IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MOTION FOR ENLARGEMENT OF**
Appellee,	)	**TIME (FIRST)**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4),	)	No. ACM S32752
DONTAVIUS A. BATES,	)	
United States Air Force,	)	12 June 2023
Appellant.	)	

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **18 August 2023**. The record of trial was docketed with this Court on 20 April 2023. From the date of docketing to the present date, 53 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,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 June 2023.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

13 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DONTAVIUS A. BATES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32752 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 13 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 (SECOND)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **DONTAVIUS A. BATES,** United States Air Force, *Appellant.*	)	No. ACM S32752 11 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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 September 2023**. The record of trial was docketed with this Court on 20 April 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 12 January 2023, Appellant was tried by a special court-martial composed of a military judge alone at Minot Air Base, North Dakota. Consistent with his pleas, the military judge found Appellant guilty of one charge and two specifications of unlawful drug use in violation of Article 112a, Uniform Code of Military Justice (UCMJ), for use of marijuana and cocaine respectively. Record of Trial (ROT), Vol 1, Entry of Judgment (EOJ), dated 12 January 2023; Vol 2, page 71. The military judge sentenced Appellant to be confined for 90 days, reduced to the grade of E-1, a reprimand, and a bad conduct discharge. ROT, Vol 1, Entry of Judgment, dated 12 January 2023; Vol 2, page 175. The convening authority took no action on the findings. As to the sentence, the convening authority waived automatic forfeitures for period of six month, or upon release from

confinement or expiration of the Appellant's term of service, if sooner. ROT, Vol 1, Convening Authority Decision on Action – *United States v. SrA Dontavius A. Bates*, dated 27 January 2023.

The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Appellant is not currently in confinement.

Through no fault of Appellant, undersigned counsel was newly detailed to represent Appellant on 28 July 2023 after the release of Appellant's previous attorney. This has prevented counsel from having an adequate opportunity to review the ROT. Additionally, the undersigned counsel has been working on other assigned matters. 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,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 11 August 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

15 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DONTAVIUS A. BATES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32752 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.

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 15 August 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,* v. Senior Airman (E-4), **DONTAVIUS A. BATES,** United States Air Force, *Appellant.*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 2 No. ACM S32752 31 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 (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 October 2023**. The record of trial was docketed with this Court on 20 April 2023. From the date of docketing to the present date, 133 days have elapsed. On the date requested, 180 days will have elapsed.

On 12 January 2023, Appellant was tried by a special court-martial composed of a military judge alone at Minot Air Base, North Dakota. Consistent with his pleas, the military judge found Appellant guilty of one charge and two specifications of unlawful drug use in violation of Article 112a, Uniform Code of Military Justice (UCMJ), for use of marijuana and cocaine respectively. Record of Trial (ROT), Vol 1, Entry of Judgment (EOJ), dated 12 January 2023; Vol 2, page 71. The military judge sentenced Appellant to be confined for 90 days, reduced to the grade of E-1, a reprimand, and a bad conduct discharge. ROT, Vol 1, Entry of Judgment, dated 12 January 2023; Vol 2, page 175. The convening authority took no action on the findings. As to the sentence, the convening authority waived automatic forfeitures for period of six month, or upon release from

confinement or expiration of the Appellant's term of service, if sooner. ROT, Vol 1, Convening Authority Decision on Action – *United States v. SrA Dontavius A. Bates*, dated 27 January 2023.

The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Appellant is not currently in confinement.

Through no fault of Appellant, undersigned counsel was newly detailed to represent Appellant on 28 July 2023 after the release of Appellant's previous attorney. This has prevented counsel from having an adequate opportunity to review the ROT. Additionally, the undersigned counsel has been working on other assigned matters. These other matters include a previous detailing as trial defense counsel in the matter of *United States v. TSgt Samoy Young*, a special court-martial docketed to take place at Osan Air Base, Republic of Korea beginning on . Undersigned counsel will be traveling to . 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,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

<u>**CERTIFICATE OF FILING AND SERVICE**</u>

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

6 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DONTAVIUS A. BATES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32752 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.

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 6 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,* v. Senior Airman (E-4), **DONTAVIUS A. BATES,** United States Air Force, *Appellant.*	)))))))))	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL** Before Panel No. 2 No. ACM S32752 23 August 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. Captain Michael Bruzik has been detailed substitute counsel in undersigned counsel's stead and filed a pleading on Appellant's behalf on 11 August 2023. A thorough turnover of the record between counsel has been completed. The undersigned counsel will be departing from the Air Force Appellate Defense Division and beginning a new assignment on 5 September 2023.

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

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

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

DAVID L. BOSNER, 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,* v. Senior Airman (E-4), **DONTAVIUS A. BATES,** United States Air Force, *Appellant.*	)))))))))	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 2 No. ACM S32752 10 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 fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 November 2023**. The record of trial was docketed with this Court on 20 April 2023. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 12 January 2023, Appellant was tried by a special court-martial composed of a military judge alone at Minot Air Base, North Dakota. Consistent with his pleas, the military judge found Appellant guilty of one charge and two specifications of unlawful drug use in violation of Article 112a, Uniform Code of Military Justice (UCMJ), for use of marijuana and cocaine respectively. Record of Trial (ROT), Vol 1, Entry of Judgment (EOJ), dated 12 January 2023; Vol 2, page 71. The military judge sentenced Appellant to be confined for 90 days, reduced to the grade of E-1, a reprimand, and a bad conduct discharge. ROT, Vol 1, Entry of Judgment, dated 12 January 2023; Vol 2, page 175. The convening authority took no action on the findings. As to the sentence, the convening authority waived automatic forfeitures for period of six month, or upon release from

confinement or expiration of the Appellant's term of service, if sooner. ROT, Vol 1, Convening Authority Decision on Action – *United States v. SrA Dontavius A. Bates*, dated 27 January 2023.

The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Appellant is not currently in confinement. Undersigned counsel has begun, but not yet completed, an initial review of the ROT.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Of those cases, 3 cases have priority over this case:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, 1 court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has begun, but not yet completed an initial review of the record of trial.
2) *United States v. Schneider*, ACM 40403 – The record of trial is four volumes consisting of three prosecution exhibits, 26 defense exhibit, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has completed review of the record of trial.
3) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and eleven Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.

Through no fault of Appellant, undersigned counsel has been unable to complete the initial review of and prepare a brief for Appellant's case. In addition to the matters specified above, counsel has been at work on a Supplement for Petition for Review before the Court of Appeals for

the Armed Forces in the matter of *United States v. SSgt Jordan Lee*, which is due to be filed on 11 October 2023. 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,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 10 October 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

12 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DONTAVIUS A. BATES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32752 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.

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 12 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 (FIFTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **DONTAVIUS A. BATES,** United States Air Force, *Appellant.*	)	No. ACM S32752
	)	9 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 fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 December 2023**. The record of trial was docketed with this Court on 20 April 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 12 January 2023, Appellant was tried by a special court-martial composed of a military judge alone at Minot Air Base, North Dakota. Consistent with his pleas, the military judge found Appellant guilty of one charge and two specifications of unlawful drug use in violation of Article 112a, Uniform Code of Military Justice (UCMJ), for use of marijuana and cocaine respectively. Record of Trial (ROT), Vol 1, Entry of Judgment (EOJ), dated 12 January 2023; Vol 2, page 71. The military judge sentenced Appellant to be confined for 90 days, reduced to the grade of E-1, a reprimand, and a bad conduct discharge. ROT, Vol 1, Entry of Judgment, dated 12 January 2023; Vol 2, page 175. The convening authority took no action on the findings. As to the sentence, the convening authority waived automatic forfeitures for period of six month, or upon release from

confinement or expiration of the Appellant's term of service, if sooner. ROT, Vol 1, Convening Authority Decision on Action – *United States v. SrA Dontavius A. Bates*, dated 27 January 2023.

The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Appellant is not currently in confinement. Undersigned counsel has begun, but not yet completed, an initial review of the ROT.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Of those cases, 3 cases have priority over this case:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, 1 court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has begun, but not yet completed an initial review of the record of trial.

2) *United States v. Schneider*, ACM 40403 – The record of trial is four volumes consisting of three prosecution exhibits, 26 defense exhibit, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has completed review of the record of trial.

3) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and eleven Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his 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. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential error.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 9 November 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

15 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DONTAVIUS A. BATES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32752 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.

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 15 November 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32752**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dontavius A. BATES	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 9 November 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 motion further states: "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 Assignments of Error (AOE)." (Emphasis added). The court finds counsel's reference to a "fourth" enlargement of time to be a scrivener's error and that the enlargement of time is Appellant's fifth request.

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 20th day of November, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **16 December 2023**.

It is further ordered:

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 enlarge-

ment of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MOTION FOR ENLARGEMENT OF**
Appellee,	)	**TIME (SIXTH)**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4),	)	No. ACM S32752
DONTAVIUS A. BATES,	)	
United States Air Force,	)	9 December 2023
Appellant.	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for 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 **15 January 2024**. The record of trial was docketed with this Court on 20 April 2023. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 12 January 2023, Appellant was tried by a special court-martial composed of a military judge alone at Minot Air Base, North Dakota. Consistent with his pleas, the military judge found Appellant guilty of one charge and two specifications of unlawful drug use in violation of Article 112a, Uniform Code of Military Justice (UCMJ), for use of marijuana and cocaine respectively. Record of Trial (ROT), Vol 1, Entry of Judgment (EOJ), dated 12 January 2023; Vol 2, page 71. The military judge sentenced Appellant to be confined for 90 days, reduced to the grade of E-1, a reprimand, and a bad conduct discharge. ROT, Vol 1, Entry of Judgment, dated 12 January 2023; Vol 2, page 175. The convening authority took no action on the findings. As to the sentence, the convening authority waived automatic forfeitures for period of six month, or upon release from

confinement or expiration of the Appellant's term of service, if sooner. ROT, Vol 1, Convening Authority Decision on Action – *United States v. SrA Dontavius A. Bates*, dated 27 January 2023.

The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Appellant is not currently in confinement. Undersigned counsel has completed an initial review of the ROT. Appellant has been advised of his right to timely appeal and of this request for an enlargement of time. Appellant agrees to the request.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Of those cases, 3 cases have priority over this case:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, 1 court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has completed an initial review of the ROT and begun drafting an assignment of error.
2) *United States v. Schneider*, ACM 40403 – The record of trial is four volumes consisting of three prosecution exhibits, 26 defense exhibit, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has completed review of the record of trial.
3) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and eleven Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. These other matters include preparations for oral argument before this Court in the matter of *In Re RW* which is scheduled to take

place on 14 December 2023. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential error.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 9 December 2023.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

12 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DONTAVIUS A. BATES, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32752 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.

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 12 December 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MOTION FOR ENLARGEMENT OF**
Appellee,	)	**TIME (SEVENTH)**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4),	)	No. ACM S32752
DONTAVIUS A. BATES,	)	
United States Air Force,	)	8 January 2024
Appellant.	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for 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 **14 February 2024**. The record of trial was docketed with this Court on 20 April 2023. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

On 12 January 2023, Appellant was tried by a special court-martial composed of a military judge alone at Minot Air Base, North Dakota. Consistent with his pleas, the military judge found Appellant guilty of one charge and two specifications of unlawful drug use in violation of Article 112a, Uniform Code of Military Justice (UCMJ), for use of marijuana and cocaine respectively. Record of Trial (ROT), Vol 1, Entry of Judgment (EOJ), dated 12 January 2023; Vol 2, page 71. The military judge sentenced Appellant to be confined for 90 days, reduced to the grade of E-1, a reprimand, and a bad conduct discharge. ROT, Vol 1, Entry of Judgment, dated 12 January 2023; Vol 2, page 175. The convening authority took no action on the findings. As to the sentence, the convening authority waived automatic forfeitures for period of six month, or upon release from

confinement or expiration of the Appellant's term of service, if sooner. ROT, Vol 1, Convening Authority Decision on Action – *United States v. SrA Dontavius A. Bates*, dated 27 January 2023.

The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Appellant is not currently in confinement. Undersigned counsel has completed an initial review of the ROT. Appellant has been advised of his right to timely appeal and of this request for an enlargement of time. Appellant agrees to the request.

Counsel is currently assigned 14 cases; 12 cases are pending initial AOEs before this Court. Of those cases, 3 cases have priority over this case:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, 1 court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has completed an initial review of the ROT and begun drafting an assignment of error.
2) *United States v. Schneider*, ACM 40403 – The record of trial is four volumes consisting of three prosecution exhibits, 26 defense exhibit, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has completed review of the record of trial.
3) *United States v. Cassaberry-Folks*, ACM 40444 – The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and eleven Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his 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,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 8 January 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

9 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DONTAVIUS A. BATES, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32752 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.

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 January 2024.

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 (EIGHTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **DONTAVIUS A. BATES,** United States Air Force, *Appellant.*	)	No. ACM S32752 7 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 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 **15 March 2024**. The record of trial was docketed with this Court on 20 April 2023. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 12 January 2023, Appellant was tried by a special court-martial composed of a military judge alone at Minot Air Base, North Dakota. Consistent with his pleas, the military judge found Appellant guilty of one charge and two specifications of unlawful drug use in violation of Article 112a, Uniform Code of Military Justice (UCMJ), for use of marijuana and cocaine respectively. Record of Trial (ROT), Vol 1, Entry of Judgment (EOJ), dated 12 January 2023; Vol 2, page 71. The military judge sentenced Appellant to be confined for 90 days, reduced to the grade of E-1, a reprimand, and a bad conduct discharge. ROT, Vol 1, Entry of Judgment, dated 12 January 2023; Vol 2, page 175. The convening authority took no action on the findings. As to the sentence, the convening authority waived automatic forfeitures for period of six month, or upon release from

confinement or expiration of the Appellant's term of service, if sooner. ROT, Vol 1, Convening Authority Decision on Action – *United States v. SrA Dontavius A. Bates*, dated 27 January 2023.

The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Appellant is not currently in confinement. Undersigned counsel has completed an initial review of the ROT. Appellant has been advised of his right to timely appeal and of this request for an enlargement of time. Appellant agrees to the request.

Counsel is currently assigned 14 cases; 12 cases are pending initial AOEs before this Court. Of those cases, 3 cases have priority over this case:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, 1 court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has completed an initial review of the ROT and is working towards completion of an assignment of errors.

2) *United States v. Schneider*, ACM 40403 – The record of trial is four volumes consisting of three prosecution exhibits, 26 defense exhibit, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has completed review of the record of trial.

3) *United States v. Cassaberry-Folks*, ACM 40444 – The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and eleven Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. These other matters include completing an assignment of errors in the matter of *United States v. Scott* by 2 March 2024, and then

immediately working towards completion of an assignment of errors in the matter of *United States v. Schneider*. Additionally, undersigned counsel is at work on a supplement to a petition for review before the Court of Appeals for the Armed Forces in *United States v. Holt*, ACM 40390. 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,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 February 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

8 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DONTAVIUS A. BATES, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32752 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.

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 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 S32752**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dontavius A. BATES	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 7 February 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) 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 9th day of February, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **15 March 2024**.

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

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MOTION FOR ENLARGEMENT OF**
Appellee,	)	**TIME (NINTH)**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4),	)	No. ACM S32752
DONTAVIUS A. BATES,	)	
United States Air Force,	)	5 March 2024
Appellant.	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for 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 **14 April 2024**. The record of trial was docketed with this Court on 20 April 2023. From the date of docketing to the present date, 320 days have elapsed. On the date requested, 360 days will have elapsed.

On 12 January 2023, Appellant was tried by a special court-martial composed of a military judge alone at Minot Air Base, North Dakota. Consistent with his pleas, the military judge found Appellant guilty of one charge and two specifications of unlawful drug use in violation of Article 112a, Uniform Code of Military Justice (UCMJ), for use of marijuana and cocaine respectively. Record of Trial (ROT), Vol 1, Entry of Judgment (EOJ), dated 12 January 2023; Vol 2, page 71. The military judge sentenced Appellant to be confined for 90 days, reduced to the grade of E-1, a reprimand, and a bad conduct discharge. ROT, Vol 1, Entry of Judgment, dated 12 January 2023; Vol 2, page 175. The convening authority took no action on the findings. As to the sentence, the convening authority waived automatic forfeitures for period of six month, or upon release from

confinement or expiration of the Appellant's term of service, if sooner. ROT, Vol 1, Convening Authority Decision on Action – *United States v. SrA Dontavius A. Bates*, dated 27 January 2023.

The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Appellant is not currently in confinement. Undersigned counsel has completed an initial review of the ROT. Appellant has been advised of his right to timely appeal and of this request for an enlargement of time. Appellant agrees to the request.

Counsel is currently assigned 14 cases; 12 cases are pending initial AOEs before this Court. Of those cases, 3 cases have priority over this case:

1) *United States v. Scott*, ACM 40411 – The record of trial is 11 volumes consisting of 14 prosecution exhibits, 14 defense exhibits, 1 court exhibit, and 55 appellate exhibits; the transcript is 1599 pages. Undersigned counsel has nearly completed the assignment of errors for submission to this Court. This case is on its eleventh enlargement of time.
2) *United States v. Schneider*, ACM 40403 – The record of trial is four volumes consisting of three prosecution exhibits, 26 defense exhibit, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has completed review of the record of trial and begun drafting an assignment of errors. This case is on its eleventh enlargement of time.
3) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has begun, but not yet completed review of the record of trial. This case is on its ninth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Undersigned counsel's main focus is submission of an assignment of errors in *United States v. Scott* which is due to this court by 9 March 2024. Counsel has also begun working on an assignment of errors for *United States v. Schneider*, which is due for submission on 19 March 2024 and is in its eleventh enlargement of time. Once this is completed, undersigned counsel will immediately begin work on an assignment of error in *United States v. Cassaberry-Folks*, before shifting focus to the instant case. Counsel continues to work diligently to complete work on these cases which have all entered high enlargements of time. However, other pressing matters have prevented counsel from completing in-depth on this 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,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

6 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DONTAVIUS A. BATES, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32752 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant 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 completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 6 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 S32752**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dontavius A. BATES	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 5 March 2024, 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 8th day of March, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED, IN PART**. Appellant shall file any assignments of error not later than **9 April 2024**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for an enlargement of time shall 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
Senior Airman (E-4), **DONTAVIUS A. BATES,** United States Air Force, *Appellant.*	)	No. ACM S32752
	)	29 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 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 **9 May 2024**. The record of trial was docketed with this Court on 20 April 2023. From the date of docketing to the present date, 344 days have elapsed. On the date requested, 385 days will have elapsed.

On 12 January 2023, Appellant was tried by a special court-martial composed of a military judge alone at Minot Air Base, North Dakota. Consistent with his pleas, the military judge found Appellant guilty of one charge and two specifications of unlawful drug use in violation of Article 112a, Uniform Code of Military Justice (UCMJ), for use of marijuana and cocaine respectively. Record of Trial (ROT), Vol 1, Entry of Judgment (EOJ), dated 12 January 2023; Vol 2, page 71. The military judge sentenced Appellant to be confined for 90 days, reduced to the grade of E-1, a reprimand, and a bad conduct discharge. ROT, Vol 1, Entry of Judgment, dated 12 January 2023; Vol 2, page 175. The convening authority took no action on the findings. As to the sentence, the convening authority waived automatic forfeitures for period of six month, or upon release from

confinement or expiration of the Appellant's term of service, if sooner. ROT, Vol 1, Convening Authority Decision on Action – *United States v. SrA Dontavius A. Bates*, dated 27 January 2023.

The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Appellant is not currently in confinement. Undersigned counsel has completed an initial review of the ROT. Appellant has been advised of his right to timely appeal and of this request for an enlargement of time. Appellant agrees to the request.

Counsel is currently assigned 14 cases; 12 cases are pending initial AOEs before this Court. Of those cases, counsel's priorities are as follows:

1) *United States v. Schneider*, ACM 40403 – The record of trial is four volumes consisting of three prosecution exhibits, 26 defense exhibit, and eight appellate exhibits; the transcript is 369 pages. Undersigned counsel has nearly completed an initial draft of a four-issue AOE,[1] which will then have to be routed for internal review before submission to this court by 9 April 2024. This case is on its twelfth and final enlargement of time.

2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has completed initial review of the record of trial and identified five issues for an AOE. This case is on its tenth enlargement of time and due for submission on 6 May 2024.

[1] Undersigned counsel offers estimation of the number of issues anticipated merely to help appraise this Court of counsel's workflow. The total number of errors raised will not be finalized until submission of AOEs to this Court for the respective cases referenced in this motion.

3) *United States v. Bates* – This is the case at bar. Undersigned counsel has completed initial review of the record of trial.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete an assignment of errors in this case. Counsel's immediate priority is completion of an AOE for *United States v. Schneider*. This case has had a longer lifespan than the one subject to this motion, but shares the same filing deadline. This has made it difficult for undersigned counsel to ensure that he is giving each case the appropriate attention it deserves in order to zealously advocate for each client. Additionally, undersigned counsel has been at work reviewing the record of trial for *United States v. Cassaberry-Folks*, which just entered its tenth enlargement of time. Undersigned counsel was detailed to each of these cases roughly midway through their lifespan following the season for permanent changes of station (PCS).

Additionally, over the last few weeks undersigned counsel has had to dedicate his time to other high priority items which were due for submission. This included submission of an eight issue AOE in the matter of *United States v. Scott*, ACM 40411, and a supplement to petition for review before the Court of Appeals for the Armed Forces in the matter of *United States v. Holt*, ACM 40390. This has hindered counsel's ability to focus on completion of an AOE in this case. Accordingly, an enlargement of time is necessary to allow counsel to advise his client on potential errors and to complete work on an AOE.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

1 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DONTAVIUS A. BATES, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32752 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 390 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 5 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.

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 1 April 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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32752**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dontavius A. BATES	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

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

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 20 April 2023, which is nearly a year.

Accordingly, it is by the court on this 1st day of April, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED, IN PART**. Appellant shall file any assignments of error not later than **29 April 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 (ELEVENTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **DONTAVIUS A. BATES,** United States Air Force, *Appellant.*	)	No. ACM S32752 19 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 eleventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 7 days, which will end on **6 May 2024**. The record of trial was docketed with this Court on 20 April 2023. From the date of docketing to the present date, 365 days have elapsed. On the date requested, 382 days will have elapsed.

On 12 January 2023, Appellant was tried by a special court-martial composed of a military judge alone at Minot Air Base, North Dakota. Consistent with his pleas, the military judge found Appellant guilty of one charge and two specifications of unlawful drug use in violation of Article 112a, Uniform Code of Military Justice (UCMJ), for use of marijuana and cocaine respectively. Record of Trial (ROT), Vol 1, Entry of Judgment (EOJ), dated 12 January 2023; Vol 2, page 71. The military judge sentenced Appellant to be confined for 90 days, reduced to the grade of E-1, a reprimand, and a bad conduct discharge. ROT, Vol 1, Entry of Judgment, dated 12 January 2023; Vol 2, page 175. The convening authority took no action on the findings. As to the sentence, the convening authority waived automatic forfeitures for period of six month, or upon release from

confinement or expiration of the Appellant's term of service, if sooner. ROT, Vol 1, Convening Authority Decision on Action – *United States v. SrA Dontavius A. Bates*, dated 27 January 2023.

The record of trial consists of two volumes. The transcript is 176 pages. There are 11 Prosecution Exhibits, ten Defense Exhibits, and five Appellate Exhibits. Appellant is not currently in confinement. Undersigned counsel has completed an initial review of the ROT. Appellant has been advised of his right to timely appeal and of this request for an enlargement of time. Appellant agrees to the request.

Counsel is currently assigned 14 cases; 12 cases are pending initial AOEs before this Court. Of those cases, counsel's priorities are as follows:

1) *United States v. Bates* – This is the instant case.
2) *United States v. Cassaberry-Folks*, ACM 40444 - The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel has completed initial review of the record of trial and identified five issues for an AOE. This case is on its tenth enlargement of time and due for submission on 6 May 2024.
3) *United States v. Hilton*, ACM 40500 - The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. Undersigned counsel has not yet completed an initial review of the ROT. This case is on its sixth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete an assignment of errors in this case. During the last request for enlargement of time, this case was listed as undersigned counsel's second highest priority. Since then, counsel has shifted this case to top priority. Counsel has identified three issues to raise and

has almost completed an initial draft of the assignment of errors. Once completed, the draft will need to be routed for internal peer and leadership review. Counsel does not anticipate asking for any additional enlargements of time, but respectfully requests this seven day enlargement to ensure adequate internal review while also allowing counsel to continue advising his client through that part of the process. Additionally, counsel's ability to dedicate adequate time to this case was hindered by the completion an assignment of errors for *United States v. Schneider,* ACM 40403, and a reply brief for *United States v. Scott*, ACM 40411. Accordingly, an enlargement of time is necessary to allow counsel to complete work on an assignment of errors in this case.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 19 April 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**BRIEF ON BEHALF OF APPELLANT**
Appellee,	)	
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4),	)	No. ACM S32752
DONTAVIUS A. BATES,	)	
United States Air Force,	)	6 May 2024
Appellant.	)	

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

Assignments of Error

I.

WHETHER THE SENTENCE IMPOSED AGAINST SENIOR AIRMAN BATES WAS INAPPROPRIATELY SEVERE.

II.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY INTRODUCING RECORDS FROM SENIOR AIRMAN BATES'S PARTICIPATION IN A SUBSTANCE ABUSE REHABILITATION PROGRAM IN VIOLATION OF AIR FORCE REGULATIONS.

III.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY ENGAGING IN IMPROPER ARGUMENT.

IV.

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 SENIOR AIRMAN BATES WAS CONVICTED OF A NON-VIOLENT OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021)?

Statement of Case

On 12 January 2023, Senior Airman (SrA) Dontavius A. Bates was tried by a special court-martial composed of a military judge alone at Minot Air Force Base (AFB), North Dakota. Consistent with his pleas, the military judge found SrA Bates guilty of one charge and two specifications of unlawful drug use in violation of Article 112a, Uniform Code of Military Justice (UCMJ), for use of marijuana and cocaine respectively. (Record of Trial (ROT), Vol 1, Entry of Judgment (EOJ), dated 12 January 2023; R. at 71.) The military judge sentenced SrA Bates to 90 days' confinement, reduction to the grade of E-1, a reprimand, and a bad-conduct discharge. (ROT, Vol 1, Entry of Judgment, dated 12 January 2023; R. at 175.) The convening authority took no action on the findings. As to the sentence, the convening authority waived automatic forfeitures for period of six month, or upon release from confinement, or expiration of the Appellant's term of service, whichever was sooner. (ROT, Vol 1, Convening Authority Decision on Action – *United States v. SrA Dontavius A. Bates*, dated 27 January 2023.)

Statement of Facts

SrA Bates was born in South Carolina as the second oldest of five children who were raised by a single mother. (Def. Ex. J at 1.) He joined the Air Force to serve his country and to be a

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

positive role model for his siblings. (*Id.*) After completing his initial training and being assigned to Minot AFB, SrA Bates promoted to the rank of Senior Airman below the zone. (*Id.*; Def. Ex. B.) During the formative period of his career, SrA Bates's leadership recognized him as high performer within his unit. (R. at 86.) Y.B., SrA Bates first sergeant, described him as an excellent Airman. (R. at 106.) His commander, J.A., echoed this sentiment by commenting on SrA Bates's great potential during the initial stages of his career. (R. at 98.) Shortly after joining, SrA Bates married a fellow Air Force member, and the two had a child together. (Def. Ex. J.)

While stationed at Minot, SrA Bates returned home for a family gathering and experienced the traumatic shooting of his family members. (R. at 116.) This pushed SrA Bates into a spiral culminating in the use of cocaine and marijuana. (R. at 115.) SrA Bates's first instance of using cocaine occurred at a house party where it was offered to him while he was drunk. (Def. Ex. J at 2.) Following this, SrA Bates used marijuana to calm the effects of the cocaine. (*Id.*)

SrA Bates substance abuse problem developed into a medically-diagnosed addiction. (R. at 107.) This caused SrA Bates to experience intense cravings and an inability to sleep. (Pros. Ex. 1 at 3.) Although this manifested through failed urinalysis testing, SrA Bates's unit recognized him as someone who had a problem, rather than some sort of hardened criminal. (R. at 111.) His unit understood that he was in the throes of addiction. (Pros. Ex. 1 at 2; R. at 87.) Although SrA Bates wanted to get clean, he could not overcome the addictive nature of the substances that he struggled with. (R. at 110.) SrA Bates was admitted to in-patient treatment, but unfortunately relapsed after completion. (R. at 103.) Similarly, SrA Bates was unsuccessful in his efforts to complete treatment through the Air Force Alcohol and Drug Abuse Treatment Program (ADAPT). (Pros. Ex. 1 at 2.) The unit provided no subsequent attempts at treatment, despite the availability

of other methods. (R. at 92, 97.) Rather, on 14 November 2023, SrA Bates was placed into pretrial confinement, where he remained for sixty days before being brought to court-martial. (R. at 73.)

While in pretrial confinement, SrA Bates engaged in extensive journaling in which he accepted personal responsibility for his circumstances. (Def. Ex. H at 6.) As the only inmate in confinement, SrA Bates carried out his time in complete solitude. (Def. Ex. H at 7.) SrA Bates came to terms with his actions by choosing to plead guilty and by cooperating with law enforcement to aid in the investigation of drug distribution at Minot AFB. (Pros. Ex. 1 at 4.) This provided substantial assistance to the Government. (*Id.*)

I.

THE SENTENCE IMPOSED AGAINST SENIOR AIRMAN BATES WAS EXCESSIVE.

Standard of Review

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

Law & Analysis

Under Article 66(d), UCMJ, this Court may only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018). "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citations omitted) (internal quotation marks omitted). This Court's broad power to ensure a just sentence is distinct from the convening authority's clemency power to grant mercy. *See United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

In assessing sentence appropriateness, this Court considers "the particular appellant, the

nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (alteration in original) (citation omitted).

The sentence adjudged against SrA Bates was inappropriately severe given the facts and circumstances of the case, to include SrA Bates's struggle with medically-diagnosed substance abuse disorder.

A. An Individual Assessment of SrA Bates Warrants Sentencing Relief.

Reviewing SrA Bates as an individual supports reducing the sentence that he received. While the conduct that SrA Bates pleaded guilty to appears severe on its face, it is important to note that SrA Bates was not driven by a desire to be a hardened criminal. Rather, he continued to test positive for unlawful substances because of his medical condition, substance abuse disorder. This was made clear throughout the stipulation of facts and the providence inquiry. Moreover, this chain of events leading into SrA Bates medical condition began after he experienced a traumatic event while visiting family back home. This event involved members of his family being shot. Despite this, SrA Bates time in pretrial confinement provided ample reflection for him in which he determined to turn his life around. These circumstances do not speak to a criminally-minded individual, but rather to someone who needed help. Additionally, by pleading guilty SrA Bates expressed great contrition. He also lent aid to law enforcement by assisting in the investigation of other illegal activities at Minot AFB. This weighs against the severity of the punishment imposed.

B. The Actual Conduct that SrA Bates was Convicted of had Limited Consequence.

The offenses that SrA Bates pleaded guilty to were not of such a serious nature as to justify the sentence he received. While the Government suggested that SrA Bates's conduct resulted in a

pattern of other disciplinary issues, there are no facts established on the record to show that this was the case. *Infra* at AOE III. Rather, his unit appeared to blame uncharged misconduct documented in his personal information file on the pattern of drug use without any substantiation to show that was the case beyond speculation. Additionally, the Government impermissibly used records from SrA Bates's participation in drug rehabilitation as a matter in aggravation. However, this was improper. *Infra* AOE II. Setting aside these two improper lines of aggravation, and the Government presented very little to show that SrA Bates conduct was of such a serious nature to justify the punishment that he received.

C. SrA Bates Maintained a Good Service Record Prior to the Development of His Addiction.

Prior to the traumatic event in his life that developed into a substance abuse disorder, SrA Bates was a promising Airman with a good service record. His unit leadership acknowledged him as a high performer, and he otherwise had no disciplinary issues.

D. All Matters Contained in the Record Called for a Lower Sentence.

The matters in the record suggest that SrA Bates should have received a lesser sentence. In particular, the narrative expounded during the sentencing hearing was that of a promising young Airman who fell into an addiction after a traumatic event but became determined to change his life after going into pretrial confinement. The latter component of this cannot be understated, and it is unclear why additional confinement and a bad-conduct discharge were necessary after SrA Bates had already spend so much with his liberty restricted.

WHEREFORE, SrA Bates respectfully request that this Honorable Court set aside and reassess his sentence to include setting aside the bad conduct discharge and approving only 60 days of the confinement as time served.

II.

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY INTRODUCING RECORDS FROM SENIOR AIRMAN BATES'S PARTICIPATION IN A SUBSTANCE ABUSE REHABILITATION PROGRAM IN VIOLATION OF AIR FORCE REGULATION.

Standard of Review

Claims of prosecutorial misconduct are reviewed de novo. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019). Even where an issue has been waived, this Court retains the authority to address errors raised for the first time on appeal. *United States v. Andersen*, 82 M.J. 543, 547 (A.F. Ct. Crim. App. 2022). A matter not raised at trial is reviewed for plain error. *United States v. Schmidt*, 82 M.J. 68, 73 (C.A.A.F. 2022). Plain error is shown where: (1) there was error, (2) the error was clear and obvious, and (3) the error results in material prejudice to the appellant's substantial rights. *Id.*

Additional Facts

During their sentencing case, the Government introduced a memorandum from the ADAPT program concerning SrA Bates's participation. (R. at 79; Pros. Ex. 11.) The memorandum contained an opening sentence declaring "[t]his report contains sensitive information," and later explained "[c]ommanders shall protect the privacy of information as they would any other health information." (Pros. Ex. 11.)

The document indicated that SrA Bates was advised to enter ADAPT by his command. (*Id.*) It contained derogatory information about SrA Bates's time in ADAPT, including allegations that he was dishonest, that he had tested positive for cocaine after being tested within the command-referred program, and that he was ultimately removed for failing to comply with treatment recommendations. (*Id.*) The memorandum concluded by recommending that SrA Bates be administratively separated from the Air Force. (*Id.*)

When asked by the military judge if there was any objection to the memorandum's admission, trial defense counsel replied in the negative. (R. at 79.) During sentencing arguments, trial counsel leaned into the memorandum as evidence in aggravation, asserting that:

> On 19 July, Airman Bates was command referred to ADAPT to receive substance abuse treatment. On 15 August, a month later, he's still positive for cocaine, over 33,000 nanograms per milliliter. The cutoff is 11 nanograms per milliliter detection. And he was also positive for marijuana.
>
> So he ends up going to Colorado Springs at expense of the U.S. Air Force. Fully paid. [A]pproximately 30 days in residence substance abuse treatment and he successfully completes it. But 24 hours upon returning to Minot, he does cocaine again.
>
> He fails ADAPT which recommends his discharge from the Air Force. But this wasn't a one off. It was the last straw for ADAPT, and that's reflected in the ADAPT memo that the government as a sentencing exhibit. And also what that memo reflects it hat is dishonest throughout this time period. 6 October, he's again positive for cocaine.

(R. at 157-58.)

Law & Analysis

"Trial prosecutorial misconduct is behavior by the prosecuting attorney that 'oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Andrews*, 77 M.J. 393, 402 (C.A.A.F. 2018) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)).

A. Admission of the ADAPT Memorandum was a Violation of Air Force Regulation.

The Government's introduction of SrA Bates's ADAPT record amounted to prosecutorial misconduct that the military judge failed to properly address. Although trial defense counsel failed to object, admission of the memorandum was plainly inadmissible in light of Air Force regulation and should have been barred from consideration for purposes of sentencing.

One of the primary objectives of the ADAPT program is "to restore function and return members to unrestricted duty status." Department of the Air Force Instruction (DAFI) 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, ¶ 3.4.1. (18 Jul. 2018, as amended by DAFGM2024-01, 3 Jan. 2024). Similarly, federal law prohibits the use of a patient's drug treatment records as "evidence in any criminal prosecution or civil action before a Federal or State court." 42 USC § 290dd-2(c)(1). This standard is incorporated by Air Force regulation "to the extent it provides records may not be used to initiate or substantiate any criminal charges against the rehabilitant." DAFI 51-201, *Administration of Military Justice*, 24 Jan. 2024, ¶ 8.9. *See also United States v. Schmenk*, 11 M.J. 803, 803-04 (A.F.C.M.R. 1981) ("No information resulting from or concerning an accused's participation in an Air Force drug rehabilitation program is admissible in an Air Force court-martial unless a specific basis for its admission is established in accord with applicable directives.") Disclosure of drug abuse rehabilitation is permissible only "with written consent of . . . the accused-patient" and limited to use as:

1. Evidence for the defense before findings;
2. Evidence in mitigation or extenuation in pre-sentencing proceedings; or
3. After trial in support of clemency or clemency petitions to the Judge Advocate General or Secretary of the Air Force.

DAFI 51-201 at ¶ 8.9.2.

Despite this hard limitation on the admission of records from drug rehabilitation programs, trial counsel offered SrA Bates's ADAPT record as aggravation. This was prohibited by DAFI 51-201's brightline rule against the Government introducing this type of evidence for that purpose. Thus, trial counsel's use of this as a prosecution exhibit was a violation of legal standard, and was not offered for any valid purpose. Similarly, the clear nature of the error should have prompted action from the military judge.

B. The Memorandum Contained Inadmissible Evidence of a Failed Drug Tests Taken Per Senior Airman Bates' Command-Directed Participation in ADAPT.

Aside from the inadmissible nature of the memorandum in light Air Force regulation, the memorandum substantively referred to matters that were inappropriate for consideration at court-martial. Specifically, the memorandum described failed drug tests that had been conducted in accordance SrA Bates's command-referred participation in the program. "Evidence obtained from nonconsensual extraction of body fluids is admissible" but only if "seized pursuant to a search warrant or a search authorization under Mil. R. Evid. 315." Mil. R. Evid. 312(d). "Absent probable cause, commander directed results may not be used for disciplinary action under the UCMJ." Department of the Air Force Manual (DAFMAN) 44-197, *Military Drug Demand Reduction Program*, Table 9.1, Note 4 (5 Sep. 2023) ("Absent probable cause, commander directed results may not be used for disciplinary action under the UCMJ.") The drug tests referenced in the memorandum were taken under the command-directed program, rather than a probable cause determination. These test results were inadmissible in court-martial. *United States v. Gaddy*, 54 M.J. 769, 771 (A.F. Ct. Crim. App. 2001) (recognizing that command-directed urinalysis results are inadmissible for sentencing when prohibited by Air Force regulation.) For this reason, they were not permissible for use during SrA Bates's court-martial, and the admission of these details was clear error.

C. *The Memorandum was Extrinsic Evidence of Specific Instances of Dishonesty that Attacked SrA Bates Character for Truthfulness Despite him Having not Testified as a Witness.*

The memorandum also contained an inadmissible reference regarding SrA Bates's alleged dishonesty about his cocaine use with ADAPT staff. This was impermissible under Mil. R. Evid. 608. *See also United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021) (acknowledging that the military rules of evidence apply during a sentencing proceeding.) As an initial matter, SrA Bates never testified as a witness to open the door to an attack on his character for truthfulness. Moreover, this aspect of the memorandum was inadmissible because it represented extrinsic evidence of specific instance of an alleged dishonest act, which was prohibited under Mil. R. Evid. 608(b). Despite this, trial counsel not only offered the memorandum into evidence, but explicitly mentioned this during their sentencing argument.

D. The Memorandum Contained a Recommendation for SrA Bates to be Separated from the Air Force.

Finally, the memorandum ended with a remark on SrA Bates's continued viability as a member of the Air Force by recommending that he be administratively separated. Hence, the memorandum provided a euphemism for recommendation of a punitive discharge. *See United States v. Cherry*, 31 M.J. 1, 5 (C.M.A. 1990) (prohibiting the admission of euphemism's during sentencing that impliedly suggest that the accused should be separated from the service). Accordingly, this portion of the memorandum was impermissible for consideration during sentencing.

E. Admission of the ADAPT Memorandum was Prejudicial to SrA Bates.

Prejudice from the improper admission of evidence in sentencing is determined based on "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *United States v.*

Edwards, 82 M.J. 239, 247 (C.A.A.F. 2022) (citing *Barker*, 77 M.J. at 384).[2] The Government "bears the burden of demonstrating that the admission of erroneous evidence was harmless." *United States v. Cunningham*, 83 M.J. 367, 372 (C.A.A.F. 2023) (quoting *Edwards*, 82 M.J. at 246).

The strength of the Government's case was low, especially when considering the various impermissible matters that trial counsel presented and argued. *Supra* AOE III. Conversely, the defense evidence presented several crucial matters in mitigation, namely the reason why SrA Bates fell into addiction and how he had sought to become healthy. In spite of this, the materiality of the ADAPT record was high because it could have been interpreted as directly related to SrA Bates potential for rehabilitation and recidivism, which raises the likelihood that it was prejudicial. Moreover, the quality of the memorandum was also high as it came from a recognized agency within the Air Force. This demonstrates the propensity of such evidence to sway the sentencing procedure against SrA Bates.

WHEREFORE, SrA Bates respectfully request that this Honorable Court set aside and reassess his sentence to include setting aside the bad conduct discharge and approving only 60 days of the confinement as time served.

[2] The validity of the *Barker* factors for determining prejudicial error in the context of sentencing has been questioned by the Court of Appeals for the Armed Forces. *United States v. Cunningham*, 83 M.J. 367, n.4 (C.A.A.F. 2023). SrA Bates challenges the use of the *Barker* factors to determine whether he was prejudiced by the errors outlined in this brief and urges this court to adopt a more appropriate standard that accounts for the total effect of the errors.

III.

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY ENGAGING IN IMPROPER ARGUMENT.

Standard of Review

Improper argument is another facet of prosecutorial misconduct. *Sewell*, 76 M.J. at 18 (C.A.A.F. 2017) (citing *United States v. Young*, 470 U.S. 1 (1985)). Where there was no objection at the trial level, the standard of review is plain error. *Andrews*, 77 M.J. at 398. "The burden of proof under plain error review is on the appellant." (*Id.*)

Additional Facts

During argument, trial counsel asserted that SrA Bates "actively contributed to and facilitated the illicit drug enterprise on [the] installation." (R. at 159.) SrA Bates was never charged with distribution, manufacture, or even possession of any unlawful substance. Trial counsel went on to argue that a series of LORs received by SrA Bates for not reporting for duty were drug related, despite conceding that such an assertion was merely speculation. (R. at 159, 162.) Despite this, trial counsel used the LORS during sentencing as evidence in aggravation (R. at 159.) Following this, trial counsel commented on SrA Bates ADAPT records, including the agency's recommendation for separation from the Air Force. (R. at 158.) Despite this, trial counsel suggested that confinement was a means of treating SrA Bates substance abuse disorder. (R. at 162.) Trial counsel concluded their argument by attacking SrA Bates personally by stating that he "would rather do drugs than be a positive role model in his son's life, so that his son never has to lead the life that he had lead over the last 6 months. And he's demonstrated time and time against that he would rather do drugs than be a husband who is there to take of his wife and support her with their young child." (R. at 163.)

Law & Analysis

In the context of improper argument by trial counsel, plain error analysis is focused on (1) whether trial counsel's arguments amounted to clear, obvious error; and (2) if so, whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019). Trial counsel's sentencing argument here was tainted by the high volume of impermissible arguments.

A. Trial Counsel Made Assertions that Were Factually Unsupported by the Record.

The Government is "prohibited from injecting into argument irrelevant matters, such as personal opinions and facts not in evidence." *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007). Despite this, trial counsel made numerous allusions during her argument which were not established as facts in the record. This included the prosecution's assertion that SrA Bates "actively contributed to and facilitated the illicit drug enterprise on [the] installation." (R. at 159.) There was no evidence presented concerning any "illicit drug enterprise" on the installation, nor was there any evidence shown that SrA Bates was somehow a "contributor" or a "facilitator" of it. Thus, trial counsel's assertion was neither directly established nor shown by fair inference. Aside from being unproven, any reference to this type of conduct represented an uncharged act not permissible for consideration during sentencing. *See United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (holding that matters in aggravation during presentencing must be directly related "to the offenses of which the accused has been found guilty" and may not consist of "'general evidence of . . . uncharged misconduct.'" (quoting *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001)). Thus, this argument was improper. *United States v. Akbar*, 74 M.J. 364, 394 (C.A.A.F. 2015).

Furthermore, trial counsel argued that matters contained in SrA Bates's letters of reprimand (LORs) were connected to drug use despite the absence of evidence showing this to be the case. Without this factual basis, trial counsel argued the letters of reprimand as improper aggravation. R.C.M. 1001(b)(4) (mandating that evidence in aggravation must "directly and immediately" result from the accused's offense); *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (holding that the scope of aggravation is a "higher standard than mere relevance"); *Hardison* 64 M.J. at 282 (holding that matters in aggravation must be "closely related in time, type, and/or often outcome, to the convicted crime").

In particular, trial counsel asserted that the LORs provided a "snap shot of what it has been like for his unit to deal with him over the last 4 to 6 months." (R. at 159.) Trial counsel went on to explain how the LORs documented SrA Bates not reporting for duty or somehow going missing after being placed on accountability for drug use. (R. at 160.) Trial counsel summed this up saying, "[T]o add insult to injury, throughout this entire time, we know he was definitely using drugs on base." (R. at 161.) Despite trial counsel's attempt to tie these episodes to the charged offenses, there was no evidence on the record showing that drug use played any role in them. In fact, trial counsel admitted that any drug use during these episodes was speculation by acknowledging that his leadership "thought oh, he's out getting high." (R. at 162.) Given this, the record does not establish a basis by which trial counsel could have argued the LORs in aggravation. *See also United States v. Williams*, 27 M.J. 529, 530 (A.F.C.M.R. 1988) (holding that use of LOR to show that accused was habitual drug user an inadmissible purpose).

B. Trial Counsel Improperly Commented on SrA Bates's Participation in ADAPT.

Trial counsel impermissibly argued for a severe sentence against SrA Bates based on his participation in the ADAPT program. Specifically, trial counsel commented on SrA Bates failure

from the program, and his alleged drug use during his enrollment. (R. at 158.) Admission of SrA Bates's status in the program was erroneous. *Supra* AOE II. Trial counsel's further comment on these matters as aggravation was outside the bounds of permissible argument. In particular, trial counsel argued uncharged matters that were not "directly and immediately resulting from the accused's offense." R.C.M. 1001(b)(4). Moreover, trial counsel drew upon ADAPT's recommendation for SrA Bates to be discharged from the Air Force to insinuate that a punitive discharge was warranted in spite of the prohibition against the court receiving sentencing recommendations in evidence under R.C.M. 1001(b)(5)(D).

C. Trial counsel Argued for Confinement Based on Collateral Matters.

Trial counsel's argument for confinement based on its potential to rehabilitate SrA Bates from drug addiction was inappropriate. Trial counsel crossed this line by arguing that confinement would force SrA Bates to be sober and that "[t]he longer he is sober, albeit forced to be sober, the greater chance that he has to ultimately be rehabilitated." (R. at 162.) This Court has recognized that "[i]t is well settled that the availability of treatment programs is a collateral matter that should not be presented in aggravation for consideration in determining a proper sentence." *United States v. McGovern*, No. ACM S31468, 2008 CCA LEXIS 485, at *3 (A.F. Ct. Crim. App. Dec. 15, 2008). Despite this, trial counsel argued for SrA Bates's confinement as a matter of treatment for his medical condition. This was error in light of *McGovern*, and trial counsel's argument was thus improper.

D. Trial counsel Attacked SrA Bates on a Personal Level

Trial counsel concluded their argument by making a series disparaging comments towards SrA Bates. This included trial counsel's assertion that SrA Bates "would rather do drugs than be a positive role model in his son's life, so that his son never has to lead the life that he had lead over

the last 6 months. And he's demonstrated time and time against that he would rather do drugs than be a husband who is there to take of his wife and support her with their young child." (R. at 163.) Disparaging comments are improper when directed at the accused and represent "more of a personal attack . . . than a commentary on the evidence." *Voorhees*, 79 M.J. at 11 (quoting *Fletcher*, 62 M.J. at 182.) Trial counsel committed misconduct by relegating their argument to a personal attack on SrA Bates rather than by fairly commenting on evidence raised in sentencing.

E. SrA Bates was Prejudiced by Trial counsel's Repeated Improper Arguments.

But for trial counsel's error, the outcome of SrA Bates' court-martial would have been different, thereby demonstrating prejudice. This Court considers whether "the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that [the appellant] was sentenced on the basis of the evidence alone." *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (internal quotation marks omitted) (citing Fletcher, 62 M.J. at 184). Three factors weigh into consideration for whether prosecutorial misconduct is prejudicial: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Fletcher*, 62 M.J. at 184.

1. Trial counsel's Improper Arguments were Severe

The severity of trial counsel's improper arguments was high. Trial counsel's misconduct occurred with high frequency and appeared to occupy the central theme of their argument. Not only did trial counsel commit multiple forms of improper argument, but they used these arguments to justify their request for a harsh sentence. This was not a situation where trial counsel committed a single discrete improper argument. Rather, the misconduct was pervasive throughout the entire argument. Despite this, the lack of corrective action by the military judge raises serious concerns about whether the sentence was unduly influenced by the impermissible matters raised.

Accordingly, trial counsel's misconduct was severe and should leave this court unconvinced that the sentence imposed was free of undue influence.

2. The Military Judge Took no Corrective Action.

The lack of corrective action from the military judge speaks to the prejudice that SrA Bates experienced. This contrasts with other portion of the hearing where the military judge corrected trial counsel's improper methods and set the record straight. This was especially pronounced where the military judge indicated that he would not take testimony from SrA Bates's commander into consideration when assessing the commander's recommendation that SrA Bates be removed from the Air Force. (R. at 120.) While that corrective action spoke to a very discrete issue, it is alarming that the military took no corrective action concerning trial counsel's repeated and flagrantly impermissible arguments. Given that the military judge went out of his way to correct trial counsel on the former issue, the lack of action in this context evinces that the military judge thought the arguments were proper and *did* take them into consideration.

3. The Weight of the Evidence Does not Support the Sentence Imposed.

Despite this, the evidence presented at sentencing did not justify the sentence imposed by the military judge. This is especially so considering the mitigating evidence presented in SrA Bates's favor, and the effect that pretrial confinement had already played in addressing the misconduct. *Supra* AOE I. This calls into question the sentence imposed and suggests that it was improperly influenced by the matters presented by trial counsel. Given that the weight of the evidence does not support the sentence imposed, this demonstrates that SrA Bates was prejudiced.

WHEREFORE, SrA Bates respectfully request that this Honorable Court set aside and reassess his sentence to include setting aside the bad conduct discharge and approving only 60 days of the confinement as time served.

IV.

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" WHEN SRA BATES WAS CONVICTED OF A NON-VIOLENT OFFENSE AND THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021).

Additional Facts

After his conviction, the Government determined that SrA Bates's conviction met the firearm prohibition under 18 U.S.C. § 922 as reflected on the Entry of Judgement and Statement of Trial Results. (ROT, Vol. 1, Entry of Judgment, 15 February 2023.) The Government did not specify why, or under which section, his case met the requirements of 18 U.S.C. § 922. *Id.*

Standard of Review

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

Law and Analysis

1. 18 U.S.C. § 922(g) is unconstitutional as applied to SrA Bates.

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."

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022) (citation omitted).

In applying this test, the Fifth Circuit recently held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.' Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated." *United States v.*

Rahimi, 61 F.4th 443, 461 (5th Cir. 2023) (citation omitted). Notably, Rahimi was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at 448-49.

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." *Id.* at 461 (citation omitted). Therefore, the Government bears the burden of justifying its regulation.

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. 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 like SrA Bates being stripped of his right to keep and bear arms after being convicted for a non-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 pleaded guilty to possessing a firearm while under an agreed upon domestic violence restraining order, then it likely cannot prove that its firearm prohibition on SrA Bates for non-violent offenses would be constitutional.

Given the non-violent nature of the facts of his case, and the *Rahimi* Court's holding, it appears that the Government would not be able to meet its burden of proving a historical analog that barred non-violent offenders from possessing firearms. *See also Range v. AG United States*,

69 F.4th 96, 106 (3d Cir. 2023) (holding application of 18 U.S.C. § 922(g)(1) to defendant convicted of providing false information on food stamp application unconstitutional.)

2. The Court may order correction of the Entry of Judgment and Statement of Trial Results.

In *United States v. Lepore*, citing to the 2016 edition of the Rules for Courts-Martial, this Court held, "the 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. 759, 763 (A.F. Ct. Crim. App. 2021). 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. However, 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.*

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.). The CAAF's direction that the Army Court of Criminal Appeals fix—or order the Government to fix—the promulgating order, is in contravention to this Court's holding in *Lepore*.

The 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, the CAAF believes that Courts of Criminal Appeals have the power to address collateral consequences

under Article 66 as well 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 the 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 n.1. This Court then emphasized "the 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 newer 2019 rules, 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). DAFI 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, SrA Bates requests this Court find the Government's firearm prohibition is unconstitutional, overrule *Lepore* in light of *Lemire*, and order that the Government correct the Statement of Trial Results and Entry of Judgement to remove the firearm prohibition.

Respectfully submitted,

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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 Operations Division on 6 May 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 2
Senior Airman (E-4) **DONTAVIUS A. BATES** United States Air Force *Appellant.*	)	No. ACM S32752 7 June 2024

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

Assignments of Error

I.

WHETHER THE SENTENCE IMPOSED AGAINST SENIOR AIRMAN BATES WAS INAPPROPRIATELY SEVERE.

II.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY INTRODUCING RECORDS FROM SENIOR AIRMAN BATES'S PARTICIPATION IN A SUBSTANCE ABUSE REHABILITATION PROGRAM IN VIOLATION OF AIR FORCE REGULATIONS.

III.

WHETHER TRIAL COUNSEL COMMITTEED PROSECUTORIAL MISCONDUCT BY ENGAGING IN IMPROPER ARGUMENT.

IV.

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" WHEN SENIOR AIRMAN BATES WAS CONVICTED OF A NON-VIOLENT OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION UNDER UNITED STATES V. LEMIRE, 82 M.J. 263 (C.A.A.F. 2022) OR UNITED STATES V. LEPORE, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021)?

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case. Undersigned Counsel filed a previous version of this answer on 5 June 2024 and withdraws because the wrong panel was listed, this case is before Panel No. 2.

STATEMENT OF THE FACTS

Appellant abused cocaine and marijuana for nearly six months, and only reduced his drug use once restrained in pretrial confinement. (Pros. Ex. 1 at 23.) Appellant started down a path of drug abuse in July of 2022 by using cocaine at a house party. (Pros. Ex. 1, Stipulation of Fact, R. at 26-31.) Appellant followed the high of cocaine, with marijuana to balance out the effects. (Id.) A few days later, Appellant was subject to a random inspection, and had a positive urine sample for both cocaine and marijuana. (Id., Pros. Ex. 1.) This started a pattern that continued for months. Appellant would abuse cocaine and marijuana, then produce a positive urine sample. After the second positive test, command directed Appellant to Alcohol and Drug Abuse Prevention and Treatment Program (ADAPT). (Pros. Ex. 1.) Treatment was ineffective, appellant produced another urine sample positive for marijuana and cocaine. (Id.) Appellant received a higher level of addiction treatment, at an inpatient center. (Id.) Twenty-four hours after inpatient treatment, Appellant relapsed and tested positive for cocaine and marijuana again. (R. at 31, 103.) Command restricted Appellant's movement to base, to keep him safe. (R. at

85.) That base restriction did not work; Appellant produced more marijuana-positive urine samples. (Pros. Ex. 1, R. at 85-86.) Out of concern for Appellant's health, and the unit's good order and discipline, Appellant's command ordered him into pretrial confinement. (R. at 85.)

Appellant in accordance with his guilty pleas, was convicted of one specification of using marijuana on divers occasions, and one specification of using cocaine on divers occasions. (ROT, Vol. 1, Entry of Judgment, 15 February 2023.) The plea agreement required the military judge to sentence Appellant to "a minimum of 76 days confinement but no more than 120 days confinement" on each specification, to run concurrently. (App. Ex. III.) Appellant was sentenced to a total of 90 days confinement, with 60 days of time served, reduction in grade and a bad conduct discharge. (Id.)

Additional facts relevant to the disposition of the issues are below.

ARGUMENT

I.

THE SENTENCE IMPOSED ACCURATELY REFLECTS APPELLANTS CONDUCT.

Standard of Review

This Court reviews the appropriateness of an appellant's sentence *de novo*. *See* United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023)

Additional Facts

Appellant was sentenced to 90 days in confinement, two weeks more than the agreed upon minimum of 76 days. (Entry of Judgement.) Appellant argues that he already spent time with his freedom restricted, in pretrial confinement, and that his sentence is inappropriately severe. (App. Br. at 6.) The plea agreement required the Military Judge to sentence Appellant to

"a minimum of 76 days confinement but no more than 120 days confinement" on each specification, to run concurrently, and a bad conduct discharge. (App. III, pg. 2.) The plea agreement also spelled out the Government's acknowledgment of Appellant's cooperation with law enforcement.

> The Government agrees that during the pre-trial state of this court-martial, I cooperated with law enforcement, and the that my cooperation gave the Government information on individuals who violated the law by using and distributing illegal substances. Accordingly, the Government agrees and recognizes that I provided substantial assistance to the Government.

(App. III, pg. 2.)

Defense counsel argued for a sentence of 80 days. (R. at 168.) Trial counsel argued for the maximum 120 days. (R. at 165.) The military judge ultimately sentenced Appellant to the minimum confinement period for Specification 1 (divers marijuana use), and 90 days of confinement for Specification 2 (divers cocaine use), to be served concurrently, with 60 days of credit time served. (Entry of Judgment.) This sentence was only 10 days more than the 80 days defense counsel advocated for.

Law & Analysis

Pursuant to Article 66(d), UCMJ, this Court "may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d). The purpose of such review is "to ensure 'that justice is done and that the accused gets the punishment he deserves.'" United States v. Joyner, 39 M.J. 965, 966 (A.F.C.M.R. 1994) (quoting United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988)).

In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters

contained in the record of trial." United States v. Hamilton, 77 M.J. 579, 587 (A.F. Ct. Crim. App. 2017) (citations omitted). In weighing all matters, this Court should give special deference to the Appellant's agreed upon sentence in the plea agreement. "An accused's own sentence proposal is a reasonable indication of its probable fairness to him" United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979). The Court also considers the "limits of the [plea agreement] that the appellant voluntarily entered into with the convening authority." United States v. Fields, 74 M.J. 619, 626 (A.F. Ct. Crim. App. 2015). Among those limits, the Court may consider, are ones not explicitly stated. For example, an Appellant's agreement to a sentence cap that does not preclude punitive discharges, indicates an Appellant agrees that a punitive discharge is not inappropriately severe. (Id.) The military judge here properly considered Appellant and all matters in the record. Appellant disagrees, arguing that the sentence does not reflect his military record, cooperation with law enforcement and his challenges with addiction. (App. Br. at 5-6.)

The plea agreement included an entire paragraph articulating the Government's acknowledgment of Appellant's cooperation with law enforcement. (App. III pg. 2.) Appellant's military record was also presented for the military judge's consideration. Appellant, a Security Forces member could not be armed, and perform the basic functions of his career field. (R. at 82.) The Security Forces Commander testified about Appellant's inability to perform basic duties because he could not be armed. (R. at 82.) For about six months his unit suffered because they were "already in a position where we are strapped for personnel [. . .] every single defender counts." (Id.) Appellant would go missing at work when he relapsed on drugs, even when he was restricted to base. (R. at 103.) Appellant would not report for work on time, and his team members would have to spend time and resources tracking him down. (R. at 103.)

The Military Judge also weighed positive aspects of Appellant's military service, including his designation as a Below the Zone Airman. (R. at 86, Def. Ex. B.) Appellant discussed, on the record, his criminal behavior and described how marijuana and cocaine made him feel. (R. at 21-30.) Appellant also described his continued use of marijuana after addiction treatment. (R. at 31.) Trial defense counsel also summarized these issues during sentencing arguments. (R. at 167-168.) Appellant's entire record was presented for the Military Judge at trial.

Appellant argues that pretrial confinement was "enough" of a punishment because his drug abuse was a medical condition triggered by a traumatic life event and he is "not criminally minded". (App. Br. at 5.) On the contrary, Appellant by pleading guilty, admitted to having a criminal mind for at least six months. (R. at 120-135) Appellant sought both cocaine and marijuana regularly from 7 July 2022 until he was confined in November 2022. (Id, Pros. Ex. 1.) Appellant purchased marijuana on Minot AFB, contributing to the illicit drug sales on a military installation. (R. at 34.) Abusing drugs while in the military is a crime, Appellant mindfully committed this crime.

Appellant claimed that a traumatic incident, where members of his family were fired upon, caused his spiral. (R. at 115, 116.) Appellant never mentioned this traumatic incident in a verbal unsworn statement through his counsel. (R. at 141-146.) Nor was in mentioned in Appellant's written unsworn statement. (R. at 146-151.) The only evidence of this is testimony from SMSgt YB, who testified that she believed it was a traumatic event in Appellant's life. SMSgt YB also testified that she discussed with Appellant that the effects of cocaine were "either the morgue or jail". (R. at 109.) Appellant's mitigation argument before the trial court was not persuasive. The court heard that there was a shooting involving Appellant's family

members, that Appellant grew concerned for them and started abusing drugs, risking his own safety. It is unclear how this traumatic event is a mitigating factor. Appellant did not take recovery seriously; he was referred to ADAPT and failed the program; he was admitted to a 30-day inpatient treatment facility and began using drugs again as soon as he was released. (Pros. Ex. 11 at 3.) The Air Force provided Appellant with resources to overcome his medical condition, he chose to commit crimes instead.

Appellant further frames the pretrial confinement period as enough of a punishment because he spent the period in "complete solitude". (App. Br. at 4.) Appellant was alone in confinement because other servicemembers at Minot AFB managed to stay out of jail. That cannot be weighed against the Government. If Appellant believed that his time in pretrial confinement served as enough punishment for his offenses, he could have agreed to a time served punishment. Instead, Appellant voluntarily agreed to a potential confinement period of one hundred and twenty days, double the time he already spent in pretrial confinement. The adjudged confinement period of 90 days was appropriate for Appellant's conduct in this case.

A bad conduct discharge was also an appropriate sentence for this drug abuse case. A bad conduct discharge may be adjudged for "one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature.)." Department of the Army Pamphlet (D.A. Pam.) 27 27-9, *Military Judges' Benchbook,* para. 2-6-9 (29 February 2020). The use of illicit drugs is a serious offense, especially in a military setting. Appellant was unable to do the basic functions of his job as Security Forces member. (R. at 85.) Appellant was a strain on his team, he would relapse and go missing, other members would spend their time searching

for him. (R. at 82, 103.) Appellant sought out and used marijuana on a military base, supporting the sale of illegal drugs on base. (R. at 34-35.) This behavior warranted a bad conduct discharge.

To the extent Appellant is implying that the bad-conduct discharge is inappropriate in comparison to other sentences for drug abuse, he falls far short of establishing that he is entitled to relief on those grounds. Appellant bears the burden of demonstrating that any cases are "closely related" to his and that the sentences are "highly disparate." United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999). Appellant has not met that burden in this case.

If Appellant believed a bad conduct discharge was unfair, the plea agreement would have spoken to it. Indeed, the fact that Appellant's offer to plead guilty did not preclude a bad-conduct discharge is a tacit acknowledgment that such punishment would not be highly disparate. *See* Fields, 74 M.J. at 626 (finding that a bad-conduct discharge was not inappropriately severe given that the appellant, inter alia, voluntarily agreed to a sentence cap that did not preclude a punitive discharge). The sentence, as adjudged was appropriate in this case. This Court should deny this assignment of error.

II.

APPALLENT WAIVED THE ADMISSION OF THE ADAPT MEMORANDUM, AND EVEN SO, DID NOT SUFFER PREJUDICE.

Standard of Review

Courts review claims of prosecutorial misconduct *de novo*. (United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)). A matter not raised at trial is reviewed for plain error. United States v. Schmidt, 82 M.J. 68, 73 (C.A.A.F. 2022).

Additional Facts

> TC: I have Prosecution Exhibit 11 for identification. It is a recommendation of treatment failure for Airman Bates from ADAPT. […] Copies have been previously provided to defense counsel.
> MJ: Okay. Defense Counsel, any objection to Prosecution Exhibit 11 for identification?
> DC: No, Your Honor.

(R. at 79.)

Defense counsel affirmatively waived an objection to admission of the ADAPT memorandum, Prosecution Exhibit 11. Defense also did not object to testimony about Appellant's admission to an inpatient facility or ADAPT failure. (R. at 84, 95, 102.) In fact, defense counsel asked witnesses numerous questions about Appellant's drug addiction treatment. (R. at 91, 102.) Appellant offered details of his rehabilitation treatment, and desire for medication to treat addiction, in an unsworn statement. (R. at 143-144.)

Appellant stipulated to the admission of evidence about random inspection drug uranalysis, and his participation in ADAPT, in the findings portion of trial. (Pros. Ex. 1 at 4.) Appellant used cocaine and marijuana on the weekend during the 4th of July weekend and failed a random inspection uranalysis on 7 July. (Pros. Ex. 1, R. at 31, 41.) Appellant stipulated that he was command referred to ADAPT. (Pros. Ex. 1.) Appellant also stipulated that ADAPT referred him "to a higher level of care" at an inpatient treatment facility. (Id.) Appellant discussed his drug abuse and experiences in drug rehabilitation programs with the Military Judge during his guilty plea. Appellant told the Judge "[t]here was also times where after I came back from rehab, that I used marijuana". (R. at 31, 33.) Defense Trial Counsel never objected, and in fact made additional clarifications of Appellant's "post-rehab" drug use. (R. at 35.)

Law & Analysis

1. Appellant waived objection to the admission of the ADAPT memorandum and this Court cannot pierce that waiver.

Trial defense counsel affirmatively stated they had no objection to Prosecution Exhibit 11, the ADAPT memorandum. (R. at 79.) "When an appellant does not raise an objection to the admission of evidence at trial, we first must determine whether the appellant waived or forfeited the objection." (United States v. Sweeney, 70 M.J. 296, 303-04 (C.A.A.F. 2011). When "an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). "In making waiver determinations, we look to the record to see if the statements signify that there was a 'purposeful decision' at play." United States v, Gutierrez, 64 M.J. 374, 377 (C.A.A.F. 2007) (quoting United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999)). Here, Appellant affirmatively stated that he had no objection to the admission of the ADAPT memorandum. Appellant purposefully waived objection because it supported his theory of the case, that he had a medical addiction, and that addiction was a mitigating factor.

Despite using the same evidence contained in Prosecution Exhibit 11 in the rest of his brief to support a mitigation argument, Appellant now claims that the admission of the memorandum was improper. (App. Br. 10-12) Appellant takes issue with four pieces of evidence contained in the short memorandum: (1) the failed drug tests and his "inability to maintain abstinence," (2) the ADAPT failure (3) Appellant's dishonesty with providers (4) ADAPT's recommendation for separation. (Id.)

The memorandum made two references to the first issue, the failed drug tests. (Pros. Ex. 11 at 1, 2.) The first drug failure reference was that Appellant failed a random uranalysis and was command referred to ADAPT. (Id.) Appellant waived an objection to that evidence when

he admitted that same information in his stipulation of fact. (Pros. Ex. 1 at 8.) Trial defense counsel even clarified Appellant's referral to ADAPT after a failed test during the plea inquiry questioning. (R. at 35.) The second reference to failed drug tests in the memorandum was Appellant's drug use during treatment. (Pros. Ex. 11 at 2.) Appellant waived any objection to this evidence as well. Appellant admitted through stipulation that he produced four positive *Bickel* re-inspections, at the same time he was in treatment, indicating that he was using cocaine and marijuana while in treatment. (Pros. Ex. 1 at 9-21.)

The continued drug use is an obvious inference a finder of fact would have made, even without the ADAPT memorandum spelling it out, because Appellant admitted he was treated to a "higher level of care" at a hospital. (Pros. Ex. 1 at 10.) If Appellant was not failing drug tests in ADAPT, he would not have needed a higher level of care. Appellant also told the military judge about his drug use while in rehab during his guilty plea. (R. at 31, 33.) This continued drug use ultimately led to pretrial confinement, where Appellant's THC levels finally dropped. (Pros. Ex. 1 at 22, R. at 85.) This pretrial confinement indicates Appellant failed ADAPT, if he had succeeded in ADAPT, he would not have been confined. Appellant's failed drug tests during ADAPT, and his ADAPT failure, was evidence Appellant purposefully agreed to admit. Appellant waived any objection to the admission of this evidence.

There are two references to the third issue, Appellant's character for truthfulness, in the memorandum. One was that Appellant's "continued dishonesty" was justification for his ADAPT failure. (Pros. Ex. 11 at 3.) The second was a reference to drug use after treatment: "The laboratory test was positive for cocaine even after a clinical interview took places where SrA Bates denied use." (Pros. Ex. 11 at 2.) The memorandum also described positive traits, saying Appellant as able to be "forthcoming with information" and "with continued assessment

he became honest." (Pros. Ex. 11 at 1.) Dishonesty about drug abuse is a commonly known behavior of those suffering from drug addiction. Appellant's theory of being a drug addict was bolstered by this evidence that he was lying about his use to providers. It could be inferred that defense trial counsel purposely waived the introduction of this character evidence, because it supported the theory that Appellant's addiction was a mitigating factor.

Finally, Appellant takes issue with ADAPT's recommendation for administrative separation. (App. Br. at 11.) Appellant waived this objection by agreeing to the admission of the memorandum. This relevant portion of the report read, "member has failed the ADAPT program and is recommended for administrative separation for the Air Force at the discretion of the commander." (Pros. Ex. 11.) Appellant claims this is "a euphemism for recommendation of a punitive discharge". (App. Br. at 11.) Yet, trial Defense Counsel did not object to even this specific part of the report, perhaps understanding the military judge's ability to discern the law. It is well established precedent that a punitive discharge is punishment for the commission of a military offense and not the result of an administrative decision at a court-martial concerning retention or separation. *See* United States v. Ohrt, 28 M.J. 301, 306 (C.M.A. 1989. It is presumed that a military judge knows and properly applies the law. United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000). Again, the evidence that Appellant agreed to admit created an obvious inference that he failed ADAPT. Even without this sentence in the ADAPT memorandum, a finder of fact could have made this conclusion. All four of the objections Appellant raises now were clearly waived at trial.

After the amendments to Article 66, UCMJ, this Court can no longer pierce that waiver: "[a] valid waiver extinguishes the claim of legal error." United States v. Coley, No. ARMY 20220231, 2024 CCA LEXIS 127, at *8-9 (A. Ct. Crim. App. Mar. 13, 2024) (quoting United

States v. Ahern, 76 M.J. 194, 197-98 (C.A.A.F. 2017)). "As such, a case becomes 'correct in law' for purposes of Article 66 review when a valid waiver applies to what would otherwise be prejudicial error." Id. (Quoting United States v. Conley, 78 M.J. 747, 749 (Army Ct. Crim. App. 2019)). Appellant made a purposeful waiver to the admission of the ADAPT memorandum, Prosecution Exhibit 11, this Court cannot pierce that waiver, and should deny this assignment of error.

2. If Appellant instead forfeited the objection to the admission of the ADAPT memorandum, Appellant cannot show that the admission was plain error and that he suffered prejudice.

If this Court is convinced, however, that Appellant did not waive, but instead, forfeited this objection, a plain error analysis is necessary. Forfeiture is the "failure to make a timely assertion of a right." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). "If an appellant has forfeited a right by failing to raise it at trial, we review for plain error." United States v. Harcrow, 66 M.J. 154, 156 (C.A.A.F. 2008). "Appellant has the burden of persuading this Court that there was plain error." United States v. Barraza Martinez, 58 M.J. 173, 175 (C.A.A.F. 2003) (citation omitted). Appellant must prove that: (1) there was an error; (2) it was plain or obvious; (3) and the error materially prejudiced a substantial right. "As all three prongs must be satisfied in order to find plain error, the failure to establish any one of the prongs is fatal to a plain error claim." United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006).

Appellant is unable to meet this standard, especially in this case, with a military judge sitting alone. "When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle." United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000). This is because a "military judge is presumed to know the law and apply it correctly, [and] is presumed capable of filtering out inadmissible evidence" United States v. Robbins, 52 M.J. 455, 457

(C.A.A.F. 2000). Therefore, "plain error before a military judge sitting alone is rare indeed." Id. (quoting United States v. Raya, 45 M.J. 251, 253 (C.A.A.F. 1996)). Appellant claims four potential errors. Appellant fails to show how any of these were plain, obvious or prejudiced a substantial right.

First, Appellant claims the admission of the ADAPT memorandum violated DAFI 51-201, *Administration of Military Justice*, 24 Jan. 2024, ¶ 8.9. (App. Br. at 9.) which states in relevant part, "Disclosure of drug abuse rehabilitation is permissible only "with written consent of . . . the accused-patient" and limited to use as (2) Evidence in mitigation or extenuation in pre-sentencing proceedings." Appellant affirmatively did not object to the admission of the report. (R. at 79.) Appellant's theory of the case is that his addiction was *mitigating*. Perhaps Appellant consented to the admission of this report because it supported that theory of the case, and contained information he was "forthcoming" and "honest" in his ADAPT intake. The fact that the report contained information that supports Appellant's theory of drug addiction illustrates that its admission was not an error. If there was an error, it cannot be seen as plain or obvious, when Appellant used the information in support of his own position. Appellant fails to show which substantial right of his was prejudiced, especially before a military judge who is presumed to be able to filter out any inadmissible evidence. Robbins, 52 M.J. 455.

Second, Appellant claims that the admission of the memorandum violates the rules against warrantless searches; "Evidence obtained from nonconsensual extraction of body fluids is admissible" but only if "seized pursuant to a search warrant or a search authorization under Mil. R. Evid. 315." Mil. R. Evid. 312(d). (App. Br. at 10.) There are two references to failed drug tests in the ADAPT memorandum. One describes Appellant's command referral to ADAPT "due to having a positive uranalysis for cocaine and THC". (Pros. Ex. 11 at 1.) The

second describes Appellant's positive uranalysis after inpatient treatment, "On 29 September 22 [..] The laboratory test was positive for cocaine even after a clinical interview took places where SrA Bates denied use." (Pros. Ex. 11 at 2.) Again, as previously discussed, Appellant admitted that same evidence to the Court through a factual stipulation, and his guilty plea. (Pros. Ex. 1, R. at 31, 35.) There was no error in the admission of this evidence. Appellant fails to show how a substantial right was prejudiced by this evidence, when he stipulated to its admission in a different exhibit.

The third error Appellant claims is that references to his character were inadmissible. (App. Br. at 10.) This was admissible aggravating evidence. "Trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty" Rule for Courts-Martial (R.C.M.) 910(e). Lying about criminal drug use, to people who are trying to help you overcome addiction, is an aggravating circumstance in a drug use case. Appellant had criminal intent, and he knew that he was using drugs illegally, he lied to ADAPT instead of being honest so he could receive proper treatment. Appellant argues that this evidence is inadmissible character evidence under Mil. R. Evid. 608. (App. Br. at 11.) This rule governs evidence of a witness's character for truthfulness during findings and does not support Appellant's argument.

The final issue Appellant claims in support of plain error is the recommendation for separation. Appellant cites a single case in support of this argument. United States v. Cherry, 31 M.J. 1, 5 (C.M.A. 1990). That case discusses "prohibiting the admission of euphemism's during sentencing that impliedly suggest that the accused should be separated from the service". (App. Br. at 11.) This case is not instructional, because it discusses a commander's testimony and opinion on rehabilitation and retention. The memorandum in Appellant's case merely

recommends separation "at the discretion of the commander." (Pros. Ex. 11) These are two very different scenarios, as an ADAPT provider does not have authority to separate a member and does not have any presumption of command influence over a military judge. As discussed in the waiver analysis, it is well established precedent that a punitive discharge is punishment for the commission of a military offense and not the result of an administrative decision at a court-martial concerning retention or separation. *See* United States v. Ohrt, 28 M.J. 301, 306 (C.M.A. 1989). It is presumed that a military judge knows and properly applies the law. United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000). In fact, the military judge *did* address an inappropriate recommendation for separation from Appellant's commander, and ensured the parties that he would not consider it. (R. at 120.) Appellant fails, again, to show an error, how it was plain or obvious, or how he was prejudiced by it before a military judge.

If this Court does assume any part of the ADAPT memorandum was admitted as plain error, it must also find Appellant suffered prejudice from the admission. Prejudice from the improper admission of evidence in sentencing is determined based on "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." United States v. Edwards, 82 M.J. 239, 247 (C.A.A.F. 2022) (citing Barker, 77 M.J. at 384). The materiality and quality of the evidence is not disputed by Appellant.

Appellant's only argument regarding prejudice is "the strength of the Government's case was low" in comparison to trial defense counsel's mitigating evidence about how "he had sought to become healthy" and the mitigating factors that lead to his addiction. (App. Br. at 12). The mitigating factor Appellant cites, is his addiction triggered by a traumatic event. That addiction is the theme of Appellant's case. Appellant consented to the admission of evidence of that

addiction, including the ADAPT memorandum. (Pros. Ex. 1, R. at 79.) The defense did not offer strong evidence that traumatic event triggered Appellant's addiction. Appellant did not discuss it in his unsworn statement, which he titled "Biography". (Def. Ex. J.) Appellant does not mention it in his journal entries. (Def. Ex. H.) Appellant does not discuss it in his unsworn statements. (R. at 140-156.) The only evidence of this traumatic shooting was SMSgt YB's testimony that she heard about and thinks it could have affected Appellant. The only evidence of Appellant's attempts to "become healthy" were his journal entries describing his workouts in pretrial confinement and his request for "cravings medication". (Def. Ex. H, R. at 143-144.)

The Government's sentencing case, was strong. That is presumably why Appellant agreed to serve up to 120 days of confinement with the potential for a punitive discharge. Evidence in support of the adjudged sentence included a stipulation of fact about Appellant's continued drug use. (Pros. Ex. 1.) The Government's case included testimony about Appellant relapsing and his inability to stop abusing drugs. (R. at 85, 103, 110, Pros. Ex. 1.) The Government's case included evidence about the strain Appellant put on his already short-staffed unit. (R. at 82.) The Government's sentencing case was strong, even without the ADAPT memorandum, the military judge had the relevant evidence to support the adjudged sentence. Even assuming Appellant did not waive this issue, this Court should deny this assignment of error, since Appellant fails to show any plain error or prejudice to a substantial right.

III.

TRIAL COUNSEL'S SENTENCING ARGUMENT WAS PROPER.

Standard of Review

When no objection is made during the trial, a counsel's arguments are reviewed for plain error. United States v. Schroder, 65 M.J. 49, 57-58 (C.A.A.F. 2007). "Plain error occurs when (1)

there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005).

Additional Facts

Appellant's leadership, SSgt YB testified that Appellant was abusing cocaine at work and would go missing.

> SSgt YB: And any time that he [Appellant] relapsed, he goes missing. And anytime an Airman is missing, that's a stop action for everyone. Everyone must find him. […] Even when he was restricted to base, he would miraculously go missing.

(R. at 103.)

> DC: Were you able to tell when he [Appellant] was using cocaine?
>
> SSgt YB: His mannerisms would change[…] Just the demeanor of how he would approach you, talk to you. I could tell when there was a shift.

(R. at 110.)

Trial Counsel discussed this behavior in sentencing argument. (R. at 156, 160.)

Appellant offered about 14 pages from his personal journals as Defense Exhibit H. Through those journals, Appellant discussed how he was missing holidays with his son because of his decisions. (Def. Ex. H at 2, 6, 7, 11.) Appellant made several references to the challenges his wife is facing with their child. Appellant wrote that he is "sorry" and "selfish". (Id. at 7.) Trial Counsel referenced Appellant's selfish decisions as a parent in sentencing argument. (R. at 163)

Appellant told the Military Judge he bought marijuana on base. (R. at 35.) Trial Defense Counsel clarified for the military judge that Appellant was not importing the marijuana to the base, because his movements were already restricted. (Id.) The Military Judge confirmed he understood the Appellant's involvement and statements. (Id.)

Law and Analysis

Improper argument does not automatically lead to relief on appeal. (Fletcher, 62 M.J. at 178). Fletcher established a three-part test to evaluate prosecutorial misconduct "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction[s]." United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017). The trial forum adds another layer for this Court to consider. "In a military judge alone case we would normally presume that the military judge would disregard any improper comments by counsel during argument and such comments would have no effect on determining an appropriate sentence." United States v. Waldrup, 30 M.J. 1126, 1132 (N.M.C.M.R. 1989). When a trial counsel makes a sentencing argument, she is allowed "to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." United States v Baer, 53 M.J. 235, 237 (C.A.A.F. 2000) (citations omitted).

Trial counsel's arguments were well supported by the evidence and inferences made from the evidence. Appellant claims trial counsel made arguments unsupported by the evidence, and that this was severe misconduct. (App. Br. at 15.) The first of these claims is that trial counsel connected Appellant's absences at work and subsequent Letters of Reprimand (LORs) to his drug use, without evidence. (Id.) However, Appellant's leadership testified, in response to defense counsel's questions, that they "could tell" when Appellant had relapsed and that he would "disappear." (R. at 103, 110.) Trial Counsel simply connected that testimony to the LORs. Trial Counsel also admitted that Appellant's leadership was speculating there was a connection between his disappearing behavior and drug use. (R. at 165) These arguments were fair inferences from the available evidence, not plain and obvious error.

Appellant next takes issue with Trial Counsel references to his involvement with on base drug rings, claiming there was no evidence of this behavior: "SrA Bates was never charged with distribution, manufacture, or even possession of any unlawful substance." (App. Br. at 13.) Trial counsel may argue more than just the charges, all of the record is fair game and Appellant admitted that he participated in on base drug sales.

> Acc: Your Honor, the individual offered me marijuana on base.
> […]
> MJ: So this person did sell it to you?
> Acc: Yes, Your Honor.

(R. at 34)

The military judge clarified during the plea inquiry that he understood Appellant was not responsible for the "importation" of the marijuana to base. (R. at 36.) This illustrates that the military judge fairly weighed Appellant's role in the on base drug enterprise. Appellant also participated with law enforcement's investigation into drug distribution at Minot AFB Trial Counsel. (Pros. Ex. 1 at 4.) Appellant must have been involved in the drug ring, to be able to assist the Government in investigating it. This line of argument was a fair inference, and not plain error.

Appellant's third allegation of misconduct is trial counsel's reference to Appellant's ADAPT participation. As thoroughly discussed in AOE II, Appellant agreed to the admission of evidence surrounding his ADAPT referral in the Stipulation of Fact. (Pros. Ex. 1) Appellant takes issue with Trial Counsel referencing his continued drug use during ADAPT enrollment and ADAPT's recommendation for separation. (App. Br. at 15-16.) Trial counsel fairly addressed this evidence, because it was evidence in the record. (Id, Pros. Ex. 11.) Since trial defense counsel argued that Appellant's continued drug use was a mitigating medical condition, trial

counsel, in turn, was obliged and entitled to counter that argument by explaining that the drug use was criminal. This was not a plain or obvious error.

Appellant next claims Trial Counsel issued “personal attacks” by referencing Appellant’s selfishness as a parent. (App. Br. at 16.) Appellant introduced this evidence himself through his journals. (Def. Ex. H.) Appellant made numerous admissions that he was not being a good father, and was absent for his son’s first holiday season because of his poor decisions. (Id., R. at 145-146.). This was evidence in the record and a fair inference that trial counsel properly argued. It was not plain and obvious error.

Appellant’s final claim of misconduct is that trial counsel argued collateral matters by inferring that Appellant must be confined to stay sober. (App. Br. at 16.) There was ample evidence that Appellant failed to remain sober through treatment. (R. at 31,35, 83.) There was also ample evidence that Appellant tested positive for drugs a mere 48 hours after being released from inpatient treatment. (R. at 103, Pros. Ex. 1, Pros. Ex. 11 at 2.) There was also testimony that pretrial confinement was the result of Appellant’s inability to stay sober. (R. at 85.) The first time Appellant’s THC levels decreased, he was in pretrial confinement. (Pros. Ex. 1.) Trial counsel properly inferred that confinement aided in Appellant’s sobriety. This too, was not a plain or obvious error.

None of the arguments trial counsel made were severe, or a plain error. Therefore, the military judge did not take any measures to correct any trial counsel’s arguments. Appellant makes much of this, because the military judge did rule that he would not consider a witness’s improper opinion about separation. (App Br. at 18, discussing R. at 120.) But this fact also weighs in favor of the Government. The military judge saw plain and obvious error in trial counsel’s line of questioning about Appellant’s rehabilitative potential in the military and

corrected it. (R. at 120.) The errors Appellant claims in his brief did not result in any corrective action because they were neither plain or obvious. Appellant has clearly failed to meet the first two prongs of a Fletcher test.

The final prong of the test in this analysis is "The weight of the evidence supporting the conviction[s]." United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017). Appellant on this point makes the conclusory statement, "But for trial counsel's error, the outcome of SrA Bates' court-martial would have been different". (App. Br. 17) Appellant fails to explain *how* the outcome would have been different. Trial counsel's arguments were fair inferences based on the evidence. Appellant pleaded guilty with the benefit of a plea agreement, that would not have been different without trial counsel's argument. The military judge heard evidence of Appellant being missing from work, that would not have changed without trial counsel's argument. (R. at 103, 110.) Appellant himself volunteered information about how his choices made him an absent parent. (Def. Ex. H, R. at 145.) None of the arguments trial counsel made were outside the evidence, and Appellant's sentence would not have been different without it. Appellant ultimately fails to show how he suffered any prejudice from trial counsel's argument, especially in front of a military judge sitting alone. Appellant is not entitled to relief on this issue, and this Court should deny this assignment of error.

IV.

THE 18 U.S.C. § 922 FIREARMS PROHIBITION—IS 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 & Analysis

1. This issue is moot because any prohibition on Appellant for drug use only lasted one year past the date of his conviction.

The purpose of Air Force FORM 177 (available at https://static.e-publishing.af.mil/production/1/saf_ig/form/af177/af177.pdf) is: "To record offender's notice of qualification for prohibition of firearms, ammunition, and explosives, and information pertaining to this prohibition; and to provide the DAF National Instant Criminal Background Check System (NICS) Program Manager with data required for NICS reporting." According to the Form 177, the firearms prohibition for drug related offenses, expires one year after the date of conviction. (AF Form 177, Block 2.). Since more than one year has passed since he was convicted, Appellant is no longer prohibited from carrying firearms for drug use, and the issue is moot. Moreover, if Appellant believes he is incorrectly coded in NICS, he can apply for an administrative expungement. *See generally* Air Force Manual (AFMAN) 71-102, *Air Force Criminal Indexing*, Chapter 9 (21 Jul. 2020).

2. If this Court does not think the issue is moot, it is a collateral matter outside of this Court's jurisdiction.

"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 argues that United States v. Lemire, in which the Court of Appeals for the Armed Forces ordered the Army to delete an annotation regarding sex offender registration from a promulgating order. 82 M.J. 263 n.* (C.A.A.F. 2022) (decision without published opinion). Relying entirely on a 20-word footnote[1] in a summary decision without a published opinion, stands for the proposition that CAAF can order correction of administrative errors in post-trial paperwork; that CAAF believes the CCA can address collateral consequences; and that CAAF does have the power to address "constitutional errors…even if the Court deems them to be a collateral consequence." (App. Br. at 22.) This Court should be unpersuaded. Although Lemire is technically a published decision, it is devoid of 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

[1] "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.*.

that case. Accordingly, 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.[2]

Thus, Appellant is not only unentitled to relief, but also powerless to obtain any from this Court at all.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the findings and sentence.

CONCLUSION

For the above reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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[2] "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.

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 7 June, 2024

DEYANA F. UNIS, 1st Lt, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), **DONTAVIUS A. BATES,** United States Air Force, *Appellant.*	)))))))))	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2 No. ACM S32752 14 June 2024

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT BY INTRODUCING RECORDS FROM SENIOR AIRMAN BATES'S PARTICIPATION IN A SUBSTANCE ABUSE REHABILITATION PROGRAM IN VIOLATION OF AIR FORCE REGULATION.

The Government wrongly contends that SrA Bates used the prejudicial aspects of his Alcohol and Drug Abuse Prevention and Treatment (ADAPT) memorandum "in the rest of his brief to support a mitigation argument." (Ans. at 10; 14.) This is unsupported by the record. At no point did SrA Bates argue that his ADAPT failure, apparent dishonesty while in treatment,[1] failed command-direct urinalyses, or ADAPT's recommendation for his discharge were somehow mitigating. Yet, the Government suggests that the memorandum's admissibility was triggered by SrA Bates's defense theory that he was suffering from drug addiction. Even if this was the defense theory, it did not open the door to admission of SrA Bates's ADAPT memorandum. Air Force regulation spells out the only permissible uses of these records at trial, none of which apply here. *See* DAFI 51-201, *Administration of Military Justice*, 24 Jan. 2024, ¶ 8.9.

Moreover, the Government over-relies on a single paragraph in Prosecution Exhibit 1 to assert that SrA Bates stipulated *carte blanche* to all information that could be derived from the

[1] The Government states that "[d]ishonesty about drug abuse is a commonly known behavior of those suffering from drug addiction." (Ans. at 12.) This factual assertion is nowhere found in the record of trial, neither by lay nor expert testimony. This Court should decline to accept the Government's factual assertions based on no evidence.

memorandum. (Ans. at 10-11.) Yet, this stipulated paragraph is limited to the following: "On 4 October 2022, ADAPT notified 5 SFS/CC that SrA Bates failed the ADAPT treatment program. While under treatment by ADAPT, SrA Bates tested positive for illicit substances, to include cocaine, multiple times." (Pros. Ex. 1 at page 2).

This paragraph contains no stipulation of his apparent dishonesty, no specification of whether the failed tests were the command-directed type documented in the ADAPT memorandum, and no reference to ADAPT's recommendation for his discharge. While the stipulation did include his general failure from the program, this rendered the reference to the failure within the memorandum redundant. Hence, the Government's only non-cumulative purpose for offering the memorandum was to veer into the impermissible matters that it documented, in violation of Air Force regulation. This amounted to prosecutorial misconduct.

The Government contends that the 2021 revisions to Article 66, UCMJ, preclude this Court from addressing errors presented during sentencing without objection. (Ans. at 12.) The impact of these revision was taken up by this court in the unpublished opinion of *United States v. George*, No. ACM 40397, 2024 CCA LEXIS 224 (A.F. Ct. Crim. App. Jun. 7, 2024). In that case, this Court held that "[the amendments to Article 66], abrogated the [criminal courts of appeal]'s ability to pierce waiver as to errors *associated with findings*." *Id.* (emphasis added). However, the error in question is not associated with findings. Rather, it is an error in sentencing. This Court retains the ability to address this error under Article 66 which empowers it to consider "whether the sentence is plainly unreasonable." 10 USC § 866(e)(1)(D). A sentence influenced by a memorandum that was taken into consideration in violation of Air Force regulation is "plainly unreasonable."

WHEREFORE, SrA Bates respectfully requests that this Honorable Court set aside and reassess his sentence to include setting aside the bad conduct discharge and approving only 60 days of the confinement as time served.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 14 June 2024.

Respectfully submitted,

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