IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF DIRECT APPEAL**
Appellee	)	**PURSUANT TO ARTICLE**
	)	**66(b)(1)(A)**
v.	)	
	)	
Technical Sergeant (E-6)	)	No. ACM 23017
JOSEPH C.G. CLARK	)	
United States Air Force	)	21 June 2023
Appellant	)	

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

On 16 November 2022, a military judge sitting as a special court-martial convicted Technical Sergeant (TSgt) Joseph C.G. Clark, consistent with his pleas, of three specifications of wrongful use, possession of a controlled substance in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2019), and one specification of failing to obey a lawful general order in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2019). The military judge sentenced TSgt Clark to 80 days' confinement, reduction to the grade of E-1, and forfeiture of $1,000 pay per month for 3 months. (Entry of Judgement, 3 January 2023.) On 28 March 2023, the Government sent TSgt Clark the required notice by mail of his right to appeal within 90 days. TSgt Clark received notice on 6 April 2023. TSgt Clark has not submitted any materials to The Judge Advocate General in accordance with Article 69, UCMJ. Pursuant to the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, TSgt Clark files his notice of direct appeal with this Court.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 21 June 2023.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division (AF/JAJA)
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23017**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Joseph C.G. CLARK	)	**DOCKETING**
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

A notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), was submitted by Appellant and received by this court in the above-styled case on 21 June 2023. On 13 July 2023, the record of trial was delivered to this court by the Military Appellate Records Branch.

Accordingly, it is by the court on this 13 day of July, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 1. Briefs will be filed in accordance with Rule 18 of the Joint Rules of Appellate Procedure and Rule 23.3(m) of this court's Rules of Practice and Procedure. *See* JT. CT. CRIM. APP. R. 18, A.F. Ct. Crim. App. R. 23.3(m).

FOR THE COURT

V U apt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Technical Sergeant (E-6) **JOSEPH C.G. CLARK** United States Air Force *Appellant*	))))))))))	**MOTION TO COMPEL PRODUCTION OF VERBATIM TRANSCRIPT** Before Panel 1 No. ACM 23017 26 July 2023

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, Technical Sergeant (TSgt) Joseph C.G. Clark (Appellant) hereby moves this Honorable Court to compel the Government to produce a verbatim transcript. Additionally, Appellant respectfully requests this Court suspend its rules in regards to the time for filing a Brief on Behalf of Appellant, JT. CT. CRIM. APP. R. 18, until such a time as the verbatim transcript is produced.

On 16 November 2022, a military judge sitting as a special court-martial convicted, Appellant, consistent with his pleas, of three specifications of wrongful use, possession of a controlled substance in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2019), and one specification of failing to obey a lawful general order in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2019). The military judge sentenced Appellant to 80 days' confinement, reduction to the grade of E-1, and forfeiture of $1,000 pay per month for 3 months. (Entry of Judgement, 3 January 2023.) On 28 March 2023, the Government sent Appellant the required notice by mail of his right to appeal within 90 days. Appellant received notice on 6 April 2023. On 21 June 2023, Appellant filed his Notice of Direct Appeal with this Court. On 13 July 2023, this Court docketed his case.

On 1 June 2023, the Appellate Records Branch of the Military Justice Law and Policy Division (AF/JAJM) delivered the record of trial to the Appellate Defense Division (AF/JAJA). The record of trial is a "summarized" record, presumably because Appellant's sentence did not include confinement in excess of six months or a punitive discharge. *See* Article 54(c)(2), UCMJ. But now that Appellant exercised his statutory right to direct appeal under Article 66(b)(1)(A), UCMJ, a verbatim transcript is relevant and necessary for undersigned counsel to fulfill her responsibilities under Article 70, UCMJ, and for this Court to exercise its responsibilities under Articles 59(a) and 66(d), UCMJ.

WHEREFORE, Appellant respectfully requests this Honorable Court compel production of a verbatim transcript.

Respectfully submitted,

HEATHER M. CAINE, 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 was sent via email to the Court and served on the Appellate Government Division on 26 July 2023.

Respectfully submitted,

HEATHER M. CAINE, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**OPPOSITION TO MOTION TO COMPEL VERBATIM TRANSCRIPT**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH C. G. CLARK,** USAF, *Appellant.*	)	No. ACM 23017
	)	2 August 2023

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

Pursuant to Rules 23(c) of this Court's Rules of Practice and Procedure, the United States submits this opposition to Appellant's Motion to Compel Production of a Verbatim Transcript, dated 26 July 2023. The Court's intervention is not warranted at this time. The United States agrees that Appellant is entitled to a verbatim transcript. The Air Force Appellate Operations Division is currently working with other offices within the directorate to ensure that a verbatim transcript is produced and provide to Appellant's counsel in accordance with R.C.M. 1116(b)(1)-(2).

This Court should decline to intervene until and unless Appellant has shown that the government cannot provide Appellant's counsel with a verbatim transcript in a timely manner. At this point, it has only been 42 days since Appellant requested direct appeal. (Notice of Direct Appeal, dated 21 Jun 2023).

For these reasons, the United States respectfully requests that this Court deny Appellant's Motion to Compel Production of a Verbatim Transcript.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 2 August 2023.

MARY ELLEN PAYNE
Associate Chief, 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 23017**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joseph C.G. CLARK	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 16 November 2022, Appellant was convicted at a special court-martial of three specifications of wrongful use or possession of a controlled substance in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a, and one specification of failing to obey a lawful general order in violation of Article 92, UCMJ, 10 U.S.C. § 892. On 3 January 2023 a military judge entered a sentence consisting of 80 days' confinement, forfeiture of $1,000.00 pay per month for three months, and reduction to E-1. On 21 June 2023, Appellant filed a timely notice of direct appeal pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A), which the court docketed on 13 July 2023.

The record of trial in Appellant's case contains a summarized transcript of the proceedings. On 26 July 2023, Appellant moved this court to compel a verbatim transcript of Appellant's case. Appellant's counsel states that in order for her to fulfill her responsibilities under Article 70, UCMJ, 10 U.S.C. § 870, and for this court to fulfill its statutory responsibilities, a verbatim transcript is "relevant and necessary." Appellant further requested that this court suspend the rule governing the time to file Appellant's assignments of error "until such a time as the verbatim transcript is produced." *See* JT. CT. CRIM. APP. R. 18.

The Government "agrees that Appellant is entitled to a verbatim transcript" but requests this court deny Appellant's motion, as they have already begun the process for producing the verbatim transcript.

In consideration of the foregoing, we moot the motion to produce a certified verbatim transcript because the Government has already begun the process of producing the verbatim transcript in Appellant's case; however, the court will establish a timeline for the completion of this transcript.

Accordingly, it is by the court on this 9th day of August, 2023,

ORDERED:

Given the Government's representation to this court that they have already begun the process for obtaining the verbatim transcript, Appellant's Motion to Compel a Verbatim Transcript is **MOOT**.

It is further ordered:

The Government will provide the verbatim transcript, either in printed or digital format, to the court, appellate defense counsel, and appellate government counsel not later than **25 September 2023**. If the transcript cannot be provided to the court and the parties by that date, the Government will inform the court in writing not later than **21 September 2023** of the status of the Government's compliance with this order.

Appellant's brief will be submitted in accordance with the timelines established under Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, with one exception: Appellant's brief shall be filed within 60 days after appellate defense counsel has received a printed or digital copy of the certified verbatim transcript.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

8 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION TO ATTACH DOCUMENT
v.	)	ACM 23017
Technical Sergeant (E-6) **JOSEPH C.G. CLARK**, USAF, *Appellant.*	)	Before Panel 1

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following document to its response to Appellant's Motion to Compel a Verbatim Transcript, filed on 2 August 2023:

> Email chain between undersigned counsel and JAT Central Docketing Workflow, dated 7 August 2023.

The attached email chain is relevant to respond to Appellant's Motion to Compel a Verbatim Transcript in this case. The authenticity of the email should be apparent. The email chain shows (1) a request from the government for the Trial Judiciary (JAT) to produce a verbatim transcript in the case; and (2) JAT's receipt of the request and confirmation that they will assign a court reporter to prepare the verbatim transcript.

Since JAT is already preparing a verbatim transcript in this case, it is unnecessary for this Court to order its production.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Document.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 August 2023 via electronic filing.

MARY ELLEN PAYNE
Associate Chief, 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,*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH C.G. CLARK** United States Air Force *Appellant.*	)	No. ACM 23017
	)	12 September 2023

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to this motion:

A. Appendix A – Special Court-Martial Verbatim Transcript – *United States v. Technical Sergeant Joseph C.G. Clark*, dated 16 November 2022 (131 pages)

B. Appendix B – Trial Counsel's Transcript Examination of Record – *United States v. Technical Sergeant Joseph C.G. Clark*, dated 8 September 2023 (1 page)

C. Appendix C – Defense Counsel's Transcript Examination of Record – *United States v. Technical Sergeant Joseph C.G. Clark*, dated 8 September 2023 (1 page)

On 9 August 2023, this Court ordered the Government to prepare a "certified verbatim transcript and provide it, either printed or digital format, to the court, appellate defense counsel, and appellate government counsel not later than 25 September 2023." (*Order*, dated 9 August 2023.) These appendices are responsive to the Court's order.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Documents.

VANESSA BAIROS, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 12 September 2023.

VANESSA BAIROS, 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 (FIRST)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH C. CLARK** United States Air Force *Appellant*	)	No. ACM 23017 3 November 2023

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

Pursuant to Rule 23.3(m)(2) and (6) 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 **10 January 2023**. The record of trial was docketed with this Court on 13 July 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 181 days will have elapsed. On 9 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 12 September 2023. As such, the brief is currently due 11 November 2023.

On 16 November 2022, at a special court-martial convened at MacDill Air Force Base, Florida, Appellant was found guilty, consistent with his pleas, of one charge and three specifications of Article 112a, Uniform Code of Military Justice (UCMJ), and one charge and specification of Article 92, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 3 January 2023. The military judge sentenced Appellant to reduction to the rank of E-1, forfeitures of $1,000 pay per month for three months, and 80 days' confinement. *Id.* The convening authority

took no action on the findings or sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 22 November 2022.

The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 21 cases, with eight initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

Undersigned counsel's current priorities include preparing for oral argument in *United States v. Flores* (ACM 40294) before the Court of Appeals for the Armed Forces (CAAF) scheduled for 7 November 2023; filing the Reply Brief on Behalf of Appellant in *United States v. Guihama* (ACM 40039) now due to the CAAF on 9 November 2023; finishing the Petition for Writ of Certiorari in *United States v. Smith* (ACM 40013) with the Supreme Court of the United States (SCOTUS) to be sent to the printer; and submitting the Petition and Supplement for Grant of Review in *United States v. Dugan* (ACM 40320) to the CAAF.

This case is currently undersigned counsel's seventh priority before this Court.[1] Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

[1] Maj Blyth's first priority case before this Court is *United States v. Cook* (ACM 40333) as lead counsel on the case.

1. *United States v. Hennessy* (ACM 40439): The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Undersigned counsel will begin review of the record of trial after completing the current priorities listed above.
2. *United States v. Alvarez* (ACM 40471): The trial transcript is 74 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, five defense exhibits, six appellate exhibits, and one court exhibit.
3. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit.
4. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.
5. *United States v. Cunningham* (ACM 23010): The trial transcript is 149 pages long and the record of trial is comprised of two volumes containing 14 prosecution exhibits, four defense exhibits, 11 appellate exhibits, and zero court exhibits.
6. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit.

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 November 2023.

Respectfully submitted,

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

7 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JOSEPH C. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23017 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 November 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH C. CLARK** United States Air Force *Appellant*	)	No. ACM 23017 3 January 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 February 2024**. The record of trial was docketed with this Court on 13 July 2023. From the date of docketing to the present date, 174 days have elapsed. On the date requested, 211 days will have elapsed. On 9 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 12 September 2023.

On 16 November 2022, at a special court-martial convened at MacDill Air Force Base, Florida, Appellant was found guilty, consistent with his pleas, of one charge and three specifications of Article 112a, Uniform Code of Military Justice (UCMJ), and one charge and specification of Article 92, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 3 January 2023. The military judge sentenced Appellant to reduction to the rank of E-1, forfeitures of $1,000 pay per month for three months, and 80 days' confinement. *Id.* The convening authority

took no action on the findings or sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 22 November 2022.

The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 22 cases, with 12 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

This case is currently undersigned counsel's sixth priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Hennessy* (ACM 40439): The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Undersigned counsel has completed review of the sealed materials in this case and begun review of the rest of the record of trial. Multiple potential issues have been identified.
2. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit.

3. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.
4. *United States v. Cunningham* (ACM 23010): The trial transcript is 149 pages long and the record of trial is comprised of two volumes containing 14 prosecution exhibits, four defense exhibits, 11 appellate exhibits, and zero court exhibits.
5. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit.

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

4 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JOSEPH C. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23017 Panel No. 1

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

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

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

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

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 4 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 (THIRD)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH C. CLARK** United States Air Force *Appellant*	)	No. ACM 23017 29 January 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 March 2024**. The record of trial was docketed with this Court on 13 July 2023. From the date of docketing to the present date, 200 days have elapsed. On the date requested, 241 days will have elapsed. On 9 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 12 September 2023.

On 16 November 2022, at a special court-martial convened at MacDill Air Force Base, Florida, Appellant was found guilty, consistent with his pleas, of one charge and three specifications of Article 112a, Uniform Code of Military Justice (UCMJ), and one charge and specification of Article 92, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 3 January 2023. The military judge sentenced Appellant to reduction to the rank of E-1, forfeitures of $1,000 pay per month for three months, and 80 days' confinement. *Id.* The convening authority

took no action on the findings or sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 22 November 2022.

The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 22 cases, with 12 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 2 in this case, undersigned counsel has been working on the number one priority case listed below. Undersigned counsel had . Undersigned counsel also spent around 3 hours preparing for and assisting in moots and was present for two oral arguments at the Court of Appeals for the Armed Forces.

This case is currently undersigned counsel's sixth priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Hennessy* (ACM 40439): The trial transcript is 1,190 pages long and the record of trial is comprised of nine volumes containing seven prosecution exhibits, 11 defense exhibits, 54 appellate exhibits, and three court exhibits. Both counsel have reviewed the record of trial and are working on finalizing the AOE

due to this Court on Thursday, 1 February 2024. Of note, after filing the AOE in *Hennessy*, undersigned counsel has three, potentially four, Petitions and Supplements to the Petitions currently due to the CAAF in February.

2. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit.
3. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.
4. *United States v. Cunningham* (ACM 23010): The trial transcript is 149 pages long and the record of trial is comprised of two volumes containing 14 prosecution exhibits, four defense exhibits, 11 appellate exhibits, and zero court exhibits.
5. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit.

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

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

31 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JOSEPH C. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23017 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 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 (FOURTH)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH C. CLARK** United States Air Force *Appellant*	)	No. ACM 23017 29 February 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 April 2024**. The record of trial was docketed with this Court on 13 July 2023. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 271 days will have elapsed. On 9 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 12 September 2023.

On 16 November 2022, at a special court-martial convened at MacDill Air Force Base, Florida, Appellant was found guilty, consistent with his pleas, of one charge and three specifications of Article 112a, Uniform Code of Military Justice (UCMJ), and one charge and specification of Article 92, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 3 January 2023. The military judge sentenced Appellant to reduction to the rank of E-1, forfeitures of $1,000 pay per month for three months, and 80 days' confinement. *Id.* The convening authority

took no action on the findings or sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 22 November 2022.

The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 22 cases, with 13 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 3 in this case, undersigned counsel has filed the Brief on Behalf of Appellant in *United States v. Hennessy* (ACM 40439) with this Court; the Supplement to the Petition for Grant of Review in *United States v. Edwards* (ACM 40349) with the Court of Appeals for the Armed Forces (CAAF); the Petition for Grant of Review and Supplement to the Petition for Grant of Review in *United States v. Greene-Watson* (ACM 40293) with the CAAF; and the Petition for Grant of Review and Supplement to the Petition for Grant of Review *United States v. Emerson* (ACM 40297) with the CAAF. Undersigned counsel also spent around 13 hours preparing for moots, assisting in moots, and attending oral arguments. Undersigned counsel was second chair at the oral argument before the CAAF on 7 February 2024 in *United States v. Guihama* (ACM 40039).

This case is currently undersigned counsel's seventh priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Arroyo* (ACM 40321 (f rev)): On 9 February 2024, undersigned counsel submitted a post-remand Motion for Enlargement of Time (First) for the amount of 60 days to end on 19 April 2024. On 15 February 2024, this Court granted the motion in part requiring undersigned counsel to file any additional AOEs no later than 20 March 2024. As such, this case has now been re-prioritized by this Court. Also on 15 February 2024, this Court ordered an outreach oral argument for one issue in this case scheduled for 10 April 2024.
2. *United States v. Holmes* (Misc. Dkt. No. 2024-1): The current transcript is 489 pages long and the current record of trial is comprised of 14 volumes.
3. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit.
4. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.
5. *United States v. Cunningham* (ACM 23010): The trial transcript is 149 pages long and the record of trial is comprised of two volumes containing 14 prosecution exhibits, four defense exhibits, 11 appellate exhibits, and zero court exhibits.
6. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit.

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

1 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JOSEPH C. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23017 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 March 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH C. CLARK** United States Air Force *Appellant*	)	No. ACM 23017 29 March 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 May 2024**. The record of trial was docketed with this Court on 13 July 2023. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 301 days will have elapsed. On 9 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 12 September 2023.

On 16 November 2022, at a special court-martial convened at MacDill Air Force Base, Florida, Appellant was found guilty, consistent with his pleas, of one charge and three specifications of Article 112a, Uniform Code of Military Justice (UCMJ), and one charge and specification of Article 92, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 3 January 2023. The military judge sentenced Appellant to reduction to the rank of E-1, forfeitures of $1,000 pay per month for three months, and 80 days' confinement. *Id.* The convening authority

took no action on the findings or sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 22 November 2022.

The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 22 cases, with 16 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 4 in this case, undersigned counsel has filed the Brief on Behalf of Appellant in *United States v. Arroyo* (ACM 40321 (f rev)) with this Court; the Appellee's Answer in *United States v. Holmes* (Misc. Dkt. No. 2024-1) with this Court; and the Reply Brief in *United States v. Hennessy* (ACM 40439) with this Court. Undersigned counsel planned and orchestrated the all-day Human Trafficking Training Event held at the Smart Center . Undersigned counsel also spent around 12 hours preparing for moots, assisting in moots, and attending oral arguments.

This case is currently undersigned counsel's seventh priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Arroyo* (ACM 40321 (f rev)): On 15 February 2024, this Court ordered an outreach oral argument for one issue in this case scheduled for 10 April 2024.

2. *United States v. Douglas* (ACM 40324 (f rev)): On 22 March 2024, this Court granted in part the appellant's motion for an enlargement of time. As such, any additional AOE must be filed by 2 May 2024.
3. *United States v. Holmes* (Misc. Dkt. No. 2024-1): On 27 March 2024, the Government filed a motion for oral argument in this case. Depending on this Court's decision on that motion and potential scheduling of an oral argument, this case would need to be prioritized ahead of *Douglas*.
4. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit.
5. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.
6. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit.

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

1 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JOSEPH C. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23017 Panel No. 1

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

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

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH C. CLARK** United States Air Force *Appellant*	)	No. ACM 23017 30 April 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 June 2024**. The record of trial was docketed with this Court on 13 July 2023. From the date of docketing to the present date, 292 days have elapsed. On the date requested, 331 days will have elapsed. On 9 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 12 September 2023. Since receiving the verbatim transcript, 231 days have elapsed.

On 16 November 2022, at a special court-martial convened at MacDill Air Force Base, Florida, Appellant was found guilty, consistent with his pleas, of one charge and three specifications of Article 112a, Uniform Code of Military Justice (UCMJ), and one charge and specification of Article 92, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 3 January 2023. The military judge sentenced Appellant to reduction to the rank of E-1, forfeitures of $1,000 pay per month for three months, and 80 days' confinement. *Id.* The convening authority

took no action on the findings or sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 22 November 2022.

The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 21 cases, with 15 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 5 in this case, undersigned counsel has filed the Reply Brief on Behalf of Appellant in *United States v. Arroyo* (ACM 40321 (f rev)); an Opposition to the Government's Motion to Cite Supplemental Authorities in *Arroyo*; the Brief on Behalf of Appellant in *United States v. Douglas* (ACM 40324 (f rev)); an Opposition to the Government's Motion for Reconsideration: Citation of Supplemental Authorities in *Arroyo*; and Motions to Withdraw from Appellate Review and Motions to Attach in *United States v. Johnson* (ACM S32774) and *United States v. Willems* (ACM 40562) with this Court. Motions to Withdraw from Appellate Review and Motions to Attach require review of the records in order to advise appellants of their options and coordination with appellants on getting the DD Form 2330s completed. Undersigned counsel also represented SrA Arroyo at the outreach oral argument held on 10 April 2024 and spent around 5 hours preparing for a colleague's moots, assisting in moots, and attending oral argument.

This case is currently undersigned counsel's fifth priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Undersigned counsel is currently reviewing the record of trial and outlining potential AOEs. The brief is currently due 23 May 2024.
2. *United States v. Holmes* (Misc. Dkt. No. 2024-1): On 5 April 2024, this Court ordered oral argument scheduled for 31 May 2024.
3. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit. Depending on coordination with civilian appellate defense counsel on priority number one, undersigned counsel may be able to start review of this case prior to preparing for oral argument in *Holmes*.
4. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit.

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 April 2024.

Respectfully submitted,

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

2 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JOSEPH C. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23017 Panel No. 1

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

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

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

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 2 May 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 23017**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joseph C. CLARK	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

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

In this motion, Appellant's counsel accurately states that the court docketed the record of trial on 13 July 2023. Appellant's counsel also notes this court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 12 September 2023. We also note that, given the sentencing date of 16 November 2022, 538 days have passed from sentencing to the date of this order.

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 7th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Sixth) is **GRANTED**. Appel-lant shall file any assignments of error not later than **8 June 2024**.

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

Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH C. CLARK** United States Air Force *Appellant*	)	No. ACM 23017 31 May 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 July 2024**. The record of trial was docketed with this Court on 13 July 2023. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 361 days will have elapsed. On 9 August 2023, this Court suspended Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 18, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellate defense counsel received the certified verbatim transcript on 12 September 2023. Since receiving the verbatim transcript, 262 days have elapsed.

On 16 November 2022, at a special court-martial convened at MacDill Air Force Base, Florida, Appellant was found guilty, consistent with his pleas, of one charge and three specifications of Article 112a, Uniform Code of Military Justice (UCMJ), and one charge and specification of Article 92, UCMJ. Record of Trial (ROT), Vol. 1, *Entry of Judgment*, 3 January 2023. The military judge sentenced Appellant to reduction to the rank of E-1, forfeitures of $1,000 pay per month for three months, and 80 days' confinement. *Id.* The convening authority

took no action on the findings or sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, 22 November 2022.

The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits. Appellant is not currently confined.

Undersigned counsel is currently assigned 22 cases, with 17 initial briefs pending before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing a Motion for EOT 6 in this case, undersigned counsel has sent the Brief on Behalf of Appellant in *United States v. Sherman* (ACM 40486) to civilian appellate defense counsel for review; filed the Motion to Withdraw from Appellate Review and Motion to Attach in *United States v. Brockington* (ACM S32768) with this Court; and conducted oral argument in *United States v. Holmes* (Misc. Dkt. No. 2024-1) with this Court.

Undersigned counsel's next priority case is *United States v. Greene-Watson* (Dkt. No. 24-0096/AF; ACM 40293) in which the CAAF granted review of one issue on 7 May 2024. The Grant Brief currently due 26 June 2024.

This case is currently undersigned counsel's third priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit. Of note, this case moved up in priority for undersigned counsel to attempt to get review done prior to going on leave at the end of June. Given the Grant Brief and Joint Appendix in *Greene-Watson* will be due to the CAAF before the end of June and takes priority, it is highly unlikely undersigned counsel would be able to finish review of *Martell*'s record prior to taking leave as it is substantially longer than *Duthu*.
2. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Undersigned counsel is in compliance with her ethical obligations as it relates to communications with her client. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 May 2024.

Respectfully submitted,

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

4 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) JOSEPH C. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 23017 Panel No. 1

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellate 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 361 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.

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 June 2024.

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23017**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joseph C.G. CLARK	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 31 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

In this motion, Appellant's counsel accurately states that the court docketed the record of trial on 13 July 2023. On 9 August 2023, the court suspended Rule 18 of the Joint Rules of Appellate Procedure for Court of Criminal Appeals, allowing Appellant to file his brief within 60 days of receiving the certified verbatim transcript. Appellant's counsel did not receive the certified verbatim transcript until 12 September 2023. From the date of sentencing through the date counsel received the verbatim transcript, 300 days transpired. We note that 569 days have passed from the date of sentencing to the date of this order.

The court held a status conference on 7 June 2024 to discuss the progress of Appellant's case. Major Brittany M. Speirs represented the Government, and Major Heather M. Bruha represented Appellant. Ms. Megan P. Marinos also attended as the Senior Counsel of the Appellate Defense Division. Appellant's counsel confirmed Appellant was advised of his right to a timely appeal, was provided with an update on the status of counsel's progress on his case, and was advised of the request for an enlargement of time. Appellant's counsel further represented that Appellant agrees with the latest request for an enlargement of time.

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 7th day of June, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED**. Appellant shall file any assignments of error not later than **8 July 2024**.

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

FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH C. CLARK,** United States Air Force *Appellant.*	)	No. ACM 23017 8 July 2024

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

Assignments of Error

I.

WHETHER THE CONDITIONS OF TSGT CLARK'S POST-TRIAL CONFINEMENT WERE CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSITUTION AND ARTICLE 55, UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 855. ALTERNATIVELY, WHETHER TSGT CLARK IS ENTITLED TO SENTENCE RELIEF UNDER ARTICLE 66, UCMJ, 10 U.S.C. § 866, BECAUSE THE CONDITIONS OF TSGT CLARK'S POST-TRIAL CONFINEMENT UNLAWFULLY INCREASED HIS SENTENCE.

II.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922(g) IS CONSITUTIONAL, MEANING ITS APPLICATION IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION, WHEN TSGT CLARK WAS CONVICTED OF NON-VIOLENT DRUG OFFENSES.

Statement of the Case

On 16 November 2022, a military judge sitting alone as a special court-martial convicted Technical Sergeant (TSgt) Joseph C. Clark, consistent with his pleas in accordance with a plea

agreement, of one charge and three specifications of Article 112a, UCMJ,[1] 10 U.S.C. § 921a, and one charge and one specification of Article 92, UCMJ, 10 U.S.C. § 892. App. Ex. IV; R. at 7. The military judge sentenced TSgt Clark to a total of 80 days of confinement, reduction in pay grade to E-1, and forfeitures of $1,000 per month for three months. R. at 129. The Convening Authority took no action on the findings or sentence. Convening Authority Decision on Action–*United States v. Clark* (CADA).

Statement of Facts

TSgt Clark served for over 14 years in the Air Force. Pros. Ex. 4. He consistently excelled in all his positions and received the highest marks. *Id.* TSgt Clark earned an associate's and two bachelor's degrees while working full-time and saved the Air Force over a million dollars through his program initiatives. *Id*. He received many awards and recognitions for his hard work and dedication to the Air Force, including the United States Air Forces in Europe Pharmacy Technician of the Year award. *Id.*; Def. Ex. BB. He is a loving husband to JN and hopes to adopt children and start a family. *Id.*

Despite his readily observable professional achievements, TSgt Clark was suffering from mental illness. R. at 104. As his mental health worsened, he turned to drugs to cope with the symptoms of his illnesses. *Id.* In May 2020, TSgt Clark smoked Methamphetamines which gave him a rush of energy and euphoria that alleviated his depression. Pros. Ex. 1. He smoked them again in October 2020. *Id.* Also in May 2020, TSgt Clark consumed Ambien without a proper prescription after receiving it from a friend. *Id.* On or about 5 March 2022, TSgt Clark was

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

prescribed Tramadol. *Id.* Initially, TSgt Clark took the Tramadol as prescribed, however, he eventually started misusing it to cope with his mental health issues. *Id.*; R. at 104.

On 9 March 2022, when TSgt Clark's husband, JN, returned from a work trip, he saw their house and pets in disarray. Pros. Ex. 1. He saw evidence that TSgt Clark had taken a dangerous amount of pills and he called the Base Defense Operations Center in hopes of getting TSgt Clark help. *Id.* After this incident, TSgt Clark was referred to Alcohol and Drug Abuse Prevention and Treatment (ADAPT). Pros. Ex. 1. As a result of the follow-up treatment, TSgt Clark was diagnosed with Major Depression Disorder and Bipolar Disorder. *Id.*

Since receiving treatment, TSgt Clark made tremendous strides in his recovery from both addiction and his mental health issues. Def. Ex. F. After the diagnoses, TSgt Clark was placed on multiple medications for his mental health, including Lamictal, Bupropion, and Gabapentin. Appendix A; R. at 105. His mood and emotions improved, and he was no longer spiraling into "chaotic circles of depression". R. at 105.

Despite this progress, TSgt Clark would soon be hindered from receiving treatment. Appendix A. Following his conviction, TSgt Clark went directly into confinement at a civilian detention center called Pinellas County Jail (PCJ) in Clearwater, Florida. *Id.* When he first got to PCJ, TSgt Clark was placed in solitary confinement. *Id.* He remained in solitary confinement for twenty days until he was transferred to the Charleston Naval Consolidated Brig. *Id.* During his time at PCJ, numerous guards made comments about how it was odd that TSgt Clark was still in solitary confinement. *Id.*

TSgt Clark was not seen by the medical staff for his in-processing physical until two days after his arrival. *Id.* During this physical, he disclosed his mental health diagnoses and stated his required prescriptions. *Id.* Three days after the physical, TSgt Clark was finally given medication. *Id.* Throughout the five days without access to medication, TSgt Clark experienced withdrawal

symptoms including nausea. *Id.* Additionally, the lack of medication combined with the solitary confinement, caused TSgt Clark to experience severe depression, hopelessness, loneliness, and suicidal ideations. *Id.*

When TSgt Clark was given medication, it was at a lower dosage than he was prescribed. *Id.* The lower dosage alleviated the nausea, but TSgt Clark's mental health continued to worsen. *Id.* TSgt Clark repeatedly complained to the medical staff delivering his medication about the incorrect dosage, but nothing changed. *Id.* After his initial physical, TSgt Clark did not see any psychologists or receive any additional wellness checks, despite PCJ keeping him in solitary confinement and giving him a lower dosage of psychiatric medication than he was prescribed. *Id.* The combination of solitary confinement for twenty days and the lack of access to proper psychiatric care made TSgt Clark's mental health decline. *Id.* After being released from confinement, TSgt Clark required an increase in anti-depressants to treat his exasperated conditions. *Id.*

On 19 November 2022, JN became aware of his husband's confinement circumstances and worked with TSgt Clark's Area Defense Counsel (ADC) to file a letter of clemency on his husband's behalf. Clemency Memorandum (Clemency), dated 19 Nov. 2022. The clemency request explicitly mentioned the lack of access to necessary psychiatric medication and TSgt Clark's extended stay in solitary confinement. *Id.* The convening authority did not grant TSgt Clark any relief. CADA. TSgt Clark saw no improvement in his conditions until he was transferred to the Charleston Naval Consolidated Brig, on or about 5 December 2022. Appendix A.

Argument

I.

THE CONDITIONS OF TSGT CLARK'S POST-TRIAL CONFINEMENT WERE CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSITUTION AND ARTICLE 55, UCMJ. ALTERNATIVELY, TSGT CLARK IS ENTITLED TO SENTENCE RELIEF UNDER ARTICLE 66, UCMJ, BECAUSE THE CONDITIONS OF APPELLANT'S POST-TRIAL CONFINEMENT UNLAWFULLY INCREASED HIS SENTENCE.

Standard of Review

The question of whether the facts alleged amount to cruel and unusual punishment is reviewed de novo. *United States v. Pullings*, 83 M.J. 205, 211 (C.A.A.F. 2023) (citation omitted). Additionally, in Eighth Amendment and Article 55, UCMJ, claims, this Court is permitted to consider material that is outside the record. *United States v. Jessie*, 79 M.J. 437, 440 (C.A.A.F. 2020); *United States v. King*, 2021 CCA LEXIS 415, at *41 (A.F. Ct. Crim. App. 16 Aug. 2021).

Law and Analysis

The Eighth Amendment prohibits "punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain." *United States v. White*, 54 M.J. 469, 474 (C.A.A.F. 2001) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976)) (internal quotation omitted). To establish an Eighth Amendment and Article 55, UCMJ, violation, an appellant must prove "1) an objectively, sufficiently serious act or omission resulted in the denial of necessities, 2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to his health and safety, and 3) he exhausted the prisoner-grievance system and that he petitioned for relief under Article 138, UCMJ." *Pullings*, 83 M.J. at 211 (cleaned up).

A) Denial of Proper Psychiatric Care and Improper Solitary Confinement are Objectively and Sufficiently Serious Omissions or Acts.

TSgt Clark has had a long battle with his mental health. Def. Ex. F; R. at 105. Initially he turned to drugs as the only way he felt that he could get relief from the depression that he was experiencing. R. at 105. His relationship to drugs was concerning but turned terrifying after a possible overdose episode which resulted in his husband calling law enforcement to get TSgt Clark the help that he needed. Pros. Ex. 1. TSgt Clark was admitted to the ADAPT program where he was first diagnosed with Major Depressive Disorder and Bipolar disorder. *Id.* Additionally, TSgt Clark was prescribed numerous psychiatric medications for his mental health. Appendix A; R. at 105. He also started going to therapy and was learning healthy coping mechanisms for his mental health, to avoid spiraling into the episodes which forced him to drugs in the first place. R. at 105. All the progress that was made in his mental health recovery was stripped away because of his time at PCJ, ultimately leaving him in a worse mental state than when he entered for no reason other than the constitutionally deficient medical treatment by PCJ. Appendix A.

Denial of Proper Psychiatric Care

PCJ knowingly lowered the dosage of TSgt Clark's prescribed psychiatric medication and then placed him in solitary confinement for twenty days, with no follow-ups by any medical professionals on his status. Appendix A. This denial of adequate medical attention is an objectively and sufficiently serious act or omission. *See White*, 54 M.J. at 474. Psychiatric evaluations for people in solitary confinement is a necessary step required by Florida law when dealing with an inmate's mental health. Fla Stat. §945.48(5) (2023) ("If an inmate must be isolated for mental health purposes, that decision must be reviewed within 72 hours by a different psychological professional or a physician other than the one making the original placement."). TSgt Clark was not given any psychiatric evaluations which would satisfy this requirement. Appendix A. The only

time he was evaluated was during a typical in-processing physical, which cannot be reasonably compared to receiving two professional opinions, especially when one must be a psychiatrist. Requesting prescribed medication is not the same as requesting admission into Narcotics Anonymous as seen in *White.* 54 M.J. at 471. In *White*, the appellant's requests for additional mental health resources were because he felt he was not receiving optimal mental health care, despite having outside medication management and regularly scheduled therapy sessions. *Id.* TSgt Clark was deprived of the necessary psychiatric care that was prescribed by doctors and that is required of the jail when placing mentally ill inmates in solitary confinement.

Solitary Confinement

TSgt Clark was placed in solitary confinement for twenty days without a valid reason. Of two available processes authorizing solitary confinement, neither was satisfied here. The only conclusion is that TSgt Clark's time in solitary confinement was without legal justification.

Under PCJ's governing rules, detainees may be placed in segregated housing for disciplinary reasons for a maximum of 30 days for reasons such as sexual abuse of another, theft, or escape. Appendix B at § XVII(B). TSgt Clark did not participate in any of those limited behaviors that would have resulted in disciplinary segregated confinement. *Id.* at XVI.

Solitary confinement is not *per se* incompatible with the evolving standards of decency that mark the progress of a maturing society; however, solitary confinement must be ordered for a valid reason. *United States v. Gay*, 74 M.J. 736, 741 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016). In *Gay*, there was no reason given for the solitary confinement lasting about seven days. *Id*. at 743. This Court reasoned that even if separation from foreign nationals was the reason for the segregation, it was an unacceptable reason. *Id.* TSgt Clark was not given a reason for his solitary confinement lasting twenty days—almost triple the amount than the appellant in

Gay. Appendix A; 74 M.J. at 739. There was no acceptable reason to keep TSgt Clark in solitary confinement—let alone for twenty days.

The omission of adequate psychiatric treatment coupled with TSgt Clark's inexcusable stay in solitary confinement resulted in actual suffering and placed him at extremely high risk for even worse suffering. *Cf. Pullings*, 83 M.J. at 213 (denying relief, in part, because the appellant did not claim specific suffering). During the five days which TSgt Clark had no medication, he experienced withdrawal symptoms impacting his already deteriorating mental health. Appendix A. One physical side effect he suffered was nausea. *Id.* The nausea subsided once he received his medication, however his mental health worsened drastically. *Id.* TSgt Clark suffered deep depression, hopelessness, and suicidal ideations caused by twenty days of solitary confinement and incorrect prescription dosages. Appendix A. Failing to act on TSgt Clark's mental health issues placed him at an extremely high risk for suffering adverse mental health effects. TSgt Clark's depression got quantifiably worse such that when he was released from confinement his psychiatrists had to increase his dosage of anti-depressants. *Id*.

B) <u>The Prison Officials were Deliberately Indifferent Demonstrating a Culpable State of Mind.</u>

The prison officials at PCJ were deliberately indifferent to the care necessary for TSgt Clark. Not only did the medical professionals know about the treatment TSgt Clark was receiving, but so did the guards. Appendix A. "It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). To prove reckless disregard of a risk it must be shown that "[1] the official knows of and disregards an excessive risk to inmate health or safety; [2] the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists; and [3] he must also draw the

inference." *Id*. at 837. While an obvious harm is not knowledge, per se, a fact-finder may conclude that the knowledge existed from the very fact that the risk was obvious. *Id*. The risk posed by placing an inmate suffering with mental illness into solitary confinement, is an obvious one. *Palakovic v. Wetzel*, 854 F.3d 209, 226(3rd Cir. 2017). Many courts have "acknowledge[d] the robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation in solitary confinement." *Palakovic*, 854 F.3d at 225; *see Porter v. Clarke*, 923 F.3d 348, 355(4th Cir. 2019). Lowering the dosage of psychiatric medications and not providing adequate follow-ups—to include wellness checks or any mental health resources—all while someone is in solitary confinement for twenty days, is an obvious risk to TSgt Clark's mental health. The prison officials were aware of the risk that improper psychiatric care on an inmate with severe mental health issues in solitary confinement can have on an inmate because it is such an obvious risk.

In this case, medical professionals made regular contact with TSgt Clark while he was in solitary confinement and the guards' verbally acknowledged that it was odd TSgt Clark was in solitary confinement—let alone for the entire twenty days he was there. Appendix A. The medical staff was aware of the substantial risk of serious harm to TSgt Clark from the day he completed the medical intake and expressed his mental health history, diagnoses, and required prescriptions. *Id.* Similarly, the guards heard TSgt Clark complain daily about the dosage of his medication. *Id.* Numerous officials at PCJ were aware both that TSgt Clark was on an incorrect dosage of his medication and was spending an inappropriate amount of time in solitary confinement and they were aware of the excessive risk that these circumstances had on TSgt Clark's health.

In *Finley v. Huss*, the Sixth Circuit found deliberate indifference could be found on the part of prison officials when they kept the appellant, who had known mental health issues, in solitary confinement for an inappropriate amount of time. 102 F.4th 789, 807 (6th Cir. 2024). "Any

reasonable person would know that if it is unconstitutional to fail to step in and address known risks, it is also unconstitutional to affirmatively and knowingly worsen those risks." *Id*. at 811. In *Finley*, the prison officials knew that the appellant suffered from mental health issues because it was brought up multiple times in his medical file at the prison. *Id.* at 806.

Similarly, the officials at PCJ were aware of TSgt Clark's mental health issues because he disclosed it to the proper medical officials during his in-processing physical. Appendix A. The Sixth Circuit also stated that the officials should have known about the high risk of harm of solitary confinement on an inmate with mental illness because of the amount of case law on both the effects of egregious solitary confinement and the case law on mentally ill inmates and solitary confinement. 102 F.4th at 811-12; n.11 (*see Porter*, 923 F.3d at 361 (finding corrections department procedures on solitary confinement, officials' actual knowledge, and extensive research established deliberate indifference); *Palakovic*, 854 F.3d at 225 (finding deliberate indifference proved by the actual knowledge of the inmates mental health and ". . . increasingly obvious reality that extended stays in solitary confinement can cause serious damage to mental health. . ."); *Walker v. Shansky*, 28 F.3d 666, 673(7th Cir. 1994) ("A jury might find that Walker's prolonged term of segregation combined with the deprivations and abuse alleged in his affidavit constitute unconstitutional conditions of confinement."); *Gates v. Collier*, 501 F.2d 1291, 1305 (5th Cir. 1974) (stating the lower court ordering restrictions on the use of "the dark hole" for solitary confinement established a minimal constitutional standard of use); *La Reau v. MacDougall*, 473 F.2d 974, 978 (2nd Cir. 1972) ("The indecent conditions that existed in this Somers prison strip cell seriously threatened the physical and mental soundness of its unfortunate occupant.")). This can also be applied to the officials at PCJ. "Relatively broad yet deep-rooted rights, such as the right to psychiatric care, are enough to place already culpable officials on notice that their actions were not only wrong but also unlawful." *Id*. at 810.

Here, the risk was obvious, and there are facts that demonstrate deliberate indifference. During the intake process at PCJ, TSgt Clark explicitly noted the medications that he required for his mental health. *See* Appendix B at § III ("Upon arrival, inmates shall receive a medical and mental health screening. Please inform the nurse of any special medical or emotional needs during this process"). TSgt Clark repeatedly told the personnel delivering his medication that he was receiving the incorrect dosage. Appendix A. The medical staff at PCJ knew TSgt Clark had serious mental health issues because of his mental health screening as well as the disclosure of diagnoses and medication. *Id*. The medical staff at PCJ knew he was receiving the incorrect dosage because he repeatedly complained. *Id*. They also knew TSgt Clark was in consistent solitary confinement since they delivered his incorrect medication to him while there. *Id.* Prison officials guarding his room were similarly aware not just that the solitary confinement for TSgt Clark was odd, but also that he required daily medications for his mental health and that he consistently complained. *Id*. However, no one took any corrective action. *White*, 54 M.J. at 474 (reasoning that a culpable state of mind is proven when the prison guards or officials are consciously aware of the risk of danger to the inmate and choose to ignore it). Thus, because prison officials were consciously aware of all the facts of TSgt Clark's situation and risks of danger posed to him were so obvious, the prison officials were deliberately indifferent.

C) TSgt Clark Faced Unusual Circumstances which made him Unable to Exhaust his Administrative Remedies.

The CAAF has held that unusual circumstances may excuse an appellant's failure to exhaust administrative remedies. *United States v. Wise*, 64 M.J. 468, 471 (C.A.A.F. 2007). In *Wise*, the appellant failed to file any grievances with the prison; however, the CAAF found that the lack of a formal grievance system and the appellant's weeklong stay at the prison, presented the appellant with an unusual circumstance. *Id*. at 472. Additionally, this Court decided an unusual

circumstance exists when an appellant was housed in a civilian facility due to the lack of administrative remedies available. *United States v. Towhill*, 2012 CCA LEXIS 94, at *6-7 (A.F. Ct. Crim. App. Mar. 16, 2012). In *Towhill*, the appellant was in confinement for fifty-five days with a foreign national but did not alert his ADC about the issue until after he had transferred out of the civilian facility. *Id*. at *2. This Court concluded that because there were limited administrative remedies available to the appellant, since he had left the civilian confinement facility, that he was faced with unusual circumstances which would excuse his failure to exhaust administrative remedies. *Id.* at *6.

Here, TSgt Clark repeatedly voiced his complaints to the medical staff about the improper medication dosage. Appendix A. While PCJ has a formal grievance system, they placed emphasis on informal complaints: "[m]ost grievances can be taken care of quickly and efficiently by voicing the complaint to any deputy. Inmates are encouraged to use this method before filing a formal complaint." Appendix B at § XXIV. TSgt Clark took advantage of this informal complaint system by repeatedly voicing his concerns to prison officials. Appendix A. Moreover, the formal grievance system would not have provided TSgt Clark with relief prior to his change in confinement location, similar to *Towhill*. 2012 CCA LEXIS 97, at *6-7. This is because the formal grievance system can last up to eighteen days. Appendix B at § XXIV. The administrative process that was available to TSgt Clark was not feasible because of his unusual circumstances and his transfer to a military confinement facility further limited any remedies that were available to him. *Id.*

D) TSgt Clark is Entitled to Sentence Relief Under Article 66, UCMJ, as the Conditions of his Post-Trial Confinement Unlawfully Increased his Sentence.

Even if TSgt Clark's complaint does not rise to a violation of the Eighth Amendment or Article 55, UCMJ, this Court may still grant relief on the issue under Article 66, UCMJ. *Gay*, 75

M.J. at 269. "[I]f an appellant claims that post-trial confinement conditions unlawfully increased the severity of the sentence, a CCA must consider whether the sentence is correct in law." *United States v. Guinn*, 81 M.J. 195, 201(C.A.A.F. 2021).

> An appellant who asks a CCA to review prisons conditions must establish the following: (1) a record demonstrating exhaustion of administrative remedies (i.e. exhaustion of the prisoner grievance system and a petition for relief under Article 138, UCMJ, 10 U.S.C. § 938, except in unusual or egregious circumstances that would justify the failure to exhaust; (2) a clear record demonstrating the jurisdictional basis for the CCA action; and (3) a clear record demonstrating the legal deficiency in administration of the prison.

Id. at 203 (cleaned up).

There is a clear record that, given his unusual circumstances, TSgt Clark exhausted the administrative remedies available to him. *See Towhill*, 2012 CCA LEXIS 97 at *6-7. TSgt Clark made repeated complaints to the medical staff every day. Appendix A. Further, his ADC provided the information to the convening authority during clemency asking for relief but was not given any. *Compare* Clemency, *with* CADA. TSgt Clark was in the middle of a mental health crisis without proper resources. Requiring him to follow the complex legal process of an Article 138 complaint while isolated in solitary confinement without the assistance of his ADC and while being directed by the PCJ's governing regulations to resolve issues informally places an unrealistic and undue burden on him that is almost impossible to meet.

There is "a clear record that demonstrates a jurisdictional basis for the CCA action." *Id.* In *Guinn*, the CAAF determined that "the CCA [has] an Article 66(c)[2] duty to determine whether Appellant's approved sentence, as executed, was correct in law and was appropriate." *Id*. at 204. In *Gay*, the CAAF held that the court has "discretion for post-trial confinement conditions that do

[2] The Article 66(c), UCMJ, referenced in *Guinn* is from the 2016 *MCM* as the offense took place in 2017. 81 M.J. at 198. Relevant to the issues raised in this case, it is identical to the Article 66(d), UCMJ, in the 2019 *MCM*.

not rise to the level of a constitutional or statutory violation." 74 M.J. at 742. TSgt Clark's twenty days in solitary confinement for no reason and without access to adequate psychiatric care created unnecessary suffering and rendered his sentence inappropriately severe. Thus, this Court should grant relief. *Guinn*, 81 M.J. at 202 ("[T]he CCAs are required to review whether a sentence is appropriate, they must address an appellant's claim that a specific prison policy contained a legal deficiency that rendered the sentence inappropriate.").

There is "a clear record demonstrating the legal deficiency in the prison policy administration." *Guinn*, 81 M.J. at 203. While in PCJ, the prison not only violated their own rules and regulations with regards to inmate psychiatric care and solitary confinement, they also violated state law. There is a clear legal deficiency in the prison policy and TSgt Clark was an unfortunate victim of it. Relief is therefore warranted.

WHEREFORE, TSgt Clark requests this Honorable Court disapprove at least 60 days of the sentence to confinement approved by the convening authority, which equates to 3:1 credit for all twenty days spent under these conditions at PCJ.

II.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922(g) IS CONSITUTIONAL, MEANING ITS APPLICATION IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION, WHEN TSGT CLARK WAS CONVICTED OF NON-VIOLENT DRUG OFFENSES.

Additional Facts

The first indorsements to both the EOJ and Statement of Trial Results (STR) state that TSgt Clark is subject to a "Firearm Prohibition Triggered Under 18 U.S.C. § 922." EOJ; STR.

Standard of Review

This court reviews questions of statutory interpretation, jurisdiction, and post-trial processing de novo. *United States v. Vanzant*, __ M.J. __, No. ACM 22004, 2024 CCA LEXIS 215, at *1, *5, *22 (A.F. Ct. Crim. App. 28 May 2024)

Law and Analysis

TSgt Clark was convicted of drug related offenses, which would make Section 922(g)(3) applicable to him. Additionally, while TSgt Clark was convicted by a special court-martial wherein the maximum confinement cannot exceed a year, the maximum time punishable for these offenses could exceed a year. *MCM*, II-14, ¶ 201(f)(2)(B)(i); *MCM*, IV-68, ¶ 50.d. Thus, Section 922(g)(1) could also arguably apply as well. However, both sections are unconstitutional as applied to TSgt Clark for the same reason—he was only convicted of non-violent offenses.

A) Section 922(g) is Unconstitutional as Applied to TSgt Clark.

The Section 922(g) ban that is placed on TSgt Clark is unconstitutional. Section 922(g)(1) states, "[I]t shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearms or ammunition . . . ." Section 922(g)(3) states, "[I]t shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearms or ammunition . . . ."

> The proper test for Second Amendment restrictions 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) (internal quotation omitted).

The first step of the *Bruen* analysis is to determine if the Second Amendment is facially applicable. *Id*. at 18. In *District of Columbia v. Heller*, the Supreme Court stated that the Second Amendment was an individual right that held by the entire political community. 554 U.S. 570, 580 (2008). They noted longstanding prohibitions on the possession of firearms by felons and the mentally ill were acceptable. *See id.* at 626. However, occasional drug use does not disqualify someone from the political community and thus the Second Amendment is applicable to TSgt Clark. *United States v. Daniels*, 77 F.4th 337, 342 (5th Cir. 2023), *vacated and remanded*, 2024 U.S. LEXIS 2910 (U.S., July 2, 2024). Therefore, TSgt Clark's drug convictions do not remove him from the corpus of political persons covered under the Second Amendment. *Id.* at 343.

Furthermore, simply because someone is convicted of drug offenses does not automatically mean that the person is considered an unlawful user within the meaning of Section 922(g)(3). *See United States v. Freitas*, 59 M.J. 755, 756 (N-M. Ct. Crim. App. 2004). The question of whether a person is an unlawful user within the meaning of Section 922(g)(3) "requires proof of a pattern, and recency, of drug use or drug use that is sufficiently consistent, prolonged, and close in time to the gun possession." *Id.* at 758 (quotation omitted). Section 922(g)(3) requires a "temporal nexus" between gun ownership and the unlawful use. *Id.* at 757. Under the current provisions, the Section 922(g) prohibition placed on TSgt Clark is indefinite. This distinguishes it from the temporary ban found constitutional in *United States v. Rahimi*. 219 L. Ed. 2d 351, 370 (2024). The automatic implication of Section 922(g)(3) on nonviolent drug offenders for an indefinite amount of time disregards the temporal nexus needed for Section 922(g)(3) while also ignoring the temporary element of other sections of 922(g), like domestic violence. *See Daniels*, 77 F.4th at 340 (unlawful use must be in temporal proximity of the gun possession); *see al*so *Rahimi*, 219 L. Ed. 2d at 370 (holding "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed").

The next step of the *Bruen* analysis is to determine if there is a historically analogous comparison that can be found to the modern restriction. 597 U.S. at 18. The Court's decision in *Rahimi* is supported by a long tradition of preventing violent felons from having access to weapons, however, non-violent offenders do not pose the same risk to the community. *Rahimi*, 219 L. Ed. 2d at 369 ("[O]ur Nation's tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not."). *Rahimi*'s ban was upheld because of the violence aspect of the ban. *Id.* at 367. However, when the violence is removed from the situation, the ban lacks any similar historical precedent. *Range v. AG United States*, 69 F.4th 96, 106 (3d Cir. 2023), *vacated by Garland v. Range*, 2024 U.S. LEXIS 2917 (2024) (remanding for further consideration in light of *Rahimi*, 219 L. Ed. 2d 351 (2024)). The Third Circuit earlier applied a similar logic to Section 922(g)(1), stating that "[b]ecause the Government has not shown that our Republic has a longstanding history and tradition of depriving people like [appellant], 922(g)(1) cannot constitutionally strip him of his Second Amendment rights." *Id*.

The Fifth Circuit earlier concluded that there was no such historical restriction which would support a Section 922(g)(3) restriction on a person for mere non-violent drug use. *Daniels,* 77 F.4th at 350. That court stated that "our history and tradition may support some limits on an intoxicated person's right to carry a weapon, but is does not justify disarming a sober citizen based exclusively on his past drug use." *Id*. at 340. The *Daniels* court once again placed emphasis on a temporal nexus between the drug use and the disarmament. *Id*. Because Section 922(g)(3)'s indefinite disarmament negates the time requirement between the gun ownership and the drug, it is unconstitutional as applied to TSgt Clark.

Since TSgt Clark's nonviolent drug offenses do not remove him from the people that are protected by the Second Amendment, and because the Government cannot prove that neither

Section 922(g)(1) or Section 922(g)(3) have a historical analogous tradition, they cannot constitutionally be applied to TSgt Clark.

B) This Court May Order Correction of the EOJ.

In *United States v. Lepore*, 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 [its] authority under Article 66." *Id.* at 760. Recently, this Court further concluded that "[t]he firearms prohibition remains a collateral consequence of the conviction, rather than an element of findings or sentence, and is therefore beyond our authority to review." *Vanzant*, 2024 CCA LEXIS 215, at *24.

However, in *United States v. Lemire*, 82 M.J. 263, at n* (C.A.A.F. 2022), the CAAF "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." The CAAF's direction to fix the promulgating order is at odds with this Court's holdings in *Lepore* and *Vanzant*, and it reveals three things. First, the CAAF has the power to correct administrative errors in promulgating orders.[3] Second, the CAAF believes that CCAs have the power to address collateral consequences under Article 66, UCMJ, as well since it "directed" a CCA 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

[3] While a promulgating order was at issue in *Lemire*, the same should apply to the EOJ, which replaced the promulgating order as the "document that reflects the outcome of the court-martial." 2019 *MCM*, App. 15 at A15-22.

Article 66, UCMJ, as they relate to collateral consequences, then they also have the power to address constitutional errors in promulgating orders, even if the Court deems them to be a collateral consequence.

Moreover, *Lepore* relates to a prior version of the R.C.M.—"[a]ll references in this opinion to the UCMJ and [R.C.M.] are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at 760 n.1. In the 2019 *MCM*, both the STR and EOJ contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6), 1111(b)(3)(F). Under DAFI 51-201, *Administration of Military Justice*, dated 14 April 2022, ¶ 29.32, the STR and EOJ must include whether the offenses trigger a prohibition under Section 922. As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now require—by incorporation—a determination of whether the firearm prohibition is triggered.[4] Thus, this Court can rule in TSgt Clark's favor without taking the case en banc.[5] If this Court disagrees, TSgt Clark offers the above argument to overrule *Lepore* under Joint Rule of Appellate Procedure 27(d).

[4] *See also United States v. Robertson*, No. 202000281, 2021 CCA LEXIS 531 (N-M. Ct. Crim. App. 18 Oct. 2021) (ordering correction of a STR because it incorrectly stated Section 922 did not apply); *United States v. Moreldelossantos*, ARMY 20210167, 2022 CCA LEXIS 164 (17 Mar. 2022) (ordering correction of the STR to change the Subsection 922(g)(1) designator to "No").

[5] TSgt Clark recognizes this Court has repeatedly ruled against this argument. *See, e.g.*, *Vanzant*, 2024 CCA LEXIS 215, at *23–26. However, this Court has not yet addressed the question of whether the Rules change provides a basis for this Court to reach a different result.

WHEREFORE, TSgt Clark requests this Honorable Court find the Government's firearm prohibition is unconstitutional as applied and order that the Government correct the EOJ and STR.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
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//signed//
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[6]Lt Ivy is a second-year law student at Tulane University School of Law. Lt Ivy was at all times supervised by Maj Bruha during her participation in the writing of this brief and Maj Bruha assumes responsibility for the content of this filing, in accordance with Rule 14.1(c) of this Court's Rules of Practice and Procedure.

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 8 July 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH C. CLARK,** United States Air Force *Appellant.*	)	No. ACM 23017 8 July 2024

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

Pursuant to Rule 23(b) of this Honorable Court's Rules of Practice and Procedure, Appellant, TSgt Joseph C. Clark, hereby moves to attach the following documents to the Record of Trial:

1. Declaration of TSgt Joseph C. Clark, dated 27 June 2024, 2 pages (Appendix A)
2. Pinellas County Jail Inmate Handbook, dated 2018, 33 pages (Appendix B)

The Appendix A is the sworn declaration of TSgt Joseph C. Clark. He provides this declaration in support of his argument relating to Assignment of Error (AOE) I. Specifically, TSgt Clark's declaration is relevant to this Court's consideration of AOE I because TSgt Clark's declaration provides additional support for his assertion that he suffered cruel and unusual punishment during his time in civilian confinement and that his sentence was unnecessarily severe because of his treatment. It is also necessary because it provides an essential factual predicate for determining TSgt Clark did suffer cruel and unusual punishment. His declaration is relevant and necessary to this Court's consideration of whether he has suffered "an objectively, sufficiently serious act or omission," whether there is "a culpable state of mind on the part of prison officials,"

and whether he has exhausted all administrative relief. *United States v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006).

The Appendix B is the Pinellas County Jail Inmate Handbook. TSgt Clark provides this handbook in support of his argument relating to AOE I. Specifically, the inmate handbook is relevant to this Court's consideration of AOE I because TSgt Clark was in civilian confinement during the time of the error. The handbook provides the regulations that are supposed to be followed in the Pinellas County Jail and the procedures that inmates are required to follow. The handbook covers how inmates are supposed to disclose medical issues, how to report grievances, and the regulations for solitary confinement. These procedures are necessary for the Court to decide of whether TSgt Clark has suffered "an objectively, sufficiently serious act or omission," whether there is "a culpable state of mind on the part of prison officials," and whether he has exhausted all administrative relief. *Id.*

In *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020), the Court of Appeals for the Armed Forces continued the practice of allowing consideration of matters outside the record to resolve issues reasonably raised by materials in the record but not fully resolvable by those materials. The violation of TSgt Clark's Eighth Amendment rights and the severity of his punishment are reasonably raised by materials in TSgt Clark's record, but not fully resolvable from the materials in the record.

WHEREFORE, TSgt Clark respectfully requests this motion be granted.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23017**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joseph C. CLARK	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 8 July 2024, Appellant submitted a motion to attach the following documents to the record: declaration of Technical Sergeant Joseph C. Clark and Pinellas County Jail Inmate Handbook. The Government did not oppose the motion.

The court has considered Appellant's motion and the applicable law. The court grants Appellant's motion; however, it specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law to the attachments until it completes its Article 66, UCMJ, review of Appellant's entire case.

Accordingly, it is by the court on this 17th day of July 2024,

ORDERED:

Appellant's Motion to Attach is **GRANTED**.

FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH, C. CLARK** United States Air Force *Appellant.*	)	No. ACM 23017
	)	7 August 2024

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

ISSUES PRESENTED

I.

WHETHER THE CONDITIONS OF TSGT CLARK'S POST-TRIAL CONFINEMENT WERE CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES [CONSTITUTION] AND ARTICLE 55, UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. § 855. ALTERNATIVELY, WHETHER TSGT CLARK IFS ENTITLED TO SENTENCE RELIEF UNDER ARTICLE 66, UCMJ, 10 U.S.C. § 866, BECAUSE THE CONDITIONS OF TSGT CLARK'S POSTTRIAL CONFINEMENT UNLAWFULLY INCREASED HIS SENTENCE.

II.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922(G) IS [CONSTITUTIONAL], MEANING ITS APPLICATION IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION, WHEN TSGT CLARK WAS CONVICTED OF NONVIOLENT DRUG OFFENSES

STATEMENT OF CASE

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

STATEMENT OF FACTS

At various times over two years on active duty, Appellant unlawfully used crystal methamphetamine, unprescribed Ambien, and prescribed Tramadol far beyond what his prescription allowed. (Pros. Ex. 1 at 1-2.) In March 2022, Appellant was referred to Alcohol and Drug Use Prevention and Treatment due to his excessive drug use, and he was eventually diagnosed with Major Depression Disorder and Bipolar Disorder. (Id. at 2.) On 6 April 2022, two Office of Special Investigation (OSI) agents interviewed Appellant about his drug use, and Appellant admitted to the drug use. (Id. at 2-3.)

Pursuant to a plea agreement, Appellant pleaded guilty to Charge I and its three specifications in violation of Article 112a, UCMJ, and Charge II and its one specification in violation of Article 92, UCMJ. (R. at 65-66; App. Ex. IV.) The military judge sitting alone as a special court-martial sentenced him to 80 days of confinement, a reduction to the grade of E-1, and a $1,000 forfeiture in pay for three months. (*Entry of Judgement*, 16 November 2022, ROT, Vol. 1 at 2.)

After his sentencing, Appellant was immediately confined in Pinellas County Jail (PCJ) until his transfer to Charleston Naval Consolidated Brig three weeks later. (*Submission of Matters*, 16 November 2022, ROT, Vol. 1 at 2; Appellant's Declaration, dated 27 June 2024). Three days into his confinement, Appellant made a series of complaints about his confinement conditions through his defense attorney in a motion for clemency that was ultimately denied. (*Submission of Matters*, dated 16 November 2022, ROT, Vol. 1 at 2; *Convening Authority Decision on Action*, dated 22 November 2022, ROT, Vol. 1.) In his submission of matters, he

claimed that confinement officials denied him access to his medications and held him in solitary confinement.[1]. (Id.) In his declaration on appeal, Appellant alleged he was only allowed out of his cell to make phone calls and the "only other human interactions he had" was with prison staff when they delivered his medications. (Appellant's Declaration). Appellant used the phone to contact his area defense counsel who then submitted a clemency request on his behalf. (*Submission of Matters*, 16 November 2022, ROT, Vol. 1; Appellant's Declaration). Appellant now alleges that he did not receive the medication prescribed for his Major Depression Disorder and Bipolar Disorder until his fifth day in prison, two days after his initial evaluation by prison medical staff. (Appellant's Declaration.) He was then given the medication he was prescribed, though in a lower dosage than he normally received. (Id.) During these three weeks, Appellant said that he experienced side effects of "nausea. . . an increase in [] depression, extreme loneliness, hopelessness, and suicidal ideation[s]" due to the delay in receiving his medication and alleged lower dosage of that medication. (Id.) Though Appellant requested clemency during his confinement, there is no record that he made a formal complaint to the prison or an Article 138 complaint during his time in PCJ. (Gov. Motion to Attach, Appx. A, Appx. C). On 5 December 2022, Appellant was transferred to Charleston Naval Consolidated Brig, where he remained until his release on 4 February 2023. (Id.)

During the appellate review process, EJ, a Security Forces Member at MacDill AFB, investigated Appellant's claims and described his conclusions in an attached declaration. (Gov. Motion to Attach, Appx. B). EJ also found that it is PCJ's policy to house Air Force inmates away from the general population and, based on a tour of PCJ, he certified that the single

[1] In clemency, Appellate also alleged confinement officials did not provide him with three meals a day, but Appellant does not make that claim on appeal. (*Submission of Matters*, ROT, Vol. 1 at 2).

person cells "are large enough to have a bed, sink, and toilet inside of them." (Id.) In her declaration, PJC's Commander of the Custody Management Division explained the single occupancy cell was 95 square feet with its own toilet, shower, and a window measuring two square feet. (Gov. Motion to Attach, Appx. A). Appellant was placed under Protective Custody upon entry into PCJ to ensure his safety while at PCJ, and Protective Custody cells house only one person. (Id. at 2.) None of PCJ's Protective Custody cells house multiple individuals. (Id.) While in Protective Custody, Appellant was offered outdoor recreation which he declined, and Appellant "utilized a telephone, on eight different dates for a total of nearly three hours and attended six video visits, each lasting nearly forty minutes." (Id. at 1.) He also has "at least, sixty interactions with security staff and three visits by a social worker." (Id. at 3.)

While in confinement, Appellant needed to take prescription medications. (Id.) PCJ's policy for prescription medications states "[a]s long as a detainee is on verified medications, the regimen will be started immediately unless the medications are non-formulary." (Id.). PCJ received Appellant's medications upon his entry into confinement and administered them in accordance with PCJ policy:

> [Appellant's] medications accompanied him when he arrived from MacDill AFB. Some of these medications were formulary to PCJ and ordered and administered on 11/17 [2022]. The non-formulary medications required approval by the appropriate physician. On 11/18 [2022], he approved two of the remaining four non-formulary medications and [Appellant] received them on 11/19 [2022].

(Id. at 1). Appellant "received each medication as prescribed, daily, except on 11/20 and 11/23, when he refused one of them; a refusal of treatment form was generated and signed." (Id.)

During his time in confinement at PCJ, Appellant used neither the PCJ grievance system nor the Article 138 complaint process. (Gov. Motion to Attach, Appx. A, Appx. C).

ARGUMENT

I.

APPELLANT'S POST TRIAL CONFINEMENT CONDITIONS DID NOT AMOUNT TO CRUEL AND UNUSUAL PUNISHMENT AND DID NOT RENDER HIS SENTENCE INAPPROPRIATELY SEVERE.

Standard of Review

This Court reviews de novo the question of whether an appellant has been subjected to impermissible conditions of post-trial confinement in violation of the Eighth Amendment or Article 55, UCMJ. United States v. Wise, 64 M.J. 468, 473 (C.A.A.F. 2007). Whether an appellant has exhausted administrative remedies while in confinement is a mixed question of law and fact and is reviewed de novo. Id.

Law

Courts of Criminal Appeals (CCAs) "may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c)." Article 66(d), UCMJ. When reviewing sentences, service courts "may affirm only such findings of guilty, and 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), UCMJ. Despite Article 66(d)'s general command for CCAs to only review sentences based on the findings of the record, the Court of Appeals for the Armed Forces (CAAF) ruled that CCAs may consider information outside the record regarding post-trial conditions of confinement when the record contains information about those conditions or when determining whether the execution of an accused's sentence violates either the Eighth Amendment or Article 55.[2] United States v.

[2] While the government recognizes that, under current CAAF precedent, Appellant can raise post-trial confinement conditions before this Court, the government maintains, as argued in

Willman, 81 M.J. 355, 358 (C.A.A.F. 2021) (quoting United States v. Jessie, 79 M.J. 437, 444-45 (C.A.A.F. 2020)).

"[A] servicemember is entitled, both by statute and under the Eighth Amendment, to protection against cruel and unusual punishment." United States v. Matthews, 16 M.J. 354, 368 (C.M.A. 1983) (internal quotations omitted); Article 55, UCMJ. The Eighth Amendment prohibits "cruel and unusual punishments" from being inflicted on prisoners. U.S. CONST. AMEND. VIII. And Article 55, UCMJ, prohibits: "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter." CAAF has stated that the Eighth Amendment prevents two types of punishments: "(1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" Id. at 215 (citing Estelle v. Gamble, 429 U.S. 97, 102-03 (1976)).

To demonstrate an Eighth Amendment or Article 55, UCMJ, violation for conditions of confinement, CAAF requires that an appellant satisfy each of the three prongs articulated in United States v. Lovett before relief is granted. An appellant must demonstrate:

> (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety; and (3) that [the appellant] has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, 10 USC § 938 [2000].

United States v. Pullings, 83 M.J. 205 (C.A.A.F. 2023), that CAAF should overrule the precedent set out in United States v. White, 54 M.J. 469, 472 (C.A.A.F. 2001), and United States v. Erby, 54 M.J. 476, 478 (C.A.A.F. 2001) because post-trial confinement conditions are not part of a sentence entered into judgment.

United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006) (alteration in original) (footnotes omitted) (internal quotations omitted).

Analysis

Appellant was not subjected to cruel and unusual punishment because his confinement conditions did not constitute a "denial of necessities;" PCJ's staff did not act with "deliberate indifference to [Appellant's] health or safety;" and Appellant failed to "exhaust the administrative remedies available to him" in confinement. 63 M.J. at 215. Appellant fails to satisfy any of the three prongs of the Lovett test, and thus his confinement conditions did not violate the Eighth Amendment or Article 55, UCMJ. Appellant's confinement conditions also did not increase the severity of Appellant's sentence under Article 66, UCMJ.

A. *A short delay before Appellant received his medications and housing Appellant in a single person cell did not result in a denial of necessities that violated of Article 55, UCMJ, or the Eighth Amendment.*

Appellant fails to satisfy the "denial of necessities" prong of the Lovett test. 63 M.J. at 215. The bar for demonstrating "an objectively, sufficiently serious act or omission resulting in the denial of necessities" is very high. Id. "'The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones.'" United States v. Avila, 53 M.J. 99, 101 (C.A.A.F. 2000) (quoting Farmer v. Brennan, 511 U.S. 825, 832 (1994)). "Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the *minimal civilized measure of life's necessities*' are sufficiently grave to form the basis of an Eighth Amendment violation." Hudson v. McMillian, 503 U.S. 1, 9 (1992) (emphasis added) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

Despite his claims to the contrary, none of the conditions that Appellant described constituted a denial of necessities. Appellant claims that his confinement at PCJ denied him of

necessities because it "stripped away" all the progress he had previously made in his mental health recovery, "leaving him in a worse mental state than when he entered for no reason." (App. Br. at 6). He claims two acts or omissions by PCJ's staff led to this result: (1) the temporary deprivation of his prescription medication, and (2) his confinement in a single person cell. (Id. at 6-7). Neither of these, individually or combined, constitute a "deprivation [of] the minimal civilized measure of life's necessity." Hudson, 503 U.S. at 9. Therefore, Appellant's claim falls short.

1. PCJ's minor delay in providing Appellant his medication and the alleged altered dosage did not constitute a denial of necessities.

Appellant's claim that PCJ's medical treatment represented a deliberate denial of adequate medical attention is baseless. Appellant's temporary lack of access to his medication and the dosage of medication he received do not qualify as a "denial of necessities." Lovett, 63 M.J. at 215. Prisoners have a constitutional right to medical treatment, but not "perfect" or "optimal" medical treatment. United States v. White, 54 M.J. 469, 475 (C.A.A.F. 2001); Estelle, 429 U.S. at 103-04 ("[not] every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment.") When prisons affirmatively provide medical treatment to prisoners, courts give them a certain amount of deference in what that medical treatment looks like: "Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law." United States ex rel. Walker v. Fayette Cnty., 599 F.2d 573, 575 n.2. (3d Cir. 1979) (citing Westlake v. Lucas, 537 F.2d 857, 860 n.5 (6th Cir. 1976)). Ultimately, Appellant received the medications he was prescribed – even if he claims the dosage was inaccurate. (Appellant's Declaration).

Thus, he received adequate medical treatment that did not violate the prohibition against cruel and unusual punishment.

Appellant claims that the jail's medical treatment violated state law based on Fla Stat. §945.48(5) (2023), which says that inmates who are isolated "for mental health purposes" must have their confinement reviewed by a different psychological professional than the one who made the original placement. (App. Br. at 6). He argues that PCJ's failure to provide psychologist reviews of his condition proves the inadequacy of their care. (Id.) The glaring problem with this argument is that this statute does not apply to appellant's confinement. The Florida statute describes procedures at mental health treatment facilities, not prisons; thus, it does not appear to apply to PCJ. Fla. Stat. §945.48(5) ("[E]mergency treatment may be provided *at a mental health treatment facility* upon the written order of a physician. . . .") (emphasis added).

Appellant's claim that "PCJ knowingly lowered the dosage of TSgt Clark's prescribed psychiatric medication" is unsupported by the evidence. (App. Br. at 7). Appellant provided no medical documentation to support the claim that the dosage he received differed from the dosage that he should have received. And the alleged five-day delay in receiving his medication does not constitute a deprivation of life's necessities either. In United States v. King, this Court declined to find cruel and unusual punishment where the appellant described how a three-day deprivation of his medication while in a single person cell worsened his mental health. No. ACM 39583, 2021 CCA LEXIS 415, at *151 (A.F. Ct. Crim. App. Aug. 16, 2021) (unpub. op.) (*aff'd*, 83 M.J. 115 (C.A.A.F. 2023)). According to PCJ, only some of Appellant's medications were delayed, and those that were delayed were administered three days after his arrival making the alleged deprivation even less problematic. (Gov. Motion to Attach, Appx. A).

Even if the dosage of the medication deviated from his prescription, that does not mean Appellant's medical care was inadequate. According to the PCJ Inmate Handbook, PCJ makes "every attempt… to verify medications taken prior to incarceration," but inmates only receive medications "deemed necessary" by an on-site provider after a prisoner's medical assessment. (App. Motion to Attach, Appx. B at 7). The Memorandum of Agreement (MOA) between PCJ and MacDill AFB reiterates medication procedures: PCJ will administer prescription medication "upon approval of the [PCJ] Medical Director or designee." (Gov. Motion to Attach, Appx. B). Appellant received the formulary medications on 17 November 2022, the day after he arrived to PCJ. (Id.) But other medications were non-formulary. (Id.) "The non-formulary medications required approval by the appropriate physician." (Id.). But the physician approved the medications on 18 November 2022, and they were administered to Appellant on 19 November 2022. (Id.). After that point, Appellant "received each medication as prescribed, daily, except on [20 November 2022] and [23 November 2022], when he refused one of them." (Id.) Ultimately, Appellant received his prescribed medications; thus, he was provided the reasonable medical care the Constitution mandates, even if he did not believe it was optimal. *See* White, 54 M.J. at 475. (Finding it is only constitutionally required that health care be "reasonable," not "optimal".)

2. PCJ did not deny Appellant basic necessities by confining him in a single person cell.

Appellant's confinement in a single person cell for three weeks did not constitute a denial of life's necessities. Appellant argues that: (1) his inadequate medication and mental health problems made confinement in a single person cell caused significantly greater suffering than normal and (2) there was no valid reason justifying his confinement in a single person cell, and therefore his confinement was particularly unjust. (App. Br. at 7-8). But these factors are not

unique or severe enough for this Court to find that Appellant was uniquely harmed in a way that constituted a deprival of the necessities of life.

This Court has repeatedly ruled that being housed in a single person cell alone does not necessarily constitute a deprivation of life's necessities. "Having a cell to oneself and being allowed outside a cell for one hour per day do not in themselves amount to a denial of the necessities of life." Stafford, No. ACM 40131 (f rev), 2023 CCA LEXIS 497, at *68 (A.F. Ct. Crim. App. Nov. 30, 2023) (unpub. op.); *see also* United States v. Pelletier, No. ACM 40277, 2023 CCA LEXIS 385, at *7 (A.F. Ct. Crim. App. Sep. 12, 2023) (unpub. op.) ("Solitary confinement is not a per se Eighth Amendment violation.") (quoting Avila, 53 M.J. at 102). Instead, this Court looks at the "totality of the circumstances" surrounding the confinement to determine whether a "sufficiently serious deprivation" has occurred. Pelletier, unpub. op. at 7.

Appellant cites no caselaw to support his argument that a mental health diagnosis makes confinement in a single person cell unconstitutional. In United States v. Binegar, the appellant argued that that his three-month confinement in a single person cell had caused a deterioration of his mental health that violated the Eighth Amendment. No. ACM S32625 (f rev), 2022 CCA LEXIS 533, at *11 (A.F. Ct. Crim. App. Sep. 14, 2022) (unpub. op.). This Court rejected the appellant's argument, finding that his confinement in a single person cell did not qualify as cruel and unusual punishment. Id. at 20. Additionally, this Court noted that Binegar's daily interactions with prison staff cut against the claim that he was deprived of human contact. Id. In his own declaration, Appellant described similar daily interactions with the staff who brought his medicine and the guards outside his cell. (Appellant's Declaration). Given the factual similarities between this case and Binegar, this Court should find that Appellant's confinement in a single person cell did not qualify as cruel and unusual punishment. Id. at 20.

Appellant's second argument, that his confinement conditions were unconstitutional because there was no valid reason justifying placement in a single person cell, is based on a flawed interpretation of CAAF's decision in United States v. Gay. 75 M.J. 264 (C.A.A.F. 2016); (App. Br. at 7.) Appellant summarized the ruling of Gay as saying that "solitary confinement must be ordered for a valid reason," implying that ordering confinement without such a reason constitutes an Eighth Amendment violation. (App. Br. at 7.) That is a misstatement of CAAF's ruling. In Gay, CAAF evaluated whether the appellant's confinement conditions constituted an increase in his sentence under Article 66 in cases *where there was no Eighth Amendment violation*. Id. at 269. CAAF's decision was limited to the principle that imposing severe solitary confinement may represent a legal deficiency when imposed only to avoid Article 12, UCMJ, violations and where an alternative solution was available, specifically for Article 66 claims. Id. That has no bearing on whether Appellant's confinement in a single person cell constituted a deprivation of life's necessities for Eighth Amendment or Article 55, UMCJ, claims.

In this case PCJ had a valid reason to place Appellant in a single person cell – prisoner safety. PCJ's MOA with the 6th Security Forces Squadron requires them "to the maximum extent possible" house Air Force inmates away from the general population. (Gov. Motion to Attach, Appx. B at 2). This policy is in place to keep Air Force inmates away from civilian inmates incarcerated for more violent offenses who present a risk of harm during confinement. All military members are placed in Protective Custody status while they are housed in PCJ, but all Protective Custody cells house only one person. (Gov. Motion to Attach, Appx. A). Thus, placing Appellant in a single person cell was the only way to comply with the MOA. Unlike in Gay, there were no legitimate alternatives available.

Viewed in the context of this Court's caselaw and the realities of life in prison, Appellant's conditions of confinement were unexceptional. Appellant failed to demonstrate how either his medical treatment or the conditions of his cell qualified as a "deprivation of the necessities of life." Lovett, 63 M.J. at 215. Thus, Appellant's argument fails the "deprivation of necessities" prong of the Lovett test. Appellant "must prove [the three Lovett prongs] to establish his claim that his confinement conditions were cruel and unusual," his failure to meet this prong alone means relief is unwarranted. United States v. Pullings, 83 M.J. 205, 211 (C.A.A.F. 2023).

B. Appellant failed to establish that Pinellas County Jail Staff acted with sufficient intentionality to constitute deliberate indifference to Appellant's health and safety.

Appellant does not present any evidence that PCJ staff "drew the inference" that Appellant's mental health conditions presented such a significant risk that required deviating from their policies. He does not present any evidence that they ignored an obvious risk in their decision making. Given that the burden is on Appellant to demonstrate these points, he fails to satisfy the culpability prong of the Lovett test.

The second prong of the Lovett test requires Appellant to demonstrate a "culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety." Lovett, 63 M.J. at 215. A culpable state of mind is required because "the Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'" Farmer, 511 U.S. at 837. Thus, Appellant must demonstrate not just that the conditions of his confinement presented an objective risk of harm, but that prison officials inflicted such conditions upon him deliberately. *See* White, 54 M.J. at 474. "The prison guards and officials must be consciously aware of the risk or danger to the inmate and choose to ignore it; they must have been aware of the harm or risk of harm caused appellant and continued

anyway." Id. (quoting United States v. Sanchez, 53 M.J. 393, 396 (C.A.A.F. 2000)). In Farmer v Brennan, the Supreme Court said that for a prison official to be found liable for denying an inmate humane conditions of confinement the official must "know[] of and disregard[] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and he must also draw the inference*." 511 U.S. at 837-38 (emphasis added). "An official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." Id. 511 U.S. at 838. The burden for demonstrating that prison officials drew the inference that a substantial risk of harm existed rests on Appellant. Lovett, 63 M.J. at 216.

The only information that prison staff had regarding Appellant's mental illness was that, according to his declaration, Appellant told the county jail medical team about his mental health conditions during his onboarding screening, and he told the prison guards that he was not receiving enough medication. (Appellant's Declaration). This was not enough for PCJ staff to infer the presence of a substantial risk of harm. PCJ gave Appellant the medication he requested to rectify these mental health conditions, at a dosage that the medical team deemed necessary, in accordance with both the MOA and PCJ's policy. (Gov. Motion to Attach, Appx. B). They placed him in a single person cell in accordance with the MOA and prison policy as they would any other military member. (Gov. Motion to Attach, Appx. A, Appx. B). Nothing that Appellant said or did while in confinement provided them a reason to deviate from this policy. He never used the prison grievance system to make them aware of the effect his confinement was having on his mental health. *See* Binegar, unpub. op. at 20-21 (finding that "[a]ppellant's failure to exhaust the prisoner grievance system failed to put prison officials on notice as required under

a deliberate indifference standard.") He never showed external signs of specific suffering, like self-harm or talk of suicide. Though he told the guards he was not receiving enough medication, he never reported that he was experiencing suicidal ideation or was at a high risk of suffering adverse mental health effects. (Appellant's Declaration; App. Br. at 4). Without contemporaneous knowledge of Appellant's alleged suffering, PCJ officials could not have consciously mistreated Appellant by treating Appellant as they would any other prisoner. Regardless, it is Appellant's burden to show that PCJ staff made this inference, not the government's burden to show that they did not. Nothing that Appellant has put forward even hints at PCJ staff willfully deciding to ignore a substantial risk of harm. Without providing evidence of such a decision, Appellant cannot succeed in meeting the burden of the second Lovett prong.

Given that he lacks any evidence to demonstrate that PCJ officials deliberately ignored a substantial risk by placing Appellant alone in a single person cell, Appellant imports a principle from nonbinding federal courts which says that deliberate indifference can be found in prison officials even without evidence because the risks of confining a mentally ill patient in a single person cell are so obvious that one can only ignore them deliberately. (App. Br. 9-10). There are two reasons why these cases do not show that the PCJ prison staff were deliberately indifferent to a substantial risk. First, these court rulings about the obvious risks of solitary confinement mention the specific risk of *prolonged* solitary confinement, not every case where an individual is confined alone. *See* Palakovic v. Wezel, 854 F.3d 209, 225 (3rd Cir. 2017) ("[*E]xtended* stays in solitary confinement can cause serious damage to mental health.") (emphasis added). There is a big difference between confining a prisoner with demonstrated suicidal tendencies in several thirty-day stints in a single person cell without telephone access, as

in Palakovic, and confining a new prisoner with diagnosed mental illnesses but no demonstrated suicidal tendencies temporarily in a cell by himself for three weeks until he can be transferred. Palakovic, 854 F.3d at 216-17.

Second, the cases Appellant cites involve fact patterns qualitatively different from the facts here. In Finley v. Huss, the case Appellant spends the most time discussing in his brief, the inmate at issue had a much more obvious history of mental illness, and there was far more documentation of prison staff's decision to put him in a single person cell than in this case. 102 F.4th 789, 799-802 (6th Cir. 2024). When prison staff decided to put Finley in a single person cell, it was after they observed him swallow razor blades several times, engage in constant self-harm, including writing messages like the word "death" with his own blood on the walls of his cell, and telling staff on multiple occasions that he wanted to kill himself. Id. The decision was specifically discussed at a documented meeting by prison staff, where they refused to consider mental-health treatment programs as an alternative to disciplinary separation, and the inmate was kept in that disciplinary separation for two and a half months. Id. at 801-02. This is nothing like Appellant's experience. Between the fact that Finley is not binding on this Court and the disparity between the drastic conditions and level of mental illness in Finley and the facts of this case, Finley is just too disanalogous to bear the weight Appellant assigns to it.

In cases with more analogous fact patterns, this Court has been hesitant to find deliberate indifference on the part of prison officials. In United States v. King, a prisoner had a very similar experience to Appellant: he was placed in a single person cell for a couple of weeks before being transferred, and during his initial confinement he was without his medication for three days, causing him to claim to experience several negative withdrawal effects, and only later was given his medication, though in a lower dosage. King, unpub. op. at 151. Unlike Appellant,

King was initially denied even this lower dosage of his prescribed medication after his medical evaluation, and King had to get into contact with the military mental health provider in order to receive it. Id. This Court found in that case that King "failed to demonstrate a culpable state of mind on behalf of prison officials that amounted to deliberate indifference to his health and safety when he did not receive prescribed medications." Id. at 169. Given that King's claim of deliberate indifference failed to warrant relief even though the prison staff initially refused to provide King any medication at all, Appellant's claim certainly falls flat.

Appellant fails to meet his burden of demonstrating that placing Appellant in a cell by himself created a serious risk to his health and that the prison officials were aware of and deliberately ignored that risk. The PCJ staff did not deliberately deprive Appellant of the necessities of life, or ignore a substantial risk of harm, through the medical treatment they provided or through his confinement in a single person cell. Appellant does not satisfy the culpability prong of the Lovett test, and therefore cannot succeed on his Eighth Amendment or Article 55, UCMJ, claim. *See* Pullings, 83 M.J. at 211.

C. *Appellant did not exhaust the prisoner-grievance system or petition for relief under Article 138 and fails to establish unusual circumstances that justify this omission.*

Even if this Court finds that Appellant satisfies the first two Lovett prongs, Appellant cannot succeed because he failed to exhaust the administrative remedies available to him. And given military court precedent, his confinement conditions were not sufficiently unusual to excuse this failure. The third prong of the Lovett test requires appellants to "exhaust their administrative remedies" in order to succeed on Eighth Amendment or Article 55, UCMJ, claims. Lovett, 63 M.J. at 215. "Absent some unusual or egregious circumstance . . . [appellant must show] he exhausted the prisoner-grievance system [in his detention facility] and that he has petitioned for relief under Article 138." (Wise, 64 M.J. at 471) (quoting White, 54 M.J. at 472.)

Appellants must attempt to use these remedies prior to invoking judicial intervention to promote resolution of grievances at the lowest possible level and to ensure an adequate record is developed. United States v. Miller, 46 M.J. 248, 250 (C.A.A.F. 1997). Requests for clemency do not constitute exhaustion of administrative remedies concerning conditions of confinement. United States v. Wilson, 73 M.J. 404, 406 n.2 (C.A.A.F. 2014).

Appellant did not use the PCJ prisoner grievance system or file an Article 138 complaint with his command, the two avenues required by precedent. And no unusual circumstances existed to excuse this failure. Appellant concedes he did not exhaust the administrative remedies available to him. (App. Br. at 11.) But he argues that this failure was excusable because the prison did not make him sufficiently aware of the formal complaint system and because his confinement was so short. (Id. at 11-12). However, his circumstances were far from unusual—in fact, this Court has repeatedly found prisoners with very similar fact patterns did not have unusual enough circumstances to excuse their failure to exhaust available administrative remedies. In Pelletier, this Court found that Appellant's claim that the prison failed to properly brief him on the grievance process was *not* an unusual circumstance that excused his failure to use the formal grievance process. Pelletier, unpub. op. at 9. This Court relied primarily on the fact that another prisoner told him about the process, but this Court also noted that the grievance process was described in the appellant's inmate handbook, as it was for Appellant in this case. Id. at 6. In King, the appellant claimed that because he was confined in a single person cell for only a few weeks before being transferred to a military prison, he could not have filed a complaint because it would have been "fruitless." King, unpub. op. at 152. This Court did not find that the temporary nature of his confinement excused his failure to exhaust administrative remedies. Id. at 169-170.

On appeal, Appellant cannot claim ignorance of available remedies for confinement conditions because he received a post-trial and appellate rights advisement from his defense counsel. (App. Ex. V at 3.) On the record, he confirmed that he knew and understood his post-trial rights. (R. at 38.) The Post-Trial and Appellate Rights Advisement stated that to succeed on an Eighth Amendment or Article 55, UCMJ, claim, Appellant had to "submit a complaint to the confinement facility (preferably in writing)" and "file[] a complaint with the commander who ordered [his] confinement under Article 138, UCMJ." (App. Ex. V at 3, 11.) Appellant also told his trial defense counsel about his confinement conditions while at PCJ, and his attorney would have reminded Appellant of the administrative remedies available to him. (Appellant's Declaration). Appellant did communicate with his trial defense counsel because his attorney addressed Appellant's complaints about his confinement conditions three days after he arrived to PCJ in clemency. (Id.) Appellant had telephone access, and he could have contacted his trial defense counsel to file an Article 138 complaint or for details about the prisoner grievance system. *See* Wise, 64 M.J. at 473 (finding the fact that appellant had the ability to apply for clemency cut against his claim of unusual circumstances.) Appellant had no excuse for his failure to use the administrative remedies available to him.

Appellant's knowledge of his duty to exhaust available remedies and belief that he was being wronged while still in confinement distinguishes him from the prisoner in United States v. Towhill. Appellant frames the ruling by arguing that Towhill's temporary confinement made it impossible to exhaust his administrative remedies. (App Br. at 12). But that was not why Towhill's circumstances were unusual. This Court found that the unusual circumstances that excused Towhill's failure to seek an administrative remedy were that he did not know his rights were being violated or that he had a right to redress until after he had been transferred out of the

civilian prison, and he did not talk to his trial defense counsel about the incident until after he was transferred. No. ACM 37695, 2012 CCA LEXIS 94, at *6 (A.F. Ct. Crim. App. Mar. 16, 2012) (unpub. op.) Here, Appellant affirmed before sentencing that he was aware of his post-trial remedies, and he communicated his complaints about his conditions to his trial defense counsel within three days of entering confinement. (App. Ex. 5 at 11; R. at 38; Appellant's Declaration). He was aware of his right, and obligation, to seek redress while still in confinement at PCJ.

Appellant's claim that a formal complaint was essentially unavailable because administrative actions "can last up to eighteen days" is misleading. (App. Br. at 12). It would be rare for a complaint to take that long. According to the PCJ Inmate Handbook, after a prisoner lodges a complaint, the Division Commander must reply to the initial complaint within five days. (App. Motion to Attach, Appx. B at 27). After the Division Commander's judgement, a prisoner may appeal— a process that can take up to thirteen days. (Id.) Most complaints will not require an appeal, so few cases will take eighteen days. The handbook also says, "if the complaint is of an emergency nature and threatens immediate health or welfare, a reply must be made as soon as possible." (Id.). Appellant alleges his injuries were serious, so this avenue would have been available to him, and his complaint could have been resolved much sooner than eighteen days.

In sum, Appellant knew that he needed to make a complaint to succeed on an Eighth Amendment or Article 55, UCMJ, claim. Yet despite having access to his trial defense counsel to file a motion for clemency three days into his confinement, he failed to exhaust the prisoner-grievance system or petition for relief under Article 138 during the eighteen remaining days of his confinement in PCJ. There was no excuse for this failure; thus, he fails to meet the third

Lovett prong. Failure of this prong alone, means relief is unwarranted. *See* Pullings, 83 M.J. at 211.

D. Appellant's post-trial confinement conditions did not unlawfully increase his sentence under Article 66, UCMJ.

Appellant's confinement conditions did not constitute cruel and unusual punishment, and the conditions did not increase the severity of his sentence.[3] CAAF decided Article 66, UCMJ, allows appellants to argue post-trial confinement conditions unlawfully increased the severity of their sentence. United States v. Guinn, 81 M.J. 195, 200 (CAAF 2021). In Guinn, CAAF explained that for an appellant to have their prison conditions reviewed under Article 66, they must establish:

> (1) [A] record demonstrating exhaustion of administrative remedies (i.e., exhaustion of the prisoner grievance system and a petition for relief under Article 138, UCMJ, 10 U.S.C. § 938 (2012), except in "unusual or egregious circumstances that would justify [the] failure" to exhaust); (2) "a clear record demonstrating ... the jurisdictional basis for [the CCA's] action"; and (3) "a clear record demonstrating ... the legal deficiency in administration of the prison."

Id. (citing Miller, 46 M.J. at 250). Although the reviewing CCA may find that an appellant's post-trial confinement conditions merit sentence appropriateness relief when they do not constitute an Eighth Amendment or Article 55, UCMJ, violation, Gay, 75 M.J. at 269, such circumstances will be "very rare." Guinn, 81 M.J. at 203 (citing United States v. Ferrando, 77 M.J. 506, 517 (A.F. Ct. Crim. App. 2017)). CCAs "are not a clearinghouse for post-trial confinement complaints or grievances," Ferrando, 77 M.J. at 517, and generally "courts should

[3] In United States v. Willman, CAAF held that extra record materials may not be considered for Article 66(c), UCMJ, sentence appropriateness review, "even when [the CCA] had already considered that evidence to resolve Appellant's Eighth Amendment and Article 55, UCMJ [] claims." 81 M.J. 355, 361 (C.A.A.F. 2021). But Willman does not apply here because Appellant addressed his claims of cruel and unusual punishment in his clemency request which is part of the record. (*Submission of Matters,* ROT, Vol. 1).

show deference to prison administrators because 'the problems of prisons in America are complex and intractable and because courts are particularly ill equipped to deal with these problems.'" (Guinn, 81 M.J. at 202-03) (quoting Shaw v. Murphy, 532 U.S. 223, 229 (2001)) (internal quotations omitted). Appellant fails to satisfy the first and third requirements for Article 66 relief under Guinn.

First, as discussed above, he failed to exhaust his administrative remedies. Although this Court has found that exhausting avenues for administrative relief is not a "requirement" for exercising Article 66 powers, it does bear "significant weight" on whether it should provide sentence relief. United States v. Henry, 76 M.J. 595, 610 (AF. Ct. Crim. App. 2017). Appellant concedes that he did not make a formal complaint with PCJ, and he did not raise an Article 138 complaint through his command. (App. Br. at 11-12). Appellant claims that, given the circumstances, he did his best to use the administrative remedies available to him. (Id. at 13). He claims that he was in the middle of a mental health crisis and therefore could not follow the complex legal process of an Article 138 complaint without the assistance of his trial defense counsel. (Id.) But Appellant's claim that he did not have assistance from his trial defense counsel is false. Appellant mentioned in his declaration that he was allowed to make phone calls throughout his time in PCJ, meaning he could have easily contacted his trial defense counsel. (Appellant's Declaration.) And the record shows that he did contact her—Appellant filed a motion for clemency through his trial defense counsel three days into his confinement. (*Submission of Matters*, 16 November 2022, ROT, Vol. 1). Given that Appellant had the opportunity to consult a legal expert, there was no excuse for his failure to exhaust the administrative remedies available| to him.

Second, Appellant fails to show a clear record demonstrating any legal deficiency in the prison policy administration. Appellant's attempt to demonstrate one is unsuccessful. In his brief, Appellant alleged that "the prison not only violated their own rules and regulations with regards to inmate psychiatric care and solitary confinement, they also violated state law." (App. Br. at 14). Appellant seems to be referring to an earlier claim that his placement in solitary confinement was unauthorized because he did not meet any of the categories laid out for disciplinary segregated confinement in the Inmate Handbook at §XVII(B). (Id. at 7). But the language used in § XVII(B) of the Inmate Handbook, "the following infractions carry a maximum penalty of 30 days in Disciplinary Confinement," does not say that the listed infractions are the *only* reasons inmates may be placed in individual cells. It just says that disciplinary confinement is the consequence for those infractions. (App. Motion to Attach, Appx. B at 17). That does not mean that to place an inmate in a cell by himself for any other reason is unlawful. Regarding the assertion that PCJ violated state law, presumably Fla Stat. §945.48(5), the statute specifically limits its application to inmates separated *for mental health purposes*. Fla. Stat. §945.48(5). This law does not create a procedural requirement that mandates psychological review for every individual placed in a single person cell. The mere fact that a physician diagnosed Appellant with a mental health condition did not mean PCJ confined him separately for mental health purposes. According to PCJ, Appellant was confined separately for his protection and to comply with the MOA, and the only cells available for inmates in Protective Custody status are single occupant cells. (Gov. Motion to Attach, Appx. A). Nothing in PCJ's Inmate Handbook or in Florida state law prohibits the temporary confinement of an inmate in a single person cell. Appellant's placement in a single occupancy cell was not

prohibited, and it did not unlawfully increase the severity of his sentence. This Court should decline to offer Appellant relief under Article 66.

Appellant failed to show that his confinement conditions constituted cruel and unusual punishment under the Eighth Amendment or Article 55, UCMJ. Appellant was not objectively and seriously denied necessities, he failed to demonstrate that the prison officials' state of mind amounted to deliberate indifference, and he failed to exhaust the prisoner grievance system or petition for relief under Article 138. Appellant's confinement conditions in PCJ did not rise to the level of cruel and unusual punishment. And he failed to demonstrate how those conditions amounted to a more severe sentence entitling him to relief under Article 66. Thus, no relief is warranted. This Court should deny this assignment of error.

II.

THE FIREARM PROHIBITION UNDER 18 U.S.C. § 922(G) IS A COLLATERAL MATTER BEYOND THIS COURT'S LIMITED STATUTORY JURISDICTION.

Additional Facts

The first indorsement to the Entry of Judgment stated Appellant was subject to "Firearms Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*Entry of Judgment*, dated 3 January 2023, ROT, Vol. 1). The Statement of Trial Results stated the same. (*Statement of Trial Results*, dated 16 November 2022, ROT, Vol. 1). Neither the Entry of Judgment nor the Statement of Trial Results specified which subsection of § 922 applied to Appellant. (*Entry of Judgment, Statement of Trial Results*, ROT, Vol. 1.). Appellant was convicted of wrongful – thus unlawful – methamphetamine use and possession, and use of a Schedule IV controlled substance. (Id.).

Law and Analysis

A. This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922, because that requirement is not part of the findings or sentence.

This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922, because the indexing requirement is not part of the findings or sentence. In United States v. Vanzant – a published opinion – this Court decided, "the firearm prohibition is a collateral matter beyond this court's authority to review[.]" 2024 CCA LEXIS 215, *2-3 (A.F. Ct. Crim. App. 28 May 2024). "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). And this Court lacks jurisdiction under Article 66, UCMJ, to order the correction of the EOJ on the grounds requested by Appellant. This Court should follow its binding published precedent in Vanzant and find once again that this Court lacks jurisdiction to review this issue.

B. In the event this Court decides it has jurisdiction over this issue, the firearm possession prohibitions in the Gun Control Act of 1968 are constitutional.

The Gun Control Act of 1968, 18 U.S.C. § 922, makes it unlawful for any person, *among other things*, "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. Id. at § 922(g)(1). Appellant was convicted of one charge and two specifications of wrongful possession and use of methamphetamine and one specification of use of a Schedule IV controlled substance, in violation of Article 112a, UCMJ, each a crime punishable by imprisonment for a term exceeding one year. (*See* Manual for Court-Martial, pt. IV, ¶ 50.d.(2).)

Appellant concedes that he was "convicted of drug related offenses, which would make Section 922(g)(3) applicable to him" and "Section 922(g)(1) could also arguably apply as well"

to Appellant. (App. Br. at 15). The government agrees. But Appellant asserts that 18 U.S.C. § 922 is unconstitutional because the government cannot prove that barring his possession of firearms is "consistent with the nation's historical tradition of firearm regulation." (App. Br. at 15). Appellant asserts that any prohibitions on the possession of firearms violates the Second Amendment, U.S. CONST. amend. II, and the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (analyzing New York's concealed carry regime). Appellant's constitutional argument lacks merit. *See*, e.g., United States v. Denney, No. ACM 40360, 2024 CCA LEXIS 101 (A.F. Ct. Crim. App. 8 March 2024)[4] (finding no discussion or relief merited for similar arguments by appellant convicted of child pornography distribution) (unpub. op.) (internal citations omitted).

In Bruen, the Supreme Court held the standard 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.

142 S. Ct, at 2129-2130. In his concurrence, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008) (finding the Second Amendment is an individual, not collective, right), and McDonald v. City of Chicago, 561 U.S. 742 (2010) (applying that right to the states), that the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2162 (Kavanaugh, J., concurring) (citations

[4] CAAF has granted review in this case. United States v. Denney, 2024 CAAF LEXIS 197 (C.A.A.F., Mar. 29, 2024).

omitted). Thus, the proper interpretation of the Second Amendment allows for a "variety" of gun regulations. Id. (citing Heller, 554 U.S. at 636).

The majority opinions in Heller and McDonald also stand for the principle that the right secured by the Second Amendment is not unlimited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose …. *[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons* and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 573 (emphasis added).

Appellant cites United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), for the proposition that the Government cannot prove that Appellant's firearm prohibition for a non-violent offense is in line with the United States' historical tradition of firearm regulation. Id. But the Supreme Court reversed the Fifth Circuit and concluded that "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment. United States v. Rahimi, 2024 U.S. LEXIS 2714, *30 (2024)[5].

Appellant also cites the Fifth Circuit's decision in United States v. Daniels, 77 F.4th 337 (5th Cir. 2023) as support for his assertion that his firearms prohibition is unconstitutional. (App. Br. at 16.) In Daniels, the Fifth Circuit held the firearms prohibition pertaining to "unlawful users" of a controlled substance under 18 U.S.C. § 922(g)(3) was unconstitutional. Id. at 355.

[5] "This preliminary version is unedited and subject to revision. The pagination of this document is subject to change pending release of the final published version." Rahimi, 2024 U.S. LEXIS 2714, *1.

But Appellant's claim that Daniels is analogous to his is erroneous. (App. Br. at 3). Appellant's firearms prohibition premised not only upon 18 U.S.C. § 922(g)(3), but also from Appellant's multiple felony convictions under 18 U.S.C. § 922(g)(1). The appellant in Daniels was not a felon, and therefore under the Fifth Circuit's reasoning, he did not fall into the category of individuals – felons – who were historically "stripped of their Second Amendment rights." 77 F.4th at 343.

Appellant's convictions for wrongful possession and use of controlled substances proves that he falls into the category of individuals that should be prohibited from possessing a firearm. Thus, the Indorsements in the Entry of Judgment and Statement of Trial Results correctly annotated that Appellant is subject to the prohibitions of 18 U.S.C. § 922. Appellant is not entitled to relief. This Court should deny this assignment of error.

CONCLUSION

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

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[6] As a civilian extern, Mr. Love as a signing, non-attorney was always supervised during the appellate process, and undersigned counsel assumes responsibility for the content of the filing pursuant to this Court's Rules of Practice and Procedure, Rule 14(c).

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CERTIFICATE OF FILING AND SERVICE

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

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United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO ATTACH**
v.	)	Before Panel No. 1
Technical Sergeant (E-6) **JOSEPH C. CLARK** United States Air Force *Appellant.*	)	No. ACM 23017
	)	7 August 2024

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to this motion:

- **Appendix A – Declaration of Captain C C , dated 7 August 2023 (3 pages)**
- **Appendix B – Declaration of E J , dated 26 July 2024 (16 pages)**
- **Appendix C – Declaration of Captain M M , dated 5 August 2024 (1 page)**

Appellant initially raised the issue of his confinement conditions in his request for clemency. (*Submission of Matters*, dated 17 November 2024, ROT, Vol. 1.) If this Court deems it appropriate under United States v. Jessie to consider the attachments provided in Appellant's Motion to Attach, dated 8 July 2024, then the government requests the above declarations also be considered in response to Appellant's allegations.

The attached declarations are responsive to Appellant's assignment of error alleging cruel and unusual punishment while he was confined at the Pinellas County Jail, Florida. (App. Br., Appx. A.) The declaration from J , the Noncommissioned Officer of Operations Support at MacDill Air Force Base, provides the Memorandum of Agreement for inmate

treatment while being held at Pinellas County Jail. The declaration from Captain C , an officer from the Custody Management Division of Pinellas County Jail, directly addresses Appellant's allegations of inadequate medical care and confinement to a single occupant cell at Pinellas County Jail. (App. Br., Appx. A). And the declaration from Captain M , MacDill AFB's Chief of Adverse Actions, explains that Appellant did not file an Article 138, UCMJ, complaint with his command – a factor this Court considers in analyzing cruel and unusual punishment allegations. *See* United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006).

Our Superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Accordingly, the attached documents are relevant and necessary to address Appellant's assignment of error.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Document.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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United States Air Force

MARY ELLEN PAYNE
Associate Chief
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CERTIFICATE OF FILING AND SERVICE

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

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23017**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Joseph C.G. CLARK	)	**PANEL CHANGE**
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 16th day of August, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal