IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant*	)	No. ACM 40552 8 February 2024

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **18 April 2024**. The record of trial was docketed with this Court on 20 December 2023. From the date of docketing to the present date, 50 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

GRANTED
8 FEB 2024

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

8 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) RICKY Z. BARLOW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40552 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 February 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant*	)	No. ACM 40552 9 April 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **18 May 2024**. The record of trial was docketed with this Court on 20 December 2023. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 26-28 September 2023 at Hill Air Force Base, Utah, R. at 1, 338, Appellant was tried by a general court-martial sitting as a military judge alone. R. at 9. Contrary to his pleas, R. at 10, Appellant was convicted of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 316. The military judge sentenced Appellant to a reduction in paygrade to E-1 (Airman Basic), to be confined for six months, and to a dishonorable discharge. R. at 338. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Ricky Z. Barlow*. Appellant is not currently confined.

ROT is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 e exhibits, and two court exhibits; the transcript is 338 pages.

GRANTED
11 APR 2024

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 9 April 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

9 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) RICKY Z. BARLOW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40552 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40552**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Ricky Z. BARLOW	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 8 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Third) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 10th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Third) is **GRANTED**. Appellant shall file any assignments of error not later than **17 June 2024**.

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits. Counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal.

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

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant*	)	No. ACM 40552 8 May 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 June 2024**. The record of trial was docketed with this Court on 20 December 2023. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

On 26-28 September 2023 at Hill Air Force Base, Utah, R. at 1, 338, Appellant was tried by a general court-martial sitting as a military judge alone. R. at 9. Contrary to his pleas, R. at 10, Appellant was convicted of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 316. The military judge sentenced Appellant to a reduction in paygrade to E-1 (Airman Basic), to be confined for six months, and to a dishonorable discharge. R. at 338. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Amn Ricky Z. Barlow*. Appellant is not currently confined.

The ROT is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 appellate exhibits, and two court exhibits; the transcript is 338 pages.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

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

Respectfully submitted,

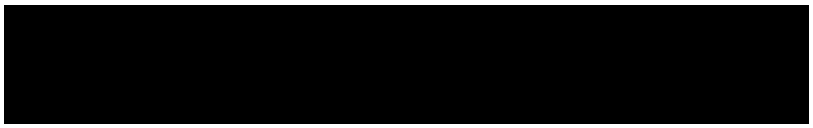
[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

10 May 2024

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) RICKY Z. BARLOW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40552 Panel No. 2

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

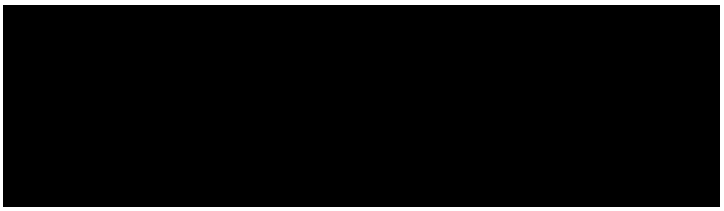
Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 10 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
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant*	)	No. ACM 40552 7 June 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 July 2024**. The record of trial was docketed with this Court on 20 December 2023. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 26-28 September 2023 at Hill Air Force Base, Utah, R. at 1, 338, Appellant was tried by a general court-martial sitting as a military judge alone. R. at 9. Contrary to his pleas, R. at 10, Appellant was convicted of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 316. The military judge sentenced Appellant to a reduction in paygrade to E-1 (Airman Basic), to be confined for six months, and to a dishonorable discharge. R. at 338. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Airman (E-2) Ricky Z. Barlow*. Appellant is not currently confined.

The record of trial is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 appellate exhibits, and two court exhibits; the transcript is 338 pages. Counsel is currently

GRANTED
10 JUN 2022

assigned 25 cases; 19 cases are pending initial AOEs before this Court. The following cases have priority over the instant case:

1) *United States v. Dillon*, ACM 40463 – The record of trial is four volumes, consisting of nine prosecution exhibits, eight defense exhibits, one court exhibit, and seven appellate exhibits; the transcript is 380 pages. Undersigned counsel field an assignment of error on 13 May 2024. The Government's answer is due on 12 June 2024, with any reply being due on 19 June 2024. This appellant is confined.
2) *United States v. Murray*, Misc. Dkt. No. 2024-04 – This is an Article 62 appeal. Undersigned counsel filed an answer on 28 May 2024. Yesterday, 5 June 2024, the Government filed their reply brief along with a motion for oral argument. Appellee will not be opposing the Government's motion. Should this Court grant the Government's motion, preparation for that oral argument will take priority over the instant case.
3) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel has begun reviewing the unsealed record and identified several potential issues. This appellant is confined.
4) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Undersigned counsel has begun reviewing the unsealed record. This appellant is confined.
5) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. This appellant is not currently confined.

6) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. This appellant is confined.

7) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. This appellant is not currently confined.

8) *United States v. Gibbs*, ACM 40523 – The record of trial is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit; the transcript is 1,084 pages. This appellant is currently confined.

9) *United States v. Evangelista*, ACM 40531 – The record of trial is 10 volumes, consisting of 56 appellate exhibits, 18 prosecution exhibits, 12 defense exhibits, and one court exhibit; the transcript is 1,439 pages. This appellant is currently confined.

10) *United States v. Smith*, ACM 40550 – The record of trial is three volumes, consisting of three prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 144 pages. This appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

Additionally, Appellant was apprised of the status of undersigned counsel's progress on Appellant's case.[1]

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

Respectfully submitted,

[redacted]

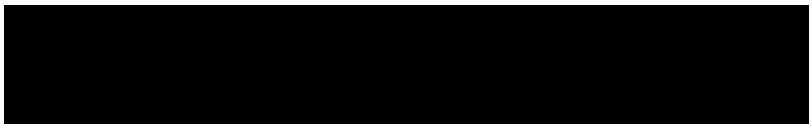
TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

[1] This disclosure is made pursuant to this Court's Order on 10 May 2024, which required inclusion of a "statement as to . . . whether Appellant was provided an update of the status of counsel's progress on Appellant's case." Appellant provided *limited* consent for the disclosure of this attorney-client privileged communication. Further, pursuant to his continuing ethical obligations as an attorney, undersigned counsel maintains compliance with his jurisdiction's Rules of Professional Responsibility as they pertain to client communications with Appellant.

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

7 June 2024

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) RICKY Z. BARLOW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40552 Panel No. 2

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

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

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

[redacted]

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 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
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant*	)	No. ACM 40552 3 July 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 August 2024**. The record of trial was docketed with this Court on 20 December 2023. From the date of docketing to the present date, 196 days have elapsed. On the date requested, 240 days will have elapsed.

On 26-28 September 2023 at Hill Air Force Base, Utah, R. at 1, 338, Appellant was tried by a general court-martial sitting as a military judge alone. R. at 9. Contrary to his pleas, R. at 10, Appellant was convicted of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 316. The military judge sentenced Appellant to a reduction in paygrade to E-1 (Airman Basic), to be confined for six months, and to a dishonorable discharge. R. at 338. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States y Z. Barlow*. Appellant is not currently confined.

ROT is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 chibits, and two court exhibits; the transcript is 338 pages. Counsel is currently

GRANTED
9 JULY 2024

assigned 25 cases; 18 cases are pending initial AOEs before this Court. The following cases have priority over the instant case:

1) *United States v. Murray*, Misc. Dkt. No. 2024-04 – This is an Article 62 appeal. On 5 June 2024, the Government filed their reply brief along with a motion for oral argument. Appellee did not oppose that motion. Should this Court grant the Government's motion, preparation for that oral argument will take priority over the instant case.
2) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel has reviewed the sealed and unsealed record, has conducted research on potential errors, and has begun drafting an assignment of errors brief. This appellant is confined.
3) *United States v. Rice*, ACM 40502 – The record of trial is ten volumes, consisting of 41 appellate exhibits, 14 prosecution exhibits, four defense exhibits, and two court exhibits; the transcript is 514 pages. This appellant is confined.
4) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Undersigned counsel has begun reviewing the unsealed record and conducting research on various identified errors. This appellant is confined.
5) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the

transcript is 494 pages. Undersigned counsel has begun a review of the record. This appellant is not currently confined.

6) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Civilian co-counsel has begun reviewing the record. This appellant is not currently confined.

7) *United States v. Gibbs*, ACM 40523 – The record of trial is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit; the transcript is 1,084 pages. This appellant is currently confined.

8) *United States v. Evangelista*, ACM 40531 – The record of trial is 10 volumes, consisting of 56 appellate exhibits, 18 prosecution exhibits, 12 defense exhibits, and one court exhibit; the transcript is 1,439 pages. This appellant is currently confined.

9) *United States v. Smith*, ACM 40550 – The record of trial is three volumes, consisting of three prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 144 pages. Today, 3 July 2024, this appellant filed a Motion to Withdraw from Appellate Review. This appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement.

Additionally, Appellant was apprised of the status of undersigned counsel's progress on Appellant's case.[1]

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

[1] This disclosure is made pursuant to this Court's Order dated 10 May 2024, which required inclusion of a "statement as to . . . whether Appellant was provided an update of the status of counsel's progress on Appellant's case." Appellant provided limited consent for the disclosure of this attorney-client privileged communication.

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 July 2024.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

3 July 2024

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) RICKY Z. BARLOW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40552 Panel No. 2

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

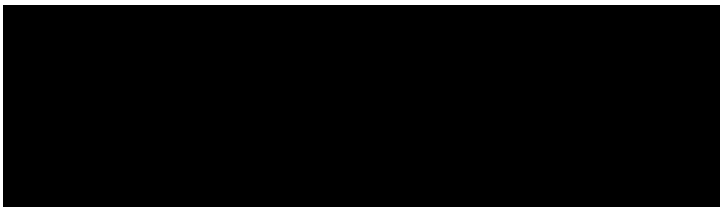
Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 July 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
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant*	)	No. ACM 40552 6 August 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **15 September 2024**. The record of trial was docketed with this Court on 20 December 2023. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 26-28 September 2023 at Hill Air Force Base, Utah, R. at 1, 338, Appellant was tried by a general court-martial sitting as a military judge alone. R. at 9. Contrary to his pleas, R. at 10, Appellant was convicted of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 316. The military judge sentenced Appellant to a reduction in paygrade to E-1 (Airman Basic), to be confined for six months, and to a dishonorable discharge. R. at 338. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Ricky Z. Barlow*. Appellant is not currently confined.

The ROT is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 appellate exhibits, and two court exhibits; the transcript is 338 pages. Counsel is currently

GRANTED
9 AUG 2024

assigned 20 cases; 11 cases are pending initial AOEs before this Court. Two cases before the Court of Appeals for the Armed Forces take priority over this case: (1) *United States v. Valentin-Andino*; and (2) *United States v. Daughma*. Undersigned counsel is conducting research in preparation for filing supplements in both cases. In addition, the following cases have priority over the instant case:

1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned filed an assignment of errors brief on 16 July 2024; the Government's answer is due on 15 August 2024. Any reply will be due on 22 August 2024.
2) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Undersigned counsel is presently drafting an initial assignment of errors brief, which is anticipated to be filed on 13 August 2024.
3) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. Undersigned counsel has begun a review of the record. Undersigned counsel has completed an initial review of the record.
4) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Civilian co-counsel has begun reviewing the record. T

5) *United States v. Gibbs*, ACM 40523 – The record of trial is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit; the transcript is 1,084 pages.

6) *United States v. Evangelista*, ACM 40531 – The record of trial is 10 volumes, consisting of 56 appellate exhibits, 18 prosecution exhibits, 12 defense exhibits, and one court exhibit; the transcript is 1,439 pages.

7) *United States v. Smith*, ACM 40550 – The record of trial is three volumes, consisting of three prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 144 pages. Today, 3 July 2024, this appellant filed a Motion to Withdraw from Appellate Review.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement. Additionally, Appellant was apprised of the status of undersigned counsel's progress on Appellant's case.[1]

[1] This disclosure is made pursuant to this Court's Order dated 10 May 2024, which required inclusion of a "statement as to . . . whether Appellant was provided an update of the status of counsel's progress on Appellant's case." Appellant provided limited consent for the disclosure of this attorney-client privileged communication.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 6 August 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

7 Augusty 2024

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) RICKY Z. BARLOW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40552 Panel No. 2

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

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

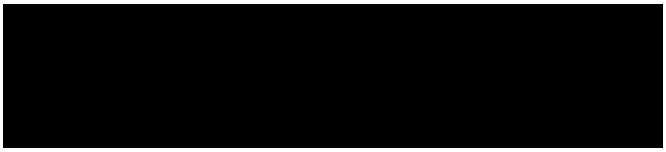
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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



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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME(SEVENTH)**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant*	)	No. ACM 40552 5 September 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **15 October 2024**. The record of trial was docketed with this Court on 20 December 2023. From the date of docketing to the present date, 260 days have elapsed. On the date requested, 300 days will have elapsed.

On 26-28 September 2023 at Hill Air Force Base, Utah, R. at 1, 338, Appellant was tried by a general court-martial sitting as a military judge alone. R. at 9. Contrary to his pleas, R. at 10, Appellant was convicted of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 316. The military judge sentenced Appellant to a reduction in paygrade to E-1 (Airman Basic), to be confined for six months, and to a dishonorable discharge. R. at 338. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States ky Z. Barlow*. Appellant is not currently confined.

ROT is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 exhibits, and two court exhibits; the transcript is 338 pages. Counsel is currently

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10 SEP 2024

assigned 21 cases; 12 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Daughma*. Undersigned counsel is presently drafting a petition for grant of review and corresponding supplement to the CAAF. In addition, the following cases have priority over the instant case:

1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. Undersigned counsel filed a reply to the Government's Answer on 28 August 2024. In addition, undersigned counsel filed a motion for oral argument; should that motion be granted, preparation for oral argument would take priority over this case.
2) *United States v. Couty*, ACM 40484 – The record of trial is seven volumes, consisting of 20 prosecution exhibits, two defense exhibits, two court exhibits, and 29 appellate exhibits; the transcript is 868 pages. Undersigned counsel filed an assignment of errors brief on 13 August 2024. The Government's Answer is due on 12 September 2024, with any reply due on 19 September 2024.
3) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. Undersigned counsel is presently drafting an initial assignment of errors brief.
4) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Civilian co-counsel has begun reviewing the record.

5) *United States v. Gibbs*, ACM 40523 – The record of trial is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit; the transcript is 1,084 pages.

6) *United States v. Evangelista*, ACM 40531 – The record of trial is 10 volumes, consisting of 56 appellate exhibits, 18 prosecution exhibits, 12 defense exhibits, and one court exhibit; the transcript is 1,439 pages.

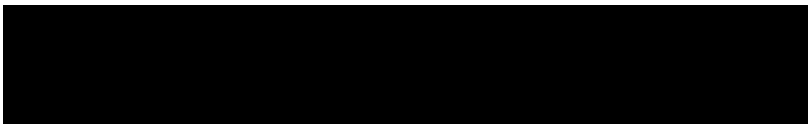
Since the filing of the last Motion for Enlargement of Time in this case, undersigned counsel has diligently been working other matters. Specifically, undersigned counsel filed: (1) an Assignment of Errors brief in *United States v. Couty*; (2) a reply brief in *United States v. Pulley*; and (3) a petition and supplement to CAAF for *United States v. Valentin-Andino*. In addition, undersigned counsel has begun drafting an Assignment of Errors brief in *United States v. Kelnhofer* and a supplement to CAAF in *United States v. Daughma*, which are likely to be filed next week.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement. Additionally, Appellant was apprised of the status of undersigned counsel's progress on Appellant's case.[1]

[1] Appellant provided limited consent for the disclosure of this attorney-client privileged communication.

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

Respectfully submitted,



TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

9 September 2024

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) RICKY Z. BARLOW, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40552 Panel No. 2

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

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

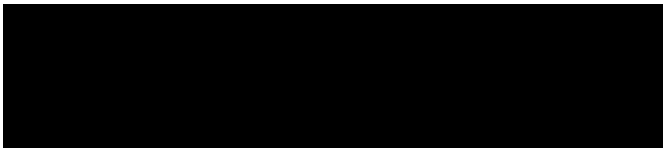
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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



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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant*	)	No. ACM 40552 4 October 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 November 2024**. The record of trial was docketed with this Court on 20 December 2023. From the date of docketing to the present date, 289 days have elapsed. On the date requested, 330 days will have elapsed.

On 26-28 September 2023 at Hill Air Force Base, Utah, R. at 1, 338, Appellant was tried by a general court-martial sitting as a military judge alone. R. at 9. Contrary to his pleas, R. at 10, Appellant was convicted of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 316. The military judge sentenced Appellant to a reduction in paygrade to E-1 (Airman Basic), to be confined for six months, and to a dishonorable discharge. R. at 338. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Ricky Z. Barlow*. Appellant is not currently confined.

The ROT is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 appellate exhibits, and two court exhibits; the transcript is 338 pages. Counsel is currently

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7 Oct 2024

assigned 21 cases; 12 cases are pending initial AOEs before this Court. One case before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Valentin-Andino*. On 30 September 2024, the CAAF granted review of two issues in *Valentin-Andino*. Undersigned counsel is presently conducting research in preparation of filing an initial brief in that case, which is due on 30 October 2024. In addition, the following cases have priority over the instant case:

1) *United States v. Pulley*, ACM 40438 – The record of trial is 11 volumes, consisting of 22 prosecution exhibits, five defense exhibits, and 66 appellate exhibits; the transcript is 730 pages. While filing is complete in this *Pulley*, undersigned counsel submitted a motion requesting oral argument. Should this Court grant that motion, preparation for that argument would take priority over the instant case.
2) *United States v. Kelnhofer*, ACM 23012 – The record of trial is two volumes, consisting of 18 prosecution exhibits, three defense exhibits, and 11 appellate exhibits; the transcript is 494 pages. Undersigned counsel filed an assignment of error brief with this Court on 23 September 2024. The Government's answer is due on 23 October 2024, with any reply being due on 30 October 2024.
3) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Undersigned counsel and civilian co-counsel have begun review of this record, to include the appellate exhibits.
4) *United States v. Gibbs*, ACM 40523 – The record of trial is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court

exhibit; the transcript is 1,084 pages. Undersigned counsel has not begun a review of this case.

5) *United States v. Evangelista*, ACM 40531 – The record of trial is 10 volumes, consisting of 56 appellate exhibits, 18 prosecution exhibits, 12 defense exhibits, and one court exhibit; the transcript is 1,439 pages. Undersigned counsel has not begun a review of this case.

Since the filing of the last Motion for Enlargement of Time in this case, undersigned counsel has diligently been working other matters. Specifically, undersigned counsel filed: (1) a supplement to the petition for grant of review in *United States v. Daughma* to the CAAF; (2) an assignments of error brief in *United States v. Beyer* to this Court; (3) an assignments of error brief in *United States v. Kelnhofer* to this Court; (4) a reply brief in *United States v. Couty* to this Court; (5) a motion to reconsider this Court's order denying an enlargement of time in *United States v. Couty*; and (6) a motion to reconsider this Court's decision in U*nited States v. Washington*. In addition, undersigned counsel completed a cursory review of *United States v. Lawrence* and filed a Notice of Direct Appeal in that case. Undersigned counsel also reviewed nine peer filings amounting to 171 pages. Further, undersigned counsel completed a review of *United States v. Brice* in anticipation of that appellant's withdrawal from appellate review. Moreover, undersigned counsel began a review of *United States v. Moreno*, specifically reviewing the first two volumes of that case. Finally, undersigned counsel began conducting research in preparation for the initial CAAF brief in *United States v. Valentin-Andino*.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant

was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement. Additionally, Appellant was apprised of the status of undersigned counsel's progress on Appellant's case.[1]

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

[1] Appellant provided limited consent for the disclosure of this attorney-client privileged communication.

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 4 October 2024.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

7 October 2024

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) RICKY Z. BARLOW, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40552 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant*	)	No. ACM 40552 5 November 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his ninth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 December 2024**. The record of trial was docketed with this Court on 20 December 2023. From the date of docketing to the present date, 321 days have elapsed. On the date requested, 360 days will have elapsed.

On 26-28 September 2023 at Hill Air Force Base, Utah, R. at 1, 338, Appellant was tried by a general court-martial sitting as a military judge alone. R. at 9. Contrary to his pleas, R. at 10, Appellant was convicted of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 316. The military judge sentenced Appellant to a reduction in paygrade to E-1 (Airman Basic), to be confined for six months, and to a dishonorable discharge. R. at 338. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Ricky Z. Barlow*. Appellant is not currently confined.

The ROT is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 appellate exhibits, and two court exhibits; the transcript is 338 pages. Counsel is currently

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7 NOV 2024

assigned 26 cases; 17 cases are pending initial AOEs before this Court. Two cases before the Court of Appeals for the Armed Forces (CAAF) has priority over this case: *United States v. Valentin-Andino* and *United States v. Pulley*. On 30 October 2024, undersigned counsel filed an initial brief in *Valentin-Andino* to the CAAF. The Government's Answer is due on 30 November 2024, with any reply due on 9 December 2024. Further, in *Pulley*, undersigned counsel has begun research in preparation of a petition and corresponding supplement to the CAAF, due on 18 December 2024. In addition, the following cases have priority over the instant case:

1) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Undersigned counsel has completed a review of the record and identified at least five potential errors. However, civilian co-counsel has suffered an injury rendering him unable to read. This has delayed preparation of a brief in this case.
2) *United States v. Gibbs*, ACM 40523 – The record of trial is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit; the transcript is 1,084 pages. Undersigned counsel has completed a review of the unsealed exhibits in this case.
3) *United States v. Evangelista*, ACM 40531 – The record of trial is 10 volumes, consisting of 56 appellate exhibits, 18 prosecution exhibits, 12 defense exhibits, and one court exhibit; the transcript is 1,439 pages. Undersigned counsel has not begun a review of this case.

Since the filing of the last Motion for Enlargement of Time in this case, undersigned counsel has diligently been working other matters. Specifically, undersigned counsel: (1) filed an initial brief in *United States v. Valentin-Andino* to the CAAF; (2) filed a reply brief in *United*

States v. Kelnhofer to this Court; (3) completed a review of *United States v. Moreno*, identified five potential errors, and began research on those errors; (4) completed a review of *United States v. Brice* and filed a withdrawal in that case; (5) completed reviews of *United States v. Turner* and *United States v. Dawson* in anticipation of notices of direct appeal; and (6) reviewed seven peer filings amounting to 121 pages.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement. Additionally, Appellant was apprised of the status of undersigned counsel's progress on Appellant's case.[1]

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

[1] Appellant provided limited consent for the disclosure of this attorney-client privileged communication.

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

6 November 2024

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) RICKY Z. BARLOW, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40552 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 6 November 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant*	)	No. ACM 40552 5 December 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his tenth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **13 January 2025**. The record of trial was docketed with this Court on 20 December 2023. From the date of docketing to the present date, 351[1] days have elapsed. On the date requested, 390 days will have elapsed.

On 26-28 September 2023 at Hill Air Force Base, Utah, R. at 1, 338, Appellant was tried by a general court-martial sitting as a military judge alone. R. at 9. Contrary to his pleas, R. at 10, Appellant was convicted of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 316. The military judge sentenced Appellant to a reduction in paygrade to E-1 (Airman Basic), to be confined for six months, and to a dishonorable discharge. R. at 338. The convening authority took no action on the findings or

[1] In a previous filing of the same name, dated 4 December 2024, the motion stated "351 days have [illegible]." At the time of that filing—4 December 2024—this was incorrect, as only 350 days had [illegible]his Court notified undersigned counsel of this scrivener's error today, 5 December 2024. [illegible]n is intended to substitute the original motion and corrects the error. Ironically, however, [illegible] counsel re-file today, 351 days—not 350 days—have elapsed. Therefore, other than the [illegible]n the date of filing and service, the substance of this motion is unchanged from the original.

GRANTED
11 DEC 2024

sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Amn Ricky Z. Barlow*. Appellant is not currently confined.

The ROT is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 appellate exhibits, and two court exhibits; the transcript is 338 pages. Counsel is currently assigned 25 cases; 17 cases are pending initial AOEs before this Court.

One case before the United States Supreme Court takes priority over this case: *United States v. Nestor*. Undersigned counsel—in coordination with counsel in *United States v. Wells,* the parent case—filed an extension of time for filing a petition for writ of certiorari. If granted, the writ petition would be due on 21 February 2024.[2] Four cases before the Court of Appeals for the Armed Forces (CAAF) have priority over this case:

1) *United States v. Valentin-Andino*. Undersigned counsel filed an opening brief in this case on 30 October 2024. The Government filed an enlargement of time due to the Government's "holiday obligations," which was granted by the CAAF. The Government's Answer is now due on 5 December 2024. Any reply will be due on 12 December 2024. Oral argument is scheduled for 14 January 2025. Three moot arguments are scheduled for 30 December 2024, 6 January 2025, and 10 January 2025, all of which will require substantial preparation.
2) *United States v. Pulley*. This appellant intends to file a petition for grant of review and corresponding supplement to the CAAF. The petition and corresponding supplement

[2] Absent additional exceptional circumstances, undersigned counsel believes that a review and filing of assignments of error in this case can happen before turning his attention to *Nestor*. But, out of an abundance of caution, this information is included to provide this Court a full picture of undersigned counsel's present workload.

are due on 18 December 2024. Undersigned counsel is presently conducting research and has begun drafting the supplement.

3) *United States v. Washington*. This appellant intends to file a petition for grant of review and corresponding supplement to the CAAF. Today, civilian co-counsel filed the petition and moved for an additional 21 days to file the corresponding supplement. That motion was granted and the supplement is due on 26 December 2024. Undersigned counsel has not yet begun research or drafting of the corresponding supplement. However, as newly assigned counsel, the undersigned has completed a review of the entire record (approximately 2,000 pages) and all corresponding decisions in this case.

4) *United States v. Kelnhofer*. This appellant intends to file a petition and corresponding supplement to the CAAF. The petition and supplement are on 9 January 2025. Undersigned counsel has not begun research or drafting.

In addition, the following cases before this Court have priority over this case:

1) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Undersigned counsel completed a review of the record and completed draft assignments of error. That draft is now with civilian co-counsel for final review.

2) *United States v. Gibbs*, ACM 40523 – The record of trial is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit; the transcript is 1,084 pages. Undersigned counsel has completed a review of the entire record, identified six potential issues, and has completed drafting of four of those issues. This Court denied, in part, an enlargement of time for this case, requiring undersigned counsel to turn his attention away from his CAAF related matters—which have statutory

deadlines which cannot be extended—and focus on this case. The initial brief in this case is now due on 9 December 2024.[3]

3) *United States v. Evangelista*, ACM 40531 – The record of trial is 10 volumes, consisting of 56 appellate exhibits, 18 prosecution exhibits, 12 defense exhibits, and one court exhibit; the transcript is 1,439 pages. Undersigned counsel has not begun a review of this case.

Since the filing of the last Motion for Enlargement of Time in this case, undersigned counsel has diligently been working other matters. Specifically, undersigned counsel: (1) drafted and filed a supplemental assignment of error brief to this Court in *United States v. Couty*; (2) completed a review of *United States v. Moreno* and completed a draft assignments of error brief; (3) completed a review of *United States v. Gibbs*, (over 2,000 pages), identified six issues, conducting research, and drafted four of the six issues; and (4) completed a review of *United States v. Washington*, consisting of nearly 2,000 pages reviewed. Further, undersigned counsel reviewed draft peer filings in four cases, spanning over 100 pages and seven issues. Additionally, seeking to fulfill his obligations to continue learning and serve as a whole airman, undersigned counsel took leave during this enlargement period to judge an undergraduate moot court tournament at his alma mater, which he had previously obligated himself to, and went on temporary duty to attend the Appellate Judge's Education Institute 2024 Summit in Boston, Massachusetts.[4]

[3] Because undersigned counsel has a reply brief in *Valentin-Andino* due on 12 December 2024, this brief must be completed well before 9 December 2024. This required full days of work each day of the Thanksgiving holiday weekend.

[4] This Court has previously remarked that personal "professional education" and the "education and . . . development of . . . aspiring lawyers" cannot "de-prioritize [counsel's] . . . primary duties of reviewing records and authoring briefs on behalf of . . . clients." Order, *United States v. Gibbs*, dated 22 November 2024. However, this Court should be aware that at both the conference and the undergraduate moot court tournament, undersigned counsel continued to do extensive work,

During the last two enlargement periods for this case, undersigned counsel has worked nearly all weekend, holiday, and family days. Maintaining these types of hours negatively impact undersigned counsel's productivity and effectiveness. These hours also have a negative personal impact on undersigned counsel as they detract from the time he should dedicate to physical and mental recovery. Due to this Court's Order in *Gibbs*—as well as the pressing demands throughout his docket—undersigned counsel has worked late nights, every weekend, and throughout the Thanksgiving holiday weekend;[5] undersigned counsel anticipates working throughout the Christmas and New Years holidays too. Undersigned counsel will also likely have to work while on projected leave in December.

Despite undersigned counsel's diligence and long hours, this Court believes undersigned counsel has "a sanguine attitude" about the delays in his cases. *See* Order, *United States v. Gibbs*, dated 22 November 2024. Therefore, it should further be noted that undersigned counsel has taken 40 days of leave since being assigned to the Appellate Defense Division. Much of this leave was "use or lose," following undersigned counsel's tour as an Area Defense Counsel, which counsel took locally and during which he continued to work full days. The remaining days were personal trips, to include one to attend counsel's only brother's wedding where he was his brother's best man. Despite significant familial responsibilities on that trip, undersigned counsel worked while on leave—to include the morning of his brother's wedding. Moreover, undersigned counsel has gone to great lengths to try to become efficient in every aspect of his life, to include outsourcing meal preparation and eating at his desk while working through lunch.

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despite being *on leave* for one of those trips. Specifically, *while on leave* for the tournament, undersigned counsel worked approximately five hours each day.

[5] This is because the CAAF petition deadlines for *Pulley*, *Washington*, and *Kelnhofer* are statutory and cannot be extended. While those petitions were to be submitted in early December, this Court's order in *Gibbs* pushed drafting and filing of those petitions into late December.

On 17 June 2024, this Court ordered that additional enlargements would not be granted absent exceptional circumstances. In addition to the circumstances noted above, the following is also provided: The exceptional circumstances justifying the instant enlargement of time are: (1) the number of cases older than Appellant's case; (2) the number of cases before the CAAF; and (3) the staffing challenges at the Appellate Defense Division given an increasing workload.

Throughout the entire life of this case, undersigned counsel has been working diligently on cases docketed before Appellant's case or that require review at the CAAF. For example, approximately two months before this case was docketed, the CAAF granted review in *United States v. Smith*. 84 M.J. 141 (C.A.A.F. 2023). Undersigned counsel prioritized briefing and oral argument in that case, while also reviewing voluminous records in *United States v. Knodel*[6] and *United States v. Daughma*—significantly older cases than Appellant's. Moreover, since the docketing of this case, undersigned counsel has reviewed 23 records of trial for cases older than Appellant's case.[7] These records contained nearly 15,000 transcript pages. Undersigned counsel has filed 17 briefs before this Court, not including three substantive motions. In addition, undersigned counsel has filed nine briefs before the CAAF (to include six supplements, two substantive briefs in *United States v. Smith*, and one substantive brief in *United States v. Valentin-Andino*). Undersigned counsel also conducted oral argument before the CAAF in *Smith* and this Court in *Daughma*.

As noted in *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), there is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant, even considering

[6] It was this case that required undersigned counsel to work while at his brother's wedding.
[7] This includes *United States v. Beyer* which, although not a case older than Appellant's, required an earlier review because civilian co-counsel was prepared to file an assignment of errors brief. *See, e.g.*, Article 70(c), UCMJ.

this Court's broad mandate for independent review. Appellant requested representation under Article 70, UCMJ, when he elected to appeal under Article 66(b)(1)(A), UCMJ. Undersigned counsel's limited progress so far is not due to an unwillingness to familiarize himself with the case or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008).

Additionally, undersigned counsel regularly examines his docket with supervisory counsel to assess the possibility of assigning substitute counsel to expedite review of Appellant's case. However, no such substitute counsel has been identified due to the Appellate Defense Division's workload. Though subject to manual counting, as of 27 September 2024, the Division's records reflect 117 cases pending initial briefing before this Court. A comparison with the 130 cases that were pending initial briefing before this Court on 9 June 2017 shows that the thirteen fewer cases now reflect fifty-eight percent more pages for counsel to review. This volume of pending cases has arisen in part due to: (1) the seventy-two percent increase in cases referred to the Division since the 23 December 2022 expansion of appellate review, *see* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022), with 141 cases eligible for direct appeal forwarded to the Division's counsel versus 195 automatic appeals over that same time; (2) the Division's robust practice before the CAAF during the October 2023 term, leading all military services with twelve cases granted oral argument in addition to the seven cases argued by Division counsel before this Court during the October 2023 term, and leading all military services heading into the October 2024 term with eight cases—only one fewer than all other services combined—granted review with briefing ordered so far; (3) the high volume of top-priority interlocutory appeals spread amongst the Division's counsel, responding to three appeals under Article 62, UCMJ, and three writ-petitions under Article 6b, UCMJ; and (4) the extensive

litigation before the Supreme Court of the United States since July 2023, with fifteen appellants petitioning for review and six briefs prepared by the Division's counsel.

Division leadership has worked to mitigate the impact of these cases on the Division's total workload and its impact on timely resolution of each appellant's case. To address gaps with two active-duty counsel, Division leadership secured reservists to be on orders, with one reservist being on orders spanning August 2023 through August 2024 to fill a vacant billet, and another reservist to cover the entirety of one active-duty counsel's parental leave from June through November 2024. While helpful in mitigating the impacts of a rising workload, this reserve support only held the Division's active duty staffing steady at previously existing levels.

Additionally, in 2024, Division leadership put forth a proposed legislative change that, though not adopted, would have authorized the military appellate defense counsel to seek a release from representing an appellant when civilian defense counsel is retained, which would have impacted approximately ten percent of the cases pending initial briefing before this Court. Forecasting the additional strain on the Division's workload arising from the upcoming expansion of the right for military members to petition the Supreme Court for review, *see* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023), in addition to the impact of direct appeals discussed above, action is pending on a Division request for eight additional active-duty counsel to be assigned to the Division beginning in the summer of 2025. Despite these mitigation measures, the increase in the Division's workload over the last 18 months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case, and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case. Therefore, exceptional circumstances exist to grant this enlargement of time.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement. Additionally, Appellant was apprised of the status of undersigned counsel's progress on Appellant's case.[8]

Should the Government oppose this motion, Appellant requests the Government specify how they are meeting their obligations under Article 70, UCMJ, and *United States v. Moreno*, to provide adequate staffing to the appellate defense division. *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006) ("The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation."). A failure to provide this information should be treated by this Court as waiver of any argument that the Government is providing adequate staffing.

[8] Appellant provided limited consent for the disclosure of this attorney-client privileged communication.

WHEREFORE, Appellant requests that this Court grant the enlargement of time for good cause shown. Should this Court think that denial of this motion is appropriate, Appellant requests a status conference.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

5 December 2024

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) RICKY Z. BARLOW, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40552 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's over year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not 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.

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant*	)	No. ACM 40552 3 January 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eleventh enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **12 February 2025**. The record of trial was docketed with this Court on 20 December 2023. From the date of docketing to the present date, 380 days have elapsed. On the date requested, 420 days will have elapsed.

On 26-28 September 2023 at Hill Air Force Base, Utah, R. at 1, 338, Appellant was tried by a general court-martial sitting as a military judge alone. R. at 9. Contrary to his pleas, R. at 10, Appellant was convicted of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 316. The military judge sentenced Appellant to a reduction in paygrade to E-1 (Airman Basic), to be confined for six months, and to a dishonorable discharge. R. at 338. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Ricky Z. Barlow*. Appellant is not currently confined.

GRANTED
8 JAN 2025

The ROT is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 appellate exhibits, and two court exhibits; the transcript is 338 pages. Counsel is currently assigned 26 cases; 19 cases are pending initial AOEs before this Court.

One case before the United States Supreme Court takes priority over this case: *United States v. Nestor*. Undersigned counsel—in coordination with counsel in *United States v. Wells,* the parent case—filed an extension of time for filing a petition for writ of certiorari. That extension was granted, and the writ petition is now due on 21 February 2024. Three cases before the Court of Appeals for the Armed Forces (CAAF) have priority over this case:

1) *United States v. Valentin-Andino*. Filing is complete in this case. However, oral argument is scheduled for 14 January 2025 and undersigned counsel is presently preparing for argument.
2) *United States v. Pulley*. The supplement brief is due to the CAAF on 15 January 2025. Undersigned counsel has completed research and has begun drafting three of five potential issues.
3) *United States v. Kelnhofer*. This appellant intends to file a petition and corresponding supplement to the CAAF. The petition and supplement are on 9 January 2025. Undersigned counsel has not begun research or drafting.

In addition, the following cases before this Court have priority over this case:

1) *United States v. Moreno*, ACM 40511 – The record of trial is six volumes, consisting of 59 appellate exhibits, 12 prosecution exhibits, and seven defense exhibits; the transcript is 531 pages. Undersigned counsel completed a review of the record and completed draft assignments of error. That draft is now with civilian co-counsel for final review.

2) *United States v. Gibbs*, ACM 40523 – The record of trial is seven volumes, consisting of 40 appellate exhibits, 26 prosecution exhibits, 11 defense exhibits, and one court exhibit; the transcript is 1,084 pages. Undersigned counsel filed an initial brief with this Court on 9 December 2024, with the Government's answer due on 8 January 2025. Due to oral argument in Valentin-Andino, undersigned counsel will likely request an enlargement of time to file a reply.

3) *United States v. Evangelista*, ACM 40531 – The record of trial is 10 volumes, consisting of 56 appellate exhibits, 18 prosecution exhibits, 12 defense exhibits, and one court exhibit; the transcript is 1,439 pages. Undersigned counsel has reviewed 153 pages of the transcript.

Since the filing of the last Motion for Enlargement of Time in this case, undersigned counsel has diligently been working other matters. Specifically, undersigned counsel: (1) drafted and filed a reply brief to the CAAF in *Valentin-Andino*; (2) reviewed, drafted, and filed a supplement brief to the CAAF in *Washington*; (3) drafted and filed an initial assignments of error brief to this Court in *Gibbs*; (4) reviewed, drafted, and filed a reply brief to this Court in *Beyer*; (5) completed research and began drafting a supplement in *Pulley*; (6) prepared for oral argument in *Valentin-Andino*, to include completing one of three scheduled moots; and (7) reviewed 153 transcript pages in *Evangelista*. Further, undersigned counsel reviewed draft peer filings in two cases, spanning over 50 pages and four issues.

During the last three enlargement periods for this case, undersigned counsel has worked nearly all weekend, holiday, and family days. This includes the Thanksgiving and Christmas holidays. Maintaining these types of hours negatively impact undersigned counsel's productivity and effectiveness. These hours also have a negative personal impact on undersigned counsel as they detract from the time he should dedicate to physical and mental recovery.

On 17 June 2024, this Court ordered that additional enlargements would not be granted absent exceptional circumstances. In addition to the circumstances noted above, the following is also provided: The exceptional circumstances justifying the instant enlargement of time are: (1) the number of cases older than Appellant's case; (2) the number of cases before the CAAF; and (3) the staffing challenges at the Appellate Defense Division given an increasing workload.

Throughout the entire life of this case, undersigned counsel has been working diligently on cases docketed before Appellant's case or that require review at the CAAF. For example, approximately two months before this case was docketed, the CAAF granted review in *United States v. Smith*. 84 M.J. 141 (C.A.A.F. 2023). Undersigned counsel prioritized briefing and oral argument in that case, while also reviewing voluminous records in *United States v. Knodel*[1] and *United States v. Daughma*—significantly older cases than Appellant's. Moreover, since the docketing of this case, undersigned counsel has reviewed 24 records of trial for cases older than Appellant's case.[2] These records contained over 15,000 transcript pages. Undersigned counsel has filed 18 briefs before this Court, not including three substantive motions. In addition, undersigned counsel has filed eleven briefs before the CAAF (to include six supplements, two substantive briefs in *United States v. Smith*, and one substantive brief in *United States v. Valentin-Andino*). Undersigned counsel also conducted oral argument before the CAAF in *Smith* and this Court in *Daughma*.

As noted in *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), there is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant, even considering

[1] It was this case that required undersigned counsel to work while at his brother's wedding.
[2] This includes *United States v. Beyer* which, although not a case older than Appellant's, required an earlier review because civilian co-counsel was prepared to file an assignment of errors brief. *See, e.g.*, Article 70(c), UCMJ.

this Court's broad mandate for independent review. Appellant requested representation under Article 70, UCMJ, when he elected to appeal under Article 66(b)(1)(A), UCMJ. Undersigned counsel's limited progress so far is not due to an unwillingness to familiarize himself with the case or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008).

Additionally, undersigned counsel regularly examines his docket with supervisory counsel to assess the possibility of assigning substitute counsel to expedite review of Appellant's case. However, no such substitute counsel has been identified due to the Appellate Defense Division's workload. Though subject to manual counting, as of 27 September 2024, the Division's records reflect 117 cases pending initial briefing before this Court. A comparison with the 130 cases that were pending initial briefing before this Court on 9 June 2017 shows that the thirteen fewer cases now reflect fifty-eight percent more pages for counsel to review. This volume of pending cases has arisen in part due to: (1) the seventy-two percent increase in cases referred to the Division since the 23 December 2022 expansion of appellate review, *see* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022), with 141 cases eligible for direct appeal forwarded to the Division's counsel versus 195 automatic appeals over that same time; (2) the Division's robust practice before the CAAF during the October 2023 term, leading all military services with twelve cases granted oral argument in addition to the seven cases argued by Division counsel before this Court during the October 2023 term, and leading all military services heading into the October 2024 term with eight cases—only one fewer than all other services combined—granted review with briefing ordered so far; (3) the high volume of top-priority interlocutory appeals spread amongst the Division's counsel, responding to three appeals under Article 62, UCMJ, and three writ-petitions under Article 6b, UCMJ; and (4) the extensive

litigation before the Supreme Court of the United States since July 2023, with fifteen appellants petitioning for review and six briefs prepared by the Division's counsel.

Division leadership has worked to mitigate the impact of these cases on the Division's total workload and its impact on timely resolution of each appellant's case. To address gaps with two active-duty counsel, Division leadership secured reservists to be on orders, with one reservist being on orders spanning August 2023 through August 2024 to fill a vacant billet, and another reservist to cover the entirety of one active-duty counsel's parental leave from June through November 2024. While helpful in mitigating the impacts of a rising workload, this reserve support only held the Division's active duty staffing steady at previously existing levels.

Additionally, in 2024, Division leadership put forth a proposed legislative change that, though not adopted, would have authorized the military appellate defense counsel to seek a release from representing an appellant when civilian defense counsel is retained, which would have impacted approximately ten percent of the cases pending initial briefing before this Court. Forecasting the additional strain on the Division's workload arising from the upcoming expansion of the right for military members to petition the Supreme Court for review, *see* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023), in addition to the impact of direct appeals discussed above, action is pending on a Division request for eight additional active-duty counsel to be assigned to the Division beginning in the summer of 2025. Despite these mitigation measures, the increase in the Division's workload over the last 18 months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case, and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case. Therefore, exceptional circumstances exist to grant this enlargement of time.

In Appellant's last motion for EOT, the Appellant requested that the Government should specify how it is meeting its obligations under Article 70, UCMJ, and *United States v. Moreno*, to provide adequate staffing to the appellate defense division. *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006) ("The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation."). In that motion for EOT, Appellant stated that a failure to provide this information should constitute waiver of any claim by the Government that it is providing adequate staffing. Despite opposing the motion for EOT, the Government failed to provide the requested information. Therefore, this Court should reject any argument by the Government that it is providing the Appellate Defense Division.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement. Additionally, Appellant was apprised of the status of undersigned counsel's progress on Appellant's case.[3]

[3] Appellant provided limited consent for the disclosure of this attorney-client privileged communication.

WHEREFORE, Appellant requests that this Court grant the enlargement of time for good cause shown. Should this Court think that denial of this motion is appropriate, Appellant requests a status conference.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

7 January 2025

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) RICKY Z. BARLOW, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40552 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's over year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not 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.

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40552**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Ricky Z. BARLOW	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 31 January 2025, Appellant's counsel submitted a Consent Motion to Examine Sealed Material, requesting both parties be allowed to examine certain portions of the record of trial, specifically:

(1) Transcript of the trial's closed sessions "ostensibly held to consider Mil. R. Evid. 412 issues raised by the parties;"

(2) Audio recording of the closed sessions referenced in (1);

(3) Appellate Exhibits VIII–XII relating to Mil. R. Evid. 412; and

(4) Prosecution Exhibit 5, a report of a sexual assault examination.

The requested materials were presented or reviewed by the parties at trial. Appellant's counsel avers he has consulted with counsel for the Government, who consents to this motion.

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

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 4th day of February, 2025,

ORDERED:

Appellant's Consent Motion to Examine Sealed Material is **GRANTED**.

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibit 5, Appellate Exhibits VIII–XII, sealed transcript pages 16–29 and 113–137, and the recording of the closed trial sessions**

contained in Volume 1 of the record of trial, subject to the following conditions:

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

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*, v. Airman (E-2) **RICKY Z. BARLOW**, United States Air Force *Appellant*.	**CONSENT MOTION TO EXAMINE SEALED MATERIALS** Before Panel No. 2 No. ACM 40552 31 January 2025

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

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i), the Appellant moves for both parties to examine the following sealed materials:

1) **Closed Session Audio Recording (Record of Trial (ROT), Volume 1)**. Closed session hearings were attended by trial counsel, defense counsel, victim's counsel, and military judge. The closed sessions were ostensibly held to consider Mil. R. Evid. 412 issues raised by the parties. *See, e.g.*, R. at 14, 111-12.
2) **Closed Session Transcript Pages (R. at 16-29, 113-37)**. This closed session hearings were apparently attended by trial counsel, defense counsel, victim's counsel, and military judge; the closed sessions were ostensibly held to consider Mil. R. Evid. 412 issues raised by the parties. *See, e.g.*, R. at 14, 111-12.
3) **Appellate Exhibits VIII-XII**. These exhibits were various motions, evidence, and rulings concerning the litigation of Mil. R. Evid. 412 issues. R. at 13-15, 138. These various exhibits were reviewed by the parties and considered by the military judge. *See, e.g.*, R. 13-15, 138. While the military judge ordered Appellate Exhibit XII sealed, the

unsealed record appears to be silent as to whether the military judge ordered Appellate Exhibits VIII-XI sealed. Nevertheless, the Government sealed these exhibits. *See* Exhibit Index.

4) **Prosecution Exhibit 5**. This exhibit is the report of a sexual assault examination. R. at 230. This exhibit was admitted, R. at 231, and was viewed by the parties and military judge. Much like the appellate exhibits, the unsealed record appears to be silent as to whether the military judge ordered this exhibit sealed. Nevertheless, the Government sealed this exhibit. *See* Exhibit Index.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant. The Appellant stands convicted of an offense related to the sealed materials admitted at trial. In order to fully present matters to this Court, the undersigned counsel requires access to sealed material.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

Appellate Government Counsel have been consulted about this motion and consents to the relief sought by the Appellant.

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

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
Office: (240) 612-4770

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 31 January 2025.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
Office: (240) 612-4770

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40552**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Ricky Z. BARLOW	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 31 January 2025, counsel for Appellant submitted a Motion for Enlargement of Time (Twelfth) requesting an additional 30 days to submit Appellant's assignments of error. Appellant's counsel identified two cases with priority over this case and listed other matters requiring his attention. Additionally, he states:

> The exceptional circumstances justifying the instant enlargement of time are: (1) the number of cases older than Appellant's case; (2) the number of cases before the CAAF; and (3) the staffing challenges at the Appellate Defense Division given an increasing workload.

Appellant's counsel did not state whether he anticipated requesting another enlargement of time in this case in the future.

The Government opposes the motion. They note: "If Appellant's new delay request is granted, the defense delay in this case will be 450 days in length."

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 5th day of February, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (Twelfth) is **GRANTED**. Appellant shall file any assignments of error not later than **14 March 2025**.

Counsel for Appellant should expect that no future requests for enlargement of time to file an initial brief in this case will be granted, and plan accordingly.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME**
	)	**(TWELFTH)**
	)	
v.	)	Before Panel 2
	)	
Airman (E-2)	)	No. ACM 40552
RICKY Z. BARLOW,	)	
United States Air Force	)	31 January 2025
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his twelfth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 March 2025**. The record of trial was docketed with this Court on 20 December 2023. From the date of docketing to the present date, 408 days have elapsed. On the date requested, 450 days will have elapsed.

On 26-28 September 2023 at Hill Air Force Base, Utah, R. at 1, 338, Appellant was tried by a general court-martial sitting as a military judge alone. R. at 9. Contrary to his pleas, R. at 10, Appellant was convicted of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 316. The military judge sentenced Appellant to a reduction in paygrade to E-1 (Airman Basic), to be confined for six months, and to a dishonorable discharge. R. at 338. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. Amn Ricky Z. Barlow*. Appellant is not currently confined.

The ROT is four volumes, consisting of six prosecution exhibits, nine defense exhibits, 16 appellate exhibits, and two court exhibits; the unsealed transcript is 338 pages. Counsel is currently assigned 26 cases; 18 cases are pending initial AOEs before this Court.

One case before the United States Supreme Court takes priority over this case: *United States v. Nestor*. The petition for writ of certiorari is due to the printer no later than 7 February 2025. Undersigned counsel has completed research and has begun drafting the writ petition.[1]

In addition, the following case before this Court has priority over this case:

1) *United States v. Evangelista*, ACM 40531 – The record of trial is 10 volumes, consisting of 56 appellate exhibits, 18 prosecution exhibits, 12 defense exhibits, and one court exhibit; the transcript is 1,439 pages. Undersigned counsel has reviewed over 800 pages of the unsealed transcript. Undersigned counsel has moved this Court to review sealed materials in this case, but that motion has not yet been granted. Additionally, earlier this week, this appellant informed undersigned counsel that he was retaining civilian counsel. This required undersigned counsel to filed an EOT in this case. Because of the retention of lead civilian counsel, undersigned counsel paused review of this case and turned to the *Nestor* Supreme Court petition and reviewing Appellant's case.

Since the filing of the last Motion for EOT in this case, undersigned counsel has diligently been working other matters. Specifically, undersigned counsel: (1) drafted and filed a supplement brief to the CAAF in *United States v. Pulley*; (2) drafted and field a supplement brief to the CAAF in *United States v. Kelnhofer*; (3) conducted two practice moot arguments and oral argument at

[1] Undersigned counsel previously represented to this Court in a status conference that review of Appellant's record would likely be completed prior to beginning work on the Supreme Court petition. While undersigned counsel has begun reviewing Appellant's record, a complete review is likely not possible before filing the Supreme Court petition.

the CAAF in *United States v. Valentin-Andino*; (4) finalized and filed an initial AOE brief to this Court in *United States v. Moreno*; (5) completed a review of nearly all unsealed portions of the record in *Evangelista*; (6) filed a motion to examine sealed materials in *Evangelista*; (7) reviewed approximately 200 pages of the record in this case; and (8) filed a motion to examine sealed materials in this case. Undersigned counsel also participated in six moot arguments for two other CAAF cases.

On 17 June 2024, this Court ordered that additional enlargements would not be granted absent exceptional circumstances. In addition to the circumstances noted above, the following is also provided: The exceptional circumstances justifying the instant enlargement of time are: (1) the number of cases older than Appellant's case; (2) the number of cases before the CAAF; and (3) the staffing challenges at the Appellate Defense Division given an increasing workload.

Throughout the entire life of this case, undersigned counsel has been working diligently on cases docketed before Appellant's case or that require review at the CAAF. For example, approximately two months before this case was docketed, the CAAF granted review in *United States v. Smith*. 84 M.J. 141 (C.A.A.F. 2023). Undersigned counsel prioritized briefing and oral argument in that case, while also reviewing voluminous records in *United States v. Knodel*[2] and *United States v. Daughma*—significantly older cases than Appellant's. Moreover, since the docketing of this case, undersigned counsel has reviewed 24 records of trial for cases older than Appellant's case.[3] These records contained over 15,000 transcript pages. Undersigned counsel has filed 19 briefs before this Court, not including three substantive motions. In addition, undersigned

[2] It was this case that required undersigned counsel to work while at his brother's wedding.
[3] This includes *United States v. Beyer* which, although not a case older than Appellant's, required an earlier review because civilian co-counsel was prepared to file an assignment of errors brief. *See, e.g.*, Article 70(c), UCMJ.

counsel has filed fourteen briefs before the CAAF (to include eight supplements, two substantive briefs in *United States v. Smith*, and two substantive briefs in *United States v. Valentin-Andino*). Undersigned counsel also conducted oral argument before the CAAF in *Smith* and *Valentin-Andino*, and this Court in *Daughma*.

As noted in *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998), there is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant, even considering this Court's broad mandate for independent review. Appellant requested representation under Article 70, UCMJ, when he elected to appeal under Article 66(b)(1)(A), UCMJ. Undersigned counsel's limited progress so far is not due to an unwillingness to familiarize himself with the case or file a brief raising substantive issues, nor is it a deliberate tactical decision in order to create an appellate issue. *See United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2008).

Additionally, undersigned counsel regularly examines his docket with supervisory counsel to assess the possibility of assigning substitute counsel to expedite review of Appellant's case. However, no such substitute counsel has been identified due to the Appellate Defense Division's workload. Though subject to manual counting, as of 27 September 2024, the Division's records reflect 117 cases pending initial briefing before this Court. A comparison with the 130 cases that were pending initial briefing before this Court on 9 June 2017 shows that the thirteen fewer cases now reflect fifty-eight percent more pages for counsel to review. This volume of pending cases has arisen in part due to: (1) the seventy-two percent increase in cases referred to the Division since the 23 December 2022 expansion of appellate review, *see* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395 (2022), with 141 cases eligible for direct appeal forwarded to the Division's counsel versus 195 automatic appeals over that same time; (2) the Division's robust practice before the CAAF during the October 2023 term,

leading all military services with twelve cases granted oral argument in addition to the seven cases argued by Division counsel before this Court during the October 2023 term, and leading all military services heading into the October 2024 term with eight cases—only one fewer than all other services combined—granted review with briefing ordered so far; (3) the high volume of top-priority interlocutory appeals spread amongst the Division's counsel, responding to three appeals under Article 62, UCMJ, and three writ-petitions under Article 6b, UCMJ; and (4) the extensive litigation before the Supreme Court of the United States since July 2023, with fifteen appellants petitioning for review and six briefs prepared by the Division's counsel.

Division leadership has worked to mitigate the impact of these cases on the Division's total workload and its impact on timely resolution of each appellant's case. To address gaps with two active-duty counsel, Division leadership secured reservists to be on orders, with one reservist being on orders spanning August 2023 through August 2024 to fill a vacant billet, and another reservist to cover the entirety of one active-duty counsel's parental leave from June through November 2024. While helpful in mitigating the impacts of a rising workload, this reserve support only held the Division's active duty staffing steady at previously existing levels.

Additionally, in 2024, Division leadership put forth a proposed legislative change that, though not adopted, would have authorized the military appellate defense counsel to seek a release from representing an appellant when civilian defense counsel is retained, which would have impacted approximately ten percent of the cases pending initial briefing before this Court. Forecasting the additional strain on the Division's workload arising from the upcoming expansion of the right for military members to petition the Supreme Court for review, *see* National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533, 137 Stat. 136 (2023), in addition to the impact of direct appeals discussed above, action is pending on a Division request

for eight additional active-duty counsel to be assigned to the Division beginning in the summer of 2025. Despite these mitigation measures, the increase in the Division's workload over the last 18 months has compounded such that, at this time, the Division's workload does not support the possibility of substitute counsel to expedite review of Appellant's case, and undersigned counsel has been unable to complete review and any appropriate briefing of Appellant's case. Therefore, exceptional circumstances exist to grant this enlargement of time.

In addition to the exceptional circumstances noted above, undersigned counsel has moved this Court to attach a declaration from Lieutenant Colonel Allen Abrams, the Deputy Chief of the Appellate Defense Division. This declaration is further evidence of exceptional circumstances.

In Appellant's motion for EOT (tenth), Appellant requested the Government specify how it is meeting its obligations under Article 70, UCMJ, and *United States v. Moreno*, to provide adequate staffing to the appellate defense division. *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006) ("The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation."). In that motion for EOT, Appellant stated that a failure to provide this information should constitute waiver of any claim by the Government that it is providing adequate staffing. Despite opposing the motion for EOT, the Government failed to provide the requested information. Therefore, this Court should reject any argument by the Government that it is providing the Appellate Defense Division.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief of Appellant's case. An enlargement of time is necessary to allow counsel time to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this

enlargement of time. Appellant has provided a limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement. Additionally, Appellant was apprised of the status of undersigned counsel's progress on Appellant's case.[4]

WHEREFORE, Appellant requests that this Court grant the enlargement of time for good cause shown. Should this Court think that denial of this motion is appropriate, Appellant requests a status conference.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

[4] Appellant provided limited consent for the disclosure of this attorney-client privileged communication.

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 31 January 2025.

Respectfully submitted,

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

4 February 2025

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) RICKY Z. BARLOW, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40552 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 450 days in length. Appellant's over year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 3 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not 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.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 February 2025.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION TO ATTACH APPENDIX**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant*	)	No. ACM 40552 31 January 2025

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

Pursuant to Rules 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant moves to attach the Appendix to this motion to the record of trial. The Appendix is a declaration from Lieutenant Colonel Allen Abrams, Deputy Chief of the Appellate Defense Division. The declaration outlines the manning and workload challenges facing the Appellate Defense Division.

This declaration is relevant and necessary for two reasons: (1) to substantiate exceptional circumstances to comply with this Court's order; and (2) demonstrate that the post-trial delay in this case is caused by the Government's failure to adequately staff the Appellate Defense Division.

On 17 June 2024, this Court ordered that Appellant must demonstrate "exceptional circumstances" before obtaining enlargements of time (EOT) which would expire 360 days after docketing. Order, dated 10 May 2024. The declaration provides a detailed assessment of the manning and workload challenges facing the Appellate Defense Division, substantiating the exceptional circumstances" required to be shown by this Court.

GRANTED
11 FEB 2025

Additionally, in Appellant's motion for EOT (tenth), Appellant requested the Government specify how it is meeting its obligations under Article 70, UCMJ, and *United States v. Moreno*, to provide adequate staffing to the appellate defense division. *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006) ("The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation."). In that motion for EOT, Appellant stated that a failure to provide this information should constitute waiver of any claim by the Government that it is providing adequate staffing. Despite opposing all motions for EOT in this case, the Government failed to provide the requested information in its response to Appellant's motion for EOT (tenth) or motion for EOT (eleventh).

The information in the declaration demonstrates the chronic manning shortage and workload challenges faced by the Appellate Defense Division. This, in turn, shows that the post-trial delays in this case were caused by the Government's failure to provide adequate staffing. This declaration, taken together with the Government's tacit admission that it has not provided adequate staffing, is relevant and necessary to litigate the post-trial delay issues inherent in this case.

WHEREFORE, Appellant requests this Court grant this motion to attach.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

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 31 January 2025.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force
(240) 612-2807

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF**
Appellee,	)	**OF APPELLANT**
	)	
	)	
v.	)	Before Panel 2
	)	
Airman (E-2)	)	No. ACM 40552
RICKY Z. BARLOW,	)	
United States Air Force	)	14 March 2025
Appellant.	)	

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

ASSIGNMENTS OF ERROR

I.

Whether Airman Barlow was denied effective assistance of counsel in violation of the Sixth Amendment.

II.

Whether Airman Barlow's indexing for sex offender registry violates public policy.

III.

Whether the Government committed prosecutorial misconduct by failing to provide discovery of CN's allegations against another Airman.[1]

STATEMENT OF THE CASE

On 26-28 September 2023 at Hill Air Force Base, Utah, R. at 1, 338, Airman (Amn) Barlow was tried by a general court-martial sitting as a military judge alone. R. at 9. Contrary to his pleas, R. at 10, Amn Barlow was convicted of one charge and specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. at 316. The military judge sentenced

[1] Issues II and III are raised personally by Amn Barlow, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Amn Barlow to a reduction in paygrade to E-1, to be confined for six months, and to a dishonorable discharge. R. at 338. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action.

STATEMENT OF FACTS

Amn Barlow and CN Attended a Christmas Party and had Sex

Amn Barlow and CN were friends. R. at 40. For a short period of time before the alleged incident, they had a consensual sexual relationship. R. at 40-41. CN ended that relationship but remained friends with Amn Barlow. R. at 41-42. At some point after, CN began a relationship with MP. R. at 43. On Christmas Day 2022, CN attended a dorm party with several friends, including Amn Barlow. R. at 47-50. MP did not attend the party. During the party, CN described her behavior as "talkative" and "definitely flirtatious." R. at 50.

At some point, CN decided to return to her dorm room. R. at 51-52. When she got back to her room, CN called MP. R. at 52. While on the phone with him, Amn Barlow knocked on CN's door. R. at 53. CN ended the call with MP and answered the door, allowing Amn Barlow in. R. at 53-54. CN sat on her bed with Amn Barlow. R. at 54. After Amn Barlow kissed CN, CN alleged that Amn Barlow had sex with her without her consent. R. at 55-56.

Later that evening, Amn Barlow left CN's dorm room and CN called MP. R. at 67. MP told CN she should report the incident as a sexual assault and coordinated with CN's leadership so CN could make the report. R. at 68. CN would later tell one witness that she regretted making the report and only did so after being pressured by MP. XL Decl. However, this witness was not called to testify at trial. Barlow Decl.

Ineffective Assistance of Counsel

Amn Barlow hired GG and KS to represent him at trial. He was also represented by his area defense counsel (ADC), JG. Barlow Decl. Before trial, Amn Barlow sent the names and contact information of approximately eight witnesses to his attorneys. Barlow Decl. This information was relayed over text message. Barlow Decl. Amn Barlow believed that his attorneys would speak with the witnesses identified and, if they provided useful information, call them as witnesses at trial. Barlow Decl.

One of the names provided by Amn Barlow was ML. Barlow Decl. ML was a close friend of MP, the named victim's boyfriend. ML was never interviewed by the defense team. ML Decl. However, had he been interviewed, ML would have informed the defense team of several things. First, he would have informed them that, shortly after the alleged incident, CN received in-patient mental health treatment.[2] ML Decl. Second, he would have informed the defense that, after the alleged incident, CN told MP that she had more feelings for Amn Barlow than MP. ML Decl. And, third, he would have said he believed CN had a character for untruthfulness and attention-seeking. ML Decl.

Another name provided by Amn Barlow was XL, a former Airman. Barlow Decl. XL had a brief interview with either GG or KS, though he cannot not recall which one. XL Decl. During that interview, XL informed the attorney that he was a coworker with CN. XL Decl. XL stated he was "friendly" with CN. XL Decl. One day after work, CN informed XL that she felt bad about everything happening to Amn Barlow because of the allegation. XL Decl. CN told XL that she only reported the incident because she was pressured by MP. XL Decl. Ultimately, CN regretted

[2] This information was also provided to the attorneys by Amn Barlow.

making the allegation. XL Decl. Despite providing this information, XL was not called to testify at trial, nor did the defense examine any witness with this information.

In addition, before trial, Amn Barlow informed his trial defense team that there is a security camera outside CN's dorm room. However, it appears this footage was not requested by the defense team or provided by the Government.

ARGUMENT

I. Airman Barlow's trial defense counsel failed to conduct an adequate pre-trial investigation and failed to present favorable evidence at trial. These failures deprived Airman Barlow of his right to effective assistance of counsel.

Standard of Review

This Court reviews allegations of ineffective assistance of counsel de novo. *United States v. Palik*, 84 M.J. 284, 288 (C.A.A.F. 2024).

Law and Analysis

A. Ineffective Assistance of Counsel, Generally

To prevail on an ineffective assistance of counsel claim, Amn Barlow must "demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Id.* at 288-89 (cleaned up).

While there is a presumption of competence, an appellant can overcome it if he shows "specific defects in counsel's performance that were unreasonable under prevailing professional norms." *United States v. Carter*, 79 M.J. 478, 480 (C.A.A.F. 2020) (cleaned up). Strategic choices counsel make must be objectively reasonable. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015). They also must be made after a thorough and appropriate investigation. *United States v. Hammer*, 60 M.J. 810, 820 (A.F. Ct. Crim. App. 2004), *aff'd,* 62 M.J. 390 (C.A.A.F. 2005) ("Defense counsel, of course, have an ethical obligation to properly investigate the charges against

their client in formulating trial strategy. This duty extends to interviewing witnesses or making reasonable tactical decisions rendering some interviews unnecessary.") (citing *Kimmelman v. Morrison*, 477 U.S. 365 (1986); *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)).

The CAAF has created a three-part test to assess ineffective assistance of counsel claims:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Palik, 84 M.J. at 289 (quoting *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)).

B. Trial defense counsel were ineffective by failing to interview ML.

Amn Barlow provided his trial defense counsel with the name and contact information for ML well before trial. ML could have shared how CN is untruthful, had a motive to fabricate to maintain her relationship with MP, and had mental health records that could have been relevant and defense counsel could have sought. Despite this, trial defense counsel never interviewed ML. Based on the CAAF's three-part test, this failure deprived Amn Barlow of his right to effective assistance of counsel.

First, Amn Barlow's allegations are true. *Palik*, 84 M.J. at 289. Not only did Amn Barlow provide a sworn declaration explaining that he gave his defense counsel the name and contact information for ML, he also provided a sworn declaration from ML. In that declaration, ML detailed that, although he had information pertinent about the charged offense, he was never contacted by any of Amn Barlow's trial defense counsel. Interestingly, this is not the first case where GG and KS have been accused of failing to interview witnesses before trial. *See, e.g.*, *United*

States v. Knodel, No. ACM 40018, 2024 CCA LEXIS 102, at *58 (A.F. Ct. Crim. App. Mar. 8, 2024) (detailing allegations that GG and KS did not adequately investigate a named victim's character for untruthfulness), *petition denied*, 85 M.J. 89 (C.A.A.F. 2024). There is also no reasonable explanation for trial defense counsel's failure to interview ML. *Palik*, 84 M.J. at 289. As this Court explained in *Hammer*, defense counsel "have an ethical obligation to properly investigate" their case, a duty which "extends to interviewing witnesses." 60 M.J. at 820. While defense counsel can make reasonable strategic decisions to not interview certain witnesses, *id.*, there is no evidence before this Court that indicates such a strategic decision occurred.

Second, trial defense counsel's actions fell measurably below the performance of fallible attorneys. *Palik*, 84 M.J. at 289. Attorneys must conduct a pre-trial investigation to understand their case. *Hammer*, 60 M.J. at 820. Failure to fully investigate a case falls measurably below the performance of fallible attorneys. This is especially true when the client provides their attorney with names and contact information well before trial. Of course, there may be strategic considerations which make interviewing certain witnesses untenable. But there is no evidence that any such considerations existed in this case. And, in this case, the defense team was specifically looking for evidence of CN's character for untruthfulness, which ML could have provided. ML Decl. For these reasons, failing to interview ML fell measurably below the performance expected of fallible attorneys.

Third, there is a reasonable probability that, but for this error, the result at trial would have been different. *Palik*, 84 M.J. at 289. If interviewed, ML would have provided a treasure trove of information to the defense team. For example, ML would have told the defense that CN received in-patient mental health treatment shortly after the alleged incident. ML Decl. Armed with this information, the trial defense team could have sought relevant records related to that treatment.

United States v. Mellette, 82 M.J. 374, 375 (C.A.A.F. 2022). Even if the defense team could not obtain the records, they could have interviewed other witnesses—such as MP—about the care CN received. And, while it may be difficult to assess exactly how this information could have changed the landscape at trial, medical records often contain information favorable to the defense. *E.g.*, *B.M. v. United States*, 84 M.J. 314, 316 (C.A.A.F. 2024).

Less speculative are ML's opinions of CN's character. If interviewed, ML would have stated that he believed CN had a character for untruthfulness and attention-seeking. ML Decl. ML could lay the foundation for those opinions and provide specific examples if challenged on cross-examination. ML Decl. This is important for two reasons. First, the Government's case at trial revolved around CN's credibility, R. at 279, which the defense recognized. *E.g.*, R. at 289-90. Second, despite the Government's reliance on CN's credibility, the defense called no character witnesses to challenge CN at trial.

Moreover, ML would have informed the defense team about CN's conversation with MP after the alleged incident. ML Decl. During that conversation, CN stated that she had more feelings for Amn Barlow than MP, her boyfriend. ML Decl. This information could have been useful in several respects. First, the defense team could have interviewed or examined other witnesses—such as MP—about the substance of this conversation. Further, the defense could have confronted CN with this information during trial challenge her credibility.

Ultimately the information provided by ML would have altered the litigation landscape. And, based on all this information, there is a reasonable likelihood the result at trial would have been different.

C. Trial defense counsel were ineffective by failing to present favorable information from XL.

Amn Barlow provided his trial defense counsel with the name and contact information for XL. Trial defense counsel interviewed XL and, during that interview, XL provided pertinent information about CN and the alleged incident. Despite this, trial defense counsel failed to call XL as a witness at trial or cross-examine any of the Government's witnesses with the information provided by XL. These failures deprived Amn Barlow of his right to effective assistance of counsel, and Amn Barlow satisfies the CAAF's three factor test.

First, Amn Barlow's allegations are true. *Palik*, 84 M.J. at 289. Trial defense counsel had the name and contact information for XL. Barlow Decl.; XL Decl. Despite providing pertinent information about CN and the alleged incident, XL was not called to testify at Amn Barlow's trial. XL Decl.; Barlow Decl. While courts presume trial defense counsel are competent, *Carter*, 79 M.J. at 480, there is no evidence supporting a reasonable explanation for trial defense counsel not calling XL as a witness, or otherwise cross-examining witnesses on the information provided. *Palik*, 84 M.J. at 289.

Second, trial defense counsel's actions fell measurably below the performance of fallible attorneys. *Palik*, 84 M.J. at 289. As his interview with trial defense counsel demonstrated, XL would have testified that CN regretted her decision to report Amn Barlow for sexual assault. XL Decl. After all, CN only reported Amn Barlow after being pressured by MP—her boyfriend—to do so. XL Decl. Despite having this information, trial defense counsel declined to call XL as a witness or cross-examine either CN or MP about this information.

Third, there is a reasonable likelihood that, but for defense counsel's failures, the result at trial would have been different. As noted, CN's credibility was paramount to the Government's case. Testimony concerning CN's motivations to make a report against Amn Barlow, and CN's

contemporaneous regret for doing so, cut against her credibility. But, despite complaining that she shouldn't have made the report against Amn Barlow, the defense never presented evidence of this contemporaneous regret. This is particularly important when coupled with the information provided by ML: that CN has a character for attention-seeking and untruthfulness. Together, this evidence would show that CN manufactured a sexual assault allegation to satisfy MP and maintain her relationship after having an affair with Amn Barlow.

These errors, coupled with the errors associated with ML, deprived Amn Barlow of his right to effective assistance of counsel. Therefore, this Court should aside the findings and sentence.

Respectfully submitted,

[redacted]

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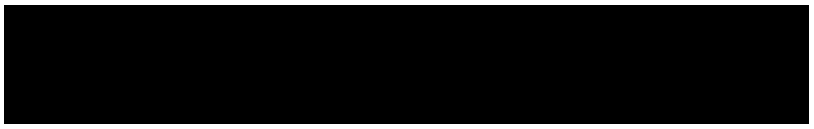
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 14 March 2025.

Respectfully submitted,



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APPENDIX

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

I. Airman Barlow's indexing for sex offender registry violates public policy.

Airman Barlow's indexing for sex offender registry violates public policy because it is unfair, unjust, or otherwise cruel. The offense for which Amn Barlow is required to register as a sex offender occurred in December of 2022. At the time, Amn Barlow was 19 years old. The alleged offense occurred on Christmas Day after Amn Barlow attended a party where people had been celebrating and drinking. These factors demonstrate significant mitigation, which the military judge recognized when he adjudged only six months of confinement.

Despite being out of high school for only two years at the time of his offense, Amn Barlow will now be a sex offender for the rest of my life. No matter how much he rehabilitates, matures, and grows after his conviction, Amn Barlow will always be a registered sex offender. The indexing requirement does not take into account the specific facts of this case nor Amn Barlow's rehabilitation and growth over time. This is a lifelong punishment for an offense that allegedly occurred when Amn Barlow was only 19 years old. Thus, the indexing is unfair, unjust, or otherwise cruel.

The sex offender registry has limitless and cascading effects on a person's life. Amn Barlow is already stigmatized because people can look him up online. Being a sex offender makes finding employment and housing nearly impossible. When coupled with the social stigma and harassment, the sex offender registry is a punishment that has daily, if not hourly, impacts on Amn Barlow's life. There is also limited evidence that the sex offender registry is effective. This

is especially true for someone like Amn Barlow, who is not a repeat offender and has been rehabilitated.

All told, the sex offender registry is an outdated, draconian system that punishes offenders for life, often for singular mistakes made decades before. Because of this, Amn Barlow's indexing for sex offender registry violates public policy. This Court has authority to correct errors in post-trial processing, Article 66(d)(2), Uniform Code of Military Justice, and it should exercise that authority to correct the indexing in this case.

II. The Government committed prosecutorial misconduct by failing to provide discovery of CN's allegations against another Airman.

After his trial, Amn Barlow learned that CN made an allegation against another Airman. This allegation involved a sexual interaction of some kind. This allegation may have been made before Amn Barlow's court-martial. However, it is possible that it was made after; Amn Barlow does not know when the allegation was made because the Government never provided discovery of it. Regardless of when the allegation occured, the Government's failure to disclose this infromation to Amn Barlow's defense team violated the Government's discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), as well as the Manual for Courts-Martial. Therefore, the findings and sentence should be set aside with prejudice.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40552**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Ricky Z. BARLOW	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 14 March 2025, Appellant, through counsel, submitted an assignments of error brief to the court. Appellant alleges, *inter alia*, that trial defense counsel were ineffective. Specifically, Appellant claims trial defense counsel were deficient in that they: (1) "failed to conduct an adequate pretrial investigation," and (2) "failed to present favorable evidence at trial."

On 24 March 2025, the Government filed a Motion to Compel Declarations. The Government requests this court compel each of Appellant's trial defense counsel, Captain Jordan Grande, Mr. Greg Gagne, and Mr. Keith Scherer, "to provide an affidavit or declaration in response to Appellant's allegation of ineffective assistance of counsel." According to the Government, Appellant's trial defense counsel indicated "they would only provide an affidavit or declaration pursuant to an order from this Court." The Government requests we provide trial defense counsel 30 days to respond to the order.

Also on 24 March 2025, the Government filed a Motion for an Enlargement of Time. Specifically, the Government "seeks a 14-day enlargement of time following the submission of trial defense counsel's declaration to this Court to respond properly and completely to Appellant's brief."

Appellant did not submit opposition to either motion.

The court has examined the claimed deficiencies and finds good cause to compel a response. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and his trial defense counsel. Considering the Government has not had an opportunity to conduct discovery of the facts and circumstances underlying the claims—because trial defense counsel stated they would not provide information except by an order from this court—the court is not disposed to deny the requested enlargement of time.

Accordingly, it is by the court on this 1st day of April, 2025,

ORDERED:

The Government's Motion to Compel Declarations is **GRANTED**. Captain Jordan Grande, Mr. Greg Gagne, and Mr. Keith Scherer are ordered to provide affidavits or declarations to the court with specific and factual responses to Appellant's claims that trial defense counsel were ineffective.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **1 May 2025**. The Government shall also deliver a copy of the responsive documents to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **15 May 2025**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**UNITED STATES' MOTION FOR AN ENLARGMENT OF TIME**
v.	)	
	)	Before Panel No. 2
Airman (E-2) **RICKY Z. BARLOW** United States Air Force *Appellant.*	)	No. ACM 40552
	)	24 March 2025

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

Pursuant to Rule 23.3(m)(5) of this Court's Rules of Practice and Procedure, the United States respectfully requests an enlargement of time to adequately respond to Appellant's assignments of error in which he alleges two claims of ineffective assistance of counsel against his trial defense counsel. Filed in conjunction with this motion, the United States filed a Motion to Compel Declarations and asked this court to order Appellant's trial defense counsel, Capt JG, Mr. GG, and Mr. KS, to each provide a declaration in response to Appellant's ineffective assistance of counsel claims. The United States seeks a 14-day enlargement of time following the submission of trial defense counsel's declarations to this Court to respond properly and completely to Appellant's brief.

The United States' Answer to Appellant's Assignment of Errors brief is currently due to the Court on 13 April 2025. Good cause exists to grant this request. Counsel will require a reasonable amount of time after the submission of declarations to address properly Appellant's ineffective assistance of counsel claim. In addition, depending on office workload over the next few weeks, this case may be assigned to one of the reservists who is scheduled to do an upcoming tour. The United States believes 14 days is sufficient to prepare a proper and

responsive brief on this issue and to secure supervisory review once the ordered declarations are received by the Court.

This case was docketed with the Court on 19 December 2023. Since docketing, Appellant has been granted twelve enlargements of time. This is the United States' first request for an enlargement of time. As of the date of this request, 461 days have elapsed.

If this Court grants the United States' request, the United States asks that this Court set a specific due date for the brief to avoid any confusion.

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

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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 24 March 2025.

VANESSA BAIROS, Maj, USAF
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Government Trial and Appellate Operations Division
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(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**UNITED STATES' MOTION TO COMPEL DECLARATIONS**
v.	)	Before Panel No. 2
Airman (E-2) **RICKY Z. BARLOW** United States Air Force *Appellant.*	)	No. ACM 40552
	)	24 March 2025

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, the United States hereby requests this Court compel each of Appellant's trial defense counsel, Capt JG, Mr. GG, and Mr. KS, to provide an affidavit or declaration in response to Appellant's allegation of ineffective assistance of counsel. In his assignments of error, Appellant claims his trial defense counsel were ineffective: (App. Br. at 1.)

On 21 March 2025 and 24 March 2025, trial defense counsel responded to undersigned counsel stating that they would only provide an affidavit or declaration pursuant to an order from this Court. Civilian defense counsel told undersigned counsel that they are currently preparing for another trial. Thirty days to respond to this Court's order should be sufficient.

To prepare an answer under the test set out in United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991), the United States requests that this Court compel trial defense counsel to provide an affidavit or declaration. Appellant is alleging his trial defense counsel were ineffective because they failed to conduct an adequate pretrial investigation and failed to present favorable evidence at trial. (App. Br. at 4.) A statement from Appellant's counsel is necessary because the record is insufficient to determine trial defense counsel's strategy and whether they failed to

conduct an adequate pretrial investigation. Thus, the United States requires statements from both trial defense counsel to adequately respond to Appellant's brief. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from both trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

Accordingly, the United States respectfully requests this Court order each trial defense counsel to provide a declaration, containing specific and factual responses to Appellant's allegations of ineffective assistance of counsel, within 30 days of this Court's order.

WHEREFORE, the United States respectfully requests that this Honorable Court grant this motion to compel declarations.

[redacted]
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MARY ELLEN PAYNE
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(240) 612-4800

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 24 March 2025.

VANESSA BAIROS, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force, *Appellant*.	)	No. ACM 40552 15 March 2025

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

Pursuant to Rules 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Amn Barlow moves to attach the following documents to the Record of Trial:

- Barlow's Declaration, dated 14 March 2025
- ML's Declaration, 12 March 2025
- XL's Declaration, dated 14 March 2025

These declarations are relevant and necessary to this Court's evaluation of ineffective assistance of counsel assignment of error. Amn Barlow's declaration details the communication he had with his trial defense counsel. It provides information concerning the witnesses he told his trial defense team to interview before trial. Barlow Decl. The declaration from ML provides that ML was never contacted by Amn Barlow's attorneys, but that he would have provided information relevant to the case if he had been. XL's declaration details the information he could have testified to had he been called at trial.

In *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020), the Court of Appeals for the [illegible]s continued the practice of allowing consideration of matters outside the record to

GRANTED
25 MAR 2025

resolve issues reasonably raised by materials in the record but not fully resolvable by those materials. Here, the ineffective assistance of counsel issue raised as an assignment of error revolves how trial defense counsel did not interview ML and failed to call XL as a witness. Their declarations, along with Amn Barlow's declaration, provides this Court the necessary information to resolve this issue.

WHEREFORE, Amn Barlow requests this Court grant this motion to attach.

Respectfully submitted,

[redacted]

TREVOR N. WARD, Maj, USAF
Appellate Defense Counsel
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(240) 612-2807

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 15 March 2025.

Respectfully submitted,

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Appellate Defense Counsel
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant.*	)	No. ACM 40552 1 May 2025

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 this Court to attach the following documents to this motion:

- Appendix A – *Maj Jordan Grande Declaration*, dated 30 April 2025 (3 pages)
- Appendix B – *Mr. Gregory Gagne Declaration*, dated 29 April 2025 (3 pages)
- Appendix C – *Mr. Keith Scherer Declaration*, dated 30 April 2025 (8 pages)

The attached declarations are responsive to this Court's order directing Maj Grande, Mr. Gagne, and Mr. Scherer to provide declarations responsive to Appellant's Assignment of Error concerning whether he received ineffective assistance of counsel. (Court Order, dated 1 April 2025.) Appellant claims his trial defense counsel were ineffective. (App. Br. at 3-9.) These declarations are necessary to resolve these assignments of error.

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Accordingly,

GRANTED
9 MAY 2025

the attached documents are relevant and necessary to address this Court's order and Appellant's Assignment of Error.

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

[redacted]
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MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 1 May 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant.*	)	No. ACM 40552 15 May 2025

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

ISSUES PRESENTED

I.

WHETHER AIRMAN BARLOW WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT.

II.

WHETHER AIRMAN BARLOW'S INDEXING FOR SEX OFFENDER REGISTRY VIOLATES PUBLIC POLICY.[1]

III.

WHETHER THE GOVERNMENT COMMITTED PROSECUTORIAL MISCONDUCT BY FAILING TO PROVIDE DISCOVERY OF CN'S ALLEGATIONS AGAINST ANOTHER AIRMAN.

STATEMENT OF CASE

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

[1] Issues II and III are raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF FACTS

In September 2022, CN arrived at Hill Air Force Base (AFB), UT, after completing her technical training. (R. at 39). CN and Appellant had attended technical training together, but CN did not know him at that time. (Id.). When CN arrived at Hill AFB, Appellant approached her and told her they had gone to technical school together. (Id.). Appellant recognized CN, but CN did not recognize him. (Id.). Appellant and CN were both assigned to the same unit at Hill AFB, but not the same "shop." (R. at 77). Over her first few weeks at Hill AFB, CN became friends with other recently arrived airman, and she started to spend time with Appellant in group settings. (R. at 40). These get-togethers involved drinking, playing games, or watching television. (Id.).

On three or four occasions in late September and early October 2022, CN and Appellant left these gatherings together to go back to either of their dormitory rooms togethers. (R. at 40-41). On two or three of these nights, they had consensual sex in their dormitory rooms. (R. at 41). CN and Appellant were not in a committed relationship and did not go on any dates. (Id.). When CN discussed wanting more than just sex from Appellant, he declined, so CN and Appellant "came to the conclusion that it was best to just go [their] own ways." (R. at 41-42). CN told Appellant they could no longer sleep together. (R. at 42). Appellant "seemed okay with that." (R. at 43).

In late October or early November 2022, CN met MP. CN and MP began to spend more time together, which progressed to an official dating relationship in early December 2022. (Id.). CN thought the relationship was "great" and that they got "along well together." (R. at 44). Shortly before 25 December 2022, CN and MP celebrated MP's birthday and the relationship was "going really well." (Id.). MP was aware that CN and Appellant had previously had a

sexual relationship. (Id.). CN and Appellant did not see each other often, but on at least one occasion a group of men in the shop, including Appellant, tried to talk to CN about MP. (R. at 45). CN "kind of shut them down" but said she appreciated the other airmen "acting like big brothers." Appellant did not like this comment and asked CN "[o]h, you sleep with your big brothers now?" (Id.). Appellant then "threw his hands up" and "walked away." (Id.). This struck CN as strange because she thought she and Appellant "had moved on." (Id.).

On 25 December 2022, CN and Appellant attended Christmas gatherings with other members of their unit. (R. at 47). While the group moved to different locations during the day, at about five or six o'clock in the evening they came together again in KG's dormitory room. (R. at 47-48). MP did not attend because he was on leave. (R. at 46). CN and MP were communicating "multiple times a day" during his leave. (R. at 47). CN started drinking around this time. (R. at 49). CN thought she had three or four canned drinks that might have been seltzers. (Id.). CN felt intoxicated and was "coming out of [her] shell." CN felt more talkative and more flirtatious. (R. at 50). CN's memory was foggy at that time. (Id.). CN could recall putting her legs over another airman and getting close to him. (Id.). At one point, Appellant put his arm around CN and she "let him." (Id.). CN could "kind of remember going home." (R. at 51).

CN did not talk to Appellant about hanging out individually like they used to after the party, nor did she tell Appellant to come over. (Id.). KG and another friend walked CN home. (Id.). KG testified that he walked CN back because she was "drunk," and he wanted to make sure she was safe. (R. at 144). CN's dormitory building was next door to KG's, and Appellant lived in a third building near theirs. (R. at 51).

CN could not recall everything precisely, but she knew she got ready for bed and called MP while in her dormitory room. (R. at 52). CN changed into an "oversized sweatshirt" and underwear and brushed her teeth because she intended to go to sleep. (R. at 52-53). While on the phone with MP, CN told him she was "so drunk." (Id.). MP testified that CN said "[e]verything is spinning" and "I can't stand up." (R. at 180). CN's voice was very slurred. (Id.). MP encouraged CN to drink water and get some rest. (Id.). CN testified she was in her dormitory room for about 20 to 30 minutes before she heard a knock on her door. (R. at 53). MP heard the knock on the phone call. (R. at 180). CN ended the call with MP to answer her door. (R. at 53).

When CN answered the door, she was confused to see Appellant outside. (R. at 53-54). Appellant had not texted her or given any other indication that he was coming to her room. (R. at 59). Appellant didn't say anything initially and just walked into her dormitory. (R. at 54). CN thought they talked for a bit at first because she didn't understand why he'd come to her dormitory after the party. (Id.). CN sat on her bed while Appellant stood in the middle of the room. (Id.). CN texted KG "I think I need help" during this time because she felt something was "off." (R. at 60). Appellant then sat next to CN on the bed, took her by the shoulders, and started to kiss her. (R. at 54). CN did not kiss Appellant back. (R. at 55). CN said "[t]his isn't right," "I have a boyfriend," and "we can't do this." (Id.). Appellant pulled CN's underwear off, "got on top of" her, and penetrated her vagina with his penis. (R. at 55-56). CN cried and told Appellant "I don't think this is right," "I have a boyfriend," and "no." (Id.). CN did not "reciprocate" any physical touch with Appellant and feared him at that point. (Id.).

Appellant asked CN if it "was okay," and CN said "no," but Appellant ignored her. (Id.). CN said "no" constantly and then turned her head away while she waited "for it to be over."

(Id.). After CN started crying, Appellant asked if she was okay. (R. at 58). CN said no, and Appellant tried to "verbally comfort" her by saying "[i]t's okay. It's fine. It's okay." (Id.). Appellant did not stop having sex with her at that time. (Id.). CN did not consent to sexual intercourse with Appellant at any time that night. (R. at 59).

While Appellant was still in bed with CN, KG came to her room. (Id.). Appellant got out of bed and answered the door. (Id.). CN saw light in the room and heard what sounded like KG's voice. (Id.). KG asked if everything was okay, and Appellant said yes. (R. at 61). The door closed and Appellant went into CN's bathroom. CN thought Appellant might have showered and thought she heard the sound of vomiting. (Id.).). MP testified that while Appellant was in the bathroom, CN called him crying and said, "I think I just got raped." (R. at 181, 183). The conversation ended abruptly because CN hung up when Appellant came back into her room. (R. at 182).

While CN couldn't quite recall how, KG came to her room again to "check on her." (R. at 62). Appellant quickly dressed and left CN's room. (Id.). CN was lying on her bed crying. (Id.). KG testified that he spoke briefly with Appellant at CN's dormitory room door, then went in to check on her. (R. at 146). KG saw CN crying on her bed and said she thought she "got raped." (R. at 147). CN testified that she told KG what Appellant had done. (R. at 62-63). They called MP, but CN asked KG to leave because she wasn't comfortable with him in the room due to lingering fear. (R. at 67). MP testified that during the phone call, CN told him she was paralyzed with fear and that Appellant "started taking off [her] clothes," that she "told him [she] don't want to do this," and "please stop." (R. at 185).

KH arrived at some point during this phone call because CN had texted him as well to say she thought she had been raped. (R. at 67, 204). KH saw that CN was "shaken up" and she

felt "lifeless" when he gave her a hug. (R. at 205). KH thought CN did not seem "mentally there" and was apprehensive. (Id.). CN wasn't speaking clearly due to her crying, but he heard her say "I don't want to ruin his life" repeatedly. (R. at 206). CN eventually told him what Appellant had done, which KH described as Appellant "pushing forward and she said no, and then the acts continued from there without her consenting." (R. at 207). When KH put his hand on her shoulder to comfort her, CN said "[d]on't touch me" and did not want any physical contact. (R. at 208).

MP finally told CN that if she did not report MP, he was going to. (R. at 68). CN decided to report the incident to one of her noncommissioned officers. (R. at 68). CN went to the Air Force Office of Special Investigations to report Appellant that night. (R. at 69). CN also had a SAFE kit conducted. (R. at 74). CN then asked KH if she could sleep in his room because hers felt "tainted." (R. at 75). KH let her come to his room, but CN was "pretty restless," and he didn't think she slept. (R. at 209). If he touched her accidentally, she again said "don't touch me." (Id.). CN's aversion to touch was not normal behavior for her. (R. at 210).

ARGUMENT

I.

APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Additional Facts

Appellant has alleged that his trial defense team was ineffective because they (1) did not conduct a full interview with ML and subsequently did not call him to testify, (2) did not call XL to testify, and (3) did not secure security video footage from CN's dormitory from the night of the sexual assault.

In response to Appellant's allegation of ineffective assistance of counsel (IAC), Appellant's trial defense counsels Maj Jordan Grande, Mr. Gregory Gagne, and Mr. Scherer provided declarations to this court on 1 May 2025. (Appendices A-C).

All three trial defense counsel stated that they discussed the witnesses provided by Appellant as possible witnesses for trial. Appellant identified ML as a possible fact witness, but did not mention that ML could also testify as to CN's untruthfulness or attention-seeking character. (Appendix C). Appellant alleged that he sent a text message proffer to his trial defense team that said, "I have more feelings for Barlow . . .than you [SSgt Porter]." (App. Decl.). Maj Grande, Mr. Gagne, and Mr. Scherer all clarified that in Appellant's text message proffer about ML, he actually wrote that ML would say MP told ML that CN said, "I have more feelings for Barlow *the guy who supposedly raped me* than you" to MP." (Appendices A-C) (emphasis added). While Mr. Scherer did reach out to ML to set up an interview, he ultimately decided it was unnecessary because such evidence would only bolster the Government's case by giving MP and CN the opportunity to maintain CN had always referred to Appellant's actions as sexual assault and Appellant as her rapist. (Appendix C).

With respect to ML informing them that CN sought mental health treatment following the sexual assault, the trial defense team was already aware of this. (Appendix B). They believed that such information would be harmful, not helpful, to Appellant's case if presented in court. (Appendices A-C).

Regarding XL, the defense paralegal reached out to him several times and XL provided a character letter for Appellant's sentencing case. (Appendix C). While Mr. Scherer felt XL's sentencing character letter was valuable, the defense team did not believe his factual proffer was. (Id.). XL could have testified that MP pressured CN to report Appellant, but the defense team

did not need XL to elicit such evidence: both MP and CN openly acknowledged it as the truth. (Id.). The defense team felt CN's admitted reluctance to report Appellant and her reluctance to "ruin [Appellant's] life" hurt Appellant's case rather than bolstered it. (Id.). Mr. Scherer felt that a victim who was reluctantly willing to testify against her alleged rapist was "more compelling" than one who was motivated by other possible factors such as financial gain. (Id.). Because of this, it would not have benefited Appellant's case to emphasize this point with an additional witness, assuming XL's hearsay testimony was even admissible. (Id.).

Finally, the defense team sought any video evidence that might have existed in the case through discovery requests. (Appendices A, C). The senior trial counsel on the case confirmed that no video recordings existed. (Appendix C).

The defense team discussed their decision to go forward without using ML or XL as a witness and without conducting an interview with ML with Appellant prior to trial. (Appendix B). At the time, Appellant "seemed to understand and agree" with the team's decisions. (Id.).

Standard of Review

Allegations of ineffective assistance are reviewed de novo. United States v. Palacios-Cueto, 82 M.J. 323, 327 (C.A.A.F. 2022) (citations omitted).

Law and Analysis

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668, 686 (1984). "In order to prevail on a claim of ineffective assistance of counsel (IAC), an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). "Appellate courts do not lightly vacate a conviction in the absence of a serious

incompetency which falls measurably below the performance . . . of fallible lawyers." United States v. DiCupe, 21 M.J. 440, 442 (C.M.A. 1986) (quotations omitted) (citing United States v. DeCoster, 624 F.2d 196, 208 (D.C.Cir.1979)). If an appellant has made an "insufficient showing" on even one of the elements, this Court need not address the other. Strickland, 466 U.S. at 697.

In assessing the effectiveness of counsel, courts "*must* indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 671 (emphasis added); *see also* Harrington v. Richter, 562 U.S. 86, 105 (2011) ("Even under de novo review, the standard for judging counsel's representation is a most deferential one."). Counsel's performance is not deficient "when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

Military courts use a three-part test to determine whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, whether there a reasonable probability that, absent the errors, there would have been a different result. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)) (quotations omitted).

1. Trial defense counsel's performance was not deficient.

a. Trial defense counsels' decision to proceed without ML and XL as findings witnesses has a reasonable explanation.

Appellant's claims of IAC for declining to interview ML, declining to call either ML or XL as witnesses, and inability to obtain security video footage from CN's dormitory fail because there was a "reasonable explanation for counsel's actions." *See* Gooch, 69 M.J. at 362. The trial defense team analyzed and advised Appellant of the possible benefits and disadvantages of proceeding with ML or XL as findings witnesses; mainly, that their testimony would not *help* Appellant's case. (Appendix C).

ML

The decision not to proceed with an interview of ML was reasonable because, based on Appellant's original proffer, ML could not provide the trial defense team with new information or information beneficial to Appellant's case.

The trial defense team had no reason to believe ML would provide a "negative opinion" about CN with respect to her character for truthfulness or attention-seeking because Appellant never informed them of that possibility. (Appendix C).

With respect to mental health evidence, the trial defense team already knew that CN had received mental health treatment following the sexual assault, and so they did not need to interview ML to learn about it. (Appendix B). Trial defense also believed that presenting the factfinder with evidence that CN was so affected by the incident with Appellant that she sought in-patient mental health care would increase CN's credibility, not hurt it. (Appendix A-C). It is reasonable to think that a factfinder would become more sympathetic and compelled by a victim's version of events after learning they were so traumatized that they sought mental health care after a sexual assault.

Second, the other piece of information ML might have provided involved a conversation between MP and CN that ML learned of through MP. The full proffer from Appellant revealed that MP thought CN had an argument with MP during which she referred to Appellant as her supposed rapist. (Appendices A-C). The trial defense team believed that introducing this evidence would only create another opportunity for CN to refer to Appellant as her rapist. (Appendix C). Mr. Scherer believed that having ML testify about this conversation, assuming there was even a method to admit it through the hearsay rules, would bolster CN with her consistent reference to Appellant's actions as a rape and he as her rapist. (Id.). Such testimony would have hurt Appellant's chances for an acquittal, not helped them, and so declining to interview or call ML as a witness had a reasonable explanation.

XL

Trial defense counsel did not need to call XL as a witness because he would not provide any additional information to the factfinder to benefit Appellant. Trial defense counsel already knew CN, MP, and KH would testify that MP had pressured her to report Appellant for sexual assault and that CN was hesitant to ruin Appellant's life even if she thought it was the right thing to do. (Id.). Even if XL testified at trial to everything contained in paragraph 3 of his declaration, he did not provide anything that CN, MP, and KH were not already going to say. (R. at 68, 187-188, 206).

Based on Mr. Scherer's assessment of the evidence and his experience with sexual assault cases, he understood that CN's reluctance to testify would likely make her testimony "more compelling" rather than less credible to the factfinder. (Id.). Since all XL would be able to testify to was CN's reluctance to testify, declining to call him as a witness had a reasonable explanation.

Video Footage

With respect to video evidence, Appellant's allegation that his defense team did not request security footage is untrue. (App. Br. at 4). His trial defense counsel could not discuss or present security footage from CN's dormitory from the night of the assault because none existed. (Appendix A). Maj Grande requested any video evidence in the case on 9 June 2023, and the Government informed her that they had nothing to disclose on 14 June 2023. Maj Grande reached out verbally to confirm that no security footage existed and was told it did not. (Id.). Mr. Scherer also confirmed the nonexistence of security footage with the senior trial counsel. (Appendix C). Therefore, the lack of any security footage by trial defense counsel is reasonably explained by its nonexistence.

Appellant's Understanding

Trial defense counsel reasonably believed that using either ML or XL as a witness would yield little benefit to Appellant and might, in fact, hurt his case by allowing CN to emphasize her perception that what occurred was a sexual assault. Appellant knowingly agreed with the defense team's way forward (Appendix B), and the decision regarding ML and XL had a reasonable explanation.

b. Trial defense counsels' performance did not fall measurably below the standard expected of fallible lawyers.

Trial defense counsel's performance did not fall below the standard of fallible attorneys because they had a coherent strategy based on the Government's "strong" case against Appellant. (Appendix A). "After a losing effort, hindsight usually suggests other ways that might have worked better; but that is not the measure of ineffective assistance of counsel." United States v. Sanders, 37 M.J. 116, 118 (C.M.A. 1993). Even with the benefit of hindsight, trial defense counsel did not take actions below the standard expected of them. The trial defense team

understood that ML and XL's testimonies would likely hinge on inadmissible hearsay (or double hearsay). Even if they were permitted to testify, it would only make CN appear more credible by bolstering the testimony CN had *already given*. If Appellant had told his trial defense team that ML might have a negative opinion on CN's character for truthfulness or attention-seeking, then perhaps the team would have completed a full interview with him. But the trial defense team should not be blamed for failing to act on information Appellant *didn't* provide to them. Believing that ML could only provide cumulative evidence, it was deficient for the defense team to expend time and resources elsewhere.

Trial defense counsel moved forward with their plan to attack CN and MP's credibility on other bases, and this strategy was sound given the strength of the Government's case against Appellant. Their conduct did not fall below the standard expected of fallible attorneys.

With respect to video evidence, trial defense counsel requested any video evidence in the case and were informed none existed. (Appendices A, C). There was no additional action necessary for the defense team to take to secure video footage because the Government hadn't *denied* the defense's request for videos; it had made clear no such videos existed. (Id.). Accepting the Government's assertion that the videos did not exist was not below the standard of fallible attorneys.

2. Appellant has not demonstrated a reasonable probability that his charges would have been dismissed but for trial defense counsel's performance.

To establish prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 698; Loving v. United States, 68 M.J. 1, 6-7 (C.A.A.F. 2008). "A reasonable probability is one sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Appellant has not shown that his trial would have resulted in a different result, in this case meaning an acquittal, if the trial defense team had conducted a full interview with ML or had either ML or XL testify.

Despite Appellant and ML's claim that he could have been a character witness against CN, the trial defense team had no knowledge that ML would testify regarding CN"s truthfulness or attention-seeking character. But even if ML had been permitted to testify to everything ML now claims he knew, it is unlikely to have swayed the factfinder. ML's opinion that CN is untruthful or attention seeking would not have effectively countered the testimony of KG, KH, and MP about the immediate aftermath of the sexual assault and CN's behavior following Appellant's sexual assault.

Regarding XL's testimony, what he could have provided would have been cumulative. CN, MP, and KH all testified that CN struggled with reporting Appellant for sexual assault. KH heard CN repeatedly say she didn't want to ruin Appellant's life." (R. at 206). XL did not provide anything new for the factfinder to consider, and so his testimony is very unlikely to have yielded a different result at trial.

Appellant also speculated that there may have been information hidden within CN's mental health records that could have assisted in his defense if ML was interviewed. (App. Br. at 6-7). However, it is unlikely trial defense counsel would have succeeded in acquiring records under MRE 513. Appellant did not specify which exception to psychotherapist privilege they could have used to access CN's mental health records. (App. Br. at 7). While Appellant cites generally to United States v. Mellette, it is unclear what unprivileged records he believes his trial defense team could have obtained or how they would have been relevant to the night of the sexual assault. Even from ML's declaration, there is no example of what "treasure trove" of

information he could have provided the trial defense team to assist in this manner other than general knowledge that CN sought mental health treatment. (*ML's Declaration*, dated 12 March 2025). Given CN and the other witnesses' testimony regarding CN's reaction to the sexual assault and deteriorated mental state afterwards, it is unlikely that CN's mental health records would have given Appellant enough evidence to result in an acquittal.

3. Conclusion.

Appellant's IAC claim fails all three prongs of the Gooch test. 69 M.J. at 362. Appellant's belief that ML and XL's testimony could have turned the tide of his court-martial disregards the significant evidence offered against him. While Appellant is displeased with the result of his trial, his trial defense team's strategy was reasonable. This Court should deny this assignment of error.

II.

THERE WAS NO ERROR UNDER ARTICLE 66(d)(2) WHEN THE STAFF JUDGE ADVOCATE CORRECTLY FOUND THAT SEX OFFENDER REGISTRATION APPLIED TO APPELLANT'S CONVICTION.[2]

Additional Facts

The Staff Judge Advocate's first indorsement to the Statement of Trial Results (STR) and Entry of Judgment (EOJ) in Appellant's case contains the following statement: "Sex Offender Notification in accordance with DoDI 1325.07: Yes." (*Statement of Trial Results*, 28 September 2023, ROT, Vol. 1; *Entry of Judgment*, 28 November 2023, ROT, Vol. 1.)

[2] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Standard of Review

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

Law and Analysis

A. This Court lacks jurisdiction to determine whether Appellant should be registered as a sex offender in accordance with DoDI 1325.07.

Because sex offender registration is a collateral consequence, it is beyond the scope of this Court's jurisdiction under Article 66, UCMJ.

In United States v. Vanzant, this Court held that 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are beyond the scope of this Court's jurisdiction under Article 66, UCMJ. 84 M.J. 671, 681 (A.F. Ct. Crim. App. 28 May 2024). A collateral consequence is "[a] penalty for committing a crime, in addition to the penalties included in the criminal sentence." United States v. Miller, 63 M.J. 452, 457 (C.A.A.F. 2006) (alteration in original). Sex offender registration, which "operates independently of the sentence adjudged," is one such consequence. United States v. Talkington, 73 M.J. 212, 216-217 (C.A.A.F. 2014).. The requirement that Appellant register as a sex offender is "a consequence of his conviction that is separate and distinct from the court-martial process." Miller, 63 M.J. at 457 (emphasis added). Pursuant to the Sex Offender Registration and Notification Act (SORNA), anyone convicted of a sex offense is required to register as a sex offender, irrespective of their sentence. 34 U.S.C. § 20913. Appellant, who was convicted of sexual assault, falls squarely into that category. *See* DoDI 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, Table 6 (11 March 2013). *See also*

DoDI 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, Table 4 (21 November 2024) (providing updated DIBRS codes for sex offender registration).

Because sex offender registration operates in the same way as firearm prohibits under 18 U.S.C. § 922(g), it is not part of the finding or sentence, and it should also be considered beyond this Court's authority to review.

B. The DoDI 1325.07 annotation was entered into the record before the judgment of the court was entered via the EOJ. Thus, this Court lacks jurisdiction to review Appellant's claim under Article 66(d)(2).

Article 66(d)(2), UCMJ, does not grant this Court authority to provide relief under this assignment of error. Article 66(d)(2), UCMJ, does not apply to Appellant's case because the DoDI 1325.07 annotation on the first indorsement of the STR and incorporated into the EOJ was neither an error nor did it occur after the judgment was entered on the record. "Article 66(d)(2), UCMJ, only authorizes a CCA to provide relief when there has been an 'error or excessive delay in the processing of the court-martial." United States v. Williams, 85 M.J. 121, 126 (C.A.A.F. 2024). In Williams, our Superior court pointed to three statutory conditions that must be met before a CCA may review a post-trial processing error under Article 66(d)(2), UCMJ. Id. First, an error must have occurred. Id. Second, an appellant must raise a post-trial processing error with the CCA. Id. Third, the error must have occurred after the judgment was entered. Id. at 27.

Before distributing the first indorsement to the STR, the Staff Judge Advocate must sign and annotate whether sex offender registration is required in accordance with DoDI 1325.07. Department of Air Force Instruction 51-201, *Administration of Military Justice*, para. 29.1 (14 April 2022.) As a result, the DoDI 1325.07 annotation on the first indorsement of the STR is attached to the STR as "other information" under R.C.M. 1101(a)(6), and then both the other

information and the STR are entered into the record. Article 60(1)(C), UCMJ. Then the EOJ is entered into the record – after the STR. The EOJ is "the judgment of the court" cited in Article 66(d)(2). *Compare* Article 66, UCMJ, *with* Article 60c, UCMJ. Because the STR and the first indorsement are entered into the record before the judgment is entered into the record under Article 60c, UCMJ, the DoDI 1325.07 annotation on the first endorsement is not an error occurring "*after* the judgment was entered into the record." Article 66, UCMJ, (emphasis added). They are entered into the record again and simultaneously with the EOJ. Because they are entered again simultaneously with the judgment of the court through the EOJ, they are not errors occurring after the judgment is entered into the record. Article 60c, UCMJ. Thus, Article 66(d)(2), UCMJ, does not grant this Court jurisdiction to review DoDI 1325.07 annotation on either the STR or the EOJ.

C. Appellant's sex offender registration notation on the First Indorsement to the STR and EOJ were correct under DoDI 1325.07.

Appellant was properly indexed within the sex offender registry, and there is no error for this Court to correct under Article 66(d)(2). Appellant was convicted of sexual assault without consent under Article 120, UCMJ. This was a qualifying offense under the 2013 version of DoDI 1325.07 in effect at the time of Appellant's offense and trial. Appellant's EOJ reflects the current DIBRS code for a conviction of sexual assault, which is 120-2D. (ROT, Vol 1; *see* DoDI 1325.07, para. 5.7.d(1), Table 4.). A conviction for sexual assault coded as 120-2D occurring on or after 1 January 2019 requires sex offender registration. DoDI 1325.07, Table 4.

The Supreme Court of the United States found that sex offender registration has "a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." United States v. Kebodeaux, 570 U.S. 387, 395 (2013), citing Smith v. Doe, 538 U.S. 84, 102-103 (2003) (internal citations omitted). While

Appellant feels his sex offender registration is "unfair" because he was only 19 at the time of the offense and had been "drinking," these facts do not create exceptions to the application of sex offender registration under either DoDI 1325.07 or 34 U.S.C. § 20913. Even if this Court has authority to consider Appellant's claim, this Court should deny this assignment of error because Appellant's conviction qualifies for sex offender registration and his registration is not against public policy.

III.

CN WAS NOT THE NAMED VICTIM IN A SEPARATE CRIMINAL INVESTIGATION.[3]

Additional Facts

Appellant asserted that he "learned that CN made an allegation against another Airman. (App. Br. at 12). This allegation involved a sexual interaction of some kind" and Appellant did not know when the allegation was made with respect to his court-martial. (Id.). Appellant provided no further details on the origin of this information and has provided no evidence to the Court to support the claim in his brief. (Id.).

On 23 April 2025, Special Agent (SA) MS conducted a search with CN's name in both ORION and I2MS. (Appendix D). Neither database contained information that CN was a named victim in an alleged sexual offense investigation beside Appellant's. (Id.).

Standard of Review

The Government's failure to disclose discoverable evidence "is tested on appeal for prejudice, which is assessed 'in light of the evidence in the entire record.'" United States v.

[3] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Santos, 59 M.J. 317, 321 (C.A.A.F. 2004), citing United States v. Stone, 40 M.J. 420, 423 (C.M.A. 1994)).

If the defense made a specific request for information and the Government did not turn it over, the appellant may be entitled to relief for prejudice unless the Government can prove the nondisclosure was harmless beyond a reasonable doubt. United States v. Claxton, 76 M.J. 356, 359 (C.A.A.F. 2017). Such a failure is not harmless beyond a reasonable doubt "if the undisclosed evidence might have affected the outcome of the trial." Id.

However, if there was only a general request for discovery from the defense, then the appellant will only be entitled to relief if there is a "reasonable probability" of a different result at trial if the evidence had been disclosed." United States v. Roberts, 59 M.J. 323, 326-27 (C.A.A.F. 2004) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)) (additional citations omitted).

Law

"[T]he defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory." United States v. Garries, 22 M.J. 288, 293 (C.M.A. 1986) (citation omitted). Trial counsel is required to disclose, upon defense request, evidence "within the possession, custody, or control of military authorities" that is "relevant to defense preparation," intended for use by trial counsel in the Government's case-in-chief or rebuttal, or was obtained from the accused. R.C.M. 701(a)(2)(A). The Government is required to disclose favorable evidence upon trial defense counsel's request "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). If the evidence is "obviously of substantial value to the defense," the prosecution must turn over the information even if the defense has not made a request for it. United States v.

Agurs, 427 U.S. 97, 110 (1976). The Government's obligations under Brady also extend to impeachment evidence. Giglio v. United States, 405 U.S. 150, 154 (1972).

Analysis

To start, this Court cannot provide relief for a claim for which Appellant has provided no evidence. CN was not a named victim in another sexual assault case, and Appellant has provided no evidence to suggest that she was. (Appendix A, B; App. Br. at 12). AFOSI has no record of such an allegation. (Id.). There was no additional evidence regarding an allegation by CN to be disclosed to trial defense counsel. The Government is only required to turn over evidence of which it has knowledge and control, but neither is present in this case. R.C.M. 701(a)(2)(A). While Appellant asserted CN was a victim in another case, he has not explained why he thinks this, where the information came from, or who told him. (App. Br. at 12). With so little information, the Government cannot even address whether such information would have been discoverable under R.C.M. 701(a) had it been in the Government's control or possession. There is not enough information to even determine if this allegation against another airman, if it were true, would have constituted exculpatory evidence.

Since there is no record of such an allegation by CN, let alone a failure to disclose it, this Court cannot perform an analysis under either the harmless beyond a reasonable doubt or reasonable probability standards. *See* Claxton, 76 M.J. at 359; Roberts, 59 M.J. at 326-27. There is nothing for this Court to compare to the evidence admitted at trial to see if the result of Appellant's court-martial would have been different. From the information provided by Appellant, he is asking this Court to grant him relief without any foundation to support his allegation of a discovery violation. As there was no evidence in the possession or control of the

Government, there was nothing for the Government to disclose, and so Appellant could not have suffered any prejudice. Therefore, 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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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 15 May 2025.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40552**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Ricky Z. BARLOW	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 15 May 2025, the Government submitted a motion to attach a declaration by Special Agent MS dated 29 April 2025. The Government contends this document is relevant to Appellant's assignment of error that the Government failed to disclose a prior sexual assault allegation by the named victim. The Government contends that "if this Court decides to entertain Appellant's claim despite the lack of proof in the record," we should consider the declaration.

Appellant did not oppose the motion.

Having considered the Government's motion, this court's Rules of Practice and Procedure, and the applicable law, we grant the motion to attach. We defer consideration of the applicability of *United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020), and related case law to the attachment until we complete our Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's case.

Accordingly, it is by the court on this 23d day of May, 2025,

ORDERED:

The Government's Motion to Attach dated 15 May 2025 is **GRANTED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO ATTACH DOCUMENTS (SECOND)
v.	)	Before Panel No. 2
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force *Appellant.*	)	No. ACM 40552
	)	15 May 2025

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 this Court to attach the following documents to this motion:

- Appendix D – *Special Agent Matthew Schuyler Declaration*, dated 29 April 2025

Appellant's third assignment of error asserts that he is entitled to relief because the Government failed to disclose a prior sexual assault allegation by the named victim in his case.

The attached declaration is responsive to Appellant's assigned error. Special Agent (SA) Schuyler is the commander of Detachment 113 of the Air Force Office of Special Investigations (AFOSI) at Hill AFB, UT. After reviewing two different criminal databases, SA Schuyler prepared the attached declaration to clarify that AFOSI is not aware of any additional allegations of sexual assault made by the named victim in this case.

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-

record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Appellant's Issue III was not raised by materials in the record. However, if this Court decides to entertain Appellant's claim despite the lack of proof in the record, the United States asks that this Court consider the attached declaration, which is relevant to answering Appellant's claims.

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

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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 15 May 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**Reply Brief**
	)	Before Panel 2
v.	)	
	)	No. ACM 40552
Airman (E-2) **RICKY Z. BARLOW,** United States Air Force, *Appellant.*	)	22 May 2025

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

I. Airman Barlow's trial defense counsel were ineffective.

A. Failure to Conduct a Pretrial Investigation

Airman Barlow's trial defense counsel failed to conduct an adequate pretrial investigation. Failure to conduct a pretrial investigation constitutes ineffective assistance. *United States v. Scott*, 81 M.J. 79, 86 (C.A.A.F. 2021) (explaining there is no tactical reason for failing to contact potentially helpful witnesses and obtain information); *United States v. Miner*, ARMY 20200063, 2022 CCA LEXIS 512, at *7-8 (A. Ct. Crim. App. Aug. 26, 2022). Airman Barlow provided his defense team with the names of witnesses who could assist in his defense. Barlow Decl; First Gov't Mot. to Attach, dated 1 May 2025, App'x A at 1-2 [hereinafter JG Decl.]; First Gov't Mot. to Attach, dated 1 May 2025, App'x B at 1 [hereinafter GG Decl.]; First Gov't Mot. to Attach, dated 1 May 2025, App'x C at 5 [hereinafter KS Decl.]. This list included ML and XL. Barlow Decl. ML was never interviewed. ML Decl.; KS Decl. ("It's true we didn't interview him."). XL was interviewed for less than five minutes. XL Decl; *cf.* KS Decl. at 6 (explaining why XL was not contacted by an attorney after his initial interview but not contesting that the interview lasted only five minutes). This falls measurably below the performance expected of fallible attorneys. *See*

United States v. Lester, 2020 CCA LEXIS 376, at *4-5 (A. Ct. Crim. App. Oct. 23, 2020) (drawing a distinction between a "thorough" pretrial investigation—to include witness interviews—and making a strategic decision not to have a witness testify).

Instead of discussing the lack of pretrial investigation, however, the Government merely reframes the issue as one about not calling witnesses at trial. United States Answer, filed on May 15, 2025, at 10 [hereinafter Ans.] ("Trial defense counsel's decision to proceed without ML and XL as findings witnesses has a reasonable explanation."). But failing to call ML and XL as witnesses is only one part of the ineffective assistance, and ignoring the lack of pretrial investigation is problematic. The trial defense team's decision to not call ML and XL was uninformed. This is because they did not have the information available to adequately make that decision. ML Decl. (indicating that he never spoke with an attorney); XL Decl. (indicating that he only spoke with an attorney for less than five minutes). Any post hoc explanation by the trial defense counsel, *see generally* KS Decl., or the Government, Ans. at 10-11, should be met with skepticism.

Making matters worse, trial defense counsel blame Airman Barlow for their ineffective representation. *See, e.g.*, KS Decl. at 7. The Government adopts this faulty premise. Ans. at 13. Airman Barlow's trial defense counsel believed it was incumbent upon a young, junior enlisted Airman to understand the difference between fact and character witnesses and provide witnesses to his attorneys that fell within neat legal categories. KS Decl. at 7; GG Decl. at 1. This is problematic for at least two reasons. First, most witnesses do not fall within a neat category: fact *or* character. Often, fact witnesses *are* character witnesses. Second, effective counsel should never rely solely on their client to determine if a witness will be helpful; this is especially true when dealing with unsophisticated clients. In fact, at least KS did not believe Airman Barlow was

diligent or intelligent (maybe both) in his communications with the trial defense team. KS Decl. at 3. Despite this recognition, the trial defense team relied solely on Airman Barlow's assessment of ML when deciding whether to interview him. This was ineffective.

Airman Barlow provided a panoply of witnesses he thought would assist in his defense. Barlow Decl. He rightfully believed his attorneys would conduct due diligence and interview these witnesses to see what, if any, information they could provide. Barlow Decl. As they concede, however, the trial defense counsel failed to do this.

B. Trial Defense Counsel's Declarations should be Viewed Skeptically

The defensiveness of at least two of Airman Barlow's trial defense counsel should give this Court pause. *Cf.* WILLIAM SHAKESPEARE, HAMLET UNABRIDGED 73 (2005) ("The lady doth protest too much, methinks."). Common sense informs that being defensive damages credibility. *See, e.g.*, *United States v. Bremer*, 72 M.J. 624, 627 (N-M. Ct. Crim. App. 2013) ("[A]lthough the military judge purported to accept responsibility, he was palpably defensive."); *United States v. Barnes*, 57 M.J. 626, 632 (N-M. Ct. Crim. App. 2002) (reasoning that appellant's testimony would have "backfired" because he would have been defensive).

In JG's declaration, she spends much of the *first* paragraph conducting an ostensible prejudice analysis. JG Decl. at 1 ("The Government's evidence against [Airman] Barlow was strong."). This is both inappropriate and outside the scope of this Court's order. This Court ordered trial defense counsel to provide specific, *factual* responses to Airman Barlow's claims of ineffective assistance. Order, dated 1 April 2025, at 2. But JG's first paragraph focuses on the purported weight of evidence against Airman Barlow. There was no reason to articulate the weight of evidence for purposes of responding to the specific allegations made, which included not contacting witnesses or requesting discovery. Then, after JG's prejudice analysis, she ultimately

provides this Court with a legal conclusion: "[t]he claim that the performance of trial defense counsel was 'deficient' is baseless." JG Decl. at 1. This type of summary conclusion of law—after talking at length about matters outside the scope of this Court's order—is extremely defensive.

Surprisingly, KS's declaration is even worse. At times, he accuses Airman Barlow (and, seemingly, undersigned counsel) of "omit[ting] truth" and misleading this Court. *See, e.g.*, KS Decl. at 3, 7. When contesting one of Airman Barlow's claims, KS tells this Court that it is "demonstrably false. Or, if true, it's only technically true." KS Decl. at 6. This statement is both nonsensical and extremely defensive. Then KS makes ad hominem attacks against his own client: "I never knew [Airman] Barlow to use even basic punctuation." KS Decl. at 3. This strange aside further indicates the bias that Airman Barlow's own trial defense counsel had against him—that he was apparently neither smart nor diligent in his communications with them.

Taken together, these declarations show attorneys who are defensive in the face of an accusation. As common sense demonstrates, witnesses who are defensive when accused of wrongdoing lack credibility. This Court, therefore, should treat JG's and KS's declarations with skepticism.

C. Airman Barlow Demonstrated Prejudice

First, ML would have provided character for untruthfulness and character for attention-seeking behavior for the complaining witness. ML Decl. No such evidence was admitted in this case through other witnesses. Instead, KS implies that there would have been a "Pandora's Bar"[1]

[1] *But see United States v. Watson*, 386 F.3d 304, 308 n.2 (1st Cir. 2004) ("Although the more common allusion is to 'Pandora's box,' that usage is apparently erroneous. Zeus, determined to avenge himself on Prometheus, presented this femme fatale to Epimetheus (Prometheus' brother), first arming her with a jar containing all the evils of the world. After Epimetheus foolishly accepted the gift, Pandora proceeded to open the jar, thereby loosing a panoply of torments upon humanity.") (citation omitted).

had they presented ML as a witness. KS Decl. at 2. But the concerns expressed by KS would not have actualized if the defense presented only character evidence; any cross-examination would have been limited to the foundation and veracity of the character evidence, not factual evidence. Mil. R. Evid. 608(b). This character evidence could have changed the litigation landscape, especially in a case where the complaining witness went essentially unimpeached during cross-examination and no other character evidence was admitted.

Second, had the defense team interviewed ML, they would have known about specific mental health records related to the alleged sexual assault. ML Decl. The Government asserts that Mil. R. Evid. 513 would have prohibited disclosure of these records. But it is unclear how this is so, especially given the United States Court of Appeals for the Armed Forces's (CAAF) holding in *United States v. Mellette*. 82 M.J. 374, 375 (C.A.A.F. 2022) (permitting discovery of mental health records that do not include communications). Instead, the Government merely speculates that "it is unlikely that [the complaining witness's] mental health records would have given [Airman Barlow] enough evidence to result in an acquittal." Ans. at 15. This ignores the fact that the trial defense team didn't bother to conduct an interview or submit a supplemental discovery request to obtain such records. Without these steps, the trial defense team could not know what they did not know. Resolving uknown unknowns, DONALD RUMSFELD, KNOWN AND UKNOWN: A MEMOIR xiii (2011) ("[T]here are also unknown unknowns—the [things] we don't know we don't know."), is what pretrial investigations are supposed to do. Of course, in this case, the inadequate pretrial investigation failed to do that.

II. There are conflicting declarations in this case which at least require a post-trial *DuBay*[2] hearing.

At the very least, this Court is in receipt of conflicting declarations on an issue of ineffective assistance of counsel. ML stated that he was never contacted by any of Airman Barlow's attorneys. ML Decl. KS contests this. KS Decl. at 1 ("This is not true."). XL also contends that, after a brief five-minute conversation, he was never contacted by any of Airman Barlow's attorneys again. XL Decl. This, too, KS contests as untrue (or, as he says, "demonstrably false."). KS Decl. at 6.

The CAAF has held that conflicting declarations on ineffective assistance of counsel cannot be resolved without a *DuBay* hearing unless:

> (1) the facts alleged by the appellant would not result in relief even if true; (2) the appellant does not assert specific facts but only speculative or conclusory observations; (3) the appellant's factual assertions are not contested; (4) the record as a whole "compellingly demonstrates" the improbability of the facts asserted by the appellant; or (5) the appellant's factual assertions contradict statements made by the appellant on the record and the appellant does not "rationally explain why he would have made such statements at trial but not upon appeal."

United States v. Anderson, 55 M.J. 198, 202 (C.A.A.F. 2001) (quoting *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997)).

First, as articulated in section I, *supra*, the facts as alleged would result in relief, if true. Second, Airman Barlow has asserted specific facts—through himself and two witnesses. These facts are not speculative or conclusory. Third, as noted above and in section I, *supra*, many of Airman Barlow's facts are contested by JG, GG, and KS. Fourth, nothing in the record "compellingly demonstrates" the improbability of the facts as asserted. And fifth, Airman Barlow

[2] *United States v. DuBay*, 37 C.M.R. 411 (1967).

made no statements on the record in this case. Therefore, a post-trial *DuBay* hearing is necessary to resolve these factual disputes.

WHEREFORE, Airman Barlow respectfully requests this Court set aside his conviction and sentence or, at the very least, order a post-trial *DuBay* hearing.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 22 May 2025.

Respectfully submitted,

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