IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Second Lieutenant (2Lt) **AUSTIN J. VAN NELSON** United States Air Force *Appellant*	)	No. ACM 40401 7 March 2023

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 the 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 **17 May 2023**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 49 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,

GRANTED
8 MAR 2023

ALEXANDRA K. FLESZAR, 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 7 March 2023.

Respectfully submitted,

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

8 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 to the Air Force Appellate Defense Division on 8 March 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 (SECOND)**
v.	)	Before Panel No. 2
Second Lieutenant (2Lt) **AUSTIN J. VAN VELSON** United States Air Force *Appellant*	)	No. ACM 40401 8 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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant, Second Lieutenant Austin Van Velson,[1] 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 **16 June 2023**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 26 July and 3 October 2022, at Laughlin Air Force Base (AFB), Texas, Appellant was tried and convicted by a military judge sitting as a General Court-Martial. R. at 50-52. Consistent with his pleas, the military judge found him guilty of one charge in violation of Article 134, Uniform Code of Military Justice (UMCJ), consisting of one specification of possession of child ıy (Specification 1) and one specification of communicating indecent language ion 2). R. at Vol. 1, Entry of Judgement in the Case of *United States v. Second Lieutenant Austin J. Van Velson.*

MOOT
12 MAY 2023

[1] Though this case was docketed with this Honorable Court listing the name "Van Nelson," review of the record demonstrates Appellant's last name is actually "Van Velson." *See*, *e.g.*, Record (R.) at 1-5.

The military judge sentenced Appellant to 18 months' confinement for Specification 1 and six months' confinement for Specification 2[2] and to be dismissed from the service. R. at 236. The convening authority took no action on the findings or sentence and denied Appellant's request for waiver and deferment. R. at Vol. 1, Convening Authority Decision on Action – *U.S. v. 2d Lt Austin Van Velson*, dated 21 Nov 22.

The record of trial consists of nine prosecution exhibits, 14 defense exhibits, 19 appellate exhibits; the record is 237 pages. Appellant is currently confined. Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

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

[2] The military judge imposed consecutive sentences to confinement. R. at 236.

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 8 May 2023.

Respectfully submitted,

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

9 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 to the Air Force Appellate Defense Division on 9 May 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 TO AMEND**
v.	)	Before Panel No. 2
Second Lieutenant (2Lt) **AUSTIN J. VAN VELSON** United States Air Force *Appellant*	)	No. ACM 40401
	)	10 May 2023

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

Pursuant to Rule 23 and 23.3(n)[1] of this Honorable Court's Rules of Practice and Procedure, Appellant, Second Lieutenant (2Lt) Austin J. Van Velson, respectfully moves to amend the following pleading previously filed with this Court: Motion For Enlargement of Time (Second), dated 8 May 2023.

New counsel for Appellant, Maj Spencer Nelson, was just assigned to the case given undersigned counsel's pending terminal leave on 1 June 2023. Accordingly, the motion requires amendment both to include the signature of new counsel to allow for his appearance on the record, as well as to indicate the requirement for newly assigned counsel to have time to review Appellant's case.

Counsel is filing this motion with the Court upon receipt of newly assigned counsel for [illegible]nt's case; information pertinent to this Court's consideration of the motion. Counsel [illegible]his Court permit the four pages attached to the instant motion be used to amend the [illegible]on for Enlargement of Time (Second).

GRANTED
12 MAY 2023

[1] "If counsel discovers a pleading previously submitted to the Court requires correction, counsel may file a motion to amend the pleading. The motion will include a proposed corrected copy of the page(s) of the pleading that require correction." A.F. CT. CRIM. APP. R. 23.3(n).

The corrected Pages 1-4 of the motion are appended to this filing and will constitute service on both the Government and this Court. Under Rule 23.2, Government counsel should be permitted two business days to review the new pages and determine if the Government desires to respond accordingly.

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

Respectfully submitted,

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

SPENCER R. NELSON, 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 10 May 2023.

Respectfully submitted,

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

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

APPENDIX TO MOTION TO AMEND
(Motion for Enlargement of Time (Second), filed 8 May 2023)

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT**
Appellee	)	**OF TIME (SECOND)**
	)	
v.	)	Before Panel No. 2
	)	
Second Lieutenant (2Lt)	)	No. ACM 40401
AUSTIN J. VAN VELSON	)	
United States Air Force	)	10 May 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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant, Second Lieutenant Austin Van Velson,[1] 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 **16 June 2023**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 26 July and 3 October 2022, at Laughlin Air Force Base (AFB), Texas, Appellant was tried and convicted by a military judge sitting as a General Court-Martial. R. at 50-52. Consistent with his pleas, the military judge found him guilty of one charge in violation of Article 134, Uniform Code of Military Justice (UMCJ), consisting of one specification of possession of child pornography (Specification 1) and one specification of communicating indecent language (Specification 2). R. at Vol. 1, Entry of Judgement in the Case of *United States v. Second Lieutenant Austin J. Van Velson.*

[1] Though this case was docketed with this Honorable Court listing the name "Van Nelson," review of the record demonstrates Appellant's last name is actually "Van Velson." *See*, *e.g.*, Record (R.) at 1-5.

The military judge sentenced Appellant to 18 months' confinement for Specification 1 and six months' confinement for Specification 2[2] and to be dismissed from the service. R. at 236. The convening authority took no action on the findings or sentence and denied Appellant's request for waiver and deferment. R. at Vol. 1, Convening Authority Decision on Action – *U.S. v. 2d Lt Austin Van Velson*, dated 21 Nov 22.

The record of trial consists of nine prosecution exhibits, 14 defense exhibits, 19 appellate exhibits; the record is 237 pages. Appellant is currently confined.

Through no fault of Appellant's, Maj Fleszar has been working on other assigned matters and has not yet started her review of Appellant's case. Maj Fleszar will be commencing terminal leave on . Maj Nelson has just been assigned as new counsel for Appellant, and has similarly not yet started review of Appellant's case. Accordingly, an enlargement of time is necessary to allow Maj Nelson to review Appellant's case and advise Appellant regarding potential errors.

[2] The military judge imposed consecutive sentences to confinement. R. at 236.

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

Respectfully submitted,

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

SPENCER R. NELSON, 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 10 May 2023.

Respectfully submitted,

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

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

10 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S AMENDED MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 Amended 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.

GRANTED
12 MAY 2023

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 10 May 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 WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	
	)	Before Panel No. 2
Second Lieutenant (2Lt) **AUSTIN J. VAN VELSON** United States Air Force *Appellant*	)	No. ACM 40401 23 May 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. Maj Spencer R. Nelson has been detailed substitute counsel in undersigned counsel's stead. A thorough turnover of the record between counsel has been completed.

Undersigned counsel will be separating from Active Duty with the United States Air Force effective . Undersigned counsel's terminal leave begins on . Undersigned counsel has accepted a position as an attorney with .

If undersigned counsel were to remain as counsel on the case, it would be her seventh priority. Her first priority is a Supplement to the Petition for Grant of Review before the Court of Appeals for the Armed Forces in *United States v. Rodriguez*, 0218, with a ROT consisting of four volumes, seven motions, three exhibits, one defense exhibit, and a 70-page transcript, due 30 May 2023.

GRANTED
1 JUN 2023

Her second priority is a Reply to the Government's Answer in *United States v. Lee*, ACM No. 40258, with the Government's Answer due on 26 May 2023 and the Reply due on 2 June 2023. In this case, the record of trial consists of five prosecution exhibits, eleven defense exhibits, and twenty-four appellate exhibits; the transcript is 595 pages. These priorities will take undersigned counsel to commencement of her terminal leave. Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started review of Appellant's case.

Though undersigned counsel is in the process of transferring to the United States Air Force Reserves, her scroll currently remains pending. In any event, she would be unable to begin her Reserve service until . Given the location of Appellant's case in undersigned counsel's docket, undersigned counsel's impending separation from the Active Duty Air Force, and her existing caseload, it is in Appellant's best interest that undersigned counsel be permitted to withdraw and that he be represented by Maj Spencer R. Nelson. Maj Nelson expects his assignment with the Appellate Defense Division to continue through at least . He will continue to represent Appellant and file all motions and briefs as necessary.

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, undersigned counsel respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

ALEXANDRA K. FLESZAR, 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 foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 May 2023.

Respectfully submitted,

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	8 June 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 July 2023**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he [illegible]cord of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 November

GRANTED
9 JUN 2023

The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined.

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

8 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S AMENDED MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 Amended 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 to the Air Force Appellate Defense Division on 8 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, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	6 July 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **15 August 2023**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he [illegible]ecord of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 November

GRANTED

7 JULY 2023

The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined.

Appellate counsel is currently assigned 23 cases; 12 cases are pending initial AOEs before this Court. Counsel has two Supreme Court petitions for certiorari. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Five Air Force Court cases have priority over the present case:

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

2. *United States v. Saul*, ACM 40341 – On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of

Article 109, UCMJ; one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. R. at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022. The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined. Counsel has not yet started his review of Appellant's case.

3. *United States v. Navarro Aguirre*, ACM 40354 – On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, UCMJ; one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ.[1] R. at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances; to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. ROT, Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances

[1] Appellant was charged, but acquitted of various specifications.

from the date of the entry of judgment and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.* The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined. Counsel has not yet started his review of Appellant's case.

4. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has not yet reviewed this case.

5. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in

violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 6 July 2023.

Respectfully submitted,

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

7 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S AMENDED MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 Amended 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 to the Air Force Appellate Defense Division on 7 July 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 (FIFTH)**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	8 August 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 September 2023**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 November 2022.

The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined.

Appellate counsel is currently assigned 26 cases; 14 cases are pending initial AOEs before this Court. Counsel has two Supreme Court petitions for certiorari. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Four Air Force Court cases have priority over the present case:

1. *United States v. Saul*, ACM 40341 – On 15 April 2022, pursuant to mixed pleas, a Military Judge sitting at a general court-martial, at Tinker Air Force Base, OK, convicted Appellant of one charge, one specification of wrongfully destroying property, in violation of Article 109, UCMJ; one charge, one specification of wrongfully using a controlled substance, in violation of Article 112A, UCMJ; and one charge, one specification of willful dereliction of duty, in violation of Article 90, UCMJ. R. at 1162. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to forfeit $1,000 pay for 9 months, to be confined for nine months, and to be discharged with a bad conduct service characterization. R. at 1265. The Convening Authority took no action on the findings or sentence and denied Appellant's request for waiver of all automatic forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 25 May 2022. The ROT consists of nine volumes, 15 prosecution exhibits, two defense exhibits, and 51 appellate exhibits. The transcript is 1266 pages. Appellant is not confined. Counsel is finalizing the AOE for submission.

2. *United States v. Navarro Aguirre*, ACM 40354 – On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-

McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, UCMJ; one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ.[1] R. at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances; to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. ROT, Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgment and ordered it to be remitted without further action, unless the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.* The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined. Counsel has started an initial review of the case.

3. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The

[1] Appellant was charged, but acquitted of various specifications.

Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has not yet reviewed this case.

4. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

9 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 9 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 40401**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Austin J. VAN VELSON	)	
Second Lieutenant (O-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 8 August 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 10th day of August, 2023,

ORDERED:

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

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 (SIXTH)**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	7 September 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 October 2023**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he

cord of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 November

GRANTED
8 SEP 2023

The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined.

Appellate counsel is currently assigned 27 cases; 14 cases are pending initial AOEs before this Court. Counsel has two Supreme Court petitions for certiorari, one case pending a CAAF supplement, and oral argument at the CAAF at the end of October. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Three Air Force Court cases have priority over the present case:

1. *United States v. Navarro Aguirre*, ACM 40354 – On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, UCMJ; one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ.[1] R. at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances; to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. ROT, Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgment and ordered it to be remitted without further action, unless

[1] Appellant was charged, but acquitted of various specifications.

the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.* The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is confined. Counsel has started an initial review of the case.

2. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has not yet reviewed this case.

3. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official

statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

8 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S AMENDED MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 Amended 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.

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 8 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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	5 October 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 November 2023**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 261 days have elapsed. On the date requested, 300 days will have elapsed.

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he deni Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 November 2022.

GRANTED
10 OCT 2023

The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined.

Appellate counsel is currently assigned 24 cases; 14 cases are pending initial AOEs before this Court. Counsel has a Supreme Court petition for certiorari, one case pending a CAAF supplement, and oral argument at the CAAF on 25 October 2023. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Three Air Force Court cases have priority over the present case:

1. *United States v. Navarro Aguirre*, ACM 40354 – On 26 March 2022, pursuant to mixed pleas, a Military Judge and a mixed panel sitting as a general court-martial at Joint Base Lewis-McChord, WA, convicted Appellant of one charge, one specification of failure to obey a lawful order, in violation of Article 92, UCMJ; one charge, two specifications of wrongful use of controlled substances, in violation of Article 112a, UCMJ; one charge, one specification of reckless driving while using a controlled substance, in violation of Article 113, UCMJ; and one charge, two specifications of assault, in violation of Article 128, UCMJ.[1] R. at 209, 849. The Military Judge sentenced Appellant to be reprimanded; to be reduced to the grade of E-1; to forfeit all pay and allowances; to be confined for two years and two months; and to be discharged with a bad conduct service characterization. R. at 895. The Convening Authority took no action on the findings. ROT, Vol. 1, Convening Authority Decision on Action, 4 May 2022. The Convening Authority suspended the first six months of the adjudged forfeiture of total pay and allowances from the date of the entry of judgment and ordered it to be remitted without further action, unless

[1] Appellant was charged, but acquitted of various specifications.

the suspension was previously vacated. *Id.* The collection of the remaining total pay and allowances would begin at the end of the period of suspension, or sooner if vacated. *Id*. The Convening Authority approved the remainder of the sentence. *Id.* The Convening Authority approved the Appellant's request for waiver of all automatic forfeitures for a period of six months and directed them to Appellant's spouse. *Id.* The ROT consists of nine volumes, 14 Prosecution Exhibits, 16 Defense Exhibits, 47 Appellate Exhibits, and one Court Exhibit. The transcript is 896 pages. The Appellant is not confined. Counsel has reviewed the entire record and is drafting the AOE.

2. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has not yet reviewed this case.

3. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in

violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

5 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S AMENDED MOTION FOR ENLARGEMENT OF TIME ACM 40401 Panel No. 2

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

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

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

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

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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 5 October 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, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	6 November 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 December 2023**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency [illegible] to include a request for deferment and waiver of automatic forfeitures, which he [illegible]ord of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 November 2022.

GRANTED
9 NOV 2023

The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined.

Appellate counsel is currently assigned 24 cases; 13 cases are pending initial AOEs before this Court. Counsel has a Supreme Court petition for certiorari and three cases pending CAAF supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Counsel filed the AOE for *United States v. Navarro Aguirre*, ACM 40354, contemporaneously with this motion. Two Air Force Court cases have priority over the present case:

1. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has not yet reviewed this case.

2. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128

Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 6 November 2023.

Respectfully submitted,

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

8 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 military 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, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 8 November 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 (NINTH)**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	6 December 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his ninth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 January 2024**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 November 2022.

The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined.

Appellate counsel is currently assigned 23 cases; 13 cases are pending initial AOEs before this Court. Counsel has a Supreme Court petition for certiorari to file and one case pending CAAF supplement. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time. Two Air Force Court cases have priority over the present case:

1. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel has started his review of this case.

2. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in

violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 6 December 2023.

Respectfully submitted,

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

8 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 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 year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not started review of the record of trial at this late stage of the appellate process.

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

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 8 December 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 40401**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Austin J. VAN VELSON	)	
Second Lieutenant (2d Lt)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 6 December 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 12th day of December, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **12 January 2024**.

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
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	5 January 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his tenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **11 February 2024**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 353 days have elapsed. On the date requested, 390 days will have elapsed.

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 November 2022.

GRANTED
9 JAN 2024

The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined.

Appellate counsel is currently assigned 23 cases; 13 cases are pending initial AOEs before this Court. Counsel has three pending CAAF Petitions and Supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time.

Since his last extension of time, Counsel has:

1. Finalized and filed a two-issue, 50-page Supreme Court petition for certiorari in *United States v. Cunningham*, 83 M.J. 367, No. 23-0027, 2023 CAAF LEXIS 520 (C.A.A.F. July 21, 2023), *Petition for Writ of Certiorari filed*

2. Reviewed approximately 700 transcript pages in *United States v. Ramirez*, No. ACM 40373

3. Took 9 days of leave for Christmas vacation

4. Prepared for, and participated in, three moots as a judge

Two Air Force Court cases have priority over the present case:

1. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits,

and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Except for sealed materials, Counsel has finished his review of this case. Counsel filed a motion to view sealed materials on 3 January 2024 which has not yet been ruled on. In his last EOT motion on 3 January 2024, which was granted, Counsel forecasted to this Court that he does not anticipate needing another EOT unless unforeseen circumstances arise.

2. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

Given this Court's order on 12 December 2023, stating that further requests for an extension of time "may necessitate a status conference," Counsel states the following: He has no planned leave for the month of January and intends to finish *United States v. Ramirez*, No. ACM 40373 in the next month. The only task that Counsel must complete in conjunction with *Ramirez*

is a CAAF Supplement in *United States v. Lampkins*, No. 24-0069, 2023 CAAF Lexis 896 (C.A.A.F. Dec. 28, 2023), *Application for Extension Previously Granted*. This supplement is due on 18 January 2024. Following these tasks, *Serjak* will be Counsel's number one priority.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 5 January 2024.

Respectfully submitted,

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

8 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 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 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 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not started review of the record of trial at this late stage of the appellate process.

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

J. 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 8 January 2024.

J. 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, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	2 February 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eleventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 March 2024**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 381 days have elapsed. On the date requested, 420 days will have elapsed.

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 November 2022.

The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined.

Appellate counsel is currently assigned 23 cases; 13 cases are pending initial AOEs before this Court. Counsel has one pending Supreme Court Reply Brief (Answer due to Court and Counsel on 20 February 2024) and four pending CAAF Petitions and Supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time.

Since his last extension of time, Counsel has:

1. Written and filed a two issue, 310-page CAAF Supplement in *United States v. Lampkins*, No. 24-0069, 2023 CAAF Lexis 896 (C.A.A.F. Dec. 28, 2023)

2. Finished reviewing the record in *United States v. Ramirez*, No. ACM 40373 and drafted (thus far) a 6-issue 37-page AOE with an originally drafted, 50+ page Appendix.

3. Prepared for, and participated in, two moots as a judge

Three Air Force Court cases have priority over the present case:

1. *United States v. Ramirez*, No. ACM 40373 – On 26 August 2022, contrary to his pleas, a Military Judge sitting at a general court-martial at Robins Air Force Base, Georgia, convicted Appellant of one charge, one specification of wrongfully possessing child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 705. The Military Judge sentenced Appellant to be reprimanded, confined for 14 months, and dishonorably discharged. R. at 767. The Convening Authority took no action on the findings and approved the sentence in its entirety. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 26 Sep 2022. The Convening Authority denied Appellant's request for waiver of automatic forfeitures. *Id.* The ROT consists of seven volumes, 16 prosecution exhibits, 40 defense exhibits, and 35 appellate exhibits. The transcript is 767 pages. The Appellant is not confined. Counsel is finalizing the AOE for submission to this Court on 8 February 2024.

2. *United States v. Ellis*, No. ACM 40430[1] – On 21 October 2022, in accordance with his pleas, a Military Judge in a general court-martial, at Spangdahlem Air Base, Germany, convicted Appellant of one charge, two specifications of assault, in violation of Article 128, UCMJ; and an additional charge, three specifications of assault in violation of Article 128, UCMJ. ROT, Vol. 1, Entry of Judgment, dated 13 December 2022.[2] R. at 359. The Military Judge sentenced Appellant to be reprimanded, to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 640 days, to be discharged from the service with a bad conduct service characterization. *Id*.; R. at 398. The Convening Authority took no actions on the findings, sentence, and denied Appellant's requests for deferments. ROT, Vol. 1, Convening Authority Decision on Action, 26 November 2022. The ROT consists of seven volumes, nine prosecution exhibits, ten defense exhibits, 38 appellate exhibits, and one court exhibit. Appellant is currently confined. Counsel has not yet started his review of this case.

3. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months

[1] On 29 January 2024, this Court (Panel 2) approved Appellant's request for EOT 9. Without prior notice and without any status conferences, this Court said, "Given the nature of the case and the number of enlargements granted thus far, the court is not willing to grant any further enlargements of time absent exceptional circumstances." As such, Counsel has changed the prioritization of this guilty plea case over the two cases docketed before this case.

[2] Various charges and specifications were withdrawn and dismissed with prejudice.

and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

Given this Court's order on 12 December 2023, stating that further requests for an extension of time "may necessitate a status conference," Counsel states the following: He intends to finish *United States v. Ramirez*, No. ACM 40373 and file it on 8 February 2024. After *Ramirez*, Counsel intends to review and file the AOE in *Ellis* before this Court's 1 March 2024 deadline. In conjunction with *Ellis*, counsel must complete a four issue CAAF Petition and Supplement in *United States v. Casillas*, No. ACM 40302, 2023 CCA LEXIS 527 (A.F. Ct. Crim. App. Dec. 15, 2023). The Petition is due on or about 8 February 2024. Counsel will also respond to the Solicitor General's Answer in *United States v. Cunningham*, 83 M.J. 367, No. 23-0027, 2023 CAAF LEXIS 520 (C.A.A.F. July 21, 2023), *Petition for Writ of Certiorari filed* which is due on 20 February 2024.

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

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division

United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 2 February 2024.

Respectfully submitted,

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

2 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 more than 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 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 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not started review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 February 2024.

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 40401**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Austin J. VAN VELSON	)	
Second Lieutenant (2d Lt)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 2 February 2024, counsel for Appellant submitted a Motion for Enlargement of Time (EOT) (Eleventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

This court held a status conference on 6 February 2024 to discuss the progress of Appellant's case. Ms. Mary Ellen Payne represented the Government, and Major Spencer Nelson represented Appellant. Lieutenant Colonel Allen Abrams also attended as the Deputy Chief of the Appellate Defense Division. Appellant's counsel explained that due to an order from this court in another case (*United States v. Ellis*) he had to reprioritize his cases. Now, out of his cases pending appeal before this court, Appellant's case is fourth in order of priority (behind *United States v. Ramirez* (No. ACM 40373, docketed 15 November 2022), *United States v. Ellis* (No. ACM 40430, docketed 7 March 2023), and *United States v. Serjak* (No. ACM 40392, docketed 19 December 2022)). Appellant's counsel informed the court that he has not begun to review Appellant's case and will not be able to review this case until the other cases are filed. Appellant's counsel has his client's permission and has support for his prioritization from Appellate Defense Division leadership. He further represented that, if granted, there may be up to two additional motions for an enlargement of time in this case.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. However, while the court will allow Appellant's counsel another 30 days to submit Appellant's brief, the court encourages counsel to exercise due diligence and review this case to determine the level and amount of work required to prepare any assignments of error. Appellant's case has been docketed with this court since 17 January 2023, which is over a year now.

Accordingly, it is by the court on this 8th day of February, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eleventh) is **GRANTED**. Appellant shall file any assignments of error not later than **12 March 2024**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for enlargement of time may necessitate another status conference in order for counsel to provide an update of progress on Appellant's case.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (TWELFTH)**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	29 February 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his twelfth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **11 April 2024**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 408 days have elapsed. On the date requested, 450 days will have elapsed.

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 November 2022.

The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined.

Appellate counsel is currently assigned 23 cases; 11 cases are pending initial AOEs before this Court. Counsel has four pending CAAF Petitions and Supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time.

Since his last extension of time, Counsel has:

1. Filed a 116-page AOE in *United States v. Ramirez*, No. ACM 40373 and various versions of a Motion to Exceed Page Limit as the original was returned with no action from this Court

2. Petitioned the CAAF and finalized a four-issue, 48-page CAAF Supplement in *United States v. Casillas*, No. 24-0089/AF, 2024 CAAF LEXIS 88 (C.A.A.F. Feb. 13, 2024)

3. Reviewed the record and filed a Motion for Withdrawal from Appellate Review and Motion to Attach in *United States v. Ellis*, No. ACM 40430

4. Prepared for, and participated in, two moots as a judge

Two Air Force Court cases have priority over the present case:

1. *United States v. Ellis*, No. ACM 40430[1] – On 21 October 2022, in accordance with his pleas, a Military Judge in a general court-martial, at Spangdahlem Air Base, Germany, convicted Appellant of one charge, two specifications of assault, in violation of Article 128, UCMJ; and an additional charge, three specifications of assault in violation of Article 128, UCMJ. ROT, Vol. 1, Entry of Judgment, dated 13 December 2022.[2] R. at 359. The Military Judge sentenced Appellant to be reprimanded, to forfeit all pay and allowances, to be reduced to the grade of E-1, to be

[1] On 29 January 2024, this Court (Panel 1) approved Appellant's request for EOT 9. Without prior notice and without any status conferences, this Court said, "Given the nature of the case and the number of enlargements granted thus far, the court is not willing to grant any further enlargements of time absent exceptional circumstances." As such, Counsel has changed the prioritization of this guilty plea case over the two cases docketed before this case.

[2] Various charges and specifications were withdrawn and dismissed with prejudice.

confined for 640 days, to be discharged from the service with a bad conduct service characterization. *Id*.; R. at 398. The Convening Authority took no actions on the findings, sentence, and denied Appellant's requests for deferments. ROT, Vol. 1, Convening Authority Decision on Action, 26 November 2022. The ROT consists of seven volumes, nine prosecution exhibits, ten defense exhibits, 38 appellate exhibits, and one court exhibit. Appellant is currently confined. On 26 February 2024, Counsel filed a Motion for Withdrawal from Appellate Review and Motion to Attach Document which this Court has not yet acted upon.

2. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has started his review of the case.

Given this Court's order on 8 February 2024, stating that further requests for an extension of time "may necessitate another status conference," and that Counsel should "exercise due

diligence and review this case to determine the level and amount of work required," Counsel states the following: He intends to finish reviewing *Serjak* and start drafting the AOE in the next 30 days. Concurrent with *Serjak*, Counsel must incorporate feedback and file *Casillas* with CAAF. After that, Counsel must petition the CAAF and write two CAAF Supplements also concurrently with his review of *Serjak*. Given that a full case review and client briefing is required to determine the amount of work required on any given appellate case, Counsel cannot opine with any *certainty* on the "level and amount of work" that *Van Velson* will require. However, given a cursory review, Counsel believes a review of the case will take three days and the amount of time to write the AOE will be dependent on the number and complexity of the issues and client input.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 29 February 2024.

Respectfully submitted,

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

1 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 more than a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 450 days in length. Appellant's 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 3 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not started review of the record of trial at this late stage of the appellate process.

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

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 March 2024.

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 40401**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Austin J. VAN VELSON	)	
Second Lieutenant (O-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 29 February 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Twelfth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

This court held a status conference on 5 March 2024 to discuss the progress of Appellant's case. Ms. Mary Ellen Payne represented the Government, and Major Spencer Nelson represented Appellant. Lieutenant Colonel Allen Abrams also attended as the Deputy Chief of the Appellate Defense Division. Appellant's counsel explained Appellant's case is second in order of priority (behind *United States v. Serjak,* No. ACM 40392, docketed 19 December 2022). Appellant's counsel informed the court that he has begun to review Appellant's case and has his client's permission to request this extension.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. While the court will allow Appellant's counsel another enlargement of time, we will only approve 25 days to submit Appellant's brief. Appellant's case has been docketed with this court since 17 January 2023, which is well over a year now.

Accordingly, it is by the court on this 6th day of March, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Twelfth) is **GRANTED IN PART**. Appellant shall file any assignments of error not later than **6 April 2024**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for enlargement of time may necessitate another status conference in order for counsel to provide an update of progress on Appellant's case.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRTEENTH)**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	27 March 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his thirteenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 May 2024**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 435 days have elapsed. On the date requested, 475 days will have elapsed.

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 November 2022.

The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined.

Appellate counsel is currently assigned 21 cases; 10 cases are pending initial AOEs before this Court. Counsel has two pending CAAF Petitions and Supplements. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time.

Since his last extension of time, Counsel has:

1. Drafted and filed a five-issue, 38-page CAAF Supplement in *United States v. Casillas*, No. 24-0089/AF, 2024 CAAF LEXIS 88 (C.A.A.F. Feb. 13, 2024)

2. Drafted and filed a two-issue, 24-page CAAF Supplement in *United States v. Saul*, No. 24-0098/AF, 2024 CAAF LEXIS 114 (C.A.A.F. Feb. 26, 2024)

3. Drafted and filed a three-issue, 238-page CAAF Supplement in *United States v. Fernandez*, No. 24-0101/AF, 2024 CAAF LEXIS 140 (C.A.A.F. Mar. 7, 2024)

4. Attended a one-week TDY at Maxwell Air Force Base for the Accident Investigation Board Course, in preparation for counsel's upcoming PCA.

5. Prepared for, and participated in, two moots as a judge

One Air Force Court cases has priority over the present case:

1. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for

deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has reviewed all unsealed exhibits, moved this Court to review sealed materials, and is currently reviewing the transcript.

Given this Court's order on 6 March 2024, stating that "any further requests for enlargement of time may necessitate another status conference in order for counsel to provide an update of progress on Appellant's case," counsel states the following: Counsel is reviewing *Serjak* diligently, but during his TDY to Maxwell, AFB, counsel was only able to attend class and work on the *Fernandez* CAAF Supplement, which he submitted on the same date of this filing. Counsel understands the significance of having such a high EOT count; however, counsel is working diligently to complete all of his assigned tasks. Counsel is optimistic that he will be able to start reviewing this case before the requested EOT period ends.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 27 March 2024.

Respectfully submitted,

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

29 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 more than 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 475 days in length. Appellant's excessive 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 14 of the 18 months provided 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.

Moreover, this is guaranteed not to be the final request for Enlargement of Time in this case: Appellant's counsel states that they only believe they will *begin* reviewing the record in this case within the current Enlargement. It is difficult to see how, even were the record of trial to be fully reviewed within the currently requested enlargement, subsequent enlargements would not be necessary to permit the drafting and filing of any assignments of error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion, or at a minimum, grant the current enlargement motion but place reasonable restrictions on any further motions of the same kind.

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 29 March 2024.

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 40401**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Austin J. VAN VELSON	)	
Second Lieutenant (O-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 27 March 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Thirteenth) 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. While the court will allow Appellant's counsel another enlargement of time, we will only approve 20 days to submit Appellant's brief, given that Appellant's case has been docketed with this court since 17 January 2023, which is well over a year.

Accordingly, it is by the court on this 29th day of March, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Thirteenth) is **GRANTED IN PART**. Appellant shall file any assignments of error not later than **26 April 2024**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for enlargement of time may necessitate another status conference in order for counsel to provide an update of progress on Appellant's case.

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 (FOURTEENTH)**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	16 April 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourteenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 May 2024**. The record of trial was docketed with this Court on 17 January 2023. From the date of docketing to the present date, 455 days have elapsed. On the date requested, 495 days will have elapsed.

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record (R.) at 93. The Military Judge sentenced Appellant to 24 months confinement a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 21 November 2022.

The ROT consists of four volumes, nine prosecution exhibits, 14 defense exhibits, and 29 appellate exhibits. The transcript is 237 pages. The Appellant is confined.

GRANTED
19 APR 2024

Appellate counsel is currently assigned 20 cases; 10 cases are pending initial AOEs before this Court. Counsel has one pending CAAF Petition and Supplement. Through no fault of Appellant, undersigned counsel has not yet finished his review of Appellant's case. Counsel has reviewed the entire record except for sealed materials and the transcript. Counsel filed a Motion to Examine Sealed Materials contemporaneously with this request for an extension of time. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time.

Since his last extension of time, Counsel has:

1. Drafted and filed a two-issue, 26-page CAAF Supplement in *United States v. Jackson*, No. 24-0106/AF, 2024 CAAF LEXIS 178 (C.A.A.F. Mar. 25, 2024)

2. Reviewed approximately 1,000 pages of transcript in *United States v. Serjak*, No. ACM 40392

3. Prepared for, and participated in, three moots as a judge

One Air Force Court cases has priority over the present case:

1. *United States v. Serjak*, No. ACM 40392 – On 29 July 2022, contrary to his pleas, enlisted members in a General Court-Martial, at Royal Air Force Mildenhall, United Kingdom, convicted Appellant of one charge and one specification of assault, in violation of Article 128 Uniform Code of Military Justice (UCMJ); one charge, two specifications of sexual assault in violation of Article 120, UCMJ; and one charge and one specification of making a false official statement, in violation of Article 107 UCMJ. R. at 1413. The Military Judge sentenced Appellant to forfeit all pay and allowances, to be reduced to the grade of E-1, to be confined for 54 months and 100 days, and to be dishonorably discharged from the service. R. at 1481. The Convening Authority took no action on the findings, no action on the sentence, denied Appellant's request for deferment of the reduction in grade and automatic forfeitures, but approved Appellant's request

for waiver of all automatic forfeitures for six months. ROT, Vol. 1, Convening Authority Decision on Action, 19 August 2022. The ROT consists of 12 volumes, 14 prosecution exhibits, 10 defense exhibits, 3 court exhibits, and 84 appellate exhibits. Appellant is currently confined. Counsel has reviewed the entire record except for sealed materials and the last 300 pages of transcript.

Given this Court's order on 29 March 2024, stating that "any further requests for enlargement of time may necessitate another status conference in order for counsel to provide an update of progress on Appellant's case," counsel states the following: Counsel is reviewing *Serjak* diligently and has completed over half of his review for *Van Velson*. Barring unforeseen circumstances, Counsel will not be requesting another extension of time in this case.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 16 April 2024.

Respectfully submitted,

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

18 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40401 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 more than 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 495 days in length. Despite this lengthy delay, Appellant's counsel still has not completed their review of the record in this case, and thus will likely require at least one, if not more additional Enlargements of Time to file a brief.

At this point, Appellant's excessive delay 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 15 of the 18 months provided for this Court to issue a decision, which only leaves 3 months combined for the Appellant to file any Assignments of Error, and then the United States and this Court to perform their separate statutory responsibilities. There is simply no possibility for the appellate processing standards to be met in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion, or at a minimum, grant the current enlargement motion but place reasonable restrictions on any further motions of the same kind.

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 18 April 2024.

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, *Appellee,*	)	**MOTION TO EXAMINE SEALED MATERIAL**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt), **AUSTIN J. VAN VELSON,** United States Air Force, *Appellant.*	)	No. ACM 40401
	)	16 April 2024

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

Pursuant to Rules 3.1 and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully moves to examine the following sealed materials in Appellant's record of trial: Prosecution Exhibits 6, 7, and 8; and Appellate Exhibit IX. The Military Judge issued an order sealing the exhibits. App. Ex XVIII. Trial Counsel, Defense Counsel, and the Military Judge presented or reviewed these materials at trial. R. at 36, 37, 113, 114, and 130.

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

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United*

> *States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998).

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Division on 16 April 2024.

Respectfully submitted,

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL
v.	)	Before Panel No. 2
Second Lieutenant (O-1) **AUSTIN J. VAN VELSON** United States Air Force *Appellant.*	)	No. ACM 40401 17 April 2024

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Material. The United States does not object to Appellant's counsel reviewing Prosecution Exhibits 6, 7, and 8, as well as Appellate Exhibit IX, provided the United States is also permitted to review the sealed exhibits as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

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

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
Military Justice and Discipline Directorate
United States Air Force

MARY ELLEN PAYNE
Associate Chief
Government Trial & Appellate Operations
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 17 April 2024

K ʊSAF
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 40401**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Austin J. VAN VELSON	)	
Second Lieutenant (O-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 16 April 2024, counsel for Appellant submitted a Motion to Examine Sealed Material. Specifically, counsel seeks to examine Prosecution Exhibits 6, 7, and 8, and Appellate Exhibit IX. The Government does not oppose the motion provided its counsel may also examine the sealed materials as necessary to respond to any assignments of error referencing those materials.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2024 ed.).

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. The court finds Appellant's counsel has made a colorable showing that review of the sealed materials is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 19th day of April, 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibits 6, 7, and 8, and Appellate Exhibit IX** subject to the following conditions:

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

No counsel granted access to the materials may photocopy, photograph, re-produce, disclose, or make available the content to any other individual with-out the court's prior written authorization.

FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

AUSTIN J. VAN VELSON,
Second Lieutenant (2d Lt),
United States Air Force
Appellant.

No. ACM 40401

BRIEF ON BEHALF OF APPELLANT

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

Counsel for Appellant

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UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt) **AUSTIN J. VAN VELSON,** United States Air Force *Appellant.*	)	No. ACM 40401 23 May 2024

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

ASSIGNMENTS OF ERROR

I.

WHETHER SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE WAS PROVIDENT UNDER *UNITED STATES V. BYUNGGU KIM*, 83 M.J. 235 (C.A.A.F. 2023), BECAUSE THE MILITARY JUDGE FAILED TO CONDUCT A HEIGHTENED PLEA INQUIRY REGARDING SECOND LIEUTENANT VAN VELSON'S FIRST AMENDMENT RIGHTS?

II.

WHETHER SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE WAS PROVIDENT UNDER *UNITED STATES V. WILCOX*, 66 M.J. 442 (C.A.A.F. 2008), BECAUSE THERE WAS NOT "A DIRECT AND PALPABLE CONNECTION BETWEEN SPEECH AND THE MILITARY MISSION OR MILITARY ENVIRONMENT"?

III.

WHETHER SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE, A CLAUSE 2, ARTICLE 134, UCMJ, OFFENSE, IS CONSTITUTIONAL, PROVIDENT, OR LEGALLY SUFFICIENT AS TO THE TERMINAL ELEMENT?

IV.

AS APPLIED TO SECOND LIEUTENANT VAN VELSON, WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN 2D LT VAN VELSON WAS NOT CONVICTED OF A VIOLENT OFFENSE?

STATEMENT OF THE CASE

On 3 October 2022, consistent with his pleas, a Military Judge sitting at a general court-martial at Laughlin Air Force Base, Texas, convicted Appellant of one charge, two specifications of possessing child pornography and using indecent language, in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 93. The Military Judge sentenced Appellant to 24 months confinement and a dismissal from the service. R. at 236. The Convening Authority took no action on the findings and sentence; he considered Appellant's clemency submission to include a request for deferment and waiver of automatic forfeitures, which he denied. *Convening Authority Decision on Action*.

STATEMENT OF FACTS

The Government charged 2d Lt Van Velson with "communicating in writing . . . certain indecent language, to wit: language describing lewd acts with a child, which was of a nature to bring discredit upon the armed forces." *Charge Sheet*. During the *Care*[2] inquiry, the Military Judge read the standard definitions pertaining to indecent language for 2d Lt Van Velson. R. at 79-81. When the Military Judge asked 2d Lt Van Velson to explain why he was guilty, 2d Lt Van Velson explained that he messaged with someone who represented themselves to be "an adult male with minor children." R. at 82. 2d Lt Van Velson said that he represented himself as "an adult female

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022).
[2] *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969).

with minor children." *Id*. 2d Lt Van Velson is not female and does not have children. Pros. Ex. 1. 2d Lt Van Velson explained, "We chatted about sexual activity with the minor children." R. at 82.

2d Lt Van Velson said his language was indecent "because it was grossly offensive to decency and propriety and would shock the morals of a member of the community. It was vulgar, disgusting, and was meant to incite lustful thoughts." *Id*. He told the Military Judge that his language was service discrediting because "[Detective] M.H., who was a civilian, found out that I was an Air Force officer; that I engaged in an offensive sexual discussion of this nature. That harmed the reputation of the Air Force and lower [*sic*] it in public esteem because officers are supposed to set the example in behavior and conduct." *Id.* The Military Judge asked, "Do you believe that upon learning that you were in the Air Force that that might lower [Detective M.H.'s] opinion of the Air Force?" R. at 88. 2d Lt Van Velson responded in the affirmative. *Id.*

2d Lt Van Velson confirmed that no one else was present for the conversation except for him and Detective M.H. R. at 83. When the Military Judge asked what the "exact language" was, 2d Lt Van Velson answered, "language concerning participating in sexual activities with minor children." *Id.* In follow-up questions, 2d Lt Van Velson said he asked Detective M.H.'s "persona" what he had "done" with his minor children. R. at 84. When the Military Judge asked 2d Lt Van Velson why he believed his language violated community standards, he responded, "Because sex with children is both illegal and immoral." R. at 86. The Military Judge never elicited specific language that 2d Lt Van Velson used nor did the Government offer any evidence of actual language prior to findings being announced. R. at 82-89. In sentencing, Detective M.H. conceded that the chat was "an untrue fantasy" since neither 2d Lt Van Velson nor himself were the persons they purported to be. R. at 103.

ARGUMENT

I.

SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE WAS NOT PROVIDENT UNDER *UNITED STATES V. BYUNGGU KIM*, 83 M.J. 235 (C.A.A.F. 2023), BECAUSE THE MILITARY JUDGE FAILED TO CONDUCT A HEIGHTENED PLEA INQUIRY REGARDING SECOND LIEUTENANT VAN VELSON'S FIRST AMENDMENT RIGHTS.

Standard of Review

This Court reviews a Military Judge's decision to accept a guilty plea for an abuse of discretion and the questions of law arising from a guilty plea de novo. *United States v. Byunggu Kim*, 83 M.J. 235, 238 (C.A.A.F. 2023).

Law and Analysis

Whenever there is the potential to criminalize constitutionally-protected conduct, "the colloquy between the military judge and an accused '*must* contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior.'" *Id*. at 239 (quoting *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2001)). This is required because a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id*. at 238 (citations omitted). "Without a proper explanation and understanding of the constitutional implications of the charge," an "[a]ppellant's admissions in his stipulation and during the colloquy regarding why he personally believed his conduct was service discrediting and prejudicial to good order and discipline do not satisfy" the requirement. *Id.* (internal citation omitted). This requirement was explained in *United States v. Hartman*, 69 M.J. 467 (C.A.A.F. 2011) and was recently affirmed in *Byunggu Kim*.

In *Hartman*, the Court of Appeals for the Armed Forces (CAAF) was troubled by the fact that the military judge failed to ask the appellant "whether he understood the relationship between

certain sections of the colloquy and the distinction between constitutionally protected behavior and criminal conduct. 69 M.J. at 469. The CAAF held that "[i]n the absence of a dialogue employing lay terminology to establish an understanding by the accused as to the relationship between the supplemental questions and the issue of criminality, we cannot view [an appellant's] plea as provident." *Id.* (citation and quotations omitted).

Last year, in *Byunggu Kim*, the CAAF affirmed the requirements of *Hartman* and overturned a conviction for indecent conduct for Sergeant Byunggu Kim. There, the government alleged the appellant committed indecent conduct by "conducting an internet search for 'rape sleep' and 'drugged sleep,' and that said conduct was of a nature to bring discredit upon the armed forces." 83 M.J. at 237. While the CAAF found that "the military judge conducted a thorough plea colloquy . . . [and a]ppellant was clear about the nature of the videos he searched for and watched and about why he watched them, as well as the service discrediting nature of his actions," "the military judge did not discuss [a]ppellant's First Amendment rights or any of the constitutional implications of his situation." *Id*. at 239.

The CAAF explained that the appellant's behavior occupied a "constitutional gray area similar to that at issue in *Hartman*," and though "[a]ppellant appeared to understand why his conduct was criminal," "the plea colloquy should have established why *possibly* constitutionally protected material could still be service discrediting in the military context." *Id*. (emphasis added). Because "the military judge did not discuss Appellant's First Amendment rights or any of the constitutional implications of his situation," and did not make sure that the appellant "understood why his behavior under the circumstances did not merit such protection," the CAAF concluded there was a substantial basis in law for questioning the plea, the guilty plea was improvident, and the military judge abused his discretion in accepting it. *Id.*

Here, the Military Judge similarly abused his discretion for two reasons. First, a court's analysis of indecent language and free speech must start with the actual words spoken and then move to the context in which they are spoken. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641, (1994) ("[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over *the content* of messages expressed by private individuals."); *FCC v. Pacifica Found.*, 438 U.S. 726, 744 (1978) ("[B]oth *the content* and the context of speech are critical elements of First Amendment."); *United States v. Hullett*, 40 M.J. 189, 191 (C.A.A.F. 1994) ("The test for determining whether language is indecent is whether *the particular language* is calculated to corrupt morals or excite libidinous thoughts.").[3] Here, the Military Judge never elicited the exact language, words, or phrases that 2d Lt Van Velson said. In fact, the Government never put into evidence the exact language 2d Lt Van Velson used until sentencing. While it is true that the Military Judge found out generally that the conversations were "about adults having sex with minor children," that is not sufficient for a First Amendment analysis. R. at 82. The Military Judge should have selected a few discrete statements—like in a child pornography case—to see and understand the actual language used. *See* R. at 62 ("What I'd like to do is go through and have you describe for me what each of these 9 videos and images depicted in the Bill of Particulars, starting with number one."). This is especially needed in this case since 2d Lt Van Velson and Detective M.H. were using fictional personas and engaging in talk that amounted to "an untrue fantasy." R. at 106. The Military Judge's failure to analyze the "particular language" is an abuse of discretion. *Hullett*, 40 M.J. at 191.

Second, the Military Judge did not "adhere to the heightened standard outlined" in *Hartman* which the CAAF recently reaffirmed in *Byunggu Kim*. 83 M.J. at 239. Although "the

[3] All emphases added.

military judge conducted a thorough plea colloquy with regard to the elements of the offense," this was not enough to find the plea provident because he did not "discuss with the appellant the relevant distinction between constitutionally protected behavior and criminal conduct." *Id.* In other words, he never mentioned the possibility that 2d Lt Van Velson's language could have been protected by the First Amendment. Again, this heightened inquiry was needed in this case since 2d Lt Van Velson and Detective M.H. were using speech, specifically using fictional personas to engage in talk that amounted to "an untrue fantasy." R. at 106. The Military Judge's failure was an abuse of discretion, even if the Military Judge were to have ultimately found that the indecent language or obscene language fell outside of the scope of the First Amendment protections. *Byunggu Kim*, 83 M.J. at 239 ("As a result, the plea colloquy should have established why possibly constitutionally protected material could still be service discrediting in the military context.").

Finally, it is worth noting that while *Byunggu Kim* was recently decided, *Hartman* was not. The CAAF decided *Hartman* in 2011, and as the CAAF explained, it has "been clear that the colloquy between the military judge and an accused '*must* contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior.'" *Id.* Moreover, in 2014, the CAAF "further clarified that such discussion is required in situations where an Article 134, UCMJ, charge implicates constitutionally protected conduct." *Id*. (citing *United States v. Moon*, 73 M.J. 382, 388 (C.A.A.F. 2014)). The Military Judge should have known that "[w]hen a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of 'critical significance.'" *Hartman*, 69 M.J. at 468 (quoting *United States v. Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003)). Even assuming, *arguendo*, that *Hartman* was out of the picture, 2d Lt Van Velson would still prevail because "[a]n 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).

WHEREFORE, 2d Lt Van Velson requests that this Court find his guilty plea improvident.

II.

SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE WAS NOT PROVIDENT UNDER *UNITED STATES V. WILCOX*, 66 M.J. 442 (C.A.A.F. 2008), BECAUSE THERE WAS NOT "A DIRECT AND PALPABLE CONNECTION BETWEEN SPEECH AND THE MILITARY MISSION OR MILITARY ENVIRONMENT."

Standard of Review

This Court reviews a Military Judge's decision to accept a guilty plea for an abuse of discretion and the questions of law arising from a guilty plea de novo. *Byunggu Kim*, 83 M.J. at 238.

Law and Analysis

The CAAF in *United States v. Wilcox*, 66 M.J. 442, 448-49 (C.A.A.F. 2008), held that "a direct and palpable connection between speech and the military mission or military environment is also required for an Article 134, UCMJ, offense charged under a service discrediting theory." The CAAF reasoned, "If such a connection were not required, the entire universe of servicemember opinions, ideas, and speech would be held to the subjective standard of what some member of the public, or even many members of the public, would find offensive." *Id.*

Here, the Government provided no evidence that 2d Lt Van Velson's language affected the "military mission" or "military environment." *Id.* In fact, the Government put on no evidence during the findings case except for 2d Lt Van Velson's *Care* inquiry. *See* R. at 95 (entering Prosecution Exhibit 1). 2d Lt Van Velson's opinion on why his conduct was service discrediting amounted to speculative, reputational concerns that the investigator might have had upon learning

that 2d Lt Van Velson was an officer in the Air Force. R. at 82. When the Military Judge asked 2d Lt Van Velson about the service discrediting nature of his conduct, he asked, "Do you believe that upon learning that you were in the Air Force that *might* lower his opinion of the Air Force?" R. at 88 (emphasis added). Reputational concerns couched in unsubstantiated, speculative questions and answers do not meet a "direct and palpable" standard. *Wilcox*, 66 M.J. at 448-49.

WHEREFORE, 2d Lt Van Velson requests that this Court find his guilty plea improvident.

III.

SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE, A CLAUSE 2, ARTICLE 134, UCMJ, OFFENSE, IS NOT CONSTITUTIONAL, PROVIDENT, OR LEGALLY SUFFICIENT AS TO THE TERMINAL ELEMENT.

Standard of Review

This Court reviews a Military Judge's decision to accept a guilty plea for an abuse of discretion and the questions of law arising from a guilty plea de novo. *Byunggu Kim*, 83 M.J. at 238.

Law and Analysis

The CAAF recently heard argument in *United States v. Wells*, 84 M.J. 113 (C.A.A.F. 2023). The issue granted in that case was, in part, whether "Appellant's conviction for a Clause 2, Article 134, UCMJ, offense [was] legally insufficient as to the terminal element." *Id.* Although that case dealt with a litigated specification, 2d Lt Van Velson asks this Court to find Clause 2 unconstitutional and his guilty plea improvident or legally insufficient. In the alternative, 2d Lt Van Velson asks this Court to decide the outcome of his case in line with the rationale that CAAF sets forth in *Wells*, given the appellant in that case asked CAAF to find Clause 2 unconstitutional and overrule *United States v. Phillips*, 70 M.J. 161, 163 (C.A.A.F. 2011).

Standing alone, decoupled from Clause 1, Clause 2 operates to criminalize "per se" service discrediting conduct, making it exceedingly difficult, if not impossible in some circumstances, to defend against the terminal element. No quantum of evidence or judicially tailored rule can cure the unconstitutional nature of Clause 2 because, ultimately, Clause 2 fails to provide fair notice of precisely what acts are forbidden and it allows discriminatory and arbitrary enforcement since the terminal element is meaningless. *Parker v. Levy*, 417 U.S. 733, 774-75 (1974) (Stewart, J., dissenting).

The constitutional problem with Clause 2 is that nothing in a record—other than the fact of the activity itself—is required to make a finding of guilt. For example, in *Phillips*, the terminal element was conclusively presumed from the possession of child pornography itself, without explanation. *Id.* at 166. The effect of *Phillips* is the service discrediting element is absorbed by the conduct element(s) and no evidence or testimony can rebut it. *See, e.g., Morissette v. United States*, 342 U.S. 246, 275 (1952) ("A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.").

This absorption of the terminal element is the "conclusive presumption," which allows the factfinder to conclusively presume the terminal element without a logical connection to proven facts. *See Morissette*, 342 U.S. at 275 ("A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect."). The *Phillips* rule operates to eliminate both the prosecution's "burden of proving all elements of the offense charged" and its burden of persuading "the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (citations omitted).

Allowing members or a military judge to find certain acts are per se service discrediting "conflict[s] with the overriding presumption of innocence with which the law endows the accused and which extends to *every element* of the crime." *Morissette*, 342 U.S. at 275 (emphasis added). Under *Phillips*, even if there is no evidence of discredit to the service, the conduct alone still leads to proof of the terminal element. As a result, the Government is relieved of its burden to prove all elements of a charged offense beyond a reasonable doubt—this is unconstitutional. *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

WHEREFORE, 2d Lt Van Velson requests that this Court set aside his conviction for indecent language.

IV.

AS APPLIED TO SECOND LIEUTENANT VAN VELSON, THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[4] WHEN SECOND LIEUTENANT VAN VELSON WAS NOT CONVICTED OF A VIOLENT OFFENSE.

Additional Facts

After his conviction, the Government determined that 2d Lt Van Velson's case met the firearm prohibition under 18 U.S.C. § 922. *Entry of Judgment*. The Government did not specify why, or under which section his case met the requirements of 18 U.S.C. § 922. *Id.*

[4] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022).

Standard of Review

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

Law and Analysis

One problem with the Statement of Trial Results and Entry of Judgment is that the Government did not indicate which specific subsection of § 922 it relied on to find that 2d Lt Van Velson fell under the firearm prohibition. Thus, 2d Lt Van Velson is unable to argue which specific subsection of § 922 is unconstitutional in his case, although he knows it could not be the domestic violence given the facts of his case. Regardless, it appears that the Government cannot be meet its burden of proving a historical analog that barred offenders like 2d Lt Van Velson from possessing firearms.

The test for applying the Second Amendment is:

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

Bruen, 597 U.S. 1, 24 (quoting *Konigsberg v. State Bar of California*, 366 U.S. 36, 50 n.10 (1961)).

Last year, the Fifth Circuit assessed an appellant who was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic violence restraining order" in violation of § 922(g)(8). *United States v. Rahimi*, 61 F.4th 443, 448-49 (5th Cir. 2023), *argued*, 143 S. Ct. 2688 (Nov. 7, 2023). Vacating the conviction, the Court held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.'" *Id*. at 461 (quoting *Bruen*, 597 U.S. at 30).

In reaching that conclusion, the Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." 61 F.4th at 450 (quoting *Bruen*, 597 U.S. at 8). Therefore, the Government bears the burden of "justify[ing] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id*. (quoting *Bruen*, 597 U.S. at 24).

Second, the Fifth Circuit recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at 451 (quoting *Heller*, 554 U.S. at 635). The Fifth Circuit explained that "*Heller*'s reference to 'law-abiding, responsible' citizens meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* at 452. Here the issue is whether the Founders would have "presumptively" tolerated a citizen being stripped of his right to keep and bear arms when he was not convicted of a violent offense. *Id.*

Third, the Fifth Circuit held that "[t]he Government fails to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id*. at 460. If the Government failed to prove that our Nation's historical tradition of firearm regulation did not include a violent offender who pled guilty to possessing a firearm while under a domestic violence restraining order, then it is questionable whether it can meet its burden for 2d Lt Van Velson's conviction when he was not convicted of a violent offense.

An additional argument bolsters 2d Lt Van Velson's position: The Fifth Circuit issued an opinion that held § 922(g)(3) unconstitutional. *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). In *Daniels*, the appellant was arrested for driving without a license, but the police officers

found marijuana butts in his ashtray. 77 F.4th at *340. He was later charged and convicted of a violation of § 922(g)(3). *Id*. at 340-41. In finding § 922(g)(3) unconstitutional, the Fifth Circuit's bottom line was:

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

Id. at 340.

In *Lepore*, citing to the 2016 edition of the Rules for Courts-Martial, this Court held, "[T]he mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. at 763. Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760. But this Court emphasized, "To be clear, we do not hold that this court lacks authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority." *Id.* at 763.

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

CAAF's decision in *Lemire* reveals three things. First, the CAAF has the power to order the correction of administrative errors in promulgating orders—even via unpublished decisions

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

Additionally, *Lepore* is distinguishable from this case. In *Lepore*, this Court made clear that "[a]ll references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at 760 n.1. This Court then emphasized, "[T]he mere fact that a firearms prohibition annotation, *not required by the Rules for Courts-Martial*, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." *Id.* at 763 (emphasis added). The new 2019 rules that apply in this case, however, contain language that both the Statement of Trial Results and the Entry of Judgment contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101 (a)(6); 1111(b)(3)(F). Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 8 April 2022, para 13.3 required the Statement of Trial Results to include "whether the following criteria are met…firearm prohibitions." As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered. Even if this Court does not find this argument persuasive, it still should consider the issue under *Lepore* since this issue is not an administrative fixing of paperwork, but an issue of constitutional magnitude.

WHEREFORE, 2d Lt Van Velson requests that this Court find the Government's firearm prohibition unconstitutional, overrule *Lepore* in light of *Lemire*, and order the Government to correct the Statement of Trial Results to reflect which subsection of § 922 it used to prohibit his firearm possession.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 23 May 2024.

Respectfully submitted,

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24 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Second Lieutenant (O-1) AUSTIN J. VAN VELSON, USAF, *Appellant.*	)))))))))	ANSWER TO ASSIGNMENTS OF ERROR Panel No. 2 ACM 40401

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

ISSUES PRESENTED

I.

WHETHER SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE WAS PROVIDENT UNDER UNITED STATES V. BYUNGGU KIM, 83 M.J. 235 (C.A.A.F. 2023) BECAUSE THE MILITARY JUDGE FAILED TO CONDUCT A HEIGHTENED PLEA INQUIRY REGARDING SECOND LIEUTENANT VAN VELSON'S FIRST AMENDMENT RIGHTS?

II.

WHETHER SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE WAS PROVIDENT UNDER UNITED STATES V. WILCOX, 66 M.J. 442 (C.A.A.F. 2008), BECAUSE THERE WAS NOT A "DIRECT AND PALPABLE CONNECTION BETWEEN SPEECH AND THE MILITARY MISSION OR MILITARY ENVIRONMENT."

III.

WHETHER SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE, A CLAUSE 2, ARTICLE 134, UCMJ, OFFENSE IS CONSTITUTIONAL, PROVIDENT, OR LEGALLY SUFFICIENT AS TO THE TERMINAL ELEMENT?

IV.

AS APPLIED TO SECOND LIEUTENANT VAN VELSON, WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATIONS" WHEN 2D LT VAN VELSON WAS NOT CONVICTED OF A VIOLENT OFFENSE.

STATEMENT OF THE CASE

As relevant to these assignments of error, Appellant pleaded guilty, without a plea agreement, to one specification of communicating indecent language in violation of Article 134, UCMJ. (Entry of Judgment (EOJ), ROT, Vol. 1; R. at 89.) He also pleaded guilty to one specification of possessing child pornography in violation of Article 134, UCMJ. (EOJ, ROT, Vol. 1.) In accordance with his pleas, the military judge convicted Appellant of both specifications and sentenced him to 6 months confinement for the indecent language specification and 18 months confinement for the child pornography specification (to run consecutively) and to a dismissal from the service. (Id.)

STATEMENT OF FACTS

Appellant pleaded guilty to one specification of indecent language in violation of Article 134, UCMJ. The specification at issue alleged that Appellant "did. . . communicate in writing to Detective [MH], certain indecent language, to wit: language describing lewd acts with a child, which was of a nature to bring discredit upon the armed forces. (Charge Sheet, ROT, Vol. 1.)

During the providence inquiry, Appellant described that he engaged in a chat with another person on the internet chat site, (R. at 82.) Appellant and this individual also exchanged text messages. (Id.) In the conversations, Appellant portrayed himself to be an adult female with minor children. (Id.) The other participant – who unbeknownst to Appellant was a

police detective – portrayed himself as an adult male with minor children. (Id.) Appellant and the other participant "chatted about sexual activity with the minor children." (Id.)

Appellant explained during the providence inquiry that the language he used was indecent because "it was grossly offensive to decency and propriety and would shock the morals of a member of the community. It was vulgar, disgusting, and was meant to incite lustful thoughts about the sexual scenarios [he] was talking about." (Id.) Appellant admitted that the subject of the conversations "would tend to corrupt morals and incite offensive sexual thoughts." (Id.)

Appellant elaborated that the conversations over Omegle and text messages were about "adults having sex with minor children." (R. at 84-85.) He admitted that the language he conveyed to the undercover officer "describe[d] sexual activity between an adult female and children, as well as an adult male and children" and specifically "discussed supposed past encounters for [the participants'] prurient interest." (R. at 86.) Appellant acknowledged that his behavior "violate[d] community standards because sex with children is both illegal and immoral. (Id.)

Appellant believed that his conduct was of a nature to bring discredit upon the armed forces because a civilian detective found out that he was an Air Force officer and that he engaged in the offensive sexual discussions. (R. at 82.) According to Appellant "[t]hat harmed the reputation of the Air Force and lowered it in public esteem because officers are supposed to set the example in behavior and conduct" and "[t]hat looked terrible for the Air Force and the military." (Id.)

When the military judge asked counsel for both side whether any additional inquiry was necessary, both trial and defense counsel responded "no." (R. at 88-89.)

During the sentencing phase of trial, the government admitted into evidence the chat between Appellant and the undercover detective. (R. at 102-03; Pros. Ex. 4.) In the conversation, Appellant portrayed himself as "Sandy," a 28-year-old mother with a six-year-old daughter and three-year old-son. (Pros. Ex. 4.) Appellant said that she and her husband "don't force anything but we let" the children "join in as much as they want for now." Appellant then said that Sandy's husband "already said hell pop [the daughter's] cherry when shes like 10" [sic] and that it "might hurt lol." (Id.) When asked what the daughter had done, Appellant replied "we feel her up, and she tries to suck on [the husband's] dick and kiss me." (Id.) Appellant then asked the undercover detective what his girlfriend's 11-year-old daughter does. The undercover detective answered that "she takes the tip and licks everywhere we ask." (Id.) Appellant asked if the undercover detective would "ever go all the way," and then Appellant commented that it was "hot to imagine just going for it." (Id.) When the undercover detective mentioned he and his girlfriend would sometimes have her daughter there "while we go at it," Appellant suggested "you could just tell her, your turn!" (Id.)

ARGUMENT

I.

APPELLANT'S INDECENT LANGUAGE WAS NOT CONSTITUTIONALLY PROTECTED UNDER THE FIRST AMENDMENT, SO THE MILITARY JUDGE HAD NO OBLIGATION TO CONDUCT A HEIGHTENED PLEA INQUIRY.

Standard of Review

This Court reviews "a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo." United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008). The Court applies "the substantial basis test,

looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." Id. "[I]n evaluating the providency of the plea, the entire record should be considered." United States v. Negron, 60 M.J. 136, 141 (C.A.A.F. 2004).

Law

Under Article 134, UCMJ, "Indecent language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thoughts." Manual for Courts-Martial (MCM), Part IV, para. 105.c (2019 ed.). The President's explanation clarifies, "Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards." Id.

Our superior Court has held that a military judge must engage in a heightened plea inquiry "[w]hen a charge against a servicemember may implicate both criminal and constitutionally protected conduct." United States v. Hartman, 69 M.J. 467, 468 (C.A.A.F. 2011). Such an inquiry "must contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior." Id.

Hartman dealt with a servicemember charged under Article 125, UCMJ (2006) for committing consensual sodomy in the presence of a third person. On one hand, Hartman's conduct might have been constitutionally protected in the civilian sector under Lawrence v. Texas.[1] On the other hand, the conduct might have still been criminalized in the military under

[1] 539 U.S. 558 (2003) (affording constitutional protection to "certain intimate sexual conduct" occurring in the privacy of one's own home).

United States v. Marcum[2] if it encompassed some behavior outside the parameters of Lawrence or if some factors relevant solely in the military environment affected the nature and reach of the Lawrence liberty interest. Id. Since the military judge failed to address how Hartman's behavior was still criminal – rather than constitutionally protected under Lawrence and the Marcum framework – Hartman's guilty plea was improvident. Id.

Similarly, in United States v. Kim, 83 M.J. 235, 237 (C.A.A.F. 2023), the appellant was charged with and pleaded guilty to indecent conduct under Article 134, UCMJ for conducting internet searches for "rape sleep" and "drugged sleep." When watching the videos found during his searches, it reminded the appellant of sexually abusing his stepdaughter. Id. Our superior Court recognized that Appellant's conduct might be constitutionally protected under Stanley v. Georgia, 394 U.S. 557, 559 (1969), where the Supreme Court held that "the mere private possession of obscene matter cannot constitutionally be made a crime." Kim, 83 M.J. at 238-39. Even so, CAAF also observed that the constitutional right protected in Stanley does not automatically apply to servicemembers. Id. As a result, CAAF concluded that because Kim's conduct inhabited a "constitutional gray area," in accordance with Hartman, "the plea colloquy should have established why possibly constitutionally protected material could still be service discrediting in the military context." Id. at 239. Because the military judge failed to conduct such an inquiry, CAAF found Kim's guilty plea improvident. Id. at 239-40.

Analysis

Appellant argues that his own guilty plea was improvident because the military judge did not conduct the type of heightened colloquy required by our superior Court in Hartman and Kim. (App. Br. at 4-8.) This Court should reject Appellant's argument; Appellant's charged conduct

[2] 60 M.J. 198, 205-07 (creating a framework for addressing Lawrence challenges within the military context).

was unquestionably outside constitutional protection and was therefore distinguishable from the conduct at issue in Hartman and Kim. Under such circumstances, the military judge had no duty to conduct a heightened plea inquiry.

As a preliminary point relevant to both this and the next assignment of error, our superior Court has already held that communicating indecent language about adult-on-child sexual acts to strangers over the internet is not constitutionally protected conduct under the First Amendment. United States v. Meakin, 78 M.J. 396 (C.A.A.F. 2019). As CAAF explained, the appellant in Meakin was "accused of transmitting obscenity over the internet by describing and encouraging the sexual exploitation and sexual abuse of children." Id. at 398. The Court reiterated that it had "long held that 'indecent' is synonymous with obscene" id. at 401 (quoting United States v. Moore, 38 M.J. 490, 492 (C.A.A.F. 1994)) and that it was "well-settled law that obscenity is not speech protected by the First Amendment, regardless of the military or civilian status of the speaker. Id. CAAF rejected the argument that the appellant's conduct was protected under Stanley v. Georgia because, unlike Stanley who had merely possessed obscenity in his home, Meakin transmitted obscenity outside the privacy of his own home onto the internet to other individuals. Id. at 402. The Court next dismissed the notion that Meakin's conduct was protected under Lawrence v. Texas. Id. at 403. According to CAAF, "distributing or transmitting obscenity to individuals whose true names [Meakin] did not even know and whom he had not met" was not "on par with the liberty interest and fundamental right to form intimate, meaningful, and personal bonds that manifest themselves through sexual conduct described in Lawrence." Id.

Appellant's conduct is essentially indistinguishable from the conduct described in Meakin. He admitted during the providence inquiry that (1) his communications were

transmitted over the internet and text message, (2) they were made to a stranger he did not know and had never met, and (3) they described adults having sex with children. (R. at 82-88.) Although Appellant does not seem to contest the indecency of his language, he does complain that the military judge did not analyze the exact content of the message and that this was "not sufficient for a First Amendment analysis." (App. Br. at 6.) But this Court has recognized that "[a] guilty plea inquiry is less likely to have developed facts, and a decision to plead guilty may include a 'conscious choice by an accused to limit the nature of the information that would otherwise be included in an adversarial process.'" United States v. Garrigan, 2013 CCA LEXIS 118, at *9 (A.F. Ct. Crim. App. 15 February 2013) (unpub. op.) (quoting United States v. Jordan, 57 M.J. 236, 238-29 (C.A.A.F. 2002)). The accused's own prerogative to limit his disclosures is one reason why military judges are afforded broad discretion in accepting guilty pleas. Id. at *6. Where Appellant admitted that his internet correspondence discussed adults having sex with children – the same conduct condemned in Meakin – the military judge did not have to inquire into the exact substance of the messages. This is especially true since Appellant admitted that his language met the definition of indecent (R. at 82; 86) and because it is hard to imagine a scenario where a description of adults sexually abusing children would not meet that definition.

In any event, Appellant's actual indecent messages were included as part of the "entire record," which this Court may consider in determining whether there is a substantial basis to question Appellant's guilty plea. *See* Negron, 60 M.J. at 141. Like the appellant in Meakin, as shown in Prosecution Exhibit 4, Appellant described sexually abusing children ("we feel her up, and she tries to suck on his dick and kiss me") and encouraged the sexual abuse of other children ("you could just tell her, your turn!"). Such language was indisputably "indecent" in that it was vulgar and disgusting and violated community standards, given that society does not accept (and

in fact criminalizes) adults engaging in sex with children. It also reasonably tended to corrupt morals and incite lustful and libidinous thoughts, because Appellant was encouraging another person to engage in such grossly offensive conduct. Thus, when Appellant's actual language was put into the record, it gave the military judge no substantial basis to question Appellant's earlier guilty plea, and it should give this Court no reason to either. Since Appellant's language was indecent and obscene, a heightened plea inquiry was not required. *Cf.* United States v. Moon, 73 M.J. 382, 387 (C.A.A.F. 2014) (finding a heightened plea inquiry was required because the appellant's conduct did *not* involve obscenity).

Meakin also explains why Appellant's case is distinguishable from Hartman and Kim. Applying Meakin, there is no "constitutional gray area" in Appellant's case, like there was in Hartman and Kim. Just like in Meakin, Appellant's conduct did not implicate the constitutional gray area from Lawrence because it involved transmitting obscenity to a stranger Appellant did not know and had never met. Such characteristics made Appellant's conduct different from the consensual sodomy among three adults at issue in Hartman. *See also* United States v. McDaniel, 80 M.J. 555, 558-59 (A.F. Ct. Crim. App. 2020) (reiterating the holding of Meakin that communicating indecent language that "encourages, describes, and revels in the sexual exploitation of children" falls outside the liberty interest recognized in Lawrence).

Appellant's conduct also did not implicate the constitutional gray area from Stanley. Like the appellant in Meakin, Appellant's conduct was not confined to his own home. He shared his obscenity with another person over the internet and over text messages. As our superior Court noted in Meakin, "there is a stark difference between thinking thoughts within the confines of the home and reaching outward to share obscenity . . ." 78 M.J. at 402. There was similarly a stark

difference between Appellant's conduct and the private internet searches and thoughts at issue in Kim.

Appellant further asserts that the heightened Hartman inquiry was needed because Appellant and the undercover officer used fictional personas to discuss "an untrue fantasy." (R. at 106.) But this Court has rejected the notion that communications made for the purpose of "fantasy" are somehow less indecent than communications made for other purposes. *See* Garrigan, 2013 CCA LEXIS 118, at *7 ("That the appellant made the communications for the purpose of 'fantasy' or 'out of curiosity' does not undermine the indecency of the language or render his plea improvident."). Indeed, even though Appellant's words described a fantasy, they were still "indecent" (or obscene) in that they were, by Appellant's own admission, "grossly offensive to decency and propriety and would shock the morals of a member of the community" and were "vulgar, disgusting, and . . . meant to incite lustful thoughts." (R. at 82.) And the fact that the indecent language described a fantasy does not make Meakin any less applicable – Appellant still transmitted his obscene fantasy to someone over the internet, taking his conduct outside the protection of Stanley.

In sum, during the providence inquiry, the military judge elicited facts from Appellant establishing that he had transmitted indecent and obscene language about adults sexually abusing children over the internet and text message to a person he did not know and had never met. Based on these facts, Appellant's conduct was not "possibly constitutionally protected." Instead, it fell squarely into the category of behavior that CAAF found not to be constitutionally protected in Meakin. As a result, the military judge had no duty under Hartman to discuss the difference between constitutionally protected and non-constitutionally protected behavior. The

military judge did not abuse his discretion in accepting Appellant's guilty plea. This Court should therefore deny Appellant's assignment of error.

II.

APPELLANT'S INDECENT LANGUAGE WAS NOT PROTECTED BY THE FIRST AMENDMENT; THUS, HIS PLEA WAS PROVIDENT WITHOUT ADMISSION TO "A DIRECT AND PALPABLE CONNECTION" BETWEEN HIS SPEECH AND THE MILITARY MISSION OR ENVIRONMENT UNDER UNITED STATES V. WILCOX, 66 M.J. 442 (C.A.A.F. 2008).

Standard of Review

The standard of review is the same as for Issue I.

Law and Analysis

Appellant claims that his guilty plea was improvident because there is no evidence that his language affected the "military mission" or "military environment." (App. Br. at 8.) Appellant rests his argument on United States v. Wilcox, 66 M.J. 442, 448-49 (C.A.A.F. 2008), which, according to Appellant, "held that direct and palpable connection between speech and the military mission or military environment is also required for an Article 134, UCMJ offense charged under a service discrediting theory." (App. Br. at 8.) But Appellant misreads Wilcox – that case's holding applies only to speech that would ordinarily be protected by the First Amendment outside the military context.

In Wilcox, CAAF acknowledged that military law may sometimes criminalize certain speech that is not criminalized in the civilian sphere. 66 M.J. at 447. When evaluating whether "speech that would be impervious to criminal sanction in the civilian world may be proscribed in the military," courts apply a test that balances "the essential needs of the armed services and the right to speak out as a free American." Id. But courts **only** apply this balancing test after making

the "threshold determination[ ]" that "the speech involved . . . is otherwise protected under the First Amendment," and **then** determining that the prosecution has shown "a reasonably direct and palpable connection between [the speech] and the military mission." Id. at 447-48. Wilcox also clarified that some speech, including obscenity, "is not protected by the First Amendment," regardless of the military or civilian status of the speaker. Id. at 447.

CAAF later reinforced the limited application of Wilcox in United States v. Rapert, 75 M.J. 164, 170 (C.A.A.F. 2016), when it described the Wilcox balancing test as a "tertiary concern" after courts "initially consider whether the speech involved ... is ... protected under the First Amendment." (internal citations omitted). And this Court reflected that same understanding in United States v. Shea, 2018 CCA LEXIS 160, at *15 (A.F. Ct. Crim. App. 26 March 2018) (unpub. op.), when it found that "Wilcox's requirement for a 'direct and palpable connection' between the conduct and the military mission or environment" was "inapposite" because the appellant's conduct "was outside the protection of the First Amendment."

Simply put, Wilcox does not apply here because Appellant's speech was not constitutionally protected, even in the civilian sphere. As discussed above, Appellant's transmission of obscenity over the internet and text message was not protected by the First Amendment, by Stanley v. Georgia, or by Lawrence v. Texas. *See* Meakin, 78 M.J. at 400-03. Thus, Appellant did not need to admit to "a direct and palpable connection between speech and the military mission or military environment" for his guilty plea to be provident. Of note, this Court reached this same conclusion in Garrigan. 2013 CCA LEXIS 118 at *8-9. In that case, the appellant had pleaded guilty to communicating indecent language to a stranger over the internet by describing performing sexual acts on underage girls. Id. at *7. This Court found Wilcox

inapt, because the appellant's indecent language was "not protected as free speech." Id. at *9. The same reasoning applies here.

The military judge here did not abuse his discretion by not applying the requirements of Wilcox, and this Court should deny this assignment of error.

III.

APPELLANT'S GUILTY PLEA WAS NOT IMPROVIDENT BECAUSE ARTICLE 134, CLAUSE IS CONSTITUTIONAL, AND THE GOVERNMENT DID NOT PROVE APPELLANT'S GUILT THROUGH A CONCLUSIVE PRESUMPTION.

Standard of Review

The standard of review for the providency of a plea is the same as for Issue I. The constitutionality of a statute is a question of law and is ordinarily reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Analysis

For an offense charged under Article 134, Clause 2, the evidence must show beyond a reasonable doubt that the conduct at issue "was of a nature to bring discredit upon the armed forces." MCM, Part IV, para. 91.b-c. "'Discredit' means to injure the reputation of." Id. at para. 91.c.(3). Article 134, Clause 2 "makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem." Id.

Appellant asks this Court to find Clause 2 of Article 134, UCMJ unconstitutional and to therefore find his guilty plea improvident or legally insufficient. (App. Br. at 9.) Alternatively, Appellant asks this Court to decide this issue in line with whatever rationale CAAF sets forth in its upcoming opinion in United States v. Wells, *rev. granted* 84 M.J. 113 (C.A.A.F. 2023). (Id.) This Court should decline both invitations.

To start, because Appellant pleaded guilty, "the issue must be analyzed in terms of providence of his plea, not sufficiency of the evidence." United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996). "[A] guilty plea does not preclude a constitutional challenge to the underlying conviction." United States v. Sollmann, 59 M.J. 831, 834 (A.F. Ct. Crim. App. 2004). Our superior Court has found a guilty plea improvident when the plea was to a violation of a statute later found to be unconstitutional. *See e.g.* United States v. O'Connor, 58 M.J. 450 (C.A.A.F. 2003). All the same, this Court should reject Appellant's argument, because Article 134, Clause 2 is constitutional. The Supreme Court has already determined Article 134, UCMJ is constitutional, as a whole, in Parker v. Levy, 417 U.S. 733, 557 (1974). Since this Court has a duty to follow Supreme Court precedent, it should not deviate from that holding. *See* United States v. Cary, 62 M.J. 277, 280 (C.A.A.F. 2006).

Co-opting the appellant's argument before CAAF in Wells,[3] Appellant specifically complains that Clause 2 of Article 134 is being applied unconstitutionally because it allows the factfinder to conclusively presume the service discrediting element based solely on the underlying conduct alone. (App. Br. at 10-11.) The United States disputes this premise, as it did before CAAF in Wells. But this Court need not wait for CAAF's Wells opinion to decide this issue because Appellant's case is distinguishable: there was certainly no conclusive presumption applied by the factfinder in Appellant's case, because there was no factfinder. Appellant gave up his right to a trial on the facts and admitted to the terminal element during the providence inquiry. Whether Appellant's conduct was of a nature to bring discredit upon the armed services was a "matter of proof which an accused may contest at trial. By pleading guilty, [A]ppellant knowingly waived a trial of the facts as to that issue." Faircloth, 45 M.J. at 174. And since he

[3] The parties' briefs and oral arguments in Wells are available at: https://www.armfor.uscourts.gov/calendar/202403.htm

pleaded guilty, there was "no requirement that any witness be called or any independent evidence be produced to establish the factual predicate for the plea." Id. (internal citations omitted).

What is more, Appellant's providence inquiry did not just rely on the nature of his indecent language offense to establish the service discrediting element. Appellant admitted that a civilian detective found out that he was an Air Force officer and had engaged in the offensive conduct. (R. at 82.) And Appellant did not just admit to theoretical or potential injury to the armed forces. He affirmatively stated that his conduct "harmed the reputation of the Air Force and lowered it in public esteem because officers are supposed to set the example in behavior and conduct" and because a civilian was seeing an Air Force officer behave in a way that was very offensive. (Id.) This admission of an actual harm to the armed forces from his conduct defeats any claim on appeal that Appellant was convicted based on an unconstitutional conclusive presumption about the nature of his conduct.

At bottom, regardless of the eventual outcome in Wells, Appellant's own conviction for indecent language under Article 134 did not rely on any unconstitutional conclusive presumption. His guilty plea was therefore provident, and this Court should deny this assignment of error.

IV.

THE 18 U.S.C. § 922 FIREARMS PROHIBITION—WHICH IS CONSTITUTIONAL AS APPLIED TO APPELLANT—IS NEVERTHELESS A COLLATERAL MATTER BEYOND THE SCOPE OF THIS COURT'S JURISDICTION.

Standard of Review

The scope and meaning of Article 66, UCMJ, is a matter of statutory interpretation, which is reviewed de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law and Analysis

The Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he has been, *inter alia*, "convicted in any court of a crime punishable by imprisonment for a term exceeding one year" or "discharged from the Armed Forces under dishonorable conditions." 18 U.S.C. § 922(g)(1), (g)(6).

Appellant, having been convicted and sentenced to over a year in confinement for his child pornography offense, falls into the former category. Having been adjudged a dismissal, he will fall into the latter category as well. Given that a plain reading of the statute is all it takes to reach this conclusion, this Court should not entertain any notion that Appellant does not know which subsection of 18 U.S.C. § 922 applies to him. (App. Br. at 12.)

Indeed, Appellant was not convicted of a physically violent offense. Appellant seeks to capitalize on this fact, while disregarding the prohibition related to his dishonorable service characterization. Appellant now asks this Court to find the firearms prohibition unconstitutional as applied to him and order correction of post-trial paperwork, citing the Government's alleged

inability to "meet its burden of proving a historical analog[ue] that barred offenders like [him] from possessing firearms." (Id.)

Appellant is not entitled to relief—first and foremost, because this nation has long barred the possession of firearms by persons who are felons, rather than law-abiding, responsible citizens; and second, irrespective of whether the statute is constitutional, this Court lacks jurisdiction to grant any relief.

A. The firearms prohibition is constitutional as applied to Appellant because this nation has a historical tradition of disarming the dangerous.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST., amend. II. But as the Supreme Court has repeatedly emphasized, "the right secured by the Second Amendment is not unlimited." District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 20 (2022); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion).

While the Amendment guarantees "the right of *law-abiding, responsible citizens* to use arms for self-defense," Bruen, 597 U.S. at 26 (emphasis added), the same cannot be said for those who have broken the law. The history of firearms regulation reflects "a concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons," Barrett v. United States, 423 U.S. 212, 220 (1976), and "an intent to impose a firearms disability on *any* felon based on the fact of conviction." Lewis v. United States, 445 U.S. 55, 62 (1980) (emphasis added).

Therein lies the rub. As someone whose right to possess firearms was restricted because of his felony-level convictions, Appellant is in a different position than the law-abiding, non-

criminal petitioners in Bruen, Heller, and McDonald.[4] For Appellant—now a felon—falls into a class of "irresponsible persons."[5] Barrett, 423 U.S. at 220. Bruen itself refers over and over to the "law-abiding" citizen's right to bear arms for self-defense. (See id. at 2122 -2125, 2131 - 2134, 2138, 2150, 2156). And various members of the Court—representing a majority of its current Justices—noted their views that Bruen did not disturb Heller's and McDonald's earlier statements about felon-dispossession laws. See id. at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm."); id. at 2162 (Kavanaugh, J., joined by Roberts, C.J.) (noting that Heller's and McDonald's statements approving felon-dispossession laws survive Bruen); id. at 2189 (Breyer, J., dissenting, joined by Sotomayor & Kagan, JJ.) ("Like Justice Kavanaugh, I understand the Court's opinion today to cast no doubt on … Heller's holding" that felon-dispossession laws are "presumptively lawful") (capitalization altered).

Still, Appellant contends that the firearms prohibition is unconstitutional as applied to him because he was not convicted of a violent offense, and asserts that the Government cannot "demonstrat[e] that it is consistent with the Nation's historical tradition of firearm regulation," as required by Bruen, 597 U.S. at 24. (App. Br. at 11.)

Not so. Fortunately for the Government, there is a "historical analogue"—the disarmament of "dangerous persons." In the early days of the republic, the law was often used to disarm groups considered dangerous, such as British loyalists. *See* Joseph Blocher & Caitlan

[4] *See* Bruen, 597 U.S. at 8 (where "law-abiding New York residents" challenged a state restriction on carrying a firearm outside the home); Heller, 554 U.S. at 573 (where a policeman challenged the District of Columbia's ban on handgun possession in the home); McDonald, 561 U.S. at 790 (challenging a city ordinance that effectively banned "law-abiding members of the community" from having handguns in the home).

[5] Although in its recent decision in United States v. Rahimi, the Supreme Court rejected the idea that a citizen can be disarmed simply because he is "not responsible," it reaffirmed that disarming felons is "presumptively lawful." ___ S. Ct. ____ (21 June 2024), slip. op. at 15; 17.

Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders*, DUKE LAW SCHOOL PUBLIC & LEGAL THEORY SERIES NO. 2020-80 (2020). This tradition of disarming the dangerous endures today—in part, through the "longstanding prohibitions on the possession of firearms by felons," which the Supreme Court has identified as "presumptively lawful regulatory measures." Heller, 554 U.S. at 626, 627 n.26.

In the modern age, dangerousness cannot be defined by violence alone. Thus, it matters little that Appellant was not convicted of a physically violent offense. As the world has evolved, crime has evolved with it. There are more laws to violate than there were in the Founding Era, more ways to violate them, and more ways to be dangerous as a result. Appellant's own crime is one such example. The proliferation of child pornography via new media technology is "a relatively recent, albeit pernicious, development." United States v. Leonard, 64 M.J. 381, 383 (C.A.A.F. 2007). It is a "tragedy" that is "sustain[ed] and aggravate[ed]" by "everyone who reproduces, distributes, [and] possesses the images of the victim's abuse." Paroline v. United States, 572 U.S. 434, 436 (2014). Thus, those convicted of such offenses are required to register as sex offenders—even if they did not personally abuse the child. *See* 34 U.S.C. § 20911.

Such sex offenders "are a serious threat in this Nation." McKune v. Lile, 536 U.S. 24, 32 (2002). Their risk of recidivism is "frightening and high," Smith, 538 U.S. at 103 (citation omitted), and when they reenter society, "they are much more likely than any other type of offender to be rearrested for a new [sex offense]." McKune, 536 U.S. at 33. For offenders like Appellant, recidivism translates into a continued interest in child pornography and sexual abuse of children. This interest in child pornography creates the demand for it, which "harms children in part because it drives production, which involves child abuse." Paroline, 572 U.S. at 439-40. The materials produced are "a permanent record of the depicted child's abuse, and the harm to

the child is exacerbated by [its] circulation." Id. at 440 (alteration in original) (internal quotation marks and citation omitted). Consequently, sex offenders like Appellant pose a real threat to our most vulnerable demographic—the children.

Appellant may not be a physically violent offender, but he is still a danger to our society. *See* New York v. Ferber, 458 U.S. 747, 758 n.9 (1982) ("[The] use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole."). Given this nation's historical tradition of disarming dangerous persons, 18 U.S.C. § 922 is constitutional as applied to Appellant, and he is not entitled to relief.

B. Irrespective of its constitutionality, the firearms prohibition is a collateral matter outside the scope of this Court's authority under Article 66, UCMJ.

"The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute." United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015). Article 66(d), UCMJ, provides that this Court "may only act with respect to the findings and sentence as entered into the record under section 860c of this title." 10 U.S.C. § 866(d). It does not authorize this Court to act on the collateral consequences of a conviction, such as the firearms prohibition. And this Court has said as much before. In United States v. Lepore, this Court held that the firearms prohibition was a collateral matter outside the scope of this Court's authority under Article 66, UCMJ, and that the Court therefore lacked authority to "direct correction of the 18 U.S.C. § 922 firearms prohibition" on a court-martial order. 81 M.J. at 760-63. In so holding, this Court reasoned that the firearms prohibition "relates to a reporting mechanism external to the UCMJ and Manual for Courts-Martial," and "was not a finding or part of the sentence, nor was it subject to approval by the convening authority." Id. at 763. "[T]he mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the

matter within [this Court's] limited authority under Article 66, UCMJ." Id. This rationale remains viable today, and this Court should decline to deviate from it.

Appellant disagrees. According to Appellant, Lepore is both distinguishable from this case and no longer good law. (App. Br. at 14-15.) Citing the 2019 versions of R.C.M. 1101(a)(6) and R.C.M. 1111(b)(3)(F)—which provide for the inclusion of "[a]ny additional information … required under the regulations prescribed by the Secretary concerned" in the statement of trial results and entry of judgment, respectively—Appellant suggests that the rules now require the firearms prohibition annotation "by incorporation." (App. Br. at 15.) But what Appellant fails to realize is that annotation by incorporation has *always* been the posture, even under the 2016 rules that governed in Lepore. R.C.M. 1114(a) in the 2016 Manual for Courts-Martial provided that promulgating orders were to be prepared under the rule, "[u]nless otherwise prescribed by the Secretary concerned." When the court-martial order at issue in Lepore was published, Air Force Instruction 51-201, *Administration of Military Justice,* ¶ 15.30 (18 Jan. 2019), prescribed the following requirement: "'FIREARMS PROHIBITION - 18 U.S.C. § 922' must be annotated in the header [of the court-martial order]." *See* Lepore, 81 M.J. at 761. Thus, there is no appreciable distinction between the entry of judgment here and the court-martial order in Lepore.

Appellant also claims that Lepore is "no longer controlling" in light of United States v. Lemire, in which CAAF ordered the Army to delete an annotation about sex offender registration from a promulgating order. 82 M.J. 263 n.* (C.A.A.F. 2022) (decision without published opinion). (App. Br. at 14.) Relying on a 20-word footnote[6] in a summary decision without a

[6] "It is directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." Lemire, 82 M.J. at 263 n.*.

published opinion, Appellant insists that the Lemire decision means that CAAF can order correction of administrative errors in post-trial paperwork; that CAAF believes the CCA can address collateral consequences; and that CAAF and the have the power to address "constitutional errors…even if the Court deems them to be a collateral consequence." (App. Br. at 14-15.) This Court should be unpersuaded. Although Lemire is technically a published decision, it lacks substance—it did not call attention to a rule of law or procedure, nor did it analyze why the ordered correction was viable and appropriate in that case. As a result, it is not the kind of decision that can be treated as precedent. *See* Rule 30.4(a), Air Force Court of Criminal Appeals, Rules of Practice and Procedure.[7]

Ultimately, the constitutional question posed here is unrelated to the actual findings and sentence in the case, and therefore outside the scope of this Court's authority. Appellant is not only unentitled to relief, but also powerless to obtain any from this Court. This Court should deny this assignment of error.

[7] "Published opinions are those that call attention to a rule of law or procedure that appears to be overlooked or misinterpreted or those that make a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the Court's decision to the public, the parties, military practitioners, and judicial authorities." Rule 30.4(a), Air Force Court of Criminal Appeals, Rules of Practice and Procedure.

CONCLUSION

The United States respectfully requests that this Court affirm the findings and sentence in this case.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, and The Appellate Defense Division, via email, on 24 June 2024.

MARY ELLEN PAYNE
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United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**REPLY BRIEF**
v.	)	Before Panel No. 2
Second Lieutenant (2d Lt) **AUSTIN J. VAN VELSON,** United States Air Force *Appellant.*	)	No. ACM 40401 1 July 2024

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

Appellant, Second Lieutenant (2d Lt) Austin Van Velson, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's answer of 24 June 2024 [hereinafter Answer]. 2d Lt Van Velson stands on the arguments in his initial brief, filed on 23 May 2024 [hereinafter AOE], and in reply to the Answer, submits additional arguments for the issue listed below.

I.

SECOND LIEUTENANT VAN VELSON'S CONVICTION FOR INDECENT LANGUAGE WAS NOT PROVIDENT UNDER *UNITED STATES V. BYUNGGU KIM*, 83 M.J. 235 (C.A.A.F. 2023), BECAUSE THE MILITARY JUDGE FAILED TO CONDUCT A HEIGHTENED PLEA INQUIRY REGARDING SECOND LIEUTENANT VAN VELSON'S FIRST AMENDMENT RIGHTS.

If 2d Lt Van Velson's language was "unquestionably outside constitutional protection," as the Government alleges, why could the Government not cite one federal or state statute barring his conduct in the civilian context? Answer at 7. The answer is because his private language with another consenting adult was not illegal. As incorporated via the Fourteenth Amendment, the First Amendment only prohibits *governments* from "abridging the freedom of speech." U.S. CONST. amend. I. "Freedom of speech" under the First Amendment is not self-executing, *see* Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1211 (2015), nor does

it, ipso facto, criminalize any particularized speech. Thus, if a government wants to criminalize speech, it must pass a law so doing. *See Packingham v. North Carolina*, 582 U.S. 98, 106 (2017) (citations omitted) (noting how a legislature may pass statutes related to the sexual abuse of children subject to constitutional protections). As such, the Government's logic has two errors.

First, the Government tried to convince this Court that a heightened plea inquiry was not necessary because 2d Lt Van Velson's case is distinguishable from *Stanley v. Georgia*, 394 U.S. 557 (1969) and *Lawrence v. Texas*, 539 U.S. 558 (2003). Answer at 9. Whether the facts of the case sub judice are similar to one of these cases is not the test; rather, the test is: Whether "a charge against a servicemember *may* implicate both criminal and constitutionally protected conduct." *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011) (emphasis added). When the answer to that possibility is yes, then heightened inquiry is required because "the distinction between what is permitted and what is prohibited constitutes a matter of 'critical significance*.'" Id.* (citing *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003)). Stated differently, a military judge must discuss with an accused, "why *possibly* constitutionally protected material could still be service discrediting in the military context." *United States v. Byunggu Kim*, 83 M.J. 235, 239 (C.A.A.F. 2023) (emphasis added). In sum, the test is not what other cases say, or that the accused's conduct *must be* protected, but rather whether there is a chance that the accused's conduct is not criminalized in the civilian context.

This leads to the second point which is that the Government misread *Hartman* and *Byunggu Kim* to make the broad point that if conduct is illegal in the military, then no heightened inquiry is needed. Answer at 7-8. However, criminality under the Uniform Code of Military Justice is only one part of a two-part inquiry. In the plea colloquy, the military judge is seeking to resolve whether conduct "protected for civilians could still qualify as prejudicing good order and discipline or

bringing discredit upon the military." *Byunggu Kim*, 83 M.J. at 239. The test looks outside of the military context, not within it, to see whether the military prohibition fits within the Constitution's bounds. *Id.* No one is contesting whether indecent language in the military can be a crime; rather, the question here is whether a heightened plea inquiry was needed because the conduct *may* not be a crime outside of the military. Thus, the Government's references to *United States v. Meakin* are inapposite because the Court of Appeals for the Armed Forces (CAAF) in that case did not analyze whether a heightened plea inquiry was required. The question in *Meakin* was whether the appellant's litigated conviction was legally sufficient, not whether the military judge should have used a heightened plea inquiry. 78 M.J. at 398.

The Government provided no law stating that private, obscene conversations were illegal and undersigned counsel could not find one either. By way of demonstration, the Department of Justice publishes the "Citizen's Guide To U.S. Federal Law On Obscenity" where it lists relevant federal laws on obscenity. (27 June 2024), https://www.justice.gov/criminal/criminal-ceos/citizens-guide-us-federal-law-obscenity. Not one law listed prohibits private, obscene conversations between two consenting adults. Furthermore, at the state level, "general use of profane and obscene language is a legal gray area." *Profanity Laws by State 2024* (27 June 2024), https://worldpopulationreview.com/state-rankings/profanity-laws-by-state. When conduct is in a "constitutional gray area" a heightened inquiry is required. *Byunggu Kim*, 83 M.J. at 239. Even assuming, arguendo, this Court can find laws that prohibit private, obscene conversations between two consenting adults, the question would still remain whether 2d Lt Van Velson's language "may" implicate both criminal and protected language. *Hartman*, 69 M.J. at 468.

WHEREFORE, 2d Lt Van Velson requests that this Court find his guilty plea improvident.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 1 July 2024.

Respectfully submitted,

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