and specification of Article 87b, UCMJ; and one charge and specification of Article 112a, UCMJ. He was found guilty, inconsistent with his pleas, of one charge and one specification of Article 134, UCMJ; one charge and

specification of Article 81, UCMJ; and one charge and specification of Article 131b, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 20 April 2022. The military judge sentenced Appellant to reduction to the rank of E-1, forfeiture of all pay and allowances, 27 months' confinement and a dishonorable discharge. *Id.* The military judge credited Appellant with 155 days' of pretrial confinement credit. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. ROT, Vol. 1, *Convening Authority Decision on Action*, 21 March 2022.

The trial transcript is 639 pages long and the record of trial is comprised of 11 volumes containing 28 prosecutions exhibits, 10 defense exhibits, 48 appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Counsel is currently assigned 25 cases, with 9 pending initial brief before this Court. This case will have priority over all other cases before this Court. However, of the current reply period is largely swallowed by holidays and family days. Counsel is simultaneously working briefs for the CAAF in *United States v. Zimmermann* (ACM 40267) and *United States v. Cornwell* (ACM 40335), which will also limit available time. Furthermore, the Government's Answer is lengthy and will require significant time to digest and prepare a reply.

Through no fault of Amn Cook, undersigned counsel is unable to complete the reply in the allotted timeframe. Amn Cook was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow

undersigned counsel to fully review the Government's Answer and advise Amn Cook on a reply.

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

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 21 December 2023.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
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27 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JAKALIEN J. COOK, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME FOR REPLY BRIEF ACM 40333 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose Appellant's Motion for Enlargement of Time to file a Reply to the United States' Answer to Assignments of Error.

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S REPLY BRIEF**
Appellee	)	
	)	
v.	)	Before Panel No. 2
	)	
Airman (E-2)	)	No. ACM 40333
JAKALIEN J. COOK	)	
United States Air Force	)	5 January 2024
Appellant	)	

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

Appellant, Airman (Amn) Jakalien J. Cook, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer, dated 18 December 2023 (Ans.). In addition to the arguments in his opening brief, filed on 31 October 2023 (App. Br.), Amn Cook submits the following arguments for the issues listed below.

I.

AMN COOK'S CONVICTION FOR TRANSPORTING ALIENS UNLAWFULLY IN THE UNITED STATES IS FACTUALLY INSUFFICIENT.

1. Reliance on the Ninth Circuit's model jury instructions subjected the Government to a lower burden in proving the transportation offense.

The Government should have borne the burden of proving Amn Cook intended to transport the five aliens "in furtherance of" their unlawful status. 8 U.S.C. § 1324(a)(1)(A)(ii). Instead, the military judge instructed the members based on the Ninth Circuit's formulation of the elements, which diminishes the "in furtherance of" element. (R. at 541.) On appeal, the Government claims that any circuit's elements

would yield guilt for Amn Cook. (Ans. at 10–11.) But this downplays the key distinction: does a court look at the appellant's *intent* in transportation, or merely the *effect* of the transportation? *United States v. Merkt*, 764 F.2d 266 (5th Cir. 1985) illuminates the difference between the tests, yet the Government tries to distinguish that case on the facts.[1] (Ans. at 14.) The point is the test, not the facts of *Merkt*. And the challenge of proving intent is the Government's—as *Merkt* explained, "No matter how difficult it may be to establish the defendant's state of mind, the government must prove this portion of its case, like every other element of the alleged crime." 764 F.2d at 272. Because the Government never had to prove Amn Cook's intent, it proved a lesser version of the offense than Amn Cook would face in other circuit courts of appeal.

The closing argument provides another indication that the members did not have to address whether Amn Cook intended to further the aliens' unlawful status. The trial counsel's argument on this element was simple: the aliens were in the country unlawfully and they were transported. (R. at 556–57.) More is required to meet the elements of 8 U.S.C. § 1324. And as the next section explains, the Government did not meet its burden of proof.

2. The evidence is factually insufficient to support the transportation conviction.

Here is the simple summary of the Government case at trial (and repeated on appeal): QM admitted to committing the offense. Amn Cook is QM's friend and rented

[1] Similarly, the Government seeks to distinguish other circuit precedent either on the specific facts or claims that evidence meets either version of the test. (Ans. at 13–15.)

the SUV. Therefore, Amn Cook must have known what was occurring from the beginning. But this faulty logic cannot suffice for a criminal conviction. This Court should require more from the Government than suspicious circumstances. The crucial questions are when Amn Cook became aware of QM's plan and what Amn Cook intended that night. The Government on appeal has no more answers than the Government at trial.

On Amn Cook's knowledge of QM's plan, the Government asserts that "[t]he entire crime was predicated on [Amn Cook's] rental of the SUV." (Ans. at 11.) Perhaps the Government makes this overstatement because the evidence of Amn Cook's actual knowledge before the aliens entered the SUV is so minimal. To fill this yawning gap, the Government highlights inconclusive or unproven factors, such as Amn Cook's possible financial difficulties (in contrast with QM's demonstrated financial desperation), the presence of a gun (which supposedly shows risk, yet Amn Cook showed up wearing shorts and slip-off sandals), or the post-hoc act of wiping phones. (Ans. at 16–17; PE 18 File 1 at 9:40-10:15.) The Government leans into the close relationship with QM, claiming that "they would not keep secrets from one another." (Ans. at 11.) Thus, the Government argues, it is "far more likely" that they discussed the plan in advance. (Ans. at 12.) Even if that were true, playing on likelihoods is a paltry standard for a criminal conviction. The Government's incredulity aside, the evidence does not establish that Amn Cook was aware of QM's plan before the aliens entered the vehicle.

Nor does the Government have an explanation for Amn Cook's surprise when the aliens entered the vehicle. It claims that Amn Cook's reaction—"why the fuck is they ducking?"—was "likely related to a concern that someone was watching their actions." (Ans. at 16–17.) This is puzzling. If Amn Cook was concerned about someone watching, wouldn't he want them to duck?

Regarding intent, the Government highlights that Amn Cook did not demand the aliens leave the vehicle immediately. (Ans. at 14.) But if Amn Cook is unaware of QM's plan, he would not be in a position to instantly grasp what was happening, take control of the situation, and eject five people from the vehicle. Such bravery is not required to avoid criminal sanction where Amn Cook never had the intent to further their unlawful status. As the Government notes elsewhere in its brief, they were only in the vehicle for a brief period before apprehension. (Ans. at 30.) In that short interlude, the evidence cannot show Amn Cook developed the requisite intent. Thus, in that regard, he was like an innocent bystander whose guilt cannot stand on QM's actions alone.

For the remaining elements, the Government again must resort to speculation and stereotype. On their unlawful status, it suggests that being near the border and having "Hispanic sounding names" is enough to meet the element. But there is no evidence that Amn Cook knew their names. The Government recognized the evidence's weakness elsewhere in the Answer when it wrote that having the aliens testify would have would put it in "a better position to firm up its case-in-chief with direct evidence of their illegal status rather than circumstantial evidence." (Ans. at

31.) The Government's presumption on the aliens' unlawful status reflects its broader approach to the evidence: where there is smoke, there is fire. Where the actual evidence rests on such an uncertain foundation, this Court should be clearly convinced that his conviction is against the weight of the evidence.

WHEREFORE, Amn Cook respectfully requests this Honorable Court set aside Specification 1 of Charge IV.

II.

THE CONSPIRACY SPECIFICATION FAILS TO STATE AN OFFENSE BECAUSE IT DOES NOT ALLEGE CONSPIRACY TO COMMIT AN OFFENSE UNDER THE UCMJ.

The Government *could* have charged Amn Cook with conspiracy under 8 U.S.C. § 1324(a)(1)(A)(v)(I) through Article 134, UCMJ, 10 U.S.C. § 934. Instead, it chose a hybrid and deficient scheme: charging Amn Cook with conspiracy to violate an offense that is not within the Code. The Government hopes this Court will accept close enough as good enough. (Ans. at 22–23.) It should not.

Article 81, UCMJ, 10 U.S.C. § 881, allows for conspiracy to commit any offense under the Code, but the actual specification does not allege conspiracy to commit an offense under the Code. For the Government, this presents no problem because the drafting "was done with the intent that 8 USC § [1324] be incorporated into the UCMJ through Article 134." (Ans. at 22.) Perhaps it was. Still, the Government's speculation on what the convening authority *meant* to write cannot substitute for the charge sheet itself. *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) ("[T]he Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged." (citations omitted)).

Amn Cook also argued that Article 81, UCMJ, cannot charge conspiracy to commit *any* offense through clause 3 of Article 134, UCMJ. (App. Br. at 23–24.) The Code defines the universe of permissible charging, and the Government impermissibly expands the scope by making any federal offense or assimilated state law subject to a *military* conspiracy charge. Yet the Government seems blithely unconcerned about breaking this barrier. It argues that because it *could* have charged conspiracy through 8 USC § 1324(a)(1)(A)(v)(I), the charging here was permissible because it does not expand what is chargeable under federal law. (Ans. at 23.) But the fact that the Government could have done it right does not excuse doing it wrong.

Finally, the Government argues that Amn Cook suffered no prejudice. Yet it cites the wrong class of cases to support its argument, including *United States v. Turner*, 79 M.J. 401, 407–08 (C.A.A.F. 2020), where the omission of "unlawful" from a murder charge imparted no prejudice. (Ans. at 22.) The problem here, unlike *Turner*, is not confusion about how to defend against a charge; rather, it is about Amn Cook's conviction for an offense that *does not exist* under the Code. This is the problem for which the Government has no argument, and it fails to meet the burden of showing the error was harmless beyond a reasonable doubt. *Turner*, 79 M.J. at 403.

WHEREFORE, Amn Cook respectfully requests this Honorable Court set aside and dismiss the Specification of Additional Charge I.

III.

AMN COOK'S CONVICTION FOR CONSPIRACY IS FACTUALLY INSUFFICIENT.

To satisfy the elements of conspiracy, an agreement must exist at the time or before the charged overt act. *Manual for Courts-Martial, United States*, pt. IV, ¶ 5.c.(4). The evidence here may show suspicious circumstances, but not an actual agreement. To uphold the conspiracy conviction here would allow "little more than guilt by association," which is impermissible. *See United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir 1980). The Government's arguments to the contrary are unavailing.

It first highlights the alleged after-the-fact reset of the phones. (Ans. at 24.) But the agreement must exist before the charged overt act, and post-hoc actions are poor evidence of a preexisting agreement. Next, the Government rehashes the argument that the circumstances of renting the SUV, combined with testimony that other smugglers may use rental vehicles, shows agreement. (Ans. at 25.) This is mere speculation about the agreement. It also overemphasizes what smugglers do in general, rather than what Amn Cook actually did. *Cf. Diaz v. United States*, 2023 U.S. App. LEXIS 1275 (9th Cir. 19 Jan. 2023), *cert. granted*, (U.S. 13 Nov. 2023) (No. 23-14) (where the Supreme Court granted review on the question of whether an expert exceeded the permissible scope of testimony by opining about the behavior of "blind mule" drug couriers in general).

The Government next claims Amn Cook "affirmatively delivered the firearm to the rental vehicle for protection from the unknown illegal aliens or the smuggler

orchestrating the operation." (Ans. at 25.) This is potent-sounding argument but not what the record actually shows. QM had the weapon and brought it to the SUV. (R. at 335; DE A at 27:30-28:25.)

Finally, the Government falls back on the close relationship with QM to claim there *must* have been an agreement. (Ans. at 25–26.) Conspiracy requires more than a close relationship. And to exit the conspiracy (which never existed), the Government would have required Amn Cook to leave the vehicle—in its words, "in the middle of nowhere"—and wait for a friend to pick him up. (Ans. at 12, 26.) This would leave Amn Cook on the side of the road with the "man in gray" who, the Government supposes, was dangerous enough to prompt Amn Cook to bring a weapon. The impracticality speaks for itself.

The Government on appeal, like the Government at trial, points to suspicious circumstances to elide its burden to prove an agreement. Furthermore, the Government does not grapple with the point that the conspiracy must encompass every element of the target offense, relying on its arguments for the first assignment of error. The paucity of evidence should leave this Court clearly convinced that Amn Cook's conviction is against the weight of the evidence.

WHEREFORE, Amn Cook respectfully requests this Honorable Court set aside the Specification of Additional Charge I.

V.

OMISSION OF THE GOVERNMENT'S CLOSING ARGUMENT SLIDES—INCLUDING THE UNKNOWN VIDEOS PLAYED TO THE MEMBERS—NECESSITATES REMAND FOR CORRECTION.

The briefs largely speak past each other on this issue. The Government claims an objection to the slides was affirmatively waived. (Ans. at 38.) Trial objections do not waive record completion. The Government, and the Declaration from Maj JJ, address the possibility that unadmitted evidence came before the members. (*Id.*; Declaration of Maj JJ, 20 Nov. 2023.[2]) Because the slides only contained admitted evidence, the argument goes, there is no prejudice. (Ans. at 38.) To be clear, Amn Cook never claimed the trial counsel slipped inadmissible evidence into the slides. The issue is about analyzing trial counsel's argument. To do so, appellate counsel must know what evidence the trial counsel showed the members to assess whether the argument asked the members to draw inferences not flowing from the evidence. This was stated in the opening brief as follows: "Even though argument is not evidence, for appellate defense counsel to scrutinize trial counsel's argument, it is crucial to know what evidence the trial counsel put before the members to assess the propriety of the argument." (App. Br. at 35.)

The omission is substantial where it inhibits appellate review. It is not "so unimportant and so uninfluential when viewed in the light of the whole record, that

[2] The declaration does not fully clear things up, either. It says all the evidence came from Defense Exhibit A and Prosecution Exhibit B. (Declaration of Maj JJ.) Prosecution Exhibit B is not a thing, and there were two prosecution exhibit videos that could have been the evidence in the slides. (PE 2, 18.)

it approaches nothingness." *United States v. Davenport,* 73 M.J. 373, 377 (C.A.A.F. 2014) (internal punctuation and citations omitted).

WHEREFORE, Amn Cook respectfully requests this Honorable Court dismiss the litigated specifications. Amn Cook also demands speedy appellate review.

VI.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED THE GOVERNMENT TO INTRODUCE ONE OF THE IMMIGRANT'S CRIMINAL HISTORY AS AGGRAVATION EVIDENCE.

The Government's argument in support of the military judge is internally inconsistent. It first argues ONA's criminal record is aggravating because "based on the number of convictions and the terms of confinement, there is some indication that he could re-offend and place the public at risk again." (Ans. at 41.) Yet by the next paragraph the fact that ONA was summarily deported (and thus could not re-offend) was "irrelevant." (*Id.*) And then on prejudice, the Government argues the prejudicial effect of the evidence was minimal because ONA did not harm anyone. (*Id.* at 42.) All these arguments cannot coexist. Where ONA was quickly deported, the probative value of his criminal history is extremely low, and the military judge abused his discretion in admitting the evidence.

WHEREFORE, Amn Cook respectfully requests this Honorable Court set aside the sentence.

VII.

THE MILITARY JUDGE AND THE PARTIES INCORRECTLY CALCULATED THE MAXIMUM PUNISHMENT, TRIPLING AMN COOK'S PUNITIVE EXPOSURE. THIS ERROR REQUIRES SETTING ASIDE THE SENTENCE.

The military judge's miscalculation of the maximum sentence placed Amn Cook at enhanced punitive exposure and shifted the anchor for sentencing far beyond what was appropriate. Citing an array of military and federal cases, Amn Cook argued that the military judge's calculation diverged from what was appropriate. (App. Br. at 45–46.) To boil the Government's argument down to its essence, it asks this Court to ignore those cases. For the federal cases, it suggests that the reason courts stated the maximum punishment as five years was because otherwise the maximum punishment "would have exceeded the federal sentencing guidelines." (Ans. at 47.) There are two problems with this argument. First, the maximum punishment usually exceeds the guidelines. *See, e.g.*, *United States v. Salazar-Villarreal*, 872 F.2d 121, 121–22 (5th Cir. 1989) (explaining the maximum confinement as five years for an 8 U.S.C. § 1324 transporting offense, but that the guideline range was four to ten months). Second, when federal courts stated the maximum punishment, they did not actually say what the Government now claims about the interaction of the maximum punishment and the guidelines. (App. Br. at 40–41.)

The Government also downplays the impact by stating that, even using the lower maximum punishment, the eventual sentence was only 24 months out of a total maximum of 10 years. But where the military judge believed the maximum was more

than three times the actual total, this plays into the sentence in a way that should cause this Court to question whether Amn Cook received the sentence he deserved. *See, e.g.*, *United States v. St. Blanc*, 70 M.J. 424, 430 (C.A.A.F. 2012) (finding an error in the maximum punishment calculation (12 years' confinement when the maximum was 2 years and 4 months) substantially prejudiced the appellant's material rights).

WHEREFORE, Amn Cook respectfully requests this Honorable Court set aside the sentence and reduce his confinement.

VIII.

AMN COOK'S SENTENCE IS INAPPROPRIATELY SEVERE.

Amn Cook also largely stands on the opening brief for this argument. Still, two of the Government's arguments merit response. First, the Government tries to invoke the firearm in the car as a basis to increase the sentence. (Ans. at 53.) As it did in the factual sufficiency argument, the Government adds to the record when it concludes that "Appellant knew that there was risk associated with this operation in that he found it necessary to bring a firearm and ammunition with him." (Ans. at 53 (citing R. at 327, 430)), but its citations do not support the conclusion. It seeks to harness the firearm to explain the massive disparity with federal sentencing in comparable cases. But to even apply a dangerous-weapon sentencing enhancement, the Government would have to show that Amn Cook, rather than QM, possessed the weapon. *See, e.g.*, *United States v. Stapelon*, 39 F.4th 1320, 1334 (11th Cir. 2022) (finding the dangerous-weapon enhancement appropriate where testimony established the appellant was carrying the firearm at issue). This it could not do where the evidence showed QM brought the weapon and Amn Cook was unaware.

(R. at 335; DE A at 27:30-28:25.)

Second, the Government seeks to minimize the value of the cited cases because they are "dated." (Ans. at 51.) The Government does not explain why these cases, the oldest of which is from 1994, should be ignored on this basis.

While nothing requires this Court to compare sentences in this case,[3] the novelty of the charges makes it worthy of such consideration. This Honorable Court should review the penalty landscape in comparable cases and find the sentence inappropriately severe.

WHERFORE, Amn Cook respectfully requests this Honorable Court set aside his sentence, reduce confinement, and lower the dishonorable discharge to a bad-conduct discharge.

IX.

THE CONVENING AUTHORITY FAILED TO PROVIDE REASONING FOR DENYING AMN COOK'S REQUEST FOR DEFERMENT OF REDUCTION IN RANK AND FORFEITURES.

The Government confuses waiver of automatic forfeitures (which requires dependents that Amn Cook does not have) with deferment. (Ans. at 59.) Amn Cook did not request waiver of forfeitures; he only requested deferment.

WHEREFORE, Amn Cook respectfully requests this Honorable Court remand for the convening authority to provide a rationale for denying Amn Cook's deferment request.

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[3] *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citing *United States v. Wacha*, 55 M.J. 266, 267–68 (C.A.A.F. 2001)).

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 5 January 2024.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40333**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Jakalien J. COOK	)	**CHANGE**
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 12th day of April, 2024,

ORDERED:

That the record of trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

FOR THE COURT

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