IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Technical Sergeant (E-5), **RENARD D. JENKINS,** United States Air Force, *Appellant.*	)	No. ACM S32765
	)	2 February 2024

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **9 April 2024**. The record of trial was docketed with this Court on 11 December 2023. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(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 Appellate Government Division on 2 February 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

5 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Technical Sergeant (E-6) RENARD D. JENKINS, USAF, *Appellant.*	)	ACM S32765 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 5 February 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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32765**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Renard D. JENKINS	)	**PANEL CHANGE**
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 14th day of February, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Technical Sergeant (E-5), **RENARD D. JENKINS,** United States Air Force, *Appellant.*	)	No. ACM S32765
	)	29 March 2024

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 May 2024**. The record of trial was docketed with this Court on 11 December 2023. From the date of docketing to the present date, 109 days have elapsed. On the date requested, 150 days will have elapsed.

On 10 July 2023, pursuant to his pleas, Technical Sergeant (TSgt) Renard D. Jenkins was convicted at a special court-martial convened at Joint Base Andrews, Maryland, of one charge and specification of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ); one charge and two specifications of communicating threats, in violation of Article 115, UCMJ; one charge and specification of unlawful entry in violation of Article 129, UCMJ; one charge and specification of false official statement in violation of Article 107, UCMJ; and one charge and specification of disorderly conduct in violation of Article 134, UCMJ. (Record of Trial (ROT), Vol 1, Entry of Judgment, dated 2 December 2023; R. at 71.) The military judge sentenced TSgt Jenkins to be confined for 150 days, reduced to the pay grade of E-1, and a bad conduct discharge. (R. at 135.) The convening authority took no action on the findings or sentence. (ROT,

Vol. 1, Convening Authority Decision on Action – *U.S. v. TSgt Renard D. Jenkins*, dated 9 August 2023.)

The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. TSgt Jenkins is not currently in confinement.

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

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(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 Appellate Government Division on 29 March 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

1 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RENARD D. JENKINS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32765 Special Panel

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 1 April 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Technical Sergeant (E-5), **RENARD D. JENKINS,** United States Air Force, *Appellant.*	)	No. ACM S32765
	)	1 May 2024

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 June 2024**. The record of trial was docketed with this Court on 11 December 2023. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 10 July 2023, pursuant to his pleas, Technical Sergeant (TSgt) Renard D. Jenkins was convicted at a special court-martial convened at Joint Base Andrews, Maryland, of one charge and specification of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ); one charge and two specifications of communicating threats, in violation of Article 115, UCMJ; one charge and specification of unlawful entry in violation of Article 129, UCMJ; one charge and specification of false official statement in violation of Article 107, UCMJ; and one charge and specification of disorderly conduct in violation of Article 134, UCMJ. (Record of Trial (ROT), Vol 1, Entry of Judgment, dated 2 December 2023; R. at 71.) The military judge sentenced TSgt Jenkins to be confined for 150 days, reduced to the pay grade of E-1, and a bad conduct discharge. (R. at 135.) The convening authority took no action on the findings or sentence. (ROT,

Vol. 1, Convening Authority Decision on Action – *U.S. v. TSgt Renard D. Jenkins*, dated 9 August 2023.)

The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. TSgt Jenkins is not currently in confinement.

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

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(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 Appellate Government Division on 1 May 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

3 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RENARD D. JENKINS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32765 Special Panel

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 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,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before a Special Panel
Technical Sergeant (E-5), **RENARD D. JENKINS,** United States Air Force, *Appellant.*	)	No. ACM S32765
	)	31 May 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignments of Error (AOE).[1] Appellant requests an enlargement for a period of 30 days, which will end on **8 July 2024**. The record of trial was docketed with this Court on 11 December 2023. From the date of docketing to the present date, 172 days have elapsed. On the date requested, 210 days will have elapsed.

On 10 July 2023, pursuant to his pleas, Technical Sergeant (TSgt) Renard D. Jenkins was convicted at a special court-martial convened at Joint Base Andrews, Maryland, of one charge and specification of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ); one charge and two specifications of communicating threats, in violation of Article 115, UCMJ; one charge and specification of unlawful entry in violation of Article 129, UCMJ; one charge and specification of false official statement in violation of Article 107, UCMJ; and one charge and specification of disorderly conduct in violation of Article 134, UCMJ. (Record of Trial

[1] Undersigned counsel originally submitted a motion for a fourth enlargement of time in this case on 31 May 2024 at approximately 1207. However, counsel respectfully withdraws that motion and submits this one in order to document the correct panel that this case is before in the caption.

(ROT), Vol 1, Entry of Judgment, dated 2 December 2023; R. at 71.) The military judge sentenced TSgt Jenkins to be confined for 150 days, reduced to the pay grade of E-1, and a bad conduct discharge. (R. at 135.) The convening authority took no action on the findings or sentence. (ROT, Vol. 1, Convening Authority Decision on Action – *U.S. v. TSgt Renard D. Jenkins*, dated 9 August 2023.)

The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. TSgt Jenkins is not currently in confinement.

Undersigned counsel is currently assigned 20 cases; 14 cases are pending initial AOEs before this Court. Of those, the following cases are counsel's highest priorities:

1) *United States v. Cassaberry-Folks*, ACM 40444 – The record of trial consists of seven volumes. The transcript is 375 pages. There are four Prosecution Exhibits, three Defense Exhibits, one Court Exhibit and 11 Appellate Exhibits. Undersigned counsel is working towards completion of a final drafted assignment of errors. This case is on its eleventh and final enlargement of time and due for submission on 31 May 2024.
2) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case it on its seventh enlargement of time. Undersigned counsel has not yet completed an initial review of the record of trial.
3) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial

from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 1134 page transcript. This case is on its fifth enlargement of time. Undersigned counsel has not yet completed an initial review of the record of trial.

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

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

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(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 Appellate Government Division on 31 May 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

3 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RENARD D. JENKINS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32765 Special Panel

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 3 June 2024.

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 S32765**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Renard D. JENKINS	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 1 July 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error.* The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 9th day of July, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **7 August 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.

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* In the heading of this motion, counsel erroneously indicates Appellant's grade is E-5.

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

[redacted]
OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before a Special Panel
Technical Sergeant (E-5), **RENARD D. JENKINS,** United States Air Force, *Appellant.*	)	No. ACM S32765
	)	1 July 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 August 2024**. The record of trial was docketed with this Court on 11 December 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 10 July 2023, pursuant to his pleas, Technical Sergeant (TSgt) Renard D. Jenkins was convicted at a special court-martial convened at Joint Base Andrews, Maryland, of one charge and specification of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ); one charge and two specifications of communicating threats, in violation of Article 115, UCMJ; one charge and specification of unlawful entry in violation of Article 129, UCMJ; one charge and specification of false official statement in violation of Article 107, UCMJ; and one charge and specification of disorderly conduct in violation of Article 134, UCMJ. (Record of Trial (ROT), Vol 1, Entry of Judgment, dated 2 December 2023; R. at 71.) The military judge sentenced TSgt Jenkins to be confined for 150 days, reduced to the pay grade of E-1, and a bad conduct discharge. (R. at 135.) The convening authority took no action on the findings or sentence. (ROT,

Vol. 1, Convening Authority Decision on Action – *U.S. v. TSgt Renard D. Jenkins*, dated 9 August 2023.)

The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. TSgt Jenkins is not currently in confinement.

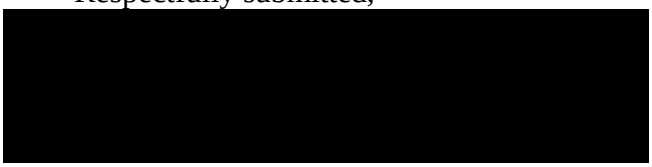
Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its ninth enlargement of time.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its sixth enlargement of time. Counsel has completed an initial review of the record of trial from the remanded hearing.
3) *United States v. Johnson*, ACM 40537 – The record of trial is 7 volumes consisting of 19 prosecution exhibits, 4 defense exhibits, 27 appellate exhibits, and 2 court exhibits. The transcript is 605 pages. This case is on its fifth enlargement of time. Counsel has completed an initial review of the record of trial.

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

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

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(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 Appellate Government Division on 1 July 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

2 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Technical Sergeant (E-6) RENARD D. JENKINS, USAF, *Appellant.*	)	ACM S32765
	)	Special Panel

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 2 July 2024.

[redacted]

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,*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before a Special Panel
Technical Sergeant (E-5), **RENARD D. JENKINS,** United States Air Force, *Appellant.*	)	No. ACM S32765
	)	31 July 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 September 2024**. The record of trial was docketed with this Court on 11 December 2023. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed.

On 10 July 2023, pursuant to his pleas, Technical Sergeant (TSgt) Renard D. Jenkins was convicted at a special court-martial convened at Joint Base Andrews, Maryland, of one charge and specification of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ); one charge and two specifications of communicating threats, in violation of Article 115, UCMJ; one charge and specification of unlawful entry in violation of Article 129, UCMJ; one charge and specification of false official statement in violation of Article 107, UCMJ; and one charge and specification of disorderly conduct in violation of Article 134, UCMJ. (Record of Trial (ROT), Vol 1, Entry of Judgment, dated 2 December 2023; R. at 71.) The military judge sentenced TSgt Jenkins to be confined for 150 days, reduced to the pay grade of E-1, and a bad conduct discharge. (R. at 135.) The convening authority took no action on the findings or sentence. (ROT,

Vol. 1, Convening Authority Decision on Action – *U.S. v. TSgt Renard D. Jenkins*, dated 9 August 2023.)

The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. TSgt Jenkins is not currently in confinement. TSgt Jenkins has been advised of his right to a timely appeal, as well as the request for an enlargement of time. TSgt Jenkins has agreed to the request for an enlargement of time. Additionally, undersigned counsel has been in communication with TSgt Jenkins as to the progress and current status of the case.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its tenth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its seventh enlargement of time. Counsel has completed an initial review of the record of trial from the remanded hearing.
3) *United States v. Jenkins*, ACM S32765 – This is the instant case. Counsel has completed an initial review of the record of trial.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Counsel's top priority is *United States v. Hilton*, which counsel hopes to have completed in coordination with civilian counsel as soon as possible. Following this, counsel expects to have a brief submitted for *United States v. Martinez* in short order. Afterwards, counsel will be dedicating his resources to completing work on this case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(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 Appellate Government Division on 31 July 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

1 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Technical Sergeant (E-6) RENARD D. JENKINS, USAF, *Appellant.*	)	ACM S32765 Special Panel

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

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

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 1 August 2024.

[redacted]

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,*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before a Special Panel
Technical Sergeant (E-5), **RENARD D. JENKINS,** United States Air Force, *Appellant.*	)	No. ACM S32765
	)	29 August 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 October 2024**. The record of trial was docketed with this Court on 11 December 2023. From the date of docketing to the present date, 262 days have elapsed. On the date requested, 300 days will have elapsed.

On 10 July 2023, pursuant to his pleas, Technical Sergeant (TSgt) Renard D. Jenkins was convicted at a special court-martial convened at Joint Base Andrews, Maryland, of one charge and specification of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ); one charge and two specifications of communicating threats, in violation of Article 115, UCMJ; one charge and specification of unlawful entry in violation of Article 129, UCMJ; one charge and specification of false official statement in violation of Article 107, UCMJ; and one charge and specification of disorderly conduct in violation of Article 134, UCMJ. (Record of Trial (ROT), Vol 1, Entry of Judgment, dated 2 December 2023; R. at 71.) The military judge sentenced TSgt Jenkins to be confined for 150 days, reduced to the pay grade of E-1, and a bad conduct discharge. (R. at 135.) The convening authority took no action on the findings or sentence. (ROT,

Vol. 1, Convening Authority Decision on Action – *U.S. v. TSgt Renard D. Jenkins*, dated 9 August 2023.)

The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. TSgt Jenkins is not currently in confinement. TSgt Jenkins has been advised of his right to a timely appeal, as well as the request for an enlargement of time. TSgt Jenkins has agreed to the request for an enlargement of time. Additionally, undersigned counsel has been in communication with TSgt Jenkins as to the progress and current status of the case, but does not have a substantive update at this time.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case it on its eleventh enlargement of time. Undersigned counsel has not yet completed an initial review of the record of trial.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its eighth enlargement of time. Undersigned counsel has completed an initial review of the remanded record of trial.
3) *United States v. Jenkins*, ACM S32765 – This is the instant case.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Counsel's current to priority is *United States v. Hilton*, which counsel has begun drafting an assignment of errors for in coordination with civilian counsel. Following this, counsel will be working to complete an assignment of errors in *United States v. Martinez* as expediently as possible. Additionally, over the previous enlargement of time, counsel was at work on a reply brief for *United States v. Saul*, ACM 40341, a case which has been granted for review before the Court of Appeals for the Armed Forces. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(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 Appellate Government Division on 29 August 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

4 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT
v.	)	OF TIME
Technical Sergeant (E-6) RENARD D. JENKINS, USAF, *Appellant.*	)	ACM S32765 Special Panel

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 300 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18 month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(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 September 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,*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before a Special Panel
Technical Sergeant (E-5), **RENARD D. JENKINS,** United States Air Force, *Appellant.*	)	No. ACM S32765
	)	29 September 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 November 2024**. The record of trial was docketed with this Court on 11 December 2023. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 10 July 2023, pursuant to his pleas, Technical Sergeant (TSgt) Renard D. Jenkins was convicted at a special court-martial convened at Joint Base Andrews, Maryland, of one charge and specification of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ); one charge and two specifications of communicating threats, in violation of Article 115, UCMJ; one charge and specification of unlawful entry in violation of Article 129, UCMJ; one charge and specification of false official statement in violation of Article 107, UCMJ; and one charge and specification of disorderly conduct in violation of Article 134, UCMJ. (Record of Trial (ROT), Vol 1, Entry of Judgment, dated 2 December 2023; R. at 71.) The military judge sentenced TSgt Jenkins to be confined for 150 days, reduced to the pay grade of E-1, and a bad conduct discharge. (R. at 135.) The convening authority took no action on the findings or sentence. (ROT,

Vol. 1, Convening Authority Decision on Action – *U.S. v. TSgt Renard D. Jenkins*, dated 9 August 2023.)

The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. TSgt Jenkins is not currently in confinement. TSgt Jenkins has been advised of his right to a timely appeal, as well as the request for an enlargement of time. TSgt Jenkins has agreed to the request for an enlargement of time. Additionally, undersigned counsel has been in communication with TSgt Jenkins as to the progress and current status of the case, but does not have a substantive update at this time.

Undersigned counsel is currently assigned 20 cases; 13 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

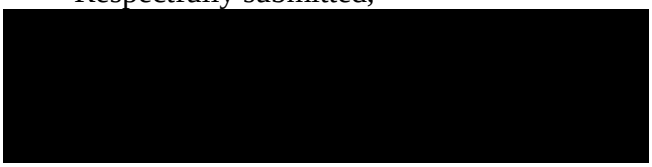
1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case it on its twelfth enlargement of time. Undersigned counsel has completed review of the record of trial and is working on an assignment of errors with civilian counsel.
2) *United States v. Martinez*, ACM 39903 (reh) – The record of trial from the remanded hearing consists of three volumes. The transcript is 134 pages. There are five prosecution exhibits, one defense exhibit, and 15 appellate exhibits. The record of trial from the initial trial consists of 11 prosecution exhibits, 24 defense exhibits, 81 appellate exhibits, and includes a 134 page transcript. This case is on its ninth enlargement of time. Undersigned counsel is working towards completion on an assignment of errors.

3) *United States v. Jenkins*, ACM S32765 – This is the instant case.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Counsel's current to priority is *United States v. Hilton*, which counsel has been working on an assignment of errors with civilian counsel. Concurrently with this, counsel has been working towards completion of an assignment of errors in *United States v. Martinez*. Counsel is also in preparation for oral arguments before the Court of Appeals for the Armed Forces in *United States v. Saul*, ACM 40341. These priorities have prevented counsel from dedicating the time necessary to begin work on the case at bar. Counsel is cognizant of this case's large number of enlargements of time, and intends to shift focus towards completion of an assignment of errors in this case as soon as the aforementioned priorities have been resolved. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(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 Appellate Government Division on 29 September 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

1 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT
v.	)	OF TIME
Technical Sergeant (E-6) RENARD D. JENKINS, USAF, *Appellant.*	)	ACM S32765 Special Panel

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 1 October 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,*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before a Special Panel
Technical Sergeant (E-5), **RENARD D. JENKINS,** United States Air Force, *Appellant.*	)	No. ACM S32765
	)	29 October 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his ninth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 December 2024**. The record of trial was docketed with this Court on 11 December 2023. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 10 July 2023, pursuant to his pleas, Technical Sergeant (TSgt) Renard D. Jenkins was convicted at a special court-martial convened at Joint Base Andrews, Maryland, of one charge and specification of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ); one charge and two specifications of communicating threats, in violation of Article 115, UCMJ; one charge and specification of unlawful entry in violation of Article 129, UCMJ; one charge and specification of false official statement in violation of Article 107, UCMJ; and one charge and specification of disorderly conduct in violation of Article 134, UCMJ. (Record of Trial (ROT), Vol 1, Entry of Judgment, dated 2 December 2023; R. at 71.) The military judge sentenced TSgt Jenkins to be confined for 150 days, reduced to the pay grade of E-1, and a bad conduct discharge. (R. at 135.) The convening authority took no action on the findings or sentence. (ROT,

Vol. 1, Convening Authority Decision on Action – *U.S. v. TSgt Renard D. Jenkins*, dated 9 August 2023.)

The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. TSgt Jenkins is not currently in confinement. TSgt Jenkins has been advised of his right to a timely appeal, as well as the request for an enlargement of time. TSgt Jenkins has agreed to the request for an enlargement of time. Additionally, undersigned counsel has been in communication with TSgt Jenkins as to the progress and current status of the case, but does not have a substantive update at this time.

Undersigned counsel is currently assigned 20 cases; 11 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its thirteenth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.
2) *United States v. Jenkins*, ACM S32765 – This is the instant case.
3) *United States v. Titus*, ACM 40557 - The record of trial consists of four volumes. The transcript is 142 pages. There are five prosecution exhibits, five defense exhibits, 31 appellate exhibits, and five court exhibits. This case is on its eighth enlargement of time.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to begin work on an assignment of errors in this case. Counsel has been work-saturated over the past thirty days. Counsel was busy preparing for oral arguments before the

Court of Appeals for the Armed Forces (CAAF) in *United States v. Saul*, ACM 40341. Additionally, counsel submitted assignments of error to this Court in both *United States v. Martinez* and *United States v. Cepeda*. Finally, counsel submitted a supplement to petition for review to the CAAF in *United States v. Schneider*. Since completion of these, Counsel has been working through pending deadlines before the CAAF for *United States v. Bates* and *United States v. Vargo*, while attempting to take leave between 30 October 2024 and 5 November 2024. Counsel's top priority right now is completion of an assignment of errors for *United States v. Hilton*. However, counsel intends to complete work on an assignment of errors in this case without asking for additional enlargements of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and complete work on an assignment of errors.

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

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(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 Appellate Government Division on 29 October 2024.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

31 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RENARD D. JENKINS, USAF, *Appellant.*	))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32765 Special Panel

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 begun their 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 31 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,*	)	**MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before a Special Panel
Technical Sergeant (E-5), **RENARD D. JENKINS,** United States Air Force, *Appellant.*	)	No. ACM S32765
	)	27 November 2024

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

Pursuant to Rule 23.3(m)(2) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his tenth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 7 days, which will end on **12 December 2024**. The record of trial was docketed with this Court on 11 December 2023. From the date of docketing to the present date, 352 days have elapsed. On the date requested, 367 days will have elapsed.

On 10 July 2023, pursuant to his pleas, Technical Sergeant (TSgt) Renard D. Jenkins was convicted at a special court-martial convened at Joint Base Andrews, Maryland, of one charge and specification of domestic violence, in violation of Article 128b, Uniform Code of Military Justice (UCMJ); one charge and two specifications of communicating threats, in violation of Article 115, UCMJ; one charge and specification of unlawful entry in violation of Article 129, UCMJ; one charge and specification of false official statement in violation of Article 107, UCMJ; and one charge and specification of disorderly conduct in violation of Article 134, UCMJ. (Record of Trial (ROT), Vol 1, Entry of Judgment, dated 2 December 2023; R. at 71.) The military judge sentenced TSgt Jenkins to be confined for 150 days, reduced to the pay grade of E-1, and a bad conduct discharge. (R. at 135.) The convening authority took no action on the findings or sentence. (ROT,

Vol. 1, Convening Authority Decision on Action – *U.S. v. TSgt Renard D. Jenkins*, dated 9 August 2023.)

The record of trial consists of three volumes stored in electronic format. The transcript is 138 pages. There are four prosecution exhibits, one defense exhibit, four appellate exhibits, and one court exhibit. TSgt Jenkins is not currently in confinement. TSgt Jenkins has been advised of his right to a timely appeal, as well as the request for an enlargement of time. TSgt Jenkins has agreed to the request for an enlargement of time. Additionally, undersigned counsel has been in communication with TSgt Jenkins as to the progress and current status of the case.

Undersigned counsel is currently assigned 20 cases; 11 cases are pending initial AOEs before this Court. Undersigned counsel's top priorities are as follows:

1) *United States v. Hilton*, ACM 40500 – The record of trial consists of 15 volumes. The transcript is 2747 pages. There are 29 prosecution exhibits, 22 defense exhibits, two court exhibits, and 102 appellate exhibits. This case is on its fourteenth enlargement of time. Counsel has completed reviewing the record of trial and has begun drafting and assignment of errors.
2) *United States v. Jenkins*, ACM S32765 – This is the instant case.
3) *United States v. Titus*, ACM 40557 - The record of trial consists of four volumes. The transcript is 142 pages. There are five prosecution exhibits, five defense exhibits, 31 appellate exhibits, and five court exhibits. This case is on its eighth enlargement of time.

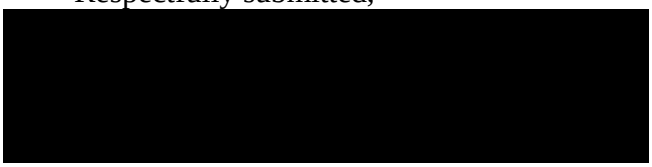
Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has been unable to complete work on Appellant's case. Undersigned counsel has been at work on an assignment of errors addressing three issues and has been working diligently to complete it. Counsel anticipates working through the Thanksgiving holiday weekend in order to accomplish

this. However, once finished, the case must be routed through peer review and leadership review before submission to this Court. Additionally, counsel needs to coordinate with Appellant once the brief is completed to ensure that it complies with his wishes for appellate review. Counsel will not be asking for any additional enlargements of time.

Exceptional circumstances exist to grant this short enlargement of time because counsel has been dealing with a lingering illness which has required him to go home from the office on multiple occasions over the past three weeks. On top of that, counsel has been balancing several competing priorities. Counsel has been working with civilian counsel in *United States v. Hilton*, which required him to dedicate time to coordinate the transmission of sealed exhibits. Counsel has had to balance his work before this Court with other priorities before the Court of Appeals for the Armed Forces (CAAF). On 13 November 2024, counsel submitted a supplement for petition for review to the CAAF in *United States v. Bates.* This supplement addressed five issues. Additionally, counsel submitted a supplement for petition for review and a response to motion to dismiss to the CAAF in *United States v. Vargo* on 20 November 2024. Counsel worked through the weekend on 16 November 2024 in order to comply with the deadline set by the CAAF. Additionally, counsel was on leave between 30 October 2024 and 5 November 2024. Accordingly, an enlargement of time is necessary for counsel to complete work on the assignment of errors, route it through internal review, and coordinate with Appellant to ensure that his interests in appellate review are being fully met.

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

Respectfully submitted,



MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(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 Appellate Government Division on 27 November 2024.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

3 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RENARD D. JENKINS, USAF, *Appellant.*	))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32765 Special Panel

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 367 days in length. Appellant's year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18 month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities.

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 3 December 2024.

[redacted]
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,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before a Special Panel
Technical Sergeant (E-5), **RENARD D. JENKINS,** United States Air Force, *Appellant.*	)	No. ACM S32765
	)	12 December 2024

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

Assignments of Error

I.

Whether the sentence imposed against Technical Sergeant Jenkins was inappropriately severe.

II.

Whether the military judge erred by admitting a prison phone recording as a Government sentencing exhibit to rebut Technical Sergeant Jenkins's unsworn statement.

III.

Whether Technical Sergeant Jenkins was denied speedy post-trial processing due to the excessive delay in the Government's production of the record of trial.

Statement of the Case

On 10 July 2023, a military judge sitting as a special court-martial convicted Technical Sergeant (TSgt) Renard D. Jenkins, pursuant to his pleas, of one specification of false official statement, two specifications of communicating threats, one specification of domestic violence, one specification of unlawful entry, and one specification of disorderly conduct, in violation of Articles 107, 115, 128b, 129, and 134, Uniform Code of Military Justice (UCMJ). (Entry of

Judgment, Dec. 2, 2023; R. at 71.) The military judge sentenced TSgt Jenkins to be confined for 150 days, reduced to the pay grade of E-1, and a bad-conduct discharge. (R. at 135.) The military judge granted 179 days of pretrial confinement credit. (R. at 75.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, Aug. 9, 2023.)

Statement of Facts

TSgt Jenkins was a high performer. He routinely received the highest ratings on his performance reports, earned numerous accolades, and was selected to promote to the rank of Master Sergeant. (Pros. Ex 3; R. at 96-97.) Around 2019 his marriage with D.L.J. rapidly deteriorated and she sought to divorce him. (Def. Ex. A. at 3.) This was especially alarming to TSgt Jenkins because it interfered with his ability to see their daughter. (*Id.*) D.L.J moved away from TSgt Jenkins, taking their daughter with her. (Pros. Ex. 1 at 1.) Their conversations about shared custody culminated in a series of arguments. (*Id.* at 2.) TSgt Jenkins was crushed by the pain he felt from being separated from his daughter. (Def. Ex. A at 3.) After the divorce was initiated, D.L.J. reported TSgt Jenkins to the Air Force Office of Special Investigations. (Report of Investigation, dated 13 December 2021 at 3.) D.L.J. accused TSgt Jenkins, on one occasion, of throwing vacuum sealed bags containing clothing in her direction, and verbally threatening her on two other occasions. (Pros. Ex. 1 at 2-3.) As a result of the investigation, TSgt Jenkins selection for promotion to Master Sergeant was put on hold. (R. at 97.)

On 11 January 2023, TSgt Jenkins learned that trial counsel, T.G., had reached out to his sister and relayed the allegations that TSgt Jenkins was facing. (Pretrial Confinement Hearing Exhibit 7.) This was just after TSgt Jenkins had learned that his uncle had passed away. (R. at 49.) TSgt Jenkins's sister informed him that T.G. had spoken ill of him and called him a narcissist to several of TSgt Jenkins's family members who were listed as witnesses. (*Id.*) This caused TSgt

Jenkins to spiral into a mental health crisis. He first attempted to resolve this by calling his commander and first sergeant. (R. at 49-50.) Unable to reach them, he drove to their office parking lot, which happened to be shared with the base legal office. (Pros. Ex. 1 at 5; R. at 49-50.) Once he was able to get the first sergeant on the phone, TSgt Jenkins was breathing heavily and crying. (Pretrial Confinement Hearing Ex. 4.) When the commander and first sergeant met TSgt Jenkins, he was in a state of extreme duress, sobbing profusely and explaining that his relationship with his sister had been harmed by the accusations against him. (Pretrial Confinement Hearing Ex. 27.)

Although TSgt Jenkins expressed animosity towards trial counsel, the commander and first sergeant were able to calm him down and ordered him to stay away from the base legal office. (*Id.*; Pretrial Confinement Hearing Ex. 5.) TSgt Jenkins left without further incident. His commander believed that the situation had been resolved, and that the no contact order and increased accountability would prevent further issues. (Pretrial Confinement Hearing Ex. 7 at 2.) C.M., the special court-martial convening authority and wing commander, concurred and declined to have any drastic measures like pretrial confinement implemented. (Pretrial Confinement Hearing Ex. 27.)

Following this, T.G. went to the Numbered Air Force (NAF) command to request that TSgt Jenkins be placed in pretrial confinement. (Pretrial Confinement Hearing Ex. 20.) The NAF informed C.M. that there was a concern about TSgt Jenkins's hypothetical reaction to his wife's intended refusal to comply with a child visitation order. (Pretrial Confinement Hearing Ex. 27 at 1.) C.M. believed that this required that TSgt Jenkins be placed in pretrial confinement. (*Id.*) TSgt Jenkins was apprehended while on the way to what he believed was his child visitation. (*Id.*) TSgt Jenkins's commander disagreed with the decision to place him in pretrial confinement. (R. at 100.) During the pretrial confinement hearing, T.G. offered a written statement in which he

blamed the defense team for the incident in the parking lot and suggested that TSgt Jenkins needed to "accept his guilt." (Pretrial Confinement Hearing Ex. 26 – Statement of T.G.) The reviewing officer opted for TSgt Jenkins to remains in confinement: "[G]iven the stressful nature of pending court-martial [sic] and an apparent record of disregard for the U.C.M.J. as well as good order and discipline in times of emotional stress, it is foreseeable the accused will engage in serious criminal misconduct." (Pretrial Confinement Hearing Officer Report at 3.)

TSgt Jenkins remained in pretrial confinement for 179 days until his court-martial. (R. at 75.) He was initially held at the Calvert County Detention Center. (R. at 91.) While there, TSgt Jenkins was not permitted to wear his rank or uniform and was comingled with the general prison population. (App. Ex. I at 200.) TSgt Jenkins later moved to Naval Consolidated Brig in Chesapeake, Virginia. (R. at 102.) Throughout his time in pretrial confinement, TSgt Jenkins suffered from medical issues and lost significant body weight. (R. at 91; 102.)

TSgt Jenkins chose to accept responsibility for his actions and plead guilty. (Def. Ex. A.) During the sentencing hearing, C.D., his commander, acknowledged that TSgt Jenkins's behavior was aggravated by the difficult situation with his wife and the separation from his daughter. (R. at 104.) C.D. reiterated his belief that pretrial confinement was unnecessary, describing it as "over the top." (R. at 101.) He also expressed that TSgt Jenkins had potential for rehabilitation. (R. at 105.) This was echoed by the first sergeant, D.H. (R. at 92.)

In his unsworn statement, TSgt Jenkins expressed remorse for what had taken place and for how his actions led him to where he was. (Def. Ex. A.) The Government offered a recorded prison phone call in which TSgt Jenkins explained that he did not want to apologize for what happened. (Pro. Ex. 4; R. at 113.) Over defense objection, the military judge allowed the phone call to come into evidence to rebut TSgt Jenkins's unsworn statement. The military judge held

that the phone recording was relevant to rebut TSgt Jenkins assertions that "his conduct alone led to this court-martial, that he regrets the decisions that he made, and that he'll regret the mistakes that he made for the rest of his life." (R. at 120.)

The Government opened their sentencing argument with a quote from the phone call and referenced it throughout. (R. at 122.) The Government principally argued that the phone call was proof that TSgt Jenkins was not remorseful. (R. at 123.) The Government recommended a sentence of reduction to the rank of E-1, maximum forfeitures, 30 days of hard labor without confinement, 180 days of confinement, and a bad-conduct discharge—the maximum sentence permitted under the plea agreement. (R. at 123; App. Ex. I.) Following sentencing, the Government did not docket this case with this Court until 11 December 2023. From the date of sentencing until docketing 154-days had elapsed.

I.

The sentence imposed against Technical Sergeant Jenkins was inappropriately severe.

Standard of Review

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

Law & Analysis

The sentence imposed against TSgt Jenkins was inappropriately severe given the facts and circumstances captured in the entire record of trial. TSgt Jenkins was an exemplary Airman and noncommissioned officer. His convictions were for offenses that were triggered by the extreme duress created by his deteriorating marriage and the prospect of losing his daughter. He faced undue hardship before any sentence was adjudged based the loss of his promotion to Master Sergeant and his stay in pretrial confinement, which exceeded his actual sentence. Against this,

the military judge imposed a particularly harsh sentence that included a reduction to lowest rank possible and a bad conduct discharge. This warrants a reassessment of his sentence that principally includes setting aside the bad-conduct discharge and restoring his rank.

Under Article 66(d), UCMJ, this Court may only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018).[1] "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citations omitted) (internal quotation marks omitted). This Court may disapprove a sentence even if bargained for through a plea agreement, such as the bad-conduct discharge in this case, if the "principles of sentencing and the matters in aggravation, as balanced by the matters in mitigation" warrant it. *United States v. Arroyo*, No. ACM 40321 (f rev), 2024 CCA LEXIS 242, at *31 (A.F. Ct. Crim. App. June 18, 2024); *United States v. Kerr*, No. 202200140, 2023 CCA LEXIS 434, at *8 (N-M Ct. Crim. App. Oct. 17, 2023) (setting aside a bad-conduct discharge as inappropriately severe even though agreed to in the plea agreement).

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

a. The sentenced imposed against TSgt Jenkins was inappropriately severe when accounting for who he is as a particular appellant and his military record.

The sentence imposed is undermined by TSgt Jenkins individual circumstances.

[1] This case is subject to the previous version of Article 66 reflected in the 2019 Manual for Courts-Martial.

TSgt Jenkins was a high-performing Airman and noncommissioned officer as shown in his enlisted performance reports. (Pros. Ex. 2.) He was highly regarded by his squadron commander, C.D., who believed he could be rehabilitated from these circumstances, thus mitigating the need for an oppressive sentence. (R. at 97.) Additionally, C.D. emphasized that TSgt Jenkins possession of a "must promote" stratification placed him among the very best members of his rank. (*Id.*) TSgt Jenkins character for rehabilitation was echoed by his first sergeant, D.H. (R. at 92.) C.D. maintained his opinion of TSgt Jenkins potential for rehabilitation by recognizing that TSgt Jenkins misconduct was driven by the tense nature of his broken marriage. (R. at 104.) This shows that TSgt Jenkins was not a criminally-minded individual, but rather someone that was struggling with their circumstances. Despite this, TSgt Jenkins took responsibility for his actions. (Def. Ex. A.)

The impact that TSgt Jenkins's marriage had on his well-being and decision-making cannot be understated. TSgt Jenkins's described having frequent verbal arguments with D.L.J. (R. at 25.) These arguments worsened once they started to involve the co-parenting of their daughter. (R. at 30.) During Thanksgiving of 2020, TSgt Jenkins was left frustrated as he struggled to work with D.L.J. on a plan that would allow him to see their daughter. (*Id.*) TSgt Jenkins acknowledged that these issues left him broken. (Def. Ex. A.) His state of duress was further exacerbated after he was informed by his sister and family members that T.G. had spoken ill of him during witness interviews. (R. at 49.) T.G. reinforced his animosity towards TSgt Jenkins in his statement to the pretrial confinement hearing officer where he faulted TSgt Jenkins for refusing to plead guilty and suggested that his defense team had instigated his mental health issues on 11 January 2023.

These circumstances shed light on why an otherwise stellar Airman spiraled into misconduct. However, the military judge still imposed an inappropriately severe sentence that

included a reduction the lowest possible rank and a bad-conduct discharge.

b. The circumstances surrounding TSgt Jenkins misconduct did not call for the severe sentence.

The offenses that TSgt Jenkins was convicted of did not warrant such a severe sentence. Importantly, none of the offenses he was convicted of resulted in physical or material harm to anyone. The most serious offense he pleaded guilty to, domestic violence, was an attempt-type assault in which TSgt Jenkins threw vacuum sealed bags in the general direction of D.L.J., without actually hitting her. (R. at 19-20.) This offense, along with the convictions for communicating threats, were all borne out of the tumultuous relationship he had with D.L.J., which included frequent arguments about the shared custody of their daughter. (R. at 31.)

d. The sentence imposed did not fully account for the issues with TSgt Jenkins's pretrial confinement.

The conditions of TSgt Jenkins's pretrial confinement represent a matter reflected in the whole record which this Court should take into consideration when reviewing his sentence. *United States v. Jessie*, 79 M.J. 437, 440 (C.A.A.F. 2020) (recognizing the "entire record" as including the entire "record of trial" and "allied papers"). Although TSgt Jenkins waived a challenge to his pretrial confinement under Article 13, this Court maintains wide latitude to reassess the sentence based on the conditions of confinement. *United States v. Gay*, 74 M.J. 736, 742-43 (A.F. Ct. Crim. App. 2015); *United v. Zarbatany*, 70 M.J. 169, 170-71 (C.A.A.F. 2011) (acknowledging that the service courts can consider pretrial confinement as a factor for sentence appropriateness).

TSgt Jenkins placement into pretrial confinement mitigated against the severe sentence imposed against him. The Government initially justified the pretrial confinement based on the episode that took place on 11 January 2023 in which TSgt Jenkins went to the parking lot outside the base legal office and had a mental health breakdown. (Probable Cause Determination – TSgt

Renard D. Jenkins.) However, both his squadron commander and the wing commander disagreed that pretrial confinement was necessary. (R. at 100; Pretrial Confinement Hearing Ex. 27.) At the time, TSgt Jenkins was under extreme duress upon learning that T.G. had spoken badly of him to his sister and other family members that were named as witnesses. (R. at 49.) TSgt Jenkins characterized his actions as a cry for help, not a purposeful attempt to be disruptive. Importantly, while the parking lot he went to was shared with the base legal office, it was also where his commander and first sergeant's offices were located. TSgt Jenkins purpose in going there, to get help from his leadership, is evidenced by the fact that he attempted to call them and then waited in the parking lot. (R. at 50.) After talking with them in person, TSgt Jenkins was able to calm down and walk away from the situation.

It was not until after trial counsel went above the wing commander's head and spoke to the NAF that the wing commander changed his decision and elected for pretrial confinement. (Pretrial Confinement Hearing Ex. 27.) The wing commander based this on concern that TSgt Jenkins would not react well to D.L.J. potential inference with his child visitation. (*Id.*) As a result of this decision, TSgt Jenkins was denied the opportunity to see his daughter. (*Id.*) This was contrary to the squadron commander's belief that increased accountability was enough. (Pretrial Confinement Hearing Ex. 27.) The circumstances of TSgt Jenkins placement into pretrial confinement justify sentencing relief. *See United States v. Taylor*, 30 M.J. 882, 885 (A.F.C.M.R. 1990) (granting sentencing relief based on appellant's lengthy pretrial confinement after a domestic incident which resolved with the appellant being highly cooperative).

Moreover, TSgt Jenkins conditions while in pretrial confinement were questionable. TSgt Jenkins was initially housed with post-trial confinees at a civilian detention facility, where he was not allowed to wear his rank or uniform. Even after being transferred to a military facility,

TSgt Jenkins' health continued to suffer and he lost weight. He endured confinement for 29 days beyond what the military judge ultimately sentenced him to, for a total of 179-days spent awaiting his day in court.

These circumstances cumulatively demonstrate the tremendous hardship that TSgt Jenkins suffered even before he was convicted and sentenced. Accordingly, TSgt Jenkins's pretrial confinement justifies a sentence reassessment as a matter related to the whole record of trial. TSgt Jenkins respectfully request that this court re-assess his sentence by setting aside the bad-conduct discharge and restoring his rank.

II.

The military judge erred by admitting a prison phone recording as a Government sentencing exhibit to rebut Technical Sergeant Jenkins's unsworn statement.

Standard of Review

A military judge's decision to admit sentencing evidence over objection is reviewed by this Court for an abuse of discretion. *United States v. Eslinger*, 70 M.J. 193, 197 (C.A.A.F. 2011). An abuse of discretion occurs where the military judges relies on erroneous legal findings or clearly erroneous findings of fact. *United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022).

Law & Argument

a. The military judge erred by admitting the prison phone recording into evidence.

An accused's constitutional right to remain silent prohibits the Government from drawing a negative implication during sentencing from an accused that declines to express responsibility for their actions. *United States v. Edwards*, 35 M.J. 351, 355 (C.A.A.F. 1992). This is consistent with R.C.M. 1001(b)(4) which limits evidence in aggravation to that "directly relating to or resulting from the offense which the accused has been found guilty." Evidence of an accused's

lack of remorse is inadmissible except under limited circumstances and only with a proper foundation. *Id.* The foundation necessary is established only if "an accused has either testified or has made an unsworn statement and has either expressed no remorse or his expressions of remorse can be arguably construed as being shallow, artificial, or contrived." *Id.* This functions as a matter of rebuttal. *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007). However, rebuttal must be specific to the factual assertions raised by the defense and may not be used a general vehicle to introduce adverse evidence. *United States v. Partyka*, 30 M.J. 242, 246 (C.A.A.F. 1990). A statement of the accused that only amounts to an opinion, rather than a factual assertion, does not open the door to rebuttal. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

The military judge abused his discretion by permitting the prison phone recording to come into evidence. Trial Counsel claimed it offered the recording to contradict assertions that TSgt Jenkins made in his unsworn statement. This namely included TSgt Jenkins's expression of gratitude towards his leadership for testifying on his behalf. (R. at 113.) Trial Counsel also suggested that the recording went to TSgt Jenkins's "state of mind regarding the offenses" and demonstrated a lack of contrition. (R. at 114.) The military judge admitted the recording as rebuttal to TSgt Jenkins's unsworn statement that his conduct alone led to the court-martial, that he regretted the decisions that he made, and that he would regret those mistakes for the rest of his life. (R. at 120.) But TSgt Jenkins's statements in the recorded phone call did not address those topics, let alone directly contradict those assertions.

Thus, the purpose that the military judge allowed the recording to come in did not constitute rebuttal because there was no conflict between the recording and the unsworn statement. *United States v. Saferite*, 59 M.J. 270, 274 (C.A.A.F. 2004) (the "scope of rebuttal is defined by evidence introduced by the other party"). The absence of a contradiction negated the purpose of the alleged

rebuttal evidence. Instead, the military judge used the concept of rebuttal as a vehicle to allow the government to introduce impermissible evidence in aggravation. *United States v. Cleveland*, 29 M.J. 361 (C.M.A. 1990) (prohibiting the government from using rebuttal as a means to introduce impermissible evidence during sentencing). This is analogous to *United States v. Cleveland* where the accused opined in an unsworn that he felt he had served well. 29 M.J. at 363-364. The C.M.A. found error in the admission of evidence of the accused's off-duty misconduct offered by the government to rebut the accused's sentiment of his good service. *Id.* This is because the accused's statement represented the accused's opinion, rather than a statement of fact, and also because the admission of the off-duty misconduct turned rebuttal into boot-strapping mechanism for "inadmissible, highly prejudice evidence." *Id.* at 364-364. Similarly, TSgt Jenkins's expression of regret in his unsworn was a matter of his own opinions and reflections on his conduct which was not a statement of fact subject to rebuttal. The military judge's admission of the phone recording transformed the notion of rebuttal into a mechanism for the government to introduce highly prejudicial evidence that would not have been admissible under R.C.M. 1001(b)(4).

Moreover, because the recording concerned TSgt Jenkins attitudes towards certain people, rather than his general sense of contrition, the factual predicate necessary for the recording to come in as a proof that TSgt Jenkins's lacked remorse was not established. In particular, the recording did not show that TSgt Jenkins's remorse for his actions was somehow "shallow, artificial, or contrived." *Edwards*, 35 M.J. at 355. Yet even if this was the case, the military judge's wholesale admission of the recording went beyond that limited utility. *See United States v. Dunlap*, No. ACM 39567, 2020 CCA LEXIS 148, at *28 (A.F. Ct. Crim. App. May 4, 2020) (finding error in the admission of an entire victim unsworn statement, as a government sentencing exhibit, addressing a variety of topics for purposes of rebutting a single point in appellant's own unsworn).

This is especially troubling given that the military did not carry out a Mil. R. Evid. 403 balancing test, thus affording the military judge's decision no deference. *Mann*, 54 M.J. at 166.

b. Admission of the recording was prejudicial.

The Government bears the burden of showing that the erroneous admission of the recording was harmless. *United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014). The test for prejudice is based on consideration of "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018). These factors demonstrate that admission of the recording was prejudicial.

The strength of the Government's sentencing case was weak. The Government introduced only three exhibits during sentencing: TSgt Jenkins's personal data sheet, his enlisted performance reports, and the prison recording. Of these three, the prison recording was the only one that was adverse to TSgt Jenkins. By contrast, his performance reports were overwhelmingly positive. This aside, the Government did not call any witnesses. The Government's reliance on the recording to make their sentencing case is reflected in Trial Counsel's frequent references to it throughout their argument. Had the Government not introduced the recording, they would not have had any sentencing case to speak of.

By contrast, the defense presented a strong case on behalf of TSgt Jenkins. This included the testimony of both his first sergeant and squadron commander who spoke well of him and offered that he had potential for rehabilitation. This opinion was sustained despite the Government attempts to confront both witnesses with matters raised in the recording. Additionally, TSgt Jenkins had a stellar career up to this point, which was reflect in his performance reports, and testimony from D.H. concerning his selection to Master Sergeant. Moreover, TSgt Jenkins

endured a lengthy stay in pretrial confinement.

The materiality of the recording was relatively low given its only permissible function was as rebuttal evidence. Despite this, the recording did not actually rebut any matter presented by the defense. Instead, the recording was material only to matters highly prejudicial to TSgt Jenkins. It made TSgt Jenkins look like a bad person undeserving of any leniency in sentencing. This is especially problematic due to the lack of a Mil. R. Evid. 403 balancing test. Conversely, the quality of the evidence was high given it came directly from TSgt Jenkins. When considered in tandem with the lack of materiality, this only highlights its prejudicial nature. This raises the substantial likelihood that the military judge impermissibly relied on the recording to arrive at the harsh sentence which he imposed.

The military judge abused his discretion by injecting highly prejudicial evidence into the sentencing case. Further, as this evidence was not proper rebuttal evidence, it served no legitimate purpose. Therefore, taken together, the factors weigh in favor of finding the military judge abused his discretion. This Court should address this by re-assessing TSgt Jenkins's sentence by setting aside the bad-conduct discharge and restoring his rank.

III.

Technical Sergeant Jenkins was denied speedy post-trial processing due to the excessive delay in the Government's production of the record of trial.

Standard of Review

This Court reviews claims challenging the due process right to a speedy post-trial review and appeal *de novo*. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law & Analysis

This Court should find that the Government's 154-day delay in docketing TSgt Jenkins's case with this Court is a due process violation. This delay has interfered with his ability to exercise his appellate rights. Even if this Court finds that TSgt Jenkins was not prejudiced, this Court should find a due process violation as the delay adversely affects the public's perception of the fairness and integrity of the military justice system, and because of the institutional neglect that this case demonstrates on the part of the Government.

Whether an appellant has been deprived of their due process right to speedy appellate review is determined by balancing the four-factor test outlined in *Barker*. *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011). The *Barker* factors are: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Barker*, 77 M.J. at 384. When examining the reason for the delay this Court determines "how much of the delay was under the Government's control" and "assess[es] any legitimate reasons for the delay." *Anderson*, 82 M.J. at 86 (finding "no indication of bad faith on the part of any of the Government actors"). Analyzing these factors requires determining which factors favor the Government or the appellant and then balancing these factors. *Id.* No single factor is dispositive, and the absence of a given factor does not prevent this Court from finding a due process violation. *Id.*

a. A 154-day delay is presumptively unreasonable.

The Government took 154 days from sentencing to docket TSgt Jenkins's case with this court, which makes the delay presumptively unreasonable. *United States v. Jackson*, No. ACM 39955, 2022 CCA LEXIS 300, at *131-32 (A.F. Ct. Crim. App. 23 May 2022) (citing *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020) (finding a "150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent

with our superior court's holding in *Moreno*")). When a case does not meet the 150-day standard, it triggers an analysis of the four non-exclusive factors set forth in *Barker*. *Jackson* 2022 CCA LEXIS 300, at *132. The delay in this case exceeds the threshold established by this Court in *Livak.*

b. There is no justification for the lengthy delay.

The record of trial contains no explanation for why this case was subject to an impermissible delay before docketing with this Court. The gap of time between that date and the eventual docketing is without commentary from the Government. If the Government cared about speedy post-trial processing, it would have provided an explanation for why it was unable to meet speedy post-trial processing standards like it has done in other cases. For example, in *United States v. Lampkins* the Court explained, "We note a troubling period during post-trial processing wherein for 77 days the record sat untouched, in a cubicle at the base legal office. We find no good reasons were provided to justify delay, and accordingly find that this factor weighs in favor of Appellant." No. ACM 40135 (f rev), 2023 CCA LEXIS 465, at *5 (A.F. Ct. Crim. App. Nov. 2, 2023). From the silence in the record, this Court should presume the Government did not have any valid reason for the delay. Therefore, this Court should use the fact that the Government failed to provide reasons for the delay as a negative presumption against them.

c. TSgt Jenkins asserts his right to speedy post-trial processing.

Third, TSgt Jenkins hereby asserts his right to timely appellate review. This factor does not weight for or against TSgt Jenkins, it is through no fault of his own that undersigned counsel had cases to review prior TSgt Jenkins's case. *Lampkins*, 2023 CCA LEXIS 465, at *13 (A.F. Ct. Crim. App. Nov. 2, 2023) (holding that this factor weighs neither for or against an appellant that asserts their right to speedy appellate review for the first time in their brief). Additionally, no one

factor is dispositive in the *Barker* analysis. *See also Moreno*, 63 M.J. at 138 ("While this factor weighs against Moreno, the weight against him is slight given that the primary responsibility for speedy processing rests with the Government and those to whom he could complain were the ones responsible for the delay.").

d. TSgt Jenkins suffered prejudice from the Government's delay.

Moreno identified three types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of a convicted person's grounds for appeal and ability to present a defense at a rehearing. 63 M.J at 138-39.

TSgt Jenkins has faced the "impairment of [his] grounds for appeal." *Moreno*, 63 M.J. at 138-39. Because of the presumptive, unreasonable delay, TSgt Jenkins was unable to petition this Court for relief sooner. Like the appellant in *United States v. Turpiano*, TSgt Jenkins has been "impeded in his ability to exercise his post-trial rights because of the actions, or more aptly delayed actions, of the Government." No. ACM 38873 (f rev), 2019 CCA LEXIS 367, at *19 (A.F. Ct. Crim. App. Sep. 10, 2019) (unpub. op.)

e. Even if this Court finds no *Barker* prejudice, the Government's delay adversely affects the public's perception of the military justice system.

Where an appellant does not show prejudice from the delay, there is no due process violation unless "in balancing the three other factors, the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson*, 82 M.J. at 87 (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)). Assuming, *arguendo*, this Court is unconvinced TSgt Jenkins was prejudiced by the Government's 324-day delay, this Court should consider its the C.A.A.F.'s admonition when deciding if there is a due process violation: "delay in the administrative handling and forwarding of the record of trial and related documents to an appellate court [] is the least defensible of all and worthy of the least

patience." *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). This Court should have little patience with the Government because "this stage involves no discretion or judgment; and, unlike an appellate court's consideration of an appeal, this stage involves no complex legal or factual issues or weighing of policy considerations." *Id*. In this case, the military justice system failed to prevent TSgt Jenkins from being "subjected to inordinate and inexcusable delay after he has been tried." *Id*. at 70. This Court should find a due process violation because a member of the public could reasonably question the "integrity" of the military justice system in this case.

f. Even without prejudice, relief is proper under Article 66(d).

Should this Court find that TSgt Jenkins has not suffered prejudice as a result of the excessive delay, relief is still appropriate. This Court may "grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), [UCMJ,] if it deems relief appropriate under the circumstances." *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). This Court has identified a list of factors to consider in evaluating whether relief under Article 66, UCMJ, should be granted for post-trial delay. *Gay*, 74 M.J. at 744. These factors include how long the delay exceeded appellate review standards, the reasons for the delay, whether the government acted with bad faith or gross indifference, evidence of institutional neglect, harm to the appellant or to the institution, whether relief is consistent with the goals of both justice and good order and discipline, and whether the court can provide any meaningful relief. *Id*. No single factor is dispositive, and this Court may consider other appropriate factors. *Id.*

Looking at the first and second factors, the delay exceeded appellate review standards, and the explanations provided within the record show no good cause for such delays. These are outlined *supra* and are not re-articulated here. Both resolve in TSgt Jenkins's favor.

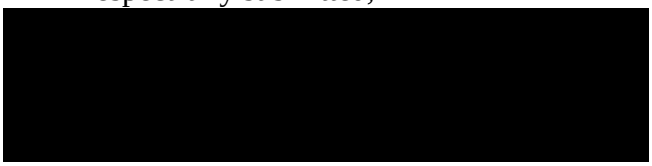
As to the third factor, while there is no evidence the Government acted in bad faith, the Government's dilatory conduct reveals its indifference. On the issue of institutional neglect, it must be noted the Government consistently struggles to timely and accurately complete post-trial processing. *See United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *18 (A.F. Ct. Crim. App. June 7, 2024) (citations omitted). The lengthy, yet non- exhaustive, list of cases with delays in post-trial processing should continue to vex this Court. Given the plethora of cases this Court has remanded for the same or similar issues in post-trial processing resulting in delays, the Government must be properly incentivized to abide by the law. This Court can and should provide that incentive in this case, wherein the interests of justice and "appropriateness" weigh in favor of granting TSgt Jenkins relief.

Looking at the fourth factor, relief is consistent with the duals goals of justice and good order and discipline. This is especially so given the institutional neglect in post-trial processing, of which this case is just one example among many. This Court has acknowledged the extent of this neglect in *Valentin-Andino* by citing numerous instances where post-trial processing errors have occurred with "alarming frequency." *Id.* at *17-18. The principles of justice demand that records of trial be assembled more expediently. This factor resolves in TSgt Jenkins's favor.

As to the remaining factors, they also resolve in TSgt Jenkins's favor. As outlined *supra*, allowing these delays harms the military justice system and the Air Force as an institution. The Government has repeatedly demonstrated gross indifference to post-trial processing. *Valentin-Andino*, 2024 CCA LEXIS 223, at *18. The Government is not "worthy" of this Court's continued "patience." *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). To the extent providing relief to TSgt Jenkins incentivizes the Government to do better, it is consistent with the goals of both justice and good order and discipline. This Court can still provide "meaningful relief" to TSgt

Jenkins despite the passage of time. *Gay*, 74 M.J. at 744. In sum, while none of these factors are dispositive, the "essential inquiry" of the "appropriateness" of relief resolves in TSgt Jenkins's favor. *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). This Court should therefore provide sentencing relief to TSgt Jenkins's by setting aside the bad-conduct discharge and restoring his rank.

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 Appellate Government Division on 12 December 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**UNITED STATES' ANSWER TO**
Appellee,	)	**ASSIGNMENTS OF ERROR**
	)	
v.	)	Before Special Panel
	)	
Technical Sergeant (E-6)	)	No. ACM S32765
RENARD D. JENKINS, USAF	)	
Appellant.	)	13 January 2025

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Special Panel
Technical Sergeant (E-6) **RENARD D. JENKINS**, USAF, *Appellant.*	)	No. ACM S32765
	)	13 January 2025

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

ASSIGNMENTS OF ERROR

I.

WHETHER THE SENTENCE IMPOSED AGAINST [APPELLANT] WAS INAPPROPRIATELY SEVERE.

II.

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING A PRISON PHONE RECORDING AS A GOVERNMENT SENTENCING EXHIBIT TO REBUT [APPELLANT'S] UNSWORN STATEMENT.

III.

WHETHER APPELLANT WAS DENIED SPEEDY POST-TRIAL PROCESSING DUE TO THE EXCESSIVE DELAY IN THE GOVERNMENT'S PRODUCTION OF THE RECORD OF TRIAL.

STATEMENT OF CASE

The United States accepts Appellant's statement of the case.

STATEMENT OF FACTS

According to the stipulation of fact (ROT Vol. 1, at 70; Pros. Ex. 1), Appellant and victim D.L.J. married in 2013, but their marriage was "filled with verbal and physical abuse until it ended in divorce." (Id., para. 2.) They began living apart in 2019 after D.L.J. obtained a humanitarian

assignment. (Id., para. 3.) Their daughter moved with D.L.J. and D.L.J.'s son (not from Appellant) lived with a friend of the family. (Id., para. 4.) In January 2019, while D.L.J. was preparing for the move, Appellant got into an argument with her, took extra-large trash bags containing vacuum sealed bags of clothes, and, from the second floor of the home, threw them down at D.L.J. on the first floor. (Id., para. 9.)[1] According to D.L.J., at the time of the assault, she was pleading with Appellant to stop, but he hit her repeated in the chest with the bags. (Id.)

Between May and June 2019, Appellant and D.L.J. began living apart. (Pros. Ex. 1, para. 12.) Appellant had been embarrassed when D.L.J. told another member of the squadron that D.L.J. did not trust Appellant with her son. (Id., para. 4.) Appellant told D.L.J. that he could do a better job taking care of his step-son than a stranger. (Id.) During a phone call between May and June 2019, Appellant became angry and said, "Bitch, I will fucking kill you," or words to that effect. (Id., paras. 4, 12.)[2]

In November 2020, Appellant told D.L.J. that, if she did not permit their daughter to come to his family for Thanksgiving, "I will fuck you up." (Pros. Ex. 1, para. 13.) He also said that, if she prevented Appellant from having their daughter at Thanksgiving, "I will fucking kill you." (Id.)[3]

In March of 2021, after Appellant and D.L.J. started their divorce proceedings, Appellant became upset about a change in their daughter's visitation plan and told D.L.J., in the presence of her son, "I will put a bullet in your head," and that Appellant would "have the last laugh." (Pros. Ex. 1., para. 5.)

---

[1] This incident is the basis for Charge I and its Specification.

[2] This incident is the basis for Charge II, Specification 1.

[3] This incident is the basis for Charge II, Specification 2.

On 16 October 2022, at approximate 2100 hours, Appellant used an access badge that did not belong to him to break into a government building located at 134 National Business Parkway, Annapolis Junction, Maryland, to which he had no lawful authority to enter. (Pros. Ex. 1., para. 14.)[4]

On 21 October 2022, Appellant had a meeting with his squadron's first sergeant and director of operations. (Pros. Ex. 1, para. 15.) After being advised of his rights under Article 31, UCMJ, Appellant waived his rights and made an official statement in which he falsely denied entering the building located at 134 National Business Parkway, Annapolis Junction, Maryland, at around 2100 hours. (Pros. Ex. 1, para. 15.)[5] Appellant claimed he was in the building earlier in the day to use computers and an employee let him in. (Id.) After the first sergeant showed Appellant a photo from the surveillance video of him in the building at 2055 hours, Appellant falsely claimed he was at a casino watching football at the time of the unlawful entry. (Id.)

In December 2022, Appellant was facing court-martial charges for the aforementioned misconduct, as well as unlawful entry and false official statements to his command. (Pros. Ex. 1, para. 7.) The prosecuting attorney was Capt T.G. (Id.)

On 11 January 2023, Appellant went to the parking lot for the building in which Capt T.G. worked, called his first sergeant, and told the first sergeant he was "going to slap the shit out of [Capt T.G.]." (Id., para. 8.) When Appellant's commander met Appellant and the first sergeant in the parking lot, Appellant exclaimed he was about to "beat [Capt T.G.]'s ass." (Id., paras. 8, 19.) Appellant started to walk, angry and breathing heavily, past his commander towards the building two separate times, so the building security office ordered a lockdown of all 70th

[4] This incident is the basis for Charge III and its Specification.

[5] This incident is the basis for Charge IV, Specification 3.

Intelligence, Surveillance, and Reconnaissance Wing spaces in the building, which was disorderly and disruptive to persons working in the building and was prejudicial to good order and discipline. (Id., paras. 8, 18, 19, 20.)[6]

Additional relevant facts are included for each Issue below.

ARGUMENT

I.

APPELLANT'S SENTENCE WAS NOT INAPPROPRIATELY SEVERE.

Additional Facts

The maximum punishment authorized for Appellant's crimes before the special court-martial was one year of confinement, hard labor without confinement for three months, a bad conduct discharge, and reduction in grade to E-1, and forfeiture of all pay and allowances. Article 19(a), UCMJ; R.C.M. 201(f)(2)(B)(i); R. at 53. Pursuant to the plea agreement, the military judge had to enter a sentence with a maximum confinement term of 180 days for all Charges, except Additional Charge II, which had a maximum term of 30 days, all to be served concurrently. (App. Ex. 1, para. 4.) The plea agreement also required the military judge to sentence Appellant to a bad conduct discharge. (Id.) In exchange for the guilty plea, the government withdrew all the original charges pending before a general court-martial and re-referred them to a special court-martial, and then they withdrew and dismissed several allegations of threats and false official statements before the special court-martial.[7]

---

[6] This incident is the basis for Additional Charge II and its Specification.

[7] The withdrawn specifications involved the following conduct. Appellant allegedly made threats against victim D.L.J. between on or about 1 and 30 November 2020, "I will fucking kill you," or words to that effect, as charged in Specification 3 of Charge II; and on or about 13 March 2021, "I'm going to have the last laugh when I put a bullet in your head," or words to that effect, as

During the guilty plea colloquy, the military judge asked Appellant about the provision in the plea agreement requiring the military judge to adjudge a bad conduct discharge:

> Military Judge: Your plea agreement also states that you agree the sentence in your case must include a bad conduct discharge. Have I correctly stated that term of your plea agreement?
>
> Appellant: Yes, sir.
>
> Military Judge: Do you understand that the only discharge this court can adjudge is a bad conduct discharge?
>
> Appellant: Yes, sir.
>
> Military Judge: Do you understand that a bad conduct discharge will forever adversely stigmatize the character of your military service, and it will limit your future employment and schooling opportunities?
>
> Appellant: Yes, sir.
>
> Military Judge: Do you understand that a bad conduct discharge may adversely affect your future with regard to legal rights, economic opportunities, and social acceptability?
>
> Appellant: Yes, sir.
>
> Military Judge: You understand that by receiving a bad conduct discharge, you will lose substantially all benefits from the Department of Veterans Affairs and the military establishment, as well as other benefits normally given by other governmental agencies?
>
> Appellant: Yes, sir.
>
> Military Judge: And – but if you have any prior and completed service enlistment that any benefits you would have based upon

---

charged in Specification 4 of Charge II. (ROT, Vol. 1, *Entry of Judgment (EOJ)*, dated 16 August 2023 and 2 December 2023.) Appellant allegedly made false official statements to a superior officer on or about 19 May and 23 June 2022, as charged in Charge IV, Specifications 1 and 2. (Id.) And Appellant allegedly communicated to two individuals a threat against an officer on or about 11 January 2023, as charged in Additional Charge I, Specifications 1 and 2. (Id.) Additional Charge II from the general court-martial was not re-referred to the special court-martial. (Id.)

> those prior completed terms of enlistment, those would not be affected by a bad conduct discharge. Do you understand that?
>
> Appellant: Yes, sir.
>
> Military Judge: Did you understand all this when you signed your agreement?
>
> Appellant: Yes, sir.
>
> Military Judge: Do you believe you fully understand the ramifications of a bad conduct discharge?
>
> Appellant: Yes, sir.
>
> Military Judge: Are you aware that if you did not receive a punitive discharge from this court martial, then your chain of command may very well try to administratively separate you from the service?
>
> Appellant: Yes, sir.
>
> Military Judge: Are you also aware that an administrative separation is considered much less severe than a discharge from a court-martial and will not stigmatize you with the devastating and long term effects of a discharge from a court-martial?
>
> Appellant: Yes, sir.
>
> Military Judge: Knowing all that I and your defense counsel have explained to you, is it your expressed desire to be discharged from the service with a bad conduct discharge as part of your plea agreement?
>
> Appellant: Yes, sir.

(R. at 63-64.)

The government's sentencing exhibits included a personal data sheet (Pros. Ex. 1), 17 enlisted performance reports (EPR) (Pros. Ex. 3), and an audio recording of a call Appellant made from jail. (Pros. Ex. 4).

D.L.J.'s special victims counsel read D.L.J.'s statement. (Ct. Ex. A; R. at 84.)

The defense called Appellant's first sergeant and his commander as pre-sentencing witnesses. (R. at 85-94, 95-108.) The first sergeant testified that he spoke with Appellant when

Appellant lost his selection for promotion to master sergeant because of the pending criminal investigation. (R. at 87-89.) The first sergeant testified about the impact of pretrial confinement on Appellant. (R. at 91.) He testified that he believed Appellant was "rehabilitatable." (Id.)

Appellant's commander also testified regarding Appellant's loss of his selection for promotion. (R. at 97-99.) The commander testified about health concerns for Appellant while he was in pretrial confinement. (R. at 102-03.) And the commander testified that Appellant had rehabilitative potential. (R. at 105, 108.)

Appellant's sole sentencing exhibit was his written unsworn statement (Def. Ex. A). In it, Appellant acknowledged, "It saddens me that my actions have led me to lose my career in the Air Force and the retirement I worked so hard for." (Def. Ex. A, p. 2.)

During closing argument for sentencing, trial counsel requested a sentence of a bad conduct discharge, a reduction to E-1, and 30 days of hard labor without confinement. (R. at 123.) Trial defense counsel used Appellant's agreement to the bad conduct discharge, as well as the time served in pretrial confinement, to argue against the government's request for hard labor and for reduction in rank, or any other additional punishment: "[Appellant] recognizes and appreciates the severity of his misconduct. And he knows that when all of this is said and done, he's going to be a civilian with no benefits, and the stigma of a BCD for the rest of his life," and "No more punishment, not hard labor without confinement, not a reduction in rank, nothing in addition to the 179 days in confinement and the BCD that he's agreeing to . . . ." R. at 132-33. The defense emphasized Appellant's 17-year military career and his "spectacular record," his caring leadership that impacted the Air Force, and his deployments. (R. at 127-29.) They addressed his "crumbling" marriage and personal life in general. (R. at 127, 129-32.)

The military judge sentenced Appellant to a bad conduct discharge, reduction to E-1, and concurrent confinement periods, the lengthiest of which was 150 days, for Charge I and its Specification. (R. at 135.) The military judge granted Appellant 179 days of pretrial confinement credit. (Id.)

In his post-sentencing submission of matters, Appellant requested clemency in the form of commuting, reducing, or deferring the reduction in grade to E-1. (ROT, Vol. 1.) On 20 July 2023, D.L.J. submitted matters to the convening authority. (Id.) Then, on 25 July 2023, Appellant responded to D.L.J.'s submission of matters to the convening authority, asking him to not reduce, commute, suspend, or set aside any part of Appellant's reduction in rank. (Id.)

Standard of Review

This Court reviews sentence appropriateness *de novo*. United States v. McAlhaney, 83 M.J. 164, 167 (C.A.A.F. 2023) (citation omitted). The Court may only affirm the sentence if it finds the sentence to be "correct in law and fact and determines, on the basis of the entire record, [it] should be approved." Article 66(d)(1), UCMJ.

Law

This Court "may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1)(A), UCMJ. The Court's authority to review a case for sentence appropriateness "reflects the unique history and attributes of the military justice system, [and] includes but is not limited to, considerations of uniformity and evenhandedness of sentencing decisions." United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001) (citations omitted). The Court "assess[es] sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the

record of trial." United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (*per curiam*) (alteration in original) (citations omitted). Although this Court has great discretion to determine whether a sentence is appropriate, the Court lacks any authority to grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, military Criminal Courts of Appeal are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

When considering the appropriateness of a sentence, the Court can consider the limits, or lack thereof, that a plea agreement placed on the sentence that could be imposed. *See* United States v. Fields, 74 M.J. 619, 625–26 (A.F. Ct. Crim. App. 2015).

Analysis

Appellant argues that his sentence was inappropriately severe and asks this Court to reassess his sentence to set aside the bad conduct discharge and to restore his rank. (App. Br. at 5-6.) His assignment of error is without merit.

Appellant affirmatively agreed in his plea agreement to receive a bad conduct discharge. (App. Ex. 1, para. 4.) He is not claiming that provision of the agreement rendered the sentencing proceeding an "empty ritual" or violates public policy. In asserting the Court can disapprove a sentence including a bad conduct discharge even if the plea agreement called for it, Appellant cites United States v. Arroyo, No. ACM 40321 (f rev), 2024 CCA LEXIS 242, at *31 (A.F. Ct. Crim. App. 18 June 2024) (unpub. op.), and United States v. Kerr, No. 202200140, 2023 CCA LEXIS 434, at *8 (N-M Ct. Crim. App. 17 October 2023) (unpub. op.).

The Arroyo opinion does not stand for the position that the Court should disapprove Appellant's bad conduct discharge. In Arroyo, this Court found 37 days of imprisonment for an assault – consisting of a one-time mere touching of the victim's leg with the appellant's hand while sitting next to each other at a party -- inappropriately severe, so it reduced the confinement term to 14 days. 2024 CCA LEXIS 242 at *31. However, the Court did not find the bad conduct discharge to be inappropriately severe. Id. Therefore, because Appellant was not adjudged additional confinement, and he agreed to the bad conduct discharge, the Arroyo opinion weakens, not strengthens, Appellant's position in this assignment of error.

As the Navy-Marine Corps Court of Criminal Appeals stated several months ago in United States v. Williams, No. 202300217, 2024 CCA LEXIS 111 (N-M Ct. Crim. App. 15 March 2024) (unpub. op.), a plea agreement calling for a bad conduct discharge is strong evidence that it is not inappropriately severe:

> Although not dispositive, when an accused who is represented by competent counsel bargains for a punitive discharge in return for other provisions, that is strong evidence that the punitive discharge is not inappropriately severe. This is particularly so where the plea agreement is accepted by the military judge without express reservation. This is particularly so where the plea agreement is accepted by the military judge without express reservation.

Id. at *5-6. *See also* Arroyo, 2024 CCA LEXIS 242 at *31 (citing United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979); United States v. Cron, 73 M.J. 718, 736 n.9 (A.F. Ct. Crim. App. 2014)) (rejecting claim of inappropriate sentence severity where appellant's plea agreement included punitive discharge); United States v. Jackson, No. ACM 40310, 2024 CCA LEXIS 9, *19 (A.F. Ct. Crim. App. 11 January 2024) (unpub. op.) (same); United States v. Peterson, No. ACM 40220, 2023 CCA LEXIS 88, *20-21 (A.F. Ct. Crim. App. 23 February 2023) (unpub. op.) (same).

In the other case Appellant cites, Kerr (App. Br. 6), the Navy-Marine Court of Criminal Appeals found the accused's adjudged bad conduct discharge was inappropriately severe based on matters in extenuation and mitigation, and the court concluded the military judge should have rejected the plea agreement in its entirety. 2023 CCA LEXIS 434, at *8. However, Appellant does not explain how Kerr is closely related to his case or that the sentences are highly disparate, so he provides no basis upon which to invoke the Court's ability to ensure uniformity and evenhandedness. In United States v. Stanford, No. ACM 40327, 2024 CCA LEXIS 77 (A.F. Ct. Crim. App. 14 February 2024) (unpub. op.), this Court rejected the appellant's reference to Kerr in alleging sentence disparity, stating, "[T]his case is unrelated to Kerr and we do not generally engage in sentence comparison in unrelated cases, and we will not do so here." Id. at *11-12. *See also* Williams, 2024 CCA LEXIS 111 at *5. And a crucial distinction between Kerr and Appellant's case is that, in Kerr, the military judge found the bad conduct discharge inappropriate because of the matters in extenuation and mitigation. Id. at *8. Importantly, the military judge in Appellant's case expressed no disagreement with the bad conduct discharge.

As part of the plea agreement, the convening authority agreed to dismiss multiple charges and/or specifications, and he agreed to limit the confinement term to what was expected to be time Appellant already served at the time of the court-martial. Thus, the only punishment the convening authority was guaranteed as part of the agreement was the bad conduct discharge.

In any event, Appellant should have received a bad conduct discharge even if he had not agreed to receive it. He committed multiple crimes on multiple dates: Appellant threatened to kill his wife, assaulted her in front of her child, made false official statements about breaking into a government building, and caused a government building to be locked down after he made threats to assault the prosecutor in his court-martial.

For those same reasons, Appellant's reduction in rank was merited, because he did not deserve to wear rank. No airman, even an airman basic, should have to look up to Appellant, whose crimes of threats, assault, false official statements, and disorderly conduct fell far below the standards expected of airmen, particularly a non-commissioned officer. In sum, the military judge treated Appellant with leniency. Appellant received less than half the year-long confinement period he could have received, and did not receive the 30 days of hard labor requested by the government.

Appellant argues many of the same matters in mitigation that he argued at trial, such as the quality of his Air Force service prior to his crimes, the stress of his deteriorating marriage and the prospect of losing his daughter, losing his promotion to master sergeant, being placed in pretrial confinement for 179 days, and the support of his commander and first sergeant, who believed Appellant had rehabilitative potential. (App. Br. at 5-6, 7; R. at 127-33.) The military judge is presumed to have considered those factors and followed the law, absent clear evidence to the contrary. United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007). Appellant cites to nothing in the record that calls into question whether the military judge afforded Appellant's points the appropriate weight and followed the law.

Appellant claims that his most serious crime was "an attempt-type assault in which [Appellant] threw vacuum sealed bags in the general direction of D.L.J., without actually hitting her." (App. Br. at 8.) He cites his own self-serving statement during the Care inquiry, "I do not believe the bags of clothes actually struck her." (Id. (citing R. at 19-20)) Appellant continues failing to acknowledge that D.L.J. said that Appellant did strike her, repeatedly, with the large bags containing the smaller vacuum sealed bags that he threw at her from upstairs while she pleaded with him to stop. (Pros. Ex. 1, para. 9.)

Appellant mentions that he waived his right to challenge his pretrial confinement under Article 13, UCMJ. (App. Br. at 8-10.) The record reflects that he did so intentionally, because he had filed such a motion but then knowingly withdrew it as part of the plea agreement. (R. at 59, 60-61, 73-74.) The military judge confirmed with Appellant, on the record, his knowing and intentional abandonment of the issue:

> Military Judge: And then finally, Article 13, pretrial punishment, if that motion were made and granted by me, that possibly could have resulted in additional sentence credit for you. So whatever sentence you get, you'd be credited. I know you've been in pretrial confinement and you're going to get credit for your pretrial confinement. But this would have been additional credit beyond the credit you got in pretrial confinement. Do you understand those, as I explained those to you, what the possible implications could have been if those motions had been granted?
>
> Appellant: Yes, sir.
>
> Military Judge: Now, knowing what your defense counsel has told you previously and what I just told you, do you want to give up making these motions in order to get the benefit of your plea agreement?
>
> Appellant: Yes, sir.
>
> Military Judge: Do you have any questions about this provision of your plea agreement?
>
> Appellant: No, sir.

(R. at 60-61; *see also* R. at 73-74.)

Nonetheless, Appellant now seeks to raise the issue anyway through his assignment of error. At his sentencing hearing, the defense complied with the plea agreement and did not raise the argument that he suffered illegal pretrial confinement. (R. at 136.) The Court cannot permit Appellant to ignore such intentional waiver and review his issue. *See* United States v. McClenney, No. ACM S32712, 2022 CCA LEXIS 559, *11 (A.F. Ct. Crim. App. 29 September 2022) (unpub.

op.), *rev. denied*, 83 M.J. 249 (C.A.A.F. 2023) (finding appellant intentionally waived issue of pretrial confinement and could not raise it on appeal) (citing United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009)); Sauk, 74 M.J. at 606 (same). In United States v. Seliskar, No. ACM 38039, 2013 CCA LEXIS 329 (A.F. Ct. Crim. App. 16 April 2013) (unpub. op.), this Court rejected the appellant's attempt to raise illegal pretrial confinement issue under the rubric of sentence severity where the appellant waived the issue. Id. at *7-8.

Even if the Court were to review the substance of Appellant's claim, pretrial confinement was justified by Appellant's threatening language and behavior towards his wife and towards a prosecutor, even while his own commander and first sergeant tried to deescalate matters. Appellant attempts on appeal to deny he was at the government building to threaten and harm the original prosecutor in his case:

> Importantly, while the parking lot he went to was shared with the base legal office, it was also where his commander and first sergeant's offices were located. [Appellant's] purpose in going there, to get help from his leadership, is evidenced by the fact that he attempted to call them and then waited in the parking lot. After talking with them in person, [Appellant] was able to calm down and walk away from the situation.

(App. Br. at 9.) Such an unsupported reading of the facts should be rejected. The record demonstrates Appellant was not there to speak with his command; rather, he told his commander and first sergeant that he was "going to slap the shit out of" the prosecutor and "beat [the prosecutor's] ass." (Pros. Ex. 1, paras. 8, 19.)

Appellant cites United States v. Taylor, 30 M.J. 882, 885 (A.F.C.M.R. 1990), for the proposition that the Court granted sentencing relief based on "appellant's lengthy pretrial confinement after a domestic incident which resolved with the appellant being highly cooperative." (App. Br. at 9.) The Court granted the relief in the form of reducing confinement

from four months to three months and forfeitures to $150 per month for four months to three months. Id. However, several factors distinguish the Taylor case from Appellant's. First, in Taylor, a case from 1990, the Court took issue with the appellant being held in pretrial confinement for 49 days for "what essentially was a domestic dispute which escalated into a court-martial." Id. at 885. The criminal justice system has taken a more serious approach to domestic violence in the 34 years since Taylor. Second, the Taylor opinion noted the pretrial confinement documentation was initially omitted from the record, and the Court was "particularly troubled by such lengthy pretrial confinement since hospital personnel reported the appellant 'very cooperative' with everyone but the on-scene Security Police officials and the appellant's work record is reasonably satisfactory." Id. In Appellant's case, he was convicted of multiple domestic violence crimes and other crimes as well. And when Appellant was confronted by his commander and his first sergeant outside of the building where his prosecutor worked, he was anything but "highly cooperative."

This Court should not find Appellant's arguments persuasive and should, instead, find his sentence that includes a bad conduct discharge and reduction to E-1 appropriate. Appellant's claim does not warrant leniency -- which this Court cannot grant -- beyond what he received as part of his plea agreement. This Court should deny this assignment of error.

II.

THE MILITARY JUDGE DID NOT ERR BY ADMITTING A PRISON PHONE RECORDING AS A GOVERNMENT SENTENCING EXHIBIT TO REBUT [APPELLANT'S] UNSWORN STATEMENT.

Additional Facts

On 28 June 2023, Appellant made a 15-minute phone call from the Naval Consolidated Brig in Chesapeake, Virginia, to a female recipient. (R. at 79-80, 117-18; Pros. Ex. 4.)

During the pre-sentencing phase of Appellant's court-martial, trial counsel sought admission of the phone call. (R. at 79.) The government represented that, in the recording, Appellant discussed the seriousness of his offenses and the fact that he will not apologize to victim D.L.J. or to the unit, so it was pertinent to Appellant's rehabilitative potential. (R. at 80.)

The defense objected on the basis the call violated R.C.M. 1001(b)(5). (R. at 80, 82.) Appellant did not cite M.R.E. 403.

After the military judge asked for a proffer of where in the phone call Appellant said he would not apologize to victim D.L.J. or to his unit, trial counsel proffered the following excerpt from the call, "The motherfucker probably want [sic] me to read a letter, an apologetic letter. I ain't writing a goddamn letter. I ain't reading nothing they write either. [Female name] tried to call to write something, talk about self-apologizing to [victim], the unit, all this other shit. I ain't reading that shit." (R. at 83.)

Initially, the military judge sustained the defense's objection under R.C.M. 1001(b)(5), because the evidence in the jail call did not relate to or result from the offenses of which Appellant was convicted, and the unsworn statement had not yet been admitted. (R. at 83.)

Appellant sought and obtained admission of his unsworn statement. (R. at 112; Def. Ex. A.) Among other things, the statement included, "And, I will always regret the decisions I made that brought me here," "But I know that my actions have brought me here, and I have to take accountability for them," and "I have made mistakes that I will regret for the rest of my life." (Id.)

After the defense admitted Appellant's unsworn statement and rested his sentencing case, trial counsel again sought admission of Appellant's jail call. (R. at 111-12.) Trial counsel cited a portion of Appellant's unsworn statement in which he wrote, "I'm grateful to those individuals who have testified on my behalf," and juxtaposed it with statements from the jail call:

- "The motherfucking First Sergeant speaking on behalf of the other man too. I wanted to throw it in his face that the information you gave on Monday was wrong. Jail sticks up for you more than the other motherfuckers."

- When addressing Charge I, Specification 1, Appellant's assault of D.L.J., he said, "That shit is stupid. Hopefully the judge sees that that shit is stupid."

- When discussing all the charges and any statement he would make to the court, Appellant said, "I ain't doing that shit," and "It ain't a murder charge. It's not like they do on TV, apologizing to the family and all that shit."

- When talking about apologizing to the First Sergeant and the unit impacted by one of Appellant's offenses, he said, "I don't give a fuck no more."

(R. at 112-13; Pros. Ex. 4.) Trial counsel noted that there were other calls in which Appellant expressed such thoughts, but the government was not going to ask the military judge to consider hours of audio calls. (R. at 117.)

Trial defense counsel renewed their objection based on R.C.M. 1001(b)(5) and an alleged violation of discovery rules. (R. at 114-16, 118.) Again, Appellant did not cite M.R.E. 403.

After denying the defense objection based on their alleged discovery violation by the government, the military judge revisited his ruling on the substance of R.C.M. 1001(b)(5) raised by trial defense counsel:

> The accused's unsworn statement states that his conduct alone led to this court-martial, that he regrets the decisions that he made, and that he'll regret the mistakes that he made for the rest of his life. I think what has been proffered is relevant to rebut that. So, I will allow it for that purpose. What is his expression of – about the crimes and the victim. So just that is what I'll consider as part of that. So, to that extent, the objection is – on the relevancy part is overruled.
>
> Again, the court understands the context of it, frustration, that all goes to weight as opposed to admissibility.

(R. at 120.)

Standard of Review

A military judge's decision to admit sentencing evidence over objection is reviewed by this Court for an abuse of discretion. United States v. Barker, 77 M.J. 377, 383 (C.A.A.F. 2018). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal citation omitted).

Law

1. Rebuttal

The Government is permitted to rebut "matter presented by the defense," R.C.M. 1001(e), including "any statement of fact" in an accused's unsworn statement. R.C.M. 1001(d)(2)(C), 1001(e). "[T]he legal function of rebuttal evidence . . . [is] to 'explain, repel, counteract or disprove the evidence introduced by the opposing party.'" United States v. Saferite, 59 M.J. 270, 274 (C.A.A.F. 2004) (quoting United States v. Banks, 36 M.J. 150, 166 (C.M.A. 1992)). "The scope of rebuttal is defined by evidence introduced by the other party." Banks, 36 M.J. at 166 (citations omitted).

2. Forfeiture of objection based on M.R.E. 403

To preserve a claim of error in a ruling to admit evidence, a party must "state[ ] the specific ground, unless it was apparent from the context." Mil. R. Evid. 103(a)(1), (2). "A party is required to provide sufficient argument to make known to the military judge the basis of his objection and, where necessary to support an informed ruling, the theory behind the objection." United States v. Datz, 61 M.J. 37, 42 (C.A.A.F. 2005) (citations omitted). *See* United States v. Humphrey, No. ACM 39937, 2022 CCA LEXIS 149, *29, 32 (A.F. Ct. Crim. App. 14 March 2022) (unpub. op.)

(applying plain error standard to appellate assignment of error on hearsay grounds, where trial defense counsel only objected on M.R.E. 403 grounds); United States v. Barnes, No. ACM 38720, 2016 CCA LEXIS 267, *26-27 (A.F. Ct. Crim. App. 27 April 2016) (unpub. op.) (applying plain error standard to claims forfeited at trial but raised on appeal under M.R.E. 403 and 404). "Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error." United States v. Brooks, 64 M.J. 325, 328 (C.A.A.F. 2007) (citing Mil. R. Evid. 103(d)). Under plain error review, the appellant has the burden of showing there was error, that the error was plain or obvious, and that the error materially prejudiced a substantial right of the appellant. United States v. Girouard, 70 M.J. 5, 11 (C.A.A.F. 2011).

3. Test for prejudice

When there is error in the admission of sentencing evidence, the test for prejudice is whether the error substantially influenced the adjudged sentence. Barker, 77 M.J. at 384 (internal quotation omitted). The Court considers four factors when determining whether an error had a substantial influence on the sentence: (1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. Id. (citation omitted).

Analysis

In the unsworn statement, Appellant wrote about his regret for his decisions, and that he had to take responsibility for his actions. (Def. Ex. A.) The military judge admitted Appellant's phone call from the brig for the limited purpose of rebutting those expressions of regret and taking of responsibility. (R. at 120.) However, Appellant now claims the statements in the recording "did not address those topics, let alone directly contradict those assertions." (App. Br. at 11.)

Appellant is wrong, because the statements in the phone call directly rebutted Appellant's claimed regret and responsibility in his unsworn statement, for which he sought admission to demonstrate his potential for rehabilitation.

Appellant objected based on R.C.M. 1001(b)(5), asserting that rule only permits evidence of rehabilitative potential in the form of an opinion. (R. at 79, 80, 82, 114-16, 118.) He did not object pursuant to M.R.E. 403; therefore, that basis was forfeited. Mil. R. Evid. 103(a)(1), (2); Datz, 61 M.J. at 42; Humphrey, 2022 CCA LEXIS 149 at *29, 32; Barnes, 2016 CCA LEXIS 267 at *26-27. And, in this case, there was no plain error and no prejudicial error that substantially influenced the adjudged sentence.

Appellant cites United States v. Cleveland, 29 M.J. 361 (C.M.A. 1990), for the proposition that the government cannot use rebuttal to introduce impermissible evidence during sentencing, claiming Appellant's case and Cleveland are "analogous." (App. Br. at 12.) But Appellant's case is completely different. In Cleveland, one sentence from appellant's unsworn statement was, "Although I have not been perfect, I feel that I have served well . . . ." 29 M.J. at 362. Based on that portion of the statement, the government presented evidence of the appellant's off-duty misconduct, including a non-judicial punishment pursuant to Article 15, UCMJ, for bad checks from several years prior; a letter of reprimand for misplaced government property from several years prior; and a few more recent bad checks and driving-related incidents. Id. at 363. In Cleveland, off-duty misconduct was not direct rebuttal to "serving well" on duty. Id. at 364. In Appellant's case, on the other hand, his phone call in which he demonstrated mendacity directly rebutted his unsworn statement's claims of regret and accountability. Also, the Court in Cleveland noted the importance of lay court-martial members in the sentencing process, id. at 363; however, in Appellant's case, a military judge sentenced him.

Appellant also cites United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000), for the proposition that only factual assertions, not opinions, can be rebutted. (App. Br. at 11.) However, in Manns, CAAF distinguished Cleveland and emphasized the appellant in Cleveland had said, "I *feel* that I have served well…." (Id. (citing 29 M.J. at 362).) Thus, CAAF in Manns upheld the admission of rebuttal evidence to the appellant's statement of fact, "I have tried throughout my life, even during childhood, to stay within the laws and regulations of this country":

> Unlike *Cleveland* and *Partyka*, this case involves appellant's assertion of fact that he had tried to obey the law. Thus, we hold that the prosecution was entitled to produce evidence that appellant had not tried, or at least had not tried very hard.

Id. In Appellant's case, his unsworn statements -- that he would always regret his decisions leading to his court-martial, and that he was taking accountability for those decision -- were assertions about his rehabilitation, not couched as opinions. Then, in his phone call, he characterized his assault charge as "stupid," he asserted he "ain't doing shit" and he "don't give a fuck" in reference to apologizing, and he said people in the jail stick up for him more than "other motherfuckers," referencing people from his unit. The government properly rebutted his unsworn statement about regret and rehabilitative potential at the court-martial with those contradictory assertions from the phone call.

A more similar case to Appellant's is the case cited frequently during the court-martial, United States v. Leach, No. ACM 39805 (f rev), 2022 CCA LEXIS 76 (A.F. Ct. Crim. App. 3 February 2022) (unpub. op.). (R. at 80, 82, 112-18.) In Leach, the appellant's guilty-plea providence inquiry included his portrayal of himself as apologetic and remorseful. 2022 CCA LEXIS 76 at *4-5. During pre-sentencing, the military judge then admitted several of the appellant's calls from confinement in which he demonstrated his attitudes toward his offenses and his victim. Id. at *6, 10. This Court held, "Appellant's attitude with respect to his crimes and his

victims squarely implicates his state of mind regarding not just his offenses, but his rehabilitative potential." Id. at *17-18. That is why Appellant's jail calls from the brig -- in which he ridiculed the charges and refused to apologize for his crimes -- directly rebut his unsworn statement in which he claimed regret for, and acceptance of responsibility for, his crimes.

This Court has repeatedly affirmed military judges' admission of evidence in rebuttal to unsworn statements and other defense sentencing evidence. In United States v. Manzano Tarin, No. ACM S32734 (f rev), 2024 CCA LEXIS 390 (A.F. Ct. Crim. App. 24 September 2024) (unpub. op.), this Court affirmed the military judge's admission, as rebuttal evidence to the appellant's unsworn statement in which he claimed he committed his crime of stealing gift cards from AAFES to help his brother with his brother's debt, a deed record that supported the government's position that the appellant used the gift cards in at least part to pay off his own mortgage. Id. at *8-9. In United States v. Zapata, No. ACM 40048, 2022 CCA LEXIS 583 (A.F. Ct. Crim. App. 14 October 2022) (unpub. op.), *rev. denied*, 83 M.J. 259 (C.A.A.F. 2023), this Court affirmed the military judge's admission -- as rebuttal evidence to a defense sentencing exhibit containing a character letter that asserted, among other things, that the appellant was "deeply kind, compassionate, and loving in his treatment and respect for others" -- a portion of a victim's statement previously precluded in which the victim recounted the appellant striking the victim in multiple ways. Id. at *11-15. In United States v. Obregon, No. ACM 39005, 2017 CCA LEXIS 609 (A.F. Ct. Crim. App. 6 September 2017) (unpub. op.), *rev. denied*, 77 M.J. 265 (C.A.A.F. 2018), this Court affirmed the military judge's admission -- as rebuttal evidence to the appellant's unsworn statement and other sentencing evidence portraying his relationship with his son in a positive light and in which appellant discussed how hard he fought to obtain visitations with his son – evidence that the appellant had not exercised his visitation rights often and, when visits did occur, the son

was unusually quiet afterwards. Id. at *6-8. *Compare* Dunlap, 2020 CCA LEXIS 148, *27-29 (finding rebuttal evidence to appellant's unsworn statement and photographs that claimed he was caring and responsible father to be admissible, but overturning military judge's admission of entire victim statement).

Appellant cites United States v. Dunlap, No. ACM 39567, 2020 CCA LEXIS 148 (A.F. Ct. Crim. App. 4 May 2020) (unpub. op.). (App. Br. at 12.) However, that case is inapplicable to Appellant's case. In Dunlap, despite admissibility of four statements from the unsworn victim impact statement (VIS) to rebut appellant's pre-sentencing evidence, the Court found error in admission of the entirety of the VIS, because much of the rest of the statement contained inadmissible evidence. Id. at *4-5, 20-29. Appellant cites no specific statements from his phone call that failed to rebut his claimed regret and acceptance of responsibility. And in Dunlap, the Court still found the error did not material prejudice the appellant's substantial rights, so it affirmed the sentence. Id. at *2, 34.

Appellant had agreed to a bad conduct discharge. The military judge adjudged a term of confinement of 150 days, much less than the 179 days of time already served. (R. at 135.) So, the only arguable additional punishment was his reduction in grade to E-1. And such a reduction is appropriate considering Appellant's numerous serious crimes, so there was no prejudice from an arguable error in admitting his phone call.

Appellant claims, "The strength of the Government's sentencing case was weak," and "Had the Government not introduced the recording, they would not have had any sentencing case to speak of." (App. Br. at 13.) However, it was quite strong, because the military judge considered the nature and circumstances of Appellant's crime, including the stipulation of fact. (R. at 133; Pros. Ex. 1.) Appellant had threatened to kill his wife, assaulted her in front of her child, made

false official statements about breaking into a government building, and caused a government building to be locked down after he made threats to assault the prosecutor in his court-martial. And yet the military judge recognized Appellant was expressing frustration in the phone call, which impacted the weight the military judge gave the evidence. (R. at 120.) Even without the jail call, the military judge would have adjudged the same sentence. As discussed in Issue I, above, the reduction in grade to E-1 was appropriate, even without considering Appellant's phone call from the brig.

Appellant's phone call directly contradicted his claims of regret and accountability in his unsworn statement, so its admission was appropriate and not plain error. Even if it had not been admitted, Appellant would have received the same sentence, so there was no arguable prejudice in any event. Thus, Appellant's assignment of error is without merit.

III.

APPELLANT WAS NOT DENIED SPEEDY POST-TRIAL PROCESSING.

Additional Facts

Appellant's sentencing took place on 10 July 2023. (R. at 1.)

The court reporter prepared a chronology from the hearing until the date on which he certified Appellant's court-martial transcript on 26 July 2023 and certified the record of trial (ROT) on 16 August 2023. (ROT, Vol. 1, *Court Reporter Chronology*.)

In addition, the government is submitting, with this Answer, a Motion to Attach the declaration of the Chief of Military Justice for the Joint Base Andrews legal office. (*Declaration of Capt Wilma Rodriguez*, dated 13 January 2025.) That declaration explains the legal office's processing of Appellant's case after the rehearing through their delivery of the electronic record of trial to JAJM on 28 November 2023. (Id.)

The case was docketed with this Court on 11 December 2023, 154 days after Appellant's rehearing ended.

Standard of Review

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

Law

In Moreno, CAAF established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision more than 18 months after the case is docketed with the court. 63 M.J. 129, 142-143 (C.A.A.F. 2006). Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633. Now, this Court applies an aggregate standard threshold of 150 days from the day the appellant was sentenced to docketing with this Court. Id.

When a case does not meet one of the above standards, the delay is presumptively unreasonable and in reviewing claims of unreasonable post-trial delay this Court evaluates (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 135 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). All four factors are considered together and "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

In Moreno, CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. 63 M.J. at 138–39 (citations omitted). As to the first type of prejudice, where Appellant does not prevail on the substantive grounds of his appeal, there is no oppressive incarceration. Id. at 139. Similarly, looking at the third type of prejudice, where Appellant's substantive appeal fails, his ability to present a defense at a rehearing is not impaired. Id. at 140. Finally, with regard to the second type of prejudice, anxiety and concern, "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." Id.

Where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). There must have been "unreasonable *and* unexplained post-trial delays." United States v. Tardif, 57 M.J. 219, 220 (C.A.A.F. 2002) (emphasis added). In such an instance, the appellate courts are to "tailor an appropriate remedy, if any is warranted, to the circumstances of this case." Id. at 225. Relief under Article 66, UCMJ, "should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." Id. In deciding whether to invoke Article 66, UCMJ, to grant relief as a "last recourse," this Court laid out a non-exhaustive list of factors to be considered, including:

> (1) How long the delay exceeded the standards set forth in Moreno;
>
> (2) What reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case;

> (3) Whether there is some evidence of harm (either to the appellant or institutionally) caused by the delay;
>
> (4) Whether the delay has lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline;
>
> (5) Whether there is any evidence of institutional neglect concerning timely post-trial processing; and
>
> (6) Given the passage of time, whether the court can provide meaningful relief.

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016).

Analysis

Appellant claims he was denied speedy post-rehearing processing. (App. Br. at 14.) His argument fails using framework from Moreno, Livak, Barker, Toohey, Tardiff, and Gay.

1. Length of Delay

This factor weighs only minimally in favor of Appellant. The length of time is not "egregious;" it is only four days more than the 150-day benchmark set out in Livak. In United States v. Lundby, No. ACM S32500, 2019 CCA LEXIS 181 (A.F. Ct. Crim. App. Apr. 23, 2019) (unpub. op.), a four day-delay was not considered egregious when the government "acted with reasonable diligence in the post-trial processing of Appellant's case." Id. at *13 (action took place well within the 120-day window, and "final modifications to the record took place over the course of an extended holiday period, and the record of trial spent 11 days in transit before being docketed with the court.") But even in cases where the Government has taken over three times the presumptively reasonable amount of time to docket an appellant's case, courts have not awarded sentence relief. *See generally* United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022) (holding

481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.")

Appellant does not cite to any cases in which the 150-day standard was exceeded by a small number of days and relief was granted. The United States has found several opinions over the last four years from this Court with more than 154 days of delay in which no relief was granted. *See* Anderson, 82 M.J. at 86 (481 days); United States v. Byrne, No. ACM 40391, 2024 CCA LEXIS 346, *50 (A.F. Ct. Crim. App. 22 August 2024) (unpub. op.) (290 days); United States v. Gardner, No. ACM 39929, 2021 CCA LEXIS 604, *70-74 (A.F. Ct. Crim. App. 16 November 2021) (unpub. op.) (281 days); United States v. Dillon, No. ACM 40463, 2024 CCA LEXIS 322, *2 (A.F. Ct. Crim. App. 2 August 2024) (unpub. op.) (228 days); United States v. Cook, No. ACM 40333, 2024 CCA LEXIS 276, *70 (A.F. Ct. Crim. App. 3 July 2024) (unpub. op.) (200 days); United States v. Leipart, No. ACM 39711, 2023 CCA LEXIS 39, *83 (A.F. Ct. Crim. App. 26 January 2023) (unpub. op.) (183 days, where 574 pages of transcript took 109 days to produce); United States v. Brown, No. ACM 40066 (f rev), 2022 CCA LEXIS 710, *65-69 (A.F. Ct. Crim. App. 9 December 2022) (unpub. op.) (181 days); United States v. Jackson, No. ACM 39955, 2022 CCA LEXIS 300, *134-36 (A.F. Ct. Crim. App. 23 May 2022) (unpub. op.) (176 days); United States v. Harrington, No. ACM 39825, 2021 CCA LEXIS 524, *103-04 (A.F. Ct. Crim. App. 14 October 2021) (unpub. op.) (175 days); United States v. Atencio, No. ACM S32783, 2024 CCA LEXIS 543, *10 (A.F. Ct. Crim. App. 20 December 2024) (unpub. op.) (166 days).

Even though the delay is presumptively unreasonable, it does not end the inquiry. The delay alone is not sufficient to justify relief—it merely triggers a due process analysis under Barker.

2. Reasons for the Delay

Appellant asserts "The record of trial contains no explanation for why this case was subject to such a lengthy delay before docketing with this Court," and notes the time between 31 May 2023, when the court reporter received the entry of judgment, and the date of docketing with the Court is "without commentary from the Government." (App. Br. at 16.) However, the declaration of the Joint Base Andrews Chief of Military Justice provides just such commentary. (*Declaration of Capt Rodriguez*.) It demonstrates that the legal office reasonably processed Appellant's case. The chronology notes almost daily activities towards and/or monitoring of post-trial processing through 25 August 2023, when the defense caused delays until 21 September 2023 by not returning excess leave documentation. (Id.) Then, assembly of the ROT continued until it was turned into JAJM on 27 November 2023. (Id.)

This is not a situation in which processing of the case was forgotten or "fell between the cracks." Rather, the government was consistently trying to move the processing forward, but there were delays that were explained and reasonable. Ultimately, there is no evidence of a "deliberate attempt to delay the trial in order to hamper the defense." Barker v. Wingo, 407 U.S. at 531. "A more neutral reason such as negligence … should be weighed less heavily." Id. Thus, this second factor should be neutral or only weigh slightly in Appellant's favor.

3. Appellant Did Not Assert the Right of Timely Review and Appeal

In his Assignments of Error, Appellant claims, "[Appellant] hereby asserts his right to timely appellate review." (App. Br. at 18) He did not make a demand for timely review prior to that. In fact, Appellant submitted motions for enlargements of time on 10 occasions, from December 2023 through December 2024. This factor should weigh against Appellant.

4. Appellant Suffered No Prejudice Distinguishable from Normal Anxiety Awaiting Appellate Decision

Appellant's brief does not try to argue that he suffered oppressive incarceration or particularized anxiety or concern. He was adjudged a time-served sentence. Rather, Appellant claims he was prejudiced by the post-trial processing delay, because he "was unable to petition this Court for relief sooner." (App. Br. at 17.) However, that argument fails because of his 10 motions for enlargements of time, which negate any claimed urgency in his appeal.

Appellant does not allege any way in which his ability to present his case in this appeal was prejudiced. Without explanation, he claims, "Like the appellant in United States v. Turpiano," [Appellant] has been 'impeded in his ability to exercise his post-trial rights…." (App. Br. at 19 (citing United States v. Turpiano, No. ACM 38873 (f rev), 2019 CCA LEXIS 367, *19 (A.F. Ct. Crim. App. 10 Sep. 2019) (unpub. op.).) In Turpiano, this Court rejected Appellant's request to set aside the convictions, but it granted relief by reducing the adjudged forfeitures to apply for two months instead of three months. Id. at *3-4. However, the Turpiano opinion emphasized the unique facts of the case, which distinguish it completely from Appellant's:

> The systemic deficiencies exhibited by the post-trial processing of this case, along with more than a dozen other cases cause us to change our focus from admonition of the legal offices at [the base processing Appellant's case] to granting relief to Appellant. Appellant's counsel refers to the processing of this case as "a comedy of errors." We are exasperated, not amused, by the failures of military justice administration at [the base] requiring judicial action to ensure Appellant has not been prejudiced.

Id. at *20. Here, there is no allegation of "systemic disorder" against the legal office processing Appellant's case after his rehearing, so Turpiano is inapplicable.

Appellant did not face oppressive incarceration, particularized anxiety and concern, or impairment of his ability to prepare an appeal, so he did not suffer a due process violation under Moreno, Barker, and Livak.

5. The Delay Was Not So Egregious as to Adversely Affect Public Perception; the Post-Trial Delays Were Both Reasonable and Explained; and Article 66, UCMJ, Relief is Not Justified

Appellant claims the delay in his case would adversely affect the public's perception of the fairness and integrity of the military justice system. (App. Br. at 18.) To the contrary, reducing Appellant's conviction or sentence for false official statement, threats, domestic violence, unlawful entry, and disorderly conduct because of post-rehearing processing delays would harm the public's perception of the military justice system.

This case does not meet the non-exhaustive Gay factors. The delay of merely four days beyond the 150-day standard, and the government demonstrated no bad faith or gross indifference to the overall processing of this case. As discussed above, Appellant faced no incarceration, oppressive or otherwise, and suffered no anxiety or concern while awaiting an appellate decision. And the delay has not lessened the disciplinary effect of the sentence, and providing Appellant's requested relief would undermine the goals of good order and discipline. Appellant was found guilty of several serious crimes. This is not a case in which the Court should provide the "last recourse" of relief under Article 66(d), UCMJ. This Court should reject Appellant's 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.

[redacted]
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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 (Capt Michael J. Bruzik) on 13 January 2025.

[redacted]
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32765**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Renard D. JENKINS	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 13 January 2025, the Government moved this court to attach documents to address Appellant's claim in Issue III of his assignments of error brief alleging a violation of his speedy post-trial processing rights. The documents consist of a declaration by the Chief of Military Justice and a 10-page summarized chronology. On 21 January 2025, Appellant opposed the motion "because the attachment consists of an unsigned declaration" that does not comply with JT. CT. CRIM. APP. R. 23(b)(2).

On 22 January 2025, the Government moved for leave to file a motion to amend its motion of 13 January 2025 in order to attach the signed declaration. The Government specifically asks this court to "grant its Motion for Leave to File and Motion to Amend the Motion to Attach." Appellant did not submit opposition to this motion.

Accordingly, it is by the court on this 30th day of January, 2025,

ORDERED:

The Government's 22 January 2025 Motion for Leave to File and Motion to Amend is **GRANTED**.

The Government's 13 January 2025 Motion to Attach Documents, as amended, 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,* v. Technical Sergeant (E-6) **RENARD D. JENKINS**, United States Air Force, *Appellant.*	)))))))))	UNITED STATES' MOTION FOR LEAVE TO FILE AND MOTION TO AMEND No. ACM S32765 Before Special Panel 22 January 2025

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

Pursuant to Rules 18.4, 23(b), 23(d), and 23.3(n) of this Court's Rules of Practice and Procedure, the United States hereby submits this Motion for Leave to File a Motion to Amend the United States' Motion to Attach dated 13 January 2025. Pursuant to Rule 23(d), the motion for leave to file is combined with the underlying pleading.

Appellant's 21 January 2025 Reply Brief correctly noted that the United States' Motion to Attach included an unsigned version of the declaration of the Chief of Military Justice for the 316th Wing Legal Office, Joint Base Andrews, Maryland. (Appellant's Reply Br. at 6.) That was error by the undersigned, who had received the signed version of the declaration on 13 January 2025 but accidentally included the earlier unsigned version. I apologize to the Court for my lack of attention to that detail, and respectfully request the Court to accept the attached signed version for the reasons explained in the original Motion to Attach.

WHEREFORE, the United States requests this Court grant this Motion for Leave to File and Motion to Amend the Motion to Attach.

STEVEN R. KAUFMAN, Col, USAF

Appellate Government Counsel, Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd, Ste 1190
Joint Base Andrews, MD 20762
(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 (Capt Michael J. Bruzik) on 22 January 2025 via electronic filing.

STEVEN R. KAUFMAN, Col, 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,*	)	UNITED STATES' MOTION TO ATTACH DOCUMENTS
v.	)	No. ACM S32765
Technical Sergeant (E-6) **RENARD D. JENKINS**, USAF, *Appellant.*	)	Before Special Panel 13 January 2025

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

Pursuant to Rule 23(b) of this Court's Rules of Practice and Procedure, the United States hereby submits this Motion to Attach Documents to address Appellant's claim in Issue III of his Assignments of Error (AOE) alleging a violation of his speedy post-trial processing rights. The Chief of Military Justice for Joint Base Andrews, Maryland, completed the declaration, which incorporates an attached Moreno chronology.

In Appellant's AOE, he claims he was denied speedy post-trial processing and is entitled to relief for an alleged violation of United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006). (App. Br. at 14.) Appellant asserts "The record of trial contains no explanation for why this case was subject to an impermissible delay before docketing with this Court. The gap of time between that date and the eventual docketing is without commentary from the Government." (App. Br. at 16.) Although the ROT includes a Court Reporter Chronology (ROT, Vol. 1), it did not address the base legal office's post-trial processing. The Chief of Military Justice's declaration and the Moreno chronology for Joint Base Andrews provide such information.

The Court of Appeals for the Armed Forces 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)). The issue of post-trial delay is raised by materials currently in the record but is not "fully resolvable by those materials." Jessie, 79 M.J. at 445. The declaration of the Chief of Military Justice for Joint Base Andrews addresses the post-trial processing of Appellant's case and is, thus, relevant and necessary to resolve and disprove Appellant's claim that the United States deprived him of speedy post-trial processing.

WHEREFORE, the United States requests this Court grant this Motion to Attach the Declaration with attachment.

STEVEN R. KAUFMAN, Col, USAF
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(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, **GOVERNMENT** *Appellee,*	)	**APPELLANT'S ANSWER TO MOTION TO ATTACH DOCUMENTS**
v.	)	Before a Special Panel
Technical Sergeant (E-6), **RENARD D. JENKINS,** United States Air Force, *Appellant.*	)	No. ACM S32765
	)	21 January 2025

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

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, Appellant, Technical Sergeant (TSgt) Renard D. Jenkins, responds to the United States' Motion to Attach Documents, dated 13 January 2025 (Motion to Attach). TSgt Jenkins opposes this motion and requests this Court deny it because the attachment consists of an unsigned declaration that does not comply with JT. CT. CRIM. APP. R. 23(b)(2) or 28 U.S.C. § 1746.

Facts

On 12 December 2024, TSgt Jenkins submitted his assignment of errors brief to this Court. TSgt Jenkins raised the issue of whether he was denied speedy appellate processing based on the delay between when his sentence was imposed and the docketing of this case. On 13 January 2025, the Government filed its motion to attach a declaration from the "custodian of records for materials related to [this case]," for purposes of explaining the post-trial chronology. (Motion to Attach at Declaration.) This declaration contained no signature for the declarant.

Law & Analysis

JT. CT. CRIM. APP. R. 23(b)(2) requires that a motion to attach containing a "statement of a person" must be in the form of either an affidavit or "an unsworn declaration under penalty of

perjury pursuant to 28 U.S.C. § 1746." That statute requires the declaration be executed by signature of the declarant. Federal courts have interpreted the absence of a signature to render the instrument fatally defective. *E.g.*, *EOC v. Ferrellgas*, 97 F.4th 338, 350 (6th Cir. 2024); *Tobin v. City & County of San Francisco*, 747 Fed. Appx. 584, 585 (9th Cir. 2019) (mem.). Here, the Government has offered to this Court a declaration with does not comply with either this Court's rules of practice and procedure or the federal statute. Accordingly, the declaration is fatally defective and should not be attached to the record because it lacks the legal efficacy necessary to have any bearing on the issues before this Court. TSgt Jenkins respectfully requests this Honorable Court deny the United States' Motion to Attach Documents.

Respectfully submitted,

[redacted]

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(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 Appellate and Trial Operations Division on 21 January 2025.

Respectfully submitted,

MICHAEL J. BRUZIK, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32765**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Renard D. JENKINS	)	**PANEL CHANGE**
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 31st day of January, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from a Special Panel and referred to another Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
RAMÍREZ, ROBERTO, Lieutenant Colonel, Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32765**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Renard D. JENKINS	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

Oral argument is hereby ordered on the following issue:

> **WHETHER THE MILITARY JUDGE ERRED BY ADMITTING A PRISON PHONE RECORDING AS A GOVERNMENT SENTENCING EXHIBIT TO REBUT APPELLANT'S UNSWORN STATEMENT.**

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

ORDERED:

Oral argument in the above-captioned case will be heard at **1200 hours** in the courtroom of the **New Mexico Court of Appeals**, 2211 Tucker Avenue NE, adjacent to the University of New Mexico School of Law, Albuquerque, New Mexico, on **Wednesday, 5 March 2025**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

20 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' NOTICE OF APPEARANCE
v.	)	
Technical Sergeant (E-6) RENARD D. JENKINS, USAF, *Appellant.*	)	ACM S32765 Special Panel

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

Pursuant to Rule 12(a) of this Court's Rules of Practice and Procedure, the undersigned counsel respectfully enters his notice of appearance in the above captioned case. Undersigned counsel will be sitting second chair for the Appellee at oral argument.

MATTHEW TALCOTT, Col, USAF
Director
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 20 February 2025.

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

20 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) RENARD D. JENKINS, USAF, *Appellant.*	))))))))	UNITED STATES' NOTICE OF APPEARANCE ACM S32765 Special Panel

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

Pursuant to Rule 12(a) of this Court's Rules of Practice and Procedure, the undersigned counsel respectfully enters her notice of appearance in the above captioned case. Undersigned counsel will argue the case for the United States.

[redacted]
REGINA HENENLOTTER, 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 20 February 2025.

REGINA HENENLOTTER, 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*	)	NOTICE OF APPEARANCE
v.	)	Before Special Panel
Technical Sergeant (E-6) RENARD D. JENKINS United States Air Force *Appellant*	)	No. ACM S32765 24 February 2025

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

COMES NOW the undersigned counsel and enters an appearance pursuant to Rules 12 and 13 of both the Joint Rules of Appellate Procedure for Courts of Criminal Appeals and this Honorable Court's Rules of Practice and Procedure. Undersigned counsel will be sitting second chair at Appellant's table as supervisory counsel for oral argument.

Respectfully Submitted,

[redacted]

PILAR G. WENNRICH, Colonel, USAF
Chief, Air Force Appellate Defense Division
Military Justice and Discipline Directorate
United States Air Force
(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 24 February 2025.

PILAR G. WENNRICH, Colonel, USAF
Chief, Air Force Appellate Defense Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4770

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32765**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Renard D. JENKINS	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 4 February 2025, this court ordered oral argument in the above-captioned case on the following issue:

> **WHETHER THE MILITARY JUDGE ERRED BY ADMITTING A PRISON PHONE RECORDING AS A GOVERNMENT SENTENCING EXHIBIT TO REBUT APPELLANT'S UNSWORN STATEMENT.**

As part of the court's oral argument outreach program, oral argument was to take place in the courtroom of the New Mexico Court of Appeals, adjacent to the University of New Mexico School of Law, Albuquerque, New Mexico, on Wednesday, 5 March 2025.

Accordingly, it is by the court on this 27th day of February, 2025,

ORDERED:

Oral argument in the above-captioned case will now be heard at **1000 hours on Wednesday, the 5th day of March 2025**, in the Air Force Court of Criminal Appeals courtroom, 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland 20762.

This order supersedes our previous order described *supra* dated 4 February 2025.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32765**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Renard D. JENKINS	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 4 February 2025, this court ordered oral argument in the above-captioned case on the following issue:

> **WHETHER THE MILITARY JUDGE ERRED BY ADMITTING A PRISON PHONE RECORDING AS A GOVERNMENT SENTENCING EXHIBIT TO REBUT APPELLANT'S UNSWORN STATEMENT.**

On 27 February 2025, we ordered the oral argument to be heard at 1000 hours on Wednesday, the 5th day of March 2025, in the Air Force Court of Criminal Appeals courtroom, 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland 20762.

The court amends the start time to 1300 hours.

Accordingly, it is by the court on this 28th day of February, 2025,

ORDERED:

Oral argument in the above-captioned case will now be heard at **1300 hours on Wednesday, the 5th day of March 2025**, at the same location identified in our 27 February 2025 order.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION TO CITE SUPPLEMENTAL AUTHORITIES
v.	)	Before a Special Panel
Technical Sergeant (E-6) **RENARD D. JENKINS** United States Air Force *Appellant.*	)	No. ACM S32765
	)	3 March 2025

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

Pursuant to Rule 23.3(d) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to submit supplemental citation of authorities. Undersigned counsel has recently been detailed to this case to present oral argument and did not write the original brief. The cases cited below came to undersigned counsel's attention while preparing for oral argument. Rule 25.2(e) of this Court's Rules of Practice and Procedure provides that counsel may submit a supplemental citation no later than two business days prior to oral argument. Oral argument is currently scheduled for 5 March 2025.

The below cases are relevant for this Court to consider when deciding whether the military judge erred by admitting a prison phone recording as a Government sentencing exhibit to rebut Appellant's unsworn statement.

1. United States v. Strong, 17 M.J. 263, 266-67 (C.M.A. 1984). Strong explains that the purpose of rebuttal evidence "is to explain, clarify, or contradict the opponent's evidence. Id. at 266. And since the defense gets wide latitude in the nature of the evidence it is permitted to offer, some latitude should also be given to the government to prevent a one-sided picture from

being presented to the sentencing authority. Id. This framework will assist the Court in deciding whether the prison phone recording constituted proper rebuttal evidence.

2. United States v. Oliver, 2016 CCA LEXIS 101, at 5-6* (A.F. Ct. Crim. App. Feb. 24, 2016) (unpub. op.). Oliver distinguishes United States v. Cleveland, 29 M.J. 361 (C.M.A. 1990), the case upon which Appellant heavily relies. In Oliver, this Court emphasized that the unsworn statement at issue in Cleveland contained the words "*I feel* that I have served well," which made it an opinion and not subject to rebuttal. 2016 CCA LEXIS 101, at 6*. In contrast, this Court found that Oliver's words in his unsworn statement, "I am a good person" was a statement of fact subject to rebuttal under RCM 1001(d)(2)(C). Oliver will be helpful to the Court in determining whether Appellant's unsworn statements were subject to rebuttal.

3. United States v. Wiseman, 2020 CCA LEXIS 260, at *10 (A.F. Ct. Crim. App. Aug. 4, 2020) (unpub. op.). Wiseman also distinguished Cleveland. This Court found that Appellant's unsworn statement that he "cooperated with law enforcement the best that [he] could" was an assertion of fact that the government could rebut. This Court clarified that "[i]f Appellant had stated 'I feel' or 'I believe I cooperated' that might have been indicative of an opinion, not a fact—but he did not." Id. This case will also assist the Court in deciding whether Appellant's unsworn statements were subject to rebuttal.

WHEREFORE, the United States respectfully requests that this Honorable Court grant its motion to submit supplemental citations of authority.

[redacted]
REGINA HENENLOTTER, Maj, USAF
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

[redacted]
MARY ELLEN PAYNE
Associate Chief, 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 the Air Force Appellate Defense Division on 3 March 2025.

[redacted]Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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United States Air Force
(240) 612-4800

APPENDIX

United States v. Strong

United States Court of Military Appeals

March 12, 1984

No. 46,420. CM 443262.

Reporter

17 M.J. 263 *; 1984 CMA LEXIS 22000 **

UNITED STATES, Appellee, v. Frank D. STRONG, Specialist Four, U.S. Army, Appellant.

Counsel: [**1] For Appellant: Colonel William G. Eckhardt, Lieutenant Colonel R. Rex Brookshire II, Major Robert M. Ott, and Captain Frank J. DiGiammarino (on brief); Captain Michael T. Kelly.

For Appellee: Colonel James Kucera, Lieutenant Colonel John T. Edwards, Captain Daniel V. Velling, and Captain Paul E. Jordan (on brief); Captain Patrick M. Flachs, Captain John L. Plotkin.

Judges: COOK, Judge; Judge FLETCHER concurs; EVERETT, Chief Judge (dissenting)

Opinion by: COOK

Opinion

[*263] *Opinion of the Court*

COOK, Judge.

Tried by general court-martial, military judge alone, the accused was convicted, pursuant to his pleas, of wrongfully possessing and selling lysergic acid diethylamide (LSD) on two occasions; and wrongfully possessing and selling marihuana, [1] in violation of Articles 92 and 134, Uniform Code of Military [*264] Justice, 10 U.S.C. §§ 892 and 934, respectively. The adjudged and approved sentence extends to a dishonorable discharge, confinement at hard labor for 15 months, forfeiture of $367.00 pay per month for 15 months, and reduction to private (E-1). [2] The United States Army Court of Military Review affirmed the findings and sentence in a memorandum opinion. This Court [**2] granted accused's petition for review on the following issue:

WHETHER THE MILITARY JUDGE IMPROPERLY PERMITTED CROSSEXAMINATION OF APPELLANT CONCERNING THE EXISTENCE OF A RECORD OF NONJUDICIAL PUNISHMENT WHICH WAS NOT OTHERWISE PROPERLY ADMISSIBLE INTO EVIDENCE.

The evidence at trial established that on three separate occasions the accused sold substantial quantities of

---

[1] The military judge found the three sets of possession and sale specifications to be multiplicious for sentencing.

[2] The sentence adjudged was less than that set out in the pretrial agreement.

illicit drugs to a military police investigator who was acting in a covert status. When the accused was apprehended shortly thereafter, he was found in possession of an additional large quantity of LSD.

After findings, the defense presented various witnesses from the accused's chain of command and family who testified about his good duty performance, leadership abilities, military appearance, attitude, personal background, and family situation. The accused then took the stand and made a sworn statement in which he detailed his service in Germany during a prior enlistment and certain achievements made at that time. [**3] He also placed into evidence the facts that he had received the good conduct medal for the period from September 8, 1978, through September 7, 1981; an honorable discharge at the termination of the prior enlistment; and that he had reenlisted in March of 1982.

Prior to beginning his cross-examination, trial counsel informed the military judge:

Your honor, because the defense has asked the accused about his prior enlistment, that he received a prior honorable discharge, and because he has submitted the letters of commendation during his prior enlistment from his unit in Germany, and because I know the question will be objected to by defense counsel. We would like to ask the accused about his duty performance during the period of time that he was in Germany, he has indicated that he received an honorable discharge and received letters of commendation while he was there. With reference to that, we would ask him about whether or not he had ever received an Article 15.

The military judge responded:

Well, this is a judge alone case, just ask your question and I'll resolve the objection when it comes up. If it is sustained I'll disregard the question. You may just continue with your [**4] cross-examination. We will take the matter up when it arises.

Trial counsel then asked the accused:

Specialist Strong, during the period of time that you were stationed in Germany in . . . June of '79, did you receive an Article 15 from a Colonel Boyd Jones for possession of marihuana?

As forecast, defense counsel objected and offered these grounds:

Your honor, the principal basis for our objection is that the prosecutor is far beyond the proper bounds of cross-examination at this point. By basing his crossexamination upon a document which he knows to be inadmissible, the appropriate military regulations would indicate that the prosecutor should not have had any knowledge of the Article 15 that he now attempts to cross-examine the accused upon. Had the Army done its job properly in taking that Article 15 out of the accused's file, it would not presently be before the court. Therefore the prosecutor is attempting to backdoor or get around the clear intent of the regulation, that is

soldiers are not to be harmed in any way by a stale Article 15.

Trial counsel responded that Mil. R. Evid. 405 permits inquiry during cross-examination [*265] into "relevant specific instances [**5] of conduct" and that "[t]he accused ha[d] opened the door" by presenting evidence of his honorable discharge and had "characterized his service as received letters of commendation."

After researching the issue, the military judge overruled the objection with these remarks:

I am of the view that the question of admissibility of a document is independent from the question of what may be covered on cross-examination of a witness. And, the accused has opened the door on his direct to this question, it's a proper question.

The accused answered that he did receive an Article 15 for possession of marihuana while he was stationed in Germany.

At the conclusion of the accused's testimony, defense counsel offered the Article 15 form and asked the trial counsel "to state whether he had a source of that information as anything other than the accused's 201 file." The military judge admitted the form as an appellate exhibit, declined to look at it, and ascertained that it provided the only source of information for trial counsel's question.

Aside from the military judge's question as to the date of the Article 15, there was no other reference to it during arguments or otherwise, even though [**6] defense counsel's closing argument characterized accused's criminal behavior as "a sudden immature desire to be greedy for three days in June." [3]

[**7] Paragraph 75*b*(2), Manual for Courts-Martial, United States, 1969 (Revised edition) (ch. 5) provides:

Under regulations of the Secretary concerned, the trial counsel may obtain and introduce from the personnel records of the accused . . . evidence of the character of prior service of the accused. Such evidence includes . . . evidence of any disciplinary actions to include punishments under Article 15.

It is agreed by all concerned that paragraph 3-15*c*(3)(*d*) of Army Regulation 27-10 (C20, August 15, 1980), required that the record of the subject Article 15 should have been removed from the accused's local Military Personnel Records Jacket (MPRJ) and destroyed after the passage of two years from the date of its imposition.

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[3] The accused testified on direct examination that he was engaged in the sale of drugs because he "could invest a little bit of money and get more back . . . I wanted the money." In spite of this testimony, the military judge, prior to announcing sentence, told the accused:

[T] his is a difficult case to decide, you are obviously a pillar of your community both military and civilian. How a person like you got into this mess in the first place frankly is a matter that I still don't understand, and I don't think you do either, but you did. I have taken into account all the evidence that you presented. In fact I have considered that evidence and you should consider that the sentence I am going to impose is less severe than it would otherwise be because of your otherwise good military and civilian character . . . . But, if I were to reduce the sentence any less than I have already, that is I have taken some off, but if I drop it down any more, it would take away from the seriousness of these offenses.

Obviously, evidence of the accused's prior misconduct had very little effect on the military judge's sentence deliberations.

Consequently, this Article 15 was not maintained in the accused's local records in accordance with secretarial regulations and could not be introduced under this portion of paragraph 75. [4]

[**8] However, paragraph 75*d,* Manual, *supra* (ch. 5), provides:

[*266] The prosecution may present evidence to rebut evidence presented by the defense. The defense in surrebuttal may then rebut any rebuttal evidence offered by the prosecution The Military Rules of Evidence may be relaxed during rebuttal and surrebuttal to the same degree as in paragraph 75*c*(3).

There is a substantial difference between the sort of evidence which may be introduced by trial counsel under paragraph 75*b* and that which may be used as proper rebuttal under paragraph 75*d*. [5]

The purpose of such rebuttal evidence is to explain, clarify, or contradict the opponent's evidence. [**9] *See United States v. Shaw,* 9 U.S.C.M.A. 267, 271, 26 C.M.R. 47, 51 (1958) (Ferguson, J., dissenting). Since the defense is given wide latitude in the nature of the evidence it is permitted to offer, . . . some latitude must likewise be accorded to the Government or only a one-sided picture is presented to the sentencing authority . . . . Thus, paragraph 75*e* of the Manual is not subject to the same evidentiary limitation as paragraph 75*d* . . .

United States v. McGill, 15 M.J. 242, 246 (C.M.A. 1983) (Cook, J., concurring with reservations). [6]

We have long recognized the Government's right to present evidence to rebut evidence of the accused's good character offered in mitigation after findings. In *United States v. Blau,* 5 U.S.C.M.A. 232, 244, 17 C.M.R. 232, 244 (1954), we said:

[W]e cannot believe that the framers of the Manual intended that the rule [**10] of exclusion regarding character testimony should be abandoned in favor of the accused, yet retained to hamper the prosecution -- once the issue of guilt or innocence has been determined . . . . [W]were we to adopt a contrary view, an accused would occupy the unique position of being able to

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[4] AR 27-10 (C20, August 15, 1980), provides for the original Article 15 correspondence to be filed in the Official Military Personnel File (OMPF) for all active duty Army enlisted men who have completed three years or less of active military service when the offense is committed (except where only minor punishment is imposed, the commander will determine whether or not the form will be filed in the serviceman's Military Personnel Records Jacket (MPRJ) or OMPF). Paras. 3-15*b* and *c* (3)(a). However, subparagraph *c* (3)(d)3 provides that the original form or copy, as applicable, will be withdrawn from the MPRJ and destroyed at the expiration of two years. Thus, even though here the Article 15 was mistakenly retained in the MPRJ beyond the two-year period, it would still be retained in the OMPF. *See also* AR 640-10, Table 4-1, p. 4-13 (February 1, 1981).

[5] *See United States v. Cisneros,* 11 M.J. 48 (C.M.A. 1981), where an Article 15 was sought to be introduced in aggravation even though the two-year period had expired after the beginning of trial, but before the accused had entered pleas. We held that the regulation (AR 27-10, para. 3-15*b* (3)(d) 3) required removal of the record from the accused's personnel file and it could not be considered by the sentencing authority. Of course, the situation there was different from the situation here.

[6] Change 5 to paragraph 75, Manual for Courts-Martial, United States, 1969 (Revised edition), which applied in this case, re-lettered the subparagraphs involved in *United States v. McGill,* 15 M.J. 242 (C.M.A. 1983); subparagraphs *d* and *e* became *b* and *d* respectively, cited in the text.

"parade a series of partisan witnesses before the court" -- testifying at length concerning specific acts of exemplary conduct by him -- without the slightest apprehension of contradiction or refutation by the opposition, full-handed with proof of a contrary import although the prosecution might be. In light of what has been said, we are sure that an accused was not marked to enjoy so substantial an advantage after conviction.

See also United States v. Plante, 13 U.S.C.M.A. 266, 32 C.M.R. 266 (1962). Although the accused controls this part of the trial proceedings, such control is not absolute -- fairness does not permit this result.

The application of the rules of evidence at this time is within the discretion of the military judge, and the standard of review is whether he abused his discretion. *See United States v. Franchia,* 13 U.S.C.M.A. 315, 32 C.M.R. 315 (1962). The question [**11] of whether the accused "opened the door" was resolved adversely to the accused by the military judge. Hence, we must examine his ruling in this light.

There is no doubt that trial counsel's question would have been proper if the accused had testified that he had never been disciplined during his prior enlistment; however, defense counsel was astute enough to avoid such testimony. The whole tenor of the evidence introduced by the accused was that he had been an exemplary soldier during that time period.

The defense must accept responsibility not only for the specific evidence it offers in mitigation, but also for the reasonable [*267] inferences which must be drawn from it. There is no question that the evidence presented here by the defense could not help but convince the military judge that the accused had an outstanding military character. Consequently, it would be illogical for trial counsel, having contrary knowledge, to be forced to stand by powerless to correct this impression.

It was sheer happenstance that the Article 15 in question here was still in the accused's personnel records file in violation of Army regulations. However, the fact that it was does not compel [**12] the conclusion that it must be excluded for all purposes in this situation. *See United States v. Caceres,* 440 U.S. 741, 754-55, 99 S. Ct. 1465, 1472-73, 59 L. Ed. 2d 733
(1979). Under the peculiar facts of this case, the question of how trial counsel discovered evidence of the
accused's prior delict is not so important as the fact that he did discover it. [7] And to require that he sit quietly by while the accused creates an incomplete picture of the character of his prior service does not comport with the purpose of paragraph 75 to present a complete and accurate picture of the accused's conduct and performance. *United States v. Morgan,* 15 M.J. 128 (C.M.A. 1983).

Our examination of the record and the evidence presented by the defense in mitigation convinces us that the military judge did not abuse his discretion when he

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[7] Since the Article 15 would have remained filed in the accused's OMPF permanently, trial counsel could have learned of it there.

permitted trial counsel to ask the accused about his prior documented misconduct, even though the document establishing that misconduct was incorrectly retained in his field personnel files.

The decision of the United States [**13] Army Court of Military Review is affirmed.

Judge FLETCHER concurs.

Dissent by: EVERETT

Dissent

EVERETT, Chief Judge (dissenting):

Appellant received nonjudicial punishment for possession of marihuana while stationed in Germany in 1979. However, under applicable Army Regulations, the record of this punishment should have been removed from his military personnel records jacket after two years from the date of its imposition, so it was inadmissible in evidence at Strong's trial in 1982. *See United States v. Cisneros,* 11 M.J. 48 (C.M.A. 1981).

Of course, the inadmissibility of the prior nonjudicial punishment can be used only as a shield and not as a sword; and a defendant may not mislead the court by manipulation of a rule of evidence. *See Walder v. United States,* 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954). Thus, like the majority, I have "no doubt that trial counsel's question would have been proper if the accused had testified that he had never been disciplined during his prior enlistment." 17 M.J. 263, 266. Likewise, I believe that trial counsel could properly have asked appellant about the Article 15 received in 1979 if in some other way appellant had "opened the door."

[**14] However, my examination of appellant's testimony and his other evidence in extenuation and mitigation does not suggest that the defense afforded any occasion for trial counsel's question. Although Strong offered evidence that he had received an honorable discharge from his prior enlistment and had earned a good-conduct medal for service during the same period, this evidence does not constitute a representation that he had never received an Article 15 during that enlistment. Certainly, the Government has not contended that, because of his nonjudicial punishment, appellant should not have been honorably discharged or granted the good-conduct medal.

The military judge properly observed "that the question of admissibility of a document is independent from the question of what may be covered on cross-examination of a witness." However, this is not to say that an otherwise inadmissible document becomes admissible simply because a witness is cross-examined about its existence or contents. Thus, under the circumstances [*268] of the present case, I would treat trial counsel's question about appellant's nonjudicial punishment in the same way that I would treat a government offer in [**15] evidence of the inadmissible record of that punishment.

My concern with the result reached by the majority is

enhanced by my belief that it violates the reasonable expectations of appellant and other soldiers. The provision in the Army Regulation which requires removal of a record of nonjudicial punishment after two years from the date of the offense is desikgned to allow the recipient of an Article 15 to clear his record. The expungement of the record of nonjudicial punishment from his personnel records jacket protects the soldier from being subjected thereafter to the use of this record against him in disciplinary or court-martial proceedings -

- although it does not entitle him to claim falsely that he has never received nonjudicial punishment.

While the majority's rationale grants him protection against the use of the record in a court-martial proceeding so long as he does not take the stand or offer evidence in mitigation, if the accused does offer such evidence, the otherwise inadmissible document becomes a proper subject of cross-examination. Thus, the soldier receives much less protection than he might have expected at the time he accepted nonjudicial punishment -- even [**16] though that expectation may have been one of the very reasons why he did not object to imposition of the nonjudicial punishment.

Furthermore, I can find no reason in logic why -- if the majority's conclusion that the evidence could be introduced here by cross-examination of appellant is correct -- it could not equally well be introduced by cross-examination of some other witness or by the presentation of extrinsic evidence. The broad latitude allowed for cross-examination is for purposes of testing credibility, and appellant's receipt of an Article 15 does not impugn his credibility. Thus, under the circumstances of this case, the judge's allowance of trial counsel's question flew in the face of *United States v. Cisneros, supra.*

Accordingly, I dissent.

United States v. Oliver

United States Air Force Court of Criminal Appeals

February 24, 2016, Decided

ACM 38481 (f rev)

Reporter

2016 CCA LEXIS 101 *

UNITED STATES v. Senior Airman CHRISTOPHER L. OLIVER, United States Air Force

Notice: THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.

Subsequent History: Review granted by United States v. Oliver, 75 M.J. 445, 2016 CAAF LEXIS 757 (C.A.A.F., Sept. 16, 2016)

Motion granted by United States v. Oliver, 75 M.J. 467, 2016 CAAF LEXIS 843 (C.A.A.F., Oct. 19, 2016)

Affirmed by United States v. Oliver, 76 M.J. 271, 2017 CAAF LEXIS 508 (C.A.A.F., May 24, 2017)

Prior History: [*1] Sentence adjudged 26 June 2013 by GCM convened at Joint Base San Antonio-Lackland, Texas. Military Judge: Donald R. Eller (sitting alone). Approved Sentence: Dishonorable discharge, confinement for 24 months, and reduction to E-1.

United States v. Oliver, 2015 CCA LEXIS 144 (A.F.C.C.A., Apr. 15, 2015)

Counsel: For Appellant: Major Christopher D. James.

For the United States: Major Meredith L. Steer; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Judges: Before TELLER, SANTORO, and ZIMMERMAN, Appellate Military Judges.

Opinion by: SANTORO

Opinion

OPINION OF THE COURT UPON FURTHER REVIEW

SANTORO, Judge:

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of two specifications of violating a general regulation, one specification of dereliction of duty, and three specifications of adultery, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. Contrary to his pleas, Appellant was convicted of five additional specifications of violating a general regulation, one specification of wrongful sexual contact, and one specification of consensual sodomy, in violation of Articles 92, 120, and 125, UCMJ, 10 U.S.C. §§ 892,

920, 925.[1] The adjudged and approved sentence consisted of a dishonorable discharge, confinement for 24 months, and reduction to E-1.

Appellant initially submitted nine assertions of error. We granted relief on his post-trial processing claim and returned the record of trial for new convening authority action but did not address his remaining arguments. *United States v. Oliver*, ACM 38481, 2015 CCA LEXIS 144 (A.F. Ct. Crim. App. 15 April 2015). We now address the remaining assignments of error, including two additional errors premised on the additional post- trial processing: (1) the military judge abused his discretion in admitting a prosecution sentencing exhibit,

(2) several specifications are multiplicious or are an unreasonable multiplication of charges, (3) several specifications are legally insufficient, (4) his guilty plea to two specifications was improvident, (5) the evidence relating to one of the specifications alleging a violation of a general regulation is legally and factually insufficient, (6) unlawful command influence undermined his substantial rights, (7) his sentence is inappropriately severe, (8) his trial defense counsel were ineffective, (9) he is entitled to additional post-trial processing because there is no [*3] indication that the convening authority reviewed his submissions before taking action, and (10) he is entitled to relief for dilatory post-trial processing.[2] We disagree and affirm.

Background

Appellant was a military training instructor (MTI) at Joint Base San Antonio-Lackland, Texas. The charges and specifications arose from his efforts to develop, conduct, and maintain personal and intimate relationships with four female trainees and his use of abusive training methods against a member of a flight under his supervision. Appellant identified certain female trainees and "tested" them by trying to get them to show him their tattoos, spending time alone with them, and treating them more favorably than their flight mates. Some of the trainees admitted flirting with him; some said the relationships were consensual, while others said they engaged in sexual conduct voluntarily but were pressured given the nature of the relationship and Appellant's power and authority over them.

Additional facts necessary to resolve the assignments of error are included below.

Admission of Prosecution Sentencing Exhibit

In his written unsworn statement, Appellant wrote, [*4] "I am a good person, a good person that made some terrible mistakes. Although I made bad decisions, those decisions do not define me as a person and I hope I can highlight to you the type of person I really am." Trial counsel then sought to introduce Appellant's response

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[1] Appellant was found not guilty of two specifications [*2] alleging abusive sexual contact, one alleging forcible sodomy, and one alleging obstruction of justice.

[2] Issues 5 through 8 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

to punishment he had received under Article 15, UCMJ, 10 U.S.C. § 815, for improper conduct toward trainees (including one of the victims named in the specifications) and attempting to impede an investigation into that conduct.[3] Trial counsel argued that Appellant's statement in his Article 15, UCMJ, response, "I know the rules and would not break them," coupled with his denials that he engaged in improper relationships with trainees, rebutted his statement that he was a "good person" and that the conduct for which he was being sentenced was inconsistent with his conduct generally.

The military judge admitted the document, stating:

> [U] nder R.C.M. 1001(c)(2)(C), "The government may rebut statements of fact contained in an unsworn. . . ." The court's evaluation of the accused's [*5] unsworn is that they are statements of fact. They are not opinion; "I'm a good person; a good person that made some terrible mistakes."
>
> In the context of paragraph 12, "I am not a bad person. I am someone who made a terrible, terrible mistake," these are in reference to his offenses. They are, nonetheless, blanket statements of fact. To the extent that Prosecution Exhibit 22 reflects that on a prior occasion the accused may have presented a false statement to his commander, it does reflect on the accused's service and in the full-person concept of being a good or a bad person.
>
> I can keep it in its appropriate context. I will give it the weight that I think it's due; however, it is a statement of fact properly rebutted under R.C.M. 1001(c)(2)(C).

We review a military judge's decision to admit sentencing evidence for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Such a review implicitly acknowledges that a military judge has a range of choices, and we will not overturn an action taken within that range. *United States v. Lubich*, 72 M.J. 170, 173 (C.A.A.F. 2013). If evidence is erroneously admitted, we grant relief only when it substantially influenced the adjudged sentence. *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005).

As correctly noted by the military judge, Rule for Court-Martial (R.C.M.) 1001(c)(2)(C) authorizes the government to rebut statements of fact in an unsworn [*6] statement. We agree that the statement, "I am a good person," is a statement of fact. *Cf. United States v. Cleveland*, 29 M.J. 361 (C.M.A. 1990) (holding that the statement, "*I feel* that I have served well" is an opinion and not subject to rebuttal (emphasis added)).

We cannot conclude that the military judge abused his discretion in admitting this document. The test is not whether we would have ruled similarly, but rather whether the trial judge's decision was within the broad range of choices available to him. *Lubich*, 72 M.J. at 173. It was. We are confident the military judge placed

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[3] A document reflecting the Article 15, UCMJ, 10 U.S.C. § 815, proceedings—without Appellant's written response—had previously been admitted, without objection, during the prosecution's sentencing case-in-chief.

the document in its proper rebuttal context as he said he would. *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000) ("A military judge is presumed to know the law and apply it correctly ").

Multiplicity and Unreasonable Multiplication of Charges

Specifications 1 and 2 of Charge I alleged that Appellant wrongfully attempted to develop, and did conduct, a personal, intimate, and sexual relationship with Airman First Class (A1C) CD. The two specifications differed only in the date ranges alleged: the first specification (and date range) corresponded with when the victim was in basic military training status whereas the second corresponded with when the victim was in technical training status. Specifications 3 and 4 of Charge [*7] I alleged similar misconduct with A1C MK and also differed only in their date ranges for the same reason. Appellant asserts that this charging scheme resulted in specifications that were "facially duplicative" and improperly exposed him to unreasonably enhanced criminal exposure, and are, therefore, either multiplicious or an unreasonable multiplication of charges.

As Appellant failed to raise this claim at trial, we test for plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). In the context of claims of unreasonable multiplication of charges, we will not find error unless there was an "extreme or unreasonable 'piling on' of charges." *See United States v. Butcher*, 53 M.J. 711, 714 (A.F. Ct. Crim. App. 2000), *aff'd*, 56 M.J. 87, 93 (C.A.A.F. 2001).

There are three related concepts surrounding multiplicity and unreasonable multiplication of charges: multiplicity for purposes of double jeopardy, unreasonable multiplication of charges as applied to findings, and unreasonable multiplication of charges as applied to sentence.

Multiplicity in violation of the double jeopardy clause of the Constitution[4] occurs when "a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006) (emphasis omitted) (quoting *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)). Thus, "an accused may not be convicted and punished for two offenses where [*8] one is necessarily included in the other, absent Congressional intent to permit separate punishments." *United States v. Morita*, 73 M.J. 548, 564 (A.F. Ct. Crim. App. 2014), *rev'd on other grounds*, 74 M.J. 116 (C.A.A.F. 2015).

The Supreme Court established a "separate elements test" for analyzing multiplicity issues: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does

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[4] U.S. CONST. amend. V.

not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). "Accordingly, multiple convictions and punishments are permitted . . . if the two charges each have at least one separate statutory element from each other." *Morita*, 73 M.J. at 564. Where one offense is necessarily included in the other under the separate elements test, legislative intent to permit separate punishments may be expressed in the statute or its legislative history, or "it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other." *Teters*, 37 M.J. at 376-77.

Even if offenses are not multiplicious, courts may apply the doctrine of unreasonable multiplication of charges to dismiss charges and specifications. Rule for Courts-Martial 307(c)(4) summarizes this principle as follows: "What is substantially [*9] one transaction should not be made the basis for an unreasonable multiplication of charges against one person." The government may not needlessly "pile on" charges against an accused. *See United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994). Our superior court has endorsed the following non-exhaustive list of factors to consider in determining whether unreasonable multiplication of charges has occurred:

> (1) Did [Appellant] object at trial that there was an unreasonable multiplication of charges and/or specifications?;
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?;
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
>
> (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?; and
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Quiroz, 55 M.J. 334, 338-39 (C.A.A.F. 2001) (quoting *United States v. Quiroz*, 53 M.J. 600, 607 (N.M. Ct. Crim. App. 2000)) (line breaks added) (quotation marks omitted). "Unlike multiplicity—where an offense found multiplicious for findings is necessarily multiplicious for sentencing—the concept of unreasonable multiplication of charges may apply differently to findings than to sentencing." *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). When the *Quiroz* factors indicate that the unreasonable [*10] multiplication of charges principles affect sentencing more than findings, "the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings." *Quiroz*, 55 M.J. at 339.

The specifications are not facially duplicative as each covers a different time period. Moreover, we conclude that it was not unreasonable to draw a distinction between the training status of the victims at the time of the offenses. When the victims were in basic training, Appellant was A1C CD's flight chief and oversaw her

military training instructor. He was A1C MK's military training instructor. His military relationship with both trainees changed when they moved from basic training to technical school, but he remained bound by the regulation not to develop personal relationships with them while they were in either status. It was not unreasonable for the Government to conclude, and to charge accordingly, that the nature of the offenses was qualitatively different based on Appellant's military relationship with his victims at the time of the offenses. The specifications were neither multiplicious nor an unreasonable multiplication of charges.

Legal and Factual Sufficiency (Wrongful Sexual Contact)

In Specification [*11] 2 of Charge II, Appellant was charged with engaging in sexual contact with A1C LMS on divers occasions without her consent. Specifically, it was alleged that he groped her groin by placing her in fear of an impact on her military career through an abuse of his military rank, position, and authority. The military judge acquitted him of the charged offense but found him guilty of the lesser included offense of wrongful sexual contact, also in violation of Article 120, UCMJ.

Appellant now asserts that the evidence is legally and factually insufficient to support his conviction because, he argues, the victim's account was implausible and she could not remember the exact date on which the incident occurred.

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). In applying this test, "we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001); *see also United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993).

The test for factual sufficiency is "whether, after weighing the [*12] evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of [Appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. The term reasonable doubt, however, does not mean that the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). Our assessment of legal and factual sufficiency

is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The elements of the offense of wrongful sexual contact, as a lesser included offense of the charged offense of abusive sexual contact, are:

(1) That Appellant engaged in sexual contact with A1C LS;

(2) That such sexual contact was done without her consent; and

(3) That the sexual contact was wrongful.

The victim testified that Appellant touched her groin without her consent on multiple occasions and described when they occurred. Her testimony, both independently and when viewed in conjunction with the other evidence in [*13] the record, was sufficient to enable a reasonable factfinder to conclude beyond a reasonable doubt that Appellant committed the offense.

We have considered the evidence in the light most favorable to the prosecution. Having paid particular attention to the matters raised by Appellant, we find the evidence legally sufficient to support his conviction for wrongful sexual contact. Moreover, having made allowances for not having personally observed the witnesses, we are, ourselves, convinced of his guilt beyond a reasonable doubt.

Violation of a General Regulation

Charge I contained seven specifications alleging violations of Air Education and Training Command Instruction (AETCI) 36-2909, *Professional and Unprofessional Relationships* (2 March 2007) (certified current 26 September 2011). Appellant pled guilty to two of the seven (Specifications 5 and 6) and was convicted, contrary to his pleas, of the others.

He now challenges the legal sufficiency of his convictions and the military judge's decision to accept his guilty pleas, arguing that violations of AETCI 36- 2909 are not punishable under Article 92, UCMJ, because the regulation fails to include the necessary notice of its punitive nature. [*14]

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Humpherys*, 57 M.J. at 94 (quoting *Turner*, 25 M.J. at 324). In applying this test, "we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *Barner*, 56 M.J. at 134; *see also McGinty*, 38 M.J. at 132.

We review a military judge's decision to accept a guilty plea for an abuse of discretion and review questions of law arising from the guilty plea de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). "In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty

plea." *Id.*; *see also United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991) (stating that a plea of guilty should not be overturned as improvident unless the record reveals a substantial basis in law or fact to question the plea). It is Appellant's burden to demonstrate a substantial basis for questioning the plea. *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004).

We have previously considered and rejected Appellant's argument. *United States v. LeBlanc*, 74 M.J. 650 (A.F. Ct. Crim. App. 2015) (en banc).[5]

> [A]lthough AETCI 36-2909 did not meet all requirements of [Air Force Instruction] 33-360, the cited provisions were [*15] not intended to protect personal liberties or interests, and the appellant lacks standing to enforce them. Any challenge to the providence of his pleas or the legal sufficiency of his conviction on that basis does not constitute an error materially prejudicial to the substantial rights of the appellant.

Id. at 658. We discern no material difference between this case and *LeBlanc*, and therefore conclude that Appellant is entitled to no relief on this issue.

Unlawful Command Influence

Appellant next alleges, for the first time on appeal, that apparent unlawful command influence so permeated the Air Force at the time of his trial that it was impossible for him to receive a fair trial or clemency consideration.

Article 37(a), UCMJ, 10 U.S.C. § 837(a), states: "No person subject to this chapter may attempt to coerce or . . . influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case." The mere appearance of unlawful command influence may be "as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Ayers*, 54 M.J. 85, 94-95 (C.A.A.F. 2000) (quoting *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991)).

[*16] On appeal, Appellant bears the initial burden of raising unlawful command influence. *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). He must show: "(1) facts, which if true, constitute unlawful command influence; (2) that the proceedings were unfair; and (3) that the unlawful command influence was the cause of the unfairness." *Id.* The initial burden of showing potential unlawful command influence is low but is more than mere allegation or speculation. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). "The quantum of evidence required to raise unlawful command influence is 'some evidence.'" *Id.* (quoting *United States v. Stoneman*, 57 M.J. 35, 47 (C.A.A.F. 2002). Once an issue of unlawful command influence is raised by some evidence, the burden shifts to the government to rebut the allegation by persuading the [c]ourt beyond a reasonable doubt that (1) the predicate facts do not exist; (2) the facts do not constitute unlawful

[5] Appellate briefs in the instant case were filed before we issued our decision in *United States v. LeBlanc*, 74 M.J. 650 (A.F. Ct. Crim. App. 2015) (en banc).

command influence; or (3) the unlawful command influence did not affect the findings or sentence. *Id.* (citing *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999).

Appellant's argument focuses in large part on various comments by officials including the President of the United States, the Secretary of Defense, and other Air Force senior leaders. Notably, none of the comments at issue were made by anyone directly involved in Appellant's court-martial.

We have reviewed the entire record, including the comments made by the senior officials. We need not reach the question of whether Appellant met his initial burden of production of evidence, as we find beyond a reasonable doubt that the statements at issue had no impact on Appellant's trial. Furthermore, an objective, disinterested, reasonable member of the public, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of Appellant's court-martial. *See United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). We find beyond a reasonable doubt that the case was not infected by actual or apparent unlawful command influence.

Sentence Severity

Appellant argues that his sentence is inappropriately severe and asks that we mitigate his sentence to confinement by one year. In support of his argument, he refers to sentences [*17] received by other military training instructors for what he asserts was similar misconduct.

We review sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (2006). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). We review Appellant's sentence based upon an individualized consideration of Appellant, the nature and seriousness of the offenses, and the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (quoting *United States v. Mamaluy*, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

While we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010); *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The maximum imposable sentence was a dishonorable discharge, confinement for 23 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1. The approved sentence of a dishonorable discharge, 24 months of confinement, and

reduction to E-1 was clearly within the discretion [*18] of the convening authority.

The appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases. *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985). We are not required to engage in comparison of specific cases "except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *Lacy*, 50 M.J. at 288 (quoting *Ballard*, 20 M.J. at 283). "[A]ppellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.'" *Id.* If that burden is satisfied, the government must then establish a rational basis for the disparity. *Id.* Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288.

We have reviewed the materials submitted by Appellant and conclude that he has not met his burden to establish that the cases he cited were "closely related." The cases all occurred at other Air Force bases, or in other military services, or with demonstrably different facts, charges, and findings.

Appellant [*19] violated his position of trust and used that position to develop and attempt to develop inappropriate relationships with four trainees, humiliated another, engaged in wrongful sexual contact and sodomy with a trainee, and committed adultery with three trainees. While there were positive aspects to his military career, his offenses were serious and had a devastating impact upon good order and discipline. Accordingly, we conclude that the approved sentence is not inappropriately severe.

Effectiveness of Counsel

Appellant next contends that his trial defense counsel provided him ineffective assistance in three ways: (1) by failing to file a motion to change venue or voir dire the military judge on his past involvement in MTI cases; (2) by failing to obtain photographs of the location where the acts of abusive sexual contact occurred; (3) and by failing to cross-examine the witnesses effectively.

We review claims of ineffective assistance of counsel de novo, *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009), following the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.
Ed. 2d 674, (1984). *See United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). Our superior court has applied this standard to military courts-martial, noting that "in order to prevail on a claim of ineffective assistance of counsel, [*20] 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 687; *Mazza*, 67 M.J. at 474).

The deficiency prong requires Appellant to show his counsel's performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Strickland*, 466 U.S. at 688. The prejudice prong requires Appellant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In doing so, Appellant "must surmount a very high hurdle." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (citing *Strickland*, 466 U.S. at 689). This is because counsel is presumed competent in the performance of his or her representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citing *Moulton*, 47 M.J. at 229).

To determine whether the presumption of competence has been overcome, our superior court has set forth a three-part test:

> 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 [*21] 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?

United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alteration and omission in original) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

"[T]he defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *Tippit*, 65 M.J. at 76 (citing *Polk*, 32 M.J. at 153). When there is a factual dispute, appellate courts determine whether further factfinding is required. *United States v. Ginn*, 47 M.J. 236, 242-43 (C.A.A.F. 1997). We ordered trial defense counsel to provide affidavits addressing the allegations outlined above. Based upon our review of Appellant's claims, trial defense counsel's affidavits, and the matters contained in the record, we can resolve this issue without ordering additional factfinding.

Trial defense counsel averred that they did not voir dire the military judge for two principal reasons: first, they were already aware of the other MTI cases over which the military judge had presided and the outcomes of those cases; and second, because the military judge placed on the record at the beginning of the trial a summary of his prior involvement in MTI cases. Appellant himself presented his counsel with photographs of [*22] the room in which the assault occurred and his counsel used those photographs to

prepare his defense and to make tactical decisions about how best to represent him. We have reviewed the cross-examination of the witnesses and the presentation of the defense as a whole and see nothing to indicate that Appellant's counsel were deficient.

Post-Trial Processing

Finally, Appellant argues that he is entitled to relief based on two alleged post-trial processing errors. First, he asserts that new review and action are required because there is no evidence that the convening authority considered Appellant's submission before taking action. Second, he asserts that post-trial processing delays warrant relief.

Proper completion of post-trial processing is a question of law which we review de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)).

With respect to his first claim, R.C.M. 1107(b)(3)(A) requires that before taking action on the findings and sentence, the convening authority shall consider, inter alia, any matters submitted by the accused during the clemency process. Pursuant to R.C.M. 1105 and during processing following our return of this case to the general court-martial convening authority, on 12 June 2015 trial defense counsel submitted his own letter [*23] and an 11 June 2015 letter (and attachments) from Appellant to the convening authority. It is this letter that Appellant now claims was not reviewed by the convening authority.

We presume a convening authority has reviewed matters submitted by an Appellant if the staff judge advocate (SJA) prepared an addendum to the staff judge advocate's recommendation (SJAR) that (1) tells the convening authority of the matters submitted, (2) advises the convening authority that he must consider the matters, and (3) lists the attachments, indicating they were actually provided. *United States v. Gaddy*, 54 M.J. 769, 773 (A.F. Ct. Crim. App. 2001). That is precisely what happened in this case. The SJA prepared an addendum advising the convening authority that he must consider the matters submitted by Appellant before taking final action in the case, and then listed "Defense Counsel Ltr, dated 12 June 2015 (with Accused letter and attachments)" as attachments. Before us, Appellant appears to be asking that we create a rule requiring that each page in a multi-part document be specifically identified. We do not believe *Gaddy* contemplated such detail, nor do we believe such a blanket rule is necessary or appropriate.

With respect to his second claim, Appellant requests [*24] that we grant the "modest relief" of setting aside his punitive discharge because of post-trial processing delays. Thirty-five days elapsed between the convening authority's second action and the docketing of this case before this court. Under *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), the record should have been docketed with this court within 30

days of the convening authority's action. Additionally, Appellant argues that the 740-day period between completion of trial and the convening authority's *second* action violates the 120-day *Moreno* standard applicable to that phase of post-trial processing.

We review de novo Appellant's claim that he has been denied his due process right to a speedy post-trial review and appeal. *Moreno*, 63 M.J. at 135. Because the 35-day period in this case is facially unreasonable, *see id.* at 142, we examine the claim under the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno*, 63 M.J. at 135. If we are able to conclude directly that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006).

Moreno identified three types of prejudice arising from post-trial [*25] processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of ability to present a defense at a rehearing. *Id.* at 138-39. None are present or alleged in this case. While we agree that *Moreno* violations are unacceptable, we find beyond a reasonable doubt that Appellant was not harmed by the 35-day period from action to docketing and is thus not entitled to relief under *Moreno*.

We also disagree with Appellant's contention that the length of the *Moreno* violation in this case should be measured against the 740 days between conclusion of trial and the *second* action. Our superior court held that when a Court of Criminal Appeals issues a decision in a case within *Moreno* time standards, and further post-trial processing is necessitated because of the court's decision, the *Moreno* clock starts anew. *See United States v. Roach*, 69 M.J. 17, 22 (C.A.A.F. 2010); *see also United States v. Mackie*, 72 M.J. 135 (C.A.A.F. 2013). While we are not unsympathetic to Appellant's argument that the necessity for a second round of post- trial processing resulted from government error, rather than appellate clarification of matters of law, he has still failed to establish that he has been prejudiced by the delay.

However, that does not end the inquiry, as we may grant sentence relief under Article 66(c), [*26] UCMJ, even when we find no prejudice in unreasonable post- trial delays. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *see also United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006) (finding delays were "such that tolerating them would adversely affect the public's perception of the fairness and integrity of the military justice system"). However, "[a]ppellate relief under Article 66(c) should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely . . . review." *Tardif*, 57 M.J. at 225.

We have reviewed the entirety of the post-trial processing, including each of the steps identified by

Moreno and the "non-exhaustive" list of factors we analyze when considering *Tardif* relief. *See United States v. Bischoff*, 74 M.J. 664, 672 (A.F. Ct. Crim. App. 2015). We do not believe *Tardif* relief is warranted under the facts of this case.

Conclusion

The findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are **AFFIRMED**.

United States v. Wiseman

United States Air Force Court of Criminal Appeals

August 4, 2020, Decided

No. ACM S32566

Reporter

2020 CCA LEXIS 260 *; 2020 WL 4499028

UNITED STATES, Appellee v. Dillon R. WISEMAN, Airman First Class (E-3), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Jennifer E. Powell (motions); John C. Degnan. Approved sentence: Bad-conduct discharge, confinement for 40 days, and reduction to E-2. Sentence adjudged 27 November 2018 by SpCM convened at Edwards Air Force Base, California.

Counsel: For Appellant: Major Yolanda D. Miller, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Mary Ellen Payne, Esquire.

Judges: Before MINK, LEWIS, and D. JOHNSON, Appellate Military Judges. Judge D. JOHNSON delivered the opinion of the court, in which Senior Judge MINK and Senior Judge LEWIS joined.

Opinion by: D. JOHNSON

Opinion

D. JOHNSON, Judge:

A special court-martial composed of a military judge convicted Appellant, in accordance with his pleas and a pretrial agreement (PTA), of one specification of wrongful use of tetrahydrocannabinol (THC) on divers occasions in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a.[1] The adjudged sentence consisted of a bad-conduct discharge, confinement for 45 days, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged, but then pursuant to the military judge's order credited Appellant [*2] "one stripe" and five days of confinement based upon a prior nonjudicial punishment (NJP) action under Article 15, UCMJ, 10 U.S.C. § 815.[2] The PTA had no impact on the convening authority's ability to approve the adjudged

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[1] All references in this opinion to the Uniform Code of Military Justice and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] In the NJP action, Appellant was found to have committed the offense of wrongful use of THC between on or about 19 February 2018 and on or about 19 March 2018, which overlapped with the charged timeframe before the court-martial. The military judge awarded Appellant a "one-stripe" credit based on his prior NJP of one reduction in grade, and five days confinement credit based on the NJP reprimand. *See United States v. Pierce*, 27 M.J. 367 (C.A.A.F. 1989).

sentence.[3]

Appellant raises four assignments of error on appeal: (1) whether the military judge erred in admitting the testimony of the Government's rebuttal sentencing witness contrary to Rule for Courts-Martial (R.C.M.) 1001(c)(2)(C); (2) whether the assistant trial counsel erred during the Government's sentencing argument; (3) whether the record of trial (ROT) is incomplete; and (4) whether Appellant is entitled to new post-trial processing because the staff judge advocate's recommendation (SJAR) failed to correctly advise the convening authority of the maximum imposable sentence and his ability to disapprove, commute, or suspend in whole or in part the term of confinement.[4] Finding no error materially prejudicial to a substantial right of Appellant, we affirm the findings and sentence.

I. BACKGROUND

Appellant's THC use began in approximately December 2017 with Appellant smoking marijuana several times with a fellow Airman in his unit.[5] During the charged timeframe, on divers occasions, [*3] Appellant ingested THC by several methods including: (1) smoking marijuana cigarettes; (2) smoking marijuana from a bong; and (3) ingesting cannabis oil containing THC using a handheld vaporizer device or "vape pen." Appellant facilitated his acquisition of THC by obtaining a medical marijuana card in the state of California.

On 19 March 2018, Appellant submitted a urine sample pursuant to a "random unit inspection" at Edwards Air Force Base (AFB) which subsequently tested positive for THC above the Department of Defense (DoD) cutoff level of 15 nanograms per milliliter (ng/ml). On 3 April 2018, after waiving his rights pursuant to Article 31, UCMJ, 10 U.S.C. § 831, Appellant spoke with Security Forces investigators at Edwards AFB, provided a sworn statement regarding his uses, and consented to a search of his dormitory room on base and cellular telephone. During the search of Appellant's dormitory room, investigators seized cannabis oil and a marijuana-grinding device which he received as a free gift when making his online purchase of the cannabis oil. Later, Appellant tested positive for THC on six different occasions from samples collected between 3 April 2018 and 18 July 2018.[6] Appellant's sample [*4] collected on 17 August 2018 tested negative.

II. DISCUSSION

[3] The PTA provided that the convening authority would approve no confinement in excess of 90 days, but included no other limitations on the sentence he could approve.

[4] The language of Appellant's assignments of error have been reworded.

[5] The following factual summary is drawn primarily from the stipulation of fact Appellant signed in accordance with his PTA. Appellant stipulated THC is "believed to be the main ingredient that produces mood-altering effects" in marijuana.

[6] According to the stipulation of fact, Appellant's urine tested positive for THC, above the DoD cutoff level, six additional times including: 3 April at 226 ng/ml; 26 April at 201 ng/ml; 9 May at 26 ng/ml; 24 May at 166 ng/ml; 11 June at 418 ng/ml; and 18 June at 375 ng/ml.

A. Government's Rebuttal Witness

1. Additional Background

During the Defense's presentencing case, Appellant provided both an oral and written unsworn statement pursuant to R.C.M. 1001(c)(2)(C). Appellant wrote in his unsworn statement: "Not long after I got back to Edwards [AFB], there was a mass drug-test. I knew I was going to fail after what I had done. After I failed, I was called in to be investigated by security forces and [the Air Force Office of Special Investigations]. *I cooperated with them the best that I could*." (Emphasis added).

In rebuttal to Appellant's unsworn statement, the Government called Investigator JS from the Security Forces squadron at Edwards AFB to testify. The Defense did not object. Investigator JS testified that he interviewed Appellant about his drug use. The assistant trial counsel then handed Defense Exhibit E, Appellant's written unsworn statement, to Investigator JS to review, again without objection.

After Investigator JS reviewed the last page of Appellant's written unsworn statement, the following dialogue occurred:

> [ATC (assistant trial counsel):] Investigator [JS], although [Appellant] eventually cooperated with [*5] you during that investigation, did he do it to the best of his ability at first?
>
> [Investigator JS:] No.
>
> DC [trial defense counsel]: Objection, Your Honor. I don't know how you could determine whether someone has cooperated to the best of their ability. I don't know if there is a foundation necessarily for that determination.
>
> MJ [military judge]: So you need the foundation, correct, defense?
>
> DC: Yes, sir.
>
> MJ: All right. Government, what is your response?
>
> ATC: May I have minute, Your Honor?
>
> MJ: Yes, you may have a moment.
>
> [The assistant trial counsel conferred with co-counsel.]
>
> MJ: Government, what is your response?
>
> ATC: Your Honor, the government can ask a few more questions.
>
> MJ: All right. *I will sustain the defense's objection*. Government, you may lay a foundation. You may continue, government.
>
> [STC (senior trial counsel):] All right. Investigator [JS], during this investigation, was [Appellant] cooperative with you?
>
> [Investigator JS:] At time [sic], yes.
>
> [STC:] And what about those other times?
>
> [Investigator JS:] He was asked specifically if he knew about another Airman who he potentially was smoking with. He initially had denied the allegation, but then admitted that he did smoke with the other [*6] Airman and knew about it.

> [STC:] Okay. And was there any amount of resistance to coming forth with this information?
>
> [Investigator JS:] Yes.
>
> [STC:] Can you describe that?
>
> [Investigator JS:] So during the course of the interview, I had asked him again about the other Airman that he potentially had smoked with. He did resist and said that he didn't know anything about [sic]. I then asked for consent to look at his telephone—at his cell phone to look at messages between this other Airman. He had consented to this. After looking through the messages, I found messages between him and this other Airman, and did talk about a number of different things in code words for what is marijuana to include the words "green" and things of that nature. After confronting him more, he then later admitted, yes, he did know the Airman that was in question and that he did smoke with him.

(Emphasis added).

Appellant argues the military judge abused his discretion because Appellant's statement that he "cooperated with [law enforcement] *the best that I could*" was the expression of an opinion and therefore not a rebuttable fact in accordance with R.C.M. 1001(c)(2)(C). Appellant contends that "the most Investigator JS was able to do was [*7] rebut Appellant's opinion with a speculative opinion of his own." Appellant avers that "Investigator JS would never have the personal knowledge necessary to rebut an opinion except to lay foundation and supply his own opinion," which Appellant avers is not permissible. Finally, Appellant contends that he was prejudiced by this error because it substantially influenced his adjudged sentence.

The Government responds that the correct standard of review is plain error—not abuse of discretion—and the statement made by Appellant was a statement of fact and was properly rebutted. The Government also contends that even if this court finds error, Appellant did not suffer material prejudice. We agree with the Government that the standard of review is plain error; that Appellant's statement was a properly rebutted statement of fact; and that Appellant suffered no material prejudice.

2. Law

R.C.M. 1001(c)(2)(C) states "[t]he accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statement of facts therein."

We review "a military judge's decision to admit evidence for an abuse of discretion." *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018) (quoting [*8] *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)). Military judges abuse their discretion when their "factual findings are clearly erroneous, view of the law is erroneous, or decision is outside of the range of reasonable choices." *United States v. Hutchins*, 78 M.J.

437, 444 (C.A.A.F. 2019) (citing *United States v. Bess*, 75 M.J. 70, 73 (C.A.A.F. 2016)). However, in the absence of an objection at trial, we review claims of erroneous admission of evidence for plain error, which is established when: (1) there was error; (2) the error was plain, clear, or obvious; and (3) the error resulted in material prejudice to the appellant's substantial rights. *See United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (citation omitted). An appellant "has the burden of persuading the court that the three prongs of the plain error test are satisfied." *Id.* (citation omitted).

If evidence is improperly admitted during sentencing proceedings, "the test for prejudice is whether the error substantially influenced the adjudged sentence." *Barker*, 77 M.J. at 384 (internal quotation marks and citation omitted). We evaluate the relative strength of the parties' cases along with the materiality and quality of the evidence in question. *Id.* (citation omitted). "An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." *Id. [*9]* (citation omitted).

"When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle." *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). As the sentencing authority, military judges are presumed to know the law and apply it correctly. *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009) (citations omitted). That presumption holds absent clear evidence to the contrary. *Id.* (citations omitted).

In *United States v. Cleveland*, the appellant made an oral unsworn statement and told the court members, "Although I have not been perfect, *I feel* that I have served well and would like an opportunity to remain in service, regain the trust and respect of my co-workers and supervisors." 29 M.J. 361, 362 (C.M.A. 1990) (emphasis added). The United States Court of Military Appeals (CMA), the predecessor to the United States Court of Appeals for the Armed Forces (CAAF), held that the accused's statement was not a statement of fact, but "more in the nature of an opinion—indeed, an argument." *Id.* at 363-64. Additionally, the CMA was "unable to conclude that the evidence of appellant's uncharged misconduct tended to 'explain' the remark that he had made in his unsworn statement." *Id.* at 364.

In *United States v. Manns*, the appellant made an oral unsworn statement and told the military judge, "I have tried throughout [*10] my life, even during childhood, to stay within the laws and *regulations of this country*." 54 M.J. 164, 165 (C.A.A.F. 2000). The CAAF distinguished this statement from that made in *Cleveland*, stating, "Unlike *Cleveland* . . . this case involves appellant's assertion of fact that he had tried to obey the law. Thus, we hold that the prosecution was entitled to produce evidence that appellant had not tried, or at least had not tried very hard." *Id.* at 166.

3. Analysis

a. Standard of Review

As an initial matter we must resolve the discrepancy between the parties on the correct standard of review. Appellant argues abuse of discretion is applicable and the Government argues plain error is the correct standard of review. As noted above, Appellant's initial objection to foundation was sustained by the military judge, and there were no further defense objections during the testimony of JS. As such, the applicable standard is plain error.

b. Rebuttal Testimony

We disagree with Appellant's contention that Investigator JS was unable to rebut whether Appellant "cooperated with law enforcement the best that [he] could."

We find Appellant's claim of cooperation to the best of his ability constitutes an assertion of fact. We agree with the Government [*11] that Appellant's statement that *he cooperated the best that [he] could* is analogous to the appellant's statement in *Manns* that *he tried to obey the law*. 54 M.J. at 165. And unlike the statement by the appellant in *Cleveland*, Appellant's statement of his limited ability to cooperate was more contrary to the rebuttal evidence that the CMA found was improper rebuttal. Investigator JS explained that Appellant resisted assisting in the investigation of another Airman because he was initially unwilling to do so, not because he was incapable due to some circumstance beyond his ability to control. Appellant initially denied knowing of another Airman's drug use and smoking with that Airman. It was not until Investigator JS confronted Appellant with messages with this other Airman on his phone with code words indicating marijuana that Appellant admitted he knew of this Airman's drug use and had in fact smoked with him. This testimony directly rebuts the statement of fact that Appellant "cooperated with [law enforcement] the best that [he] could." If Appellant had stated "*I feel*" or "*I believe I cooperated*" that might have been indicative of an opinion, not a fact—but he did not. The Government was entitled [*12] to produce evidence that initially lying to law enforcement is not cooperating to the best of one's ability. Since the testimony was proper rebuttal pursuant to R.C.M. 1001(c)(2)(C) the military judge did not commit error in allowing the testimony, much less plain error.

c. Prejudice

Assuming *arguendo* that it was plain error to consider the testimony, we disagree with Appellant that the testimony had a substantial influence on his adjudged sentence. We apply the factors cited in *Barker*—the relative strength of the parties' cases, along with the materiality and quality of the evidence—below. *See* 77
M.J. at 384 (citations omitted).

The Government's case was strong. Appellant's misconduct could have exposed him to the jurisdictional

maximum of a special court-martial consisting of a bad-conduct discharge, 12 months' confinement, forfeiture of two-thirds pay per month for 12 months, and reduction to the grade of E-1. Trial defense counsel successfully negotiated a pretrial agreement which limited Appellant's confinement exposure to 90 days. Appellant's adjudged sentence, before the *Pierce* credit, was a bad-conduct discharge, 45 days confinement, and reduction to the grade of E-1. *United States v. Pierce*, 27 M.J. 367 (C.A.A.F. 1989).

Appellant's guilt was laid out in detail [*13] in the stipulation of fact which demonstrated that Appellant tested positive for THC on six occasions after his initial positive drug test from the unit inspection on 19 March 2018, and five occasions after his interview with investigators on 3 April 2018. Appellant's last positive urinalysis was from a sample collected on 18 July 2018. Appellant's commander testified that Appellant had low to medium rehabilitation potential, and testified concerning the impact of Appellant's THC use on the unit. His commander further testified that his duty performance was "right in the middle of the line" and elaborated further "he wasn't the sharpest Airman but he certainly wasn't the worst performance wise." Finally, the Government admitted two letters of reprimand for Appellant's failure to attend mandatory fitness formations and three enlisted performance reports which all contained negative performance indicators.

The Defense's case, which was comparatively weak, consisted of Appellant's oral and written unsworn statements; two character statements; and various pictures of Appellant during his military service and with his family. We acknowledge the mitigating testimony from Appellant's commander [*14] that "[Appellant's] mental health history, to me, started well before preferring charges or even testing positive for THC." We also recognize that Appellant stated he used THC only after seeking mental health treatment, and Appellant's cooperation with law enforcement as noted in Investigator JS's testimony. However, despite this information from Appellant before the military judge, the Government's evidence in aggravation—including the impact on Appellant's unit, Appellant's rehabilitation potential, and testing positive for THC six times after the initial unit urinalysis test and five times after his interview with law enforcement—overpowers the Defense's case.

The final two factors of the prejudice analysis, materiality and quality, require us to essentially assess "how much the erroneously admitted evidence may have affected the court-martial." *See United States v. Washington*, M.J. __, No. 19-0252, 2020 CAAF LEXIS 296, at *12 (C.A.A.F. 29 May 2020). We are to consider the particular factual circumstances of each case. Two considerations CAAF discussed in *Washington* that also are relevant here include the extent to which (1) the Government referred to the evidence in argument and (2) the evidence contributed to the Government's case. *See id.* (citations omitted). [*15]

As for the first consideration—the extent to which the

Government referred to the evidence in argument—the Government did not argue the rebuttal evidence at all during its sentencing argument. The assistant trial counsel provided other justifications for her sentencing recommendation focusing mainly on Appellant's continued use of marijuana after his interview with law enforcement. As to the second consideration—the extent to which the evidence contributed to the Government's case—any contribution it made was marginal in this judge-alone case.

As the CAAF did in *Barker*, we find it "highly relevant" that this case was tried before a military judge who is presumed to know the law. 77 M.J. at 384 (citations omitted). After evaluating Appellant's case using the four factors from *Barker*, we do not find that the assumed error substantially influenced the adjudged sentence. *See id.* (citation omitted).

B. Improper Argument

Appellant alleges assistant trial counsel's argument was improper because (1) the Government argued for double punishment by asking the military judge to punish Appellant for the same offense for which he had received NJP which was improper and (2) the Government argued facts not in evidence. [*16] [7] For the purpose of analysis we assume the Government argued for double punishment and that it was plain or obvious error. Further, we find the Government argued facts that were not in evidence during its sentencing argument and it was plain or obvious error. However, we do not find Appellant suffered material prejudice.

1. Additional Background

a. Double Punishment

Appellant pleaded guilty to using THC on divers occasions between on or about 1 December 2017 and on or about 31 July 2018 in violation of Article 112a, UCMJ. During presentencing, the Government offered into evidence Prosecution Exhibit (P.E.) 4 for identification which was Appellant's "personnel information file." Included in P.E. 4 was an NJP action in which Appellant's commander found he used THC between on or about 19 February 2018 and on or about 19 March 2018 in violation of Article 112a, UCMJ. After finding Appellant committed the offense, his commander reduced Appellant one grade from Senior Airman to Airman First Class, and issued a reprimand. Prosecution exhibit 4 was admitted into evidence by the military judge without objection.

[7] Appellant contends that the Government should not have offered the NJP action because they are not the gatekeeper of that evidence. This contention does not account for trial defense counsel's statement that he did not object to the admissibility of the NJP action "for the purposes of getting the credit for the Article 15 punishment" which we find waived the issue of the NJP's admissibility. *See United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009). We acknowledge our discretion to pierce waiver to correct a legal error under Article 66, UCMJ, 10 U.S.C. § 866. *See generally United States v. Hardy*, 77 M.J. 438, 442-43 (C.A.A.F. 2018). We decline to disturb Appellant's waiver.

After the NJP was admitted, the Government assured the military judge [*17] that it was not seeking to punish Appellant for the timeframe included within the NJP action. Prior to argument on sentencing, the military judge stated, "Government, I won't consider double punishment in this case, and I appreciate that concern and bringing that to my attention."

Assistant trial counsel began her sentencing argument by stating, "Your Honor, this isn't just a case about at least *eight months* of marijuana use We are here because [Appellant] flagrantly ignored the military standards and broke the law for at least *eight months*." (Emphasis added). Later she argued that Appellant broke the law repeatedly for *at least eight months* and "*[e]ight months is a long moment*." (Emphasis added). Finally, she argued that Appellant "needs to feel the consequences of his actions. [Appellant] broke the law *for almost a year*." (Emphasis added). Assistant trial counsel's argument failed to exclude, or clarify, from the eight-month calculation the one-month timeframe for which Appellant received the NJP action.

There was no objection from trial defense counsel to any portion of assistant trial counsel's argument. The Government argued for one month of confinement, reduction to the [*18] grade of E-1, and a bad-conduct discharge as an appropriate sentence.

b. Facts Not in Evidence

Assistant trial counsel argued during her sentencing argument, "[Appellant's] commander told you she didn't know what else to do in order to get [Appellant] to stop using drugs; and that when she restricted [Appellant] to base on August 9th that is why she restricted him to base " Although Appellant's squadron commander testified during presentencing, she did not testify about Appellant's restriction to base or her rationale for restricting Appellant. The transcript demonstrates that it was Appellant who discussed his restriction to base during his oral unsworn statement while explaining the time period of the restriction and the fact he never violated the restriction. Appellant never discussed the commander's rationale for the restriction.

2. Law

Improper argument is a question of law that this court reviews de novo. *United States v. Marsh*, 70 M.J. 101, 106 (C.A.A.F. 2011) (citation omitted). If a proper objection is not made we test for plain error. *United States v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2013) (citation omitted). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation [*19] omitted). The burden of proof under a plain error review is on the appellant. *See United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citation omitted).

"Improper argument is one facet of prosecutorial

misconduct." *Sewell*, 76 M.J. at 18 (citation omitted). "Prosecutorial misconduct occurs when trial counsel 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *United States v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014) (alteration in original) (quoting *Fletcher*, 62 M.J. at 179). Such misconduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, [for example], a constitutional provision, a statute, a [Manual for Courts-Martial] rule, or an applicable professional ethics canon." *Id.* at 160 (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)).

Improper argument does not automatically require a new trial or the dismissal of the charges against the accused. *Fletcher*, 62 M.J. at 178 (citation omitted). Relief will be granted only if the trial counsel's misconduct "actually impacted on a substantial right of an accused (i.e., resulted in prejudice)." *Id.* (quoting *Meek*, 44 M.J. at 5).

The CAAF recommended balancing three factors to assess whether misconduct impacted the appellant's substantial rights and the integrity of his trial: "(1) the severity of the misconduct, (2) the measures [*20] adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id.* at 184. The *Fletcher* court did not articulate how much weight to give each factor. *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017).

The CAAF extended the *Fletcher* test to improper sentencing argument in *Halpin*, 71 M.J. at 480. In applying the *Fletcher* factors in the context of an allegedly improper sentencing argument, we consider whether "'trial counsel's comments, taken as a whole, were so damaging that we cannot be confident' that [the appellant] was sentenced 'on the basis of the evidence alone.'" *Id.* at 480 (alteration in original) (quoting *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007)). The CAAF in *United States v. Frey* framed the third *Fletcher* factor as "the weight of the evidence supporting the sentence." 73 M.J. 245, 249 (C.A.A.F. 2014) (citation omitted).

Trial counsel is entitled "to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citation omitted). Trial counsel may also argue for an appropriate sentence, recommend a specific lawful sentence, and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. R.C.M. 1001(g).

As the CAAF has explained:

> When the issue [*21] of plain error involves a judge alone trial, an appellant faces a particularly high hurdle. A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed

> not to have relied on such evidence on the question of guilt or innocence. . . . As a result, "plain error before a military judge sitting alone is rare indeed."

Robbins, 52 M.J. at 457 (quoting *United States v. Raya*, 45 M.J. 251, 253 (C.A.A.F. 1996) (citations omitted)). Similarly, we presume the military judge is able to filter out improper argument in the absence of evidence to the contrary. *United States v. McCall*, No. ACM 39548, 2020 CCA LEXIS 97, at *20 (A.F. Ct. Crim. App. 26 Mar. 2020) (unpub. op.).

The CAAF, in *Pierce*, addressed the requirement in Article 15(f), UCMJ, 10 U.S.C. § 815(f), to consider in mitigation of the sentence any prior NJP action for the same offense introduced into evidence by the accused. Such consideration is designed to ensure the accused is not punished twice for the same offense. 27 M.J. at 369.

3. Analysis

a. Double Punishment

We assume without deciding that assistant trial counsel improperly argued for double punishment. We will address whether Appellant suffered prejudice from this improper argument after discussing Appellant's contention that assistant trial counsel also improperly argued [*22] facts not in evidence.

b. Facts Not in Evidence

We find that the assistant trial counsel argued facts not in evidence. Appellant's squadron commander never testified concerning Appellant's restriction to base. Although Appellant discussed the topic in his oral unsworn statement, he did not address his commander's rationale for the restriction. Assistant trial counsel's argument that Appellant's commander restricted him to base in order to stop him from using drugs was erroneous; it was plain or obvious; and therefore we test for prejudice.

c. Prejudice

"Though *Fletcher* recommended a balancing of all three factors, it did not assign a particular value to each or comment on whether they should be weighed equally." *Frey*, 73 M.J. at 251. In this case, considering the cumulative impact of arguing for double punishment and facts not in evidence in the context of the trial as a whole, we find as the CAAF did in *Halpin* that the third *Fletcher* factor—the weight of the evidence—weighs so heavily in favor of the Government that we are confident that Appellant was sentenced on the basis of the evidence alone. *See Halpin*, 71 M.J. at 480.

Appellant's misconduct could have exposed him to the jurisdictional maximum of a special court-martial including [*23] a bad-conduct discharge, 12 months' confinement, forfeiture of two-thirds pay per month for 12 months, and reduction to the grade of E-1. Trial defense counsel successfully negotiated a pretrial

agreement which limited Appellant's confinement exposure to 90 days. Appellant's adjudged sentence, before the *Pierce* credit, was a bad-conduct discharge, 45 days' confinement, and reduction to the grade of E-1.

As stated above, the uncontroverted evidence against Appellant, as admitted in his stipulation of fact, showed that Appellant tested positive five additional times for THC for over three months after his 3 April 2018 interview with law enforcement investigators. In recommending a sentence of a bad-conduct discharge, at least one month of confinement, and reduction to the grade of E-1, assistant trial counsel focused her argument on Appellant's continuing positive urinalysis results. Trial defense counsel in his own argument recommended a sentence of up to two months' confinement, one month of hard labor without confinement, and a reduction in grade that the military judge felt was appropriate. Trial defense counsel focused his argument on Appellant's "clinical decision" to medicate himself [*24] after other efforts failed rather than "killing himself."

Finally, and quite importantly, this was a military judge-alone trial and the military judge is presumed to know what portions of argument are impermissible absent clear evidence to the contrary. *See United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008) (citations omitted). In this case, the military judge stated on the record he was not going to doubly punish Appellant. Even if each statement Appellant takes issue with was plain or obvious error, Appellant failed to establish that the weight of the evidence did not clearly support the adjudged sentence and is therefore not entitled to relief.

C. Record of Trial

Appellant next asserts that the ROT is incomplete because two items were missing: (1) a motion for release filed by Appellant's initial trial defense counsel, Captain (Capt) AD; and (2) an appellate exhibit consisting of slides assistant trial counsel used in her sentencing argument. Appellant claims each of these missing items are substantial—rendering the ROT incomplete—and as a result requests this court set aside his bad-conduct discharge. While we find the appellate exhibit of the sentencing argument slides is missing from the authenticated record, we are not persuaded [*25] that the ROT is incomplete.

1. Additional Background

a. Motion

According to the parties at trial, prior to his court-martial, Appellant requested release of his trial defense counsel, Capt AD. Capt AD subsequently filed a motion for release on 31 October 2018. That same day, the initial military judge on Appellant's case granted the motion.

During Appellant's court-martial the military judge informed Appellant of his rights to counsel. When the military judge inquired by whom Appellant wished to be

represented, Appellant replied "By Capt [LL], sir." The military judge then asked, "And by Capt [LL] alone," and Appellant replied, "Yes, sir."

Shortly afterwards while summarizing a previous conference held pursuant to R.C.M. 802, the military judge asked Capt LL, "[I]t is also my understanding that you are not going to put into the record Capt [AD's] motion; is that correct?" Capt LL responded, "Yes, Your Honor." The military judge then said, "If you want to put that in the record that is fine defense, and if you don't that is fine as well. All right?" Capt LL then responded, "Thank you, Your Honor." There is no evidence in the record that Capt LL requested the motion be marked as an appellate exhibit. [*26]

b. Slides

During trial, while still discussing the R.C.M. 802 conference referenced above, the military judge stated the following:

> The [G]overnment also informed me that they had requested a break prior to their sentencing argument, which you may have, to set up your slides. I also requested the [G]overnment just to consult with the court reporter to ensure that the slide is marked as an appropriate appellate exhibit for the record. I have a copy of the slide, [G]overnment, so I don't need a copy, but please provide a copy to the [D]efense if you have not already done so.

2. Law

A complete record of the proceedings and testimony shall be prepared in each special court-martial where the adjudged sentence includes, *inter alia*, a bad- conduct discharge. Article 54, UCMJ, 10 U.S.C. § 854. A complete record of trial includes all *appellate exhibits*, or an adequate substitute with the permission of the military judge. R.C.M. 1103(b)(2)(D)(v), (c)(1) (emphasis added); *United States v. Gaskins*, 72 M.J. 225, 230 (C.A.A.F. 2013).

Whether an omission from a ROT is substantial is a question of law we review de novo. *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). A record of trial that is missing exhibits may be substantially incomplete. *Id.* at 26 (holding that the record was substantially incomplete for sentencing when all three defense sentencing exhibits were missing). [*27] However, "[i]nsubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (holding that four missing prosecution exhibits were insubstantial omissions when other exhibits of similar sexually explicit material were included). "[A] substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the government must rebut." *United States v. Harrow*, 62 M.J. 649, 654 (A.F. Ct. Crim. App. 2006) (citation omitted), *aff'd*, 65 M.J. 190 (C.A.A.F. 2007). We must approach the question of

what constitutes a substantial omission on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999) (citation omitted).

3. Analysis

There is no question that the authenticated record of trial does not contain either (1) Capt AD's motion or (2) assistant trial counsel's slides used during argument. However, the analysis does not end there. First, we must determine if the document is indeed an omission, and second, if actually an omission, whether the omission is substantial—requiring the Government to rebut a presumption of prejudice. We will examine each document separately.

a. Motion

This document, although not contained in the ROT, is not an omission from the record. Nothing in the record before us indicates this motion [*28] was ever marked as an appellate exhibit requiring inclusion into the record. Appellant avers that the military judge was required to have the exhibit marked as an appellate exhibit, but does not cite any authority for this position. The military judge gave the trial defense counsel the option to include the motion in the record, and he chose not to have the exhibit marked as an appellate exhibit. The absence of the motion in the record is not just insubstantial, it is not an omission at all.

b. Slides

This court granted a motion to attach, over Appellant's objection, a declaration from assistant trial counsel and three slides, one of which has data and the other two of which are solid black. Assistant trial counsel avers the slides, which are not marked as an appellate exhibit, are the slides she used during her sentencing argument. The writing on the one slide has the date December 2017 to the far left and then a bar graph with dates from 3 April to 18 July with nanogram levels which match the dates and nanogram levels contained in the stipulation of fact indicating when Appellant provided urine samples and the concentration of THC in those samples. In addition, the slide depicts the [*29] statement "I know it was wrong when I did it. For some reason, I justified it in my mind, even though I knew it was wrong while I was doing it."

As an initial matter, we must decide whether we can consider the slides under *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020). *Jessie* was decided after we granted the Government's motion to attach. We find we can consider the slides for the purpose of our analysis as the slides were clearly raised in the record when the military judge ordered them marked as an appellate exhibit. *See id.* at 444.

We next turn to whether the missing slides are an omission and, if so, whether it was substantial. We find that the absence of a document that the military judge

ordered into the record is an omission. Finding an omission, our next step is to determine if the omission is substantial, and we conclude it was not. Of the three slides attached to the record, only one has any type of data on it; the other two are solid black. The first slide has dates indicating when Appellant tested positive and his nanogram level for each test. This information is identical to the information contained in the stipulation of fact. Further, the nearly identical quotation from Appellant was provided by Appellant during the providence [*30] inquiry.

After a review of the entire ROT, we are confident that the missing slides are an insubstantial omission and the record is complete under Article 54, UCMJ. The missing slides have no impact on the underlying evidence or the providence of Appellant's guilty plea. This is not just a case where other exhibits contained *similar* information and the omission was therefore insubstantial; in this case the record contains nearly *identical* information. Appellant used almost identical language under oath during his providency inquiry as quoted on the slide; and the stipulation of fact contains an identical listing of Appellant's positive drug test results by date and the nanogram levels as represented on the slide. Furthermore, unlike in *Stoffer* and *Henry* where the missing documents were evidence, the slides were a demonstrative aide for an argument that is not evidence. *See Fletcher*, 62 M.J. at 183.

D. SJAR

Appellant next argues that the SJAR contained two errors requiring new post-trial processing: (1) the SJAR inaccurately advised the convening authority of the maximum punishment for a special court-martial; and (2) the SJAR failed to inform the convening authority that he had the authority to disapprove, commute, [*31] or suspend in whole or part the term of confinement. We disagree that new post-trial processing is required.

1. Additional Background

Following Appellant's trial, the staff judge advocate (SJA) prepared the SJAR to guide the convening authority's action on the results of the court-martial. The SJAR provided, *inter alia*, the following advice:

> The maximum imposable sentence for the offense for which the accused was convicted is a bad conduct discharge, *forfeiture of all pay and allowances*, and confinement for twelve (12) months.
>
> . . . You do not have the authority to disapprove, commute or suspend in whole or part the punitive discharge. You do have the authority to disapprove, commute, or suspend in whole or in part the *reduction in rank*.

(Emphasis added). The SJAR initially recommended the convening authority only approve "so much of the sentence as calls for confinement" but later concluded with a recommendation that the convening authority "approve the sentence as adjudged."

In accordance with R.C.M. 1106(f)(1), trial defense counsel was served with a copy of the SJAR prior to a decision whether to submit matters on behalf of Appellant for the convening authority's consideration pursuant to R.C.M. 1105. Appellant [*32] subsequently waived in writing his right to submit clemency matters and his trial defense counsel submitted a separate memorandum indicating that Appellant was advised of his right to submit matters.

After Appellant waived his right to submit matters, the SJA prepared an addendum to the SJAR that again recommended approval of the sentence as adjudged but advised the convening authority the military judge awarded "one (1) stripe credit based upon a one (1) stripe reduction as a result of a previously issued nonjudicial punishment and awarded five (5) days of confinement credit based upon a reprimand given as a result of a previously issued nonjudicial punishment." The convening authority approved the adjudged sentence, but instructed that Appellant would be credited with the "one stripe" and five days of confinement credit. The action from the convening authority states *inter alia*: "The term of confinement having been served, no place of confinement is designated."

Appellant contends there is a colorable showing of possible prejudice because stating the incorrect maximum punishment made it seem as if Appellant received a more lenient sentence than possible. Appellant also believes the [*33] two errors "provide a misleading juxtaposition of Appellant's sentence and what Appellant could have received and what clemency could have been granted by the Convening Authority."

The Government concedes the misstatement of the maximum punishment was error, but argues Appellant has not made a colorable showing of possible prejudice. As to the omission of the convening authority's power with regard to confinement, the Government argues it is not error, much less plain or obvious error.

2. Law

Proper completion of post-trial processing is a question of law this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted). "Failure to timely comment on matters in the SJAR, or matters attached to the recommendation, forfeits any later claim of error in the absence of plain error." *United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (en banc) (citing R.C.M. 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)). To prevail under a plain error analysis, an appellant must show: "(1) there was an error; (2) [the error] was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id.* (quoting *Scalo*, 60 M.J. at 436).

To meet the third prong of the plain error test "in the context of a post-trial recommendation error, whether that error is preserved or is otherwise considered under the plain error doctrine, an appellant [*34] must make

'some colorable showing of possible prejudice.'" *Scalo*, 60 M.J. at 436-37 (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). "The low threshold for material prejudice with respect to an erroneous post-trial recommendation . . . is designed to avoid undue speculation as to how certain information might impact the convening authority's exercise of such broad discretion." *Id.* at 437 (citation omitted). While the threshold is low, "there must be some colorable showing of possible prejudice." *Id.* (citing *Kho*, 54 M.J. at 65). Whether an appellant was prejudiced by a mistake in the SJAR generally requires consideration of "whether the convening authority 'plausibly may have taken action more favorable to' the appellant had he or she been provided accurate or more complete information." *United States v. Kyc*, No. ACM S32391, 2017 CCA LEXIS 376, at *6 (A.F. Ct. Crim. App. 30 May 2017) (unpub. op.) (citing *United States v. Johnson*, 26 M.J. 686, 689 (A.C.M.R. 1988), *aff'd*, 28 M.J. 452 (C.M.A. 1989)) (additional citation omitted).

Because Appellant did not object to the SJAR, we test for plain error. We consider each asserted error in turn.

3. Analysis

a. Misstatement of the Maximum Punishment

The maximum forfeiture that a special court-martial may adjudge is two-thirds of the accused's pay per month for 12 months. R.C.M. 201(f)(2)(B)(i). Thus, Appellant could not have been sentenced to "forfeiture of all pay [*35] and allowances" and the SJAR is plainly erroneous in that respect.

However, Appellant has not made a colorable showing of possible prejudice arising from this plain or obvious error. The military judge did not adjudge any forfeiture of pay. Thus, the convening authority was not called upon to make any decisions regarding adjudged forfeitures when he acted upon the sentence. We are not persuaded the misstatement of the jurisdictional maximum punishment for forfeitures in any way influenced the convening authority to Appellant's detriment. Because Appellant has failed to make a "colorable showing of possible prejudice," he is entitled to no relief.

b. Authority to Disapprove the Adjudged Confinement

As an initial matter, this court granted a motion to attach Appellant's Department of Defense Form 2718, *Prisoner Release Order* (Mar. 2013) (DD Form 2718), which we did not consider in our analysis below. *See Jessie*, 79 M.J. at 444-45.

R.C.M. 1106(d)(3) does not list a statement of the convening authority's power among the "required contents" of an SJAR. We find no plain or obvious error in the SJAR which complies with R.C.M. 1106 and caselaw.

Assuming *arguendo* that it was error for the SJAR to omit the convening authority's ability to disapprove [*36] the adjudged confinement and that the error was plain or obvious, we are not persuaded that the omission in any way influenced the convening authority to Appellant's detriment.

We agree with Appellant that the SJA plays a "pivotal role in an accused's chances for relief." *United States v. Taylor*, 60 M.J. 191, 194 (C.A.A.F. 2004) (citation omitted). However, there is one individual in the clemency process that arguably plays an even more pivotal role—the appellant. Appellant never exercised his right to request the convening authority to disapprove his confinement, he chose to waive his right to submit matters altogether. Further, the convening authority that signed the PTA with Appellant is the same convening authority that took action on his case. The PTA between the convening authority and Appellant limited the amount of confinement the convening authority could approve to 90 days; once *Pierce* credit was given, Appellant was sentenced to less than half that amount. Additionally, by the date of the convening authority's action Appellant already had served his period of confinement. Finally, the SJAR correctly advised the convening authority that he could disapprove the reduction in grade and the convening authority declined to do so.

We considered [*37] whether the convening authority "plausibly may have taken action more favorable to" Appellant had he been provided more complete information. *Johnson*, 26 M.J. at 689; *see also United States v. Green*, 44 M.J. 93, 95 (C.A.A.F. 1996). Under these circumstances, we find no plausible reason to conclude that the convening authority would have taken a more favorable action if he had been explicitly advised that he could disapprove, commute, or suspend, in whole or in part, the confinement. Because Appellant has failed to make a colorable showing of possible prejudice, he is entitled to no relief.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are **AFFIRMED**.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32765**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Renard D. JENKINS	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 4 February 2025, this court ordered oral argument in the above-captioned case on the following issue:

> **WHETHER THE MILITARY JUDGE ERRED BY ADMITTING A PRISON PHONE RECORDING AS A GOVERNMENT SENTENCING EXHIBIT TO REBUT APPELLANT'S UNSWORN STATEMENT.**

On 28 February 2025, we ordered the oral argument be heard at 1300 hours on Wednesday, the 5th day of March 2025.

The oral argument is cancelled and will not be rescheduled. However, appellate government counsel and appellate defense counsel each may submit a supplemental brief relating to the above issue of no more than 10 pages in length.

Accordingly, it is by the court on this 5th day of March, 2025,

ORDERED:

Oral argument in the above-captioned case is **CANCELLED**.

Should appellate government counsel and appellate defense counsel wish to file a supplemental brief in response to the above issue, the briefs are due **not later than 12 March 2025**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' SUPPLEMENTAL ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before a Special Panel
Technical Sergeant (E-6) **RENARD D. JENKINS** United States Air Force *Appellant.*	)	No. ACM S32765 12 March 2025

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

Pursuant to this Court's order on 5 March 2025, the United States provides this supplemental answer on the following issue:

> **WHETHER THE MILITARY JUDGE ERRED BY ADMITTING A PRISON PHONE RECORDING AS A GOVERNMENT SENTENCING EXHIBIT TO REBUT APPELLANT'S UNSWORN STATEMENT.**

SUPPLEMENTAL ARGUMENT

Additional Facts

In the first paragraph of his unsworn statement, Appellant stated "[m]y misconduct, and my misconduct alone, led to this court-martial. And, I will always regret the decisions I made that brought me here." (Def. Ex. A). Later in his statement, Appellant said "[i]t saddens me that my actions have led me to lose my career in the Air Force and the retirement I worked so hard for. But, I know that my actions have brought me here, and I have to take accountability for them." (Id.). Appellant also said, "I have made mistakes that I will regret for the rest of my life." (Id.).

In a prison phone call on 28 June 2023, Appellant discussed his case and plea offer with his sister. (Pros. Ex. 4). Regarding his offer to plead guilty for domestic violence in violation of Article 128b, Appellant said "reading that shit I said you know what? Fuck it. People outside read this? This shit is crazy." (Id.). Appellant then said "[o]ffering to strike. That shit stupid. They sound stupid. Hopefully the judge see that shit stupid. But it's all good." (Id.).

Appellant later said "[m]otherfuckers probably want me to write a letter, apologetic letter. I ain't writing no letter. I ain't reading none that they write either. Last time they called to write something, talk about apologizing to [DJ]. . . I ain't reading that shit. Fuck it." (Id.). Finally, Appellant said "[t]here is this like letter apologizing to the victim. I ain't doing that shit. This ain't no murder charge. . . I don't give a fuck no more. I already signed the paper. [DJ] little crazy ass." (Id.).

Law and Analysis

The military judge did not abuse his discretion by finding that Appellant's prison phone call was appropriate rebuttal against his unsworn statement.

CAAF and this Court have provided guidance on what may make a statement one of fact or opinion for purposes of RCM 1001(d)(2)(C).

In United States v. Cleveland, 29 M.J. 361, 364 (C.M.A. 1990), CAAF found the unsworn statement "[a]lthough I have not been perfect, I feel I have served well" was "more in the nature of an opinion – indeed, an argument" than a statement of fact subject to rebut. CAAF further found that the introduction of uncharged off-duty misconduct did not "tend[] to explain the remark that [the appellant] had made in his unsworn statement." Id.

CAAF limited their holding in Cleveland ten years later in United States v. Manns, 54 M.J. 164 (C.A.A.F. 2000). The Court found the statement "I have tried throughout my life, even

during childhood, to stay within the laws and regulations of this country" was an "assertion of fact that [the appellant] had tried to obey the law." Id. at 166. It followed that the government was permitted to "produce evidence that appellant had not tried, or at least had not tried very hard" to obey the law. Id. In distinguishing this case from Cleveland, CAAF first emphasized that the appellant in Cleveland had couched his statement with the words "I *feel*," which was not present in the unsworn statement in Manns. Id. Second, the government's evidence that the appellant had used marijuana in his lifetime "rebutted his assertion that he tried to obey the law all his life." Contrasting the two cases, part of the problem with the sentencing evidence in Cleveland wasn't just that the appellant had expressed an opinion; it was also that nothing the government offered in rebuttal would "explain, repel, counteract, or disprove" the appellant's unsworn statement. United States v. Saferite, 59 M.J. 270, 274 (C.A.A.F. 2004).

This Court followed the guidance from Manns in United States v. Oliver, 2016 CCA LEXIS 101 (A.F. Ct. Crim. App. Feb. 24, 2016) (unpub. op.). It found the unsworn statement "I am a good person" was a statement of fact. Id. at *5-6. The military judge permitted trial counsel to introduce evidence of uncharged misconduct to contradict the appellant's assertion that he was a good person. Id. at *4. This Court found such admission was not an abuse of discretion. Id. at 6. In making this finding, this Court distinguished Cleveland by emphasizing that the words "I *feel* I have served well" were an opinion. Id. at *5-6 (internal citations omitted).

This Court went further in United States v. Wiseman, 2020 CCA LEXIS 260 (A.F. Ct. Crim. App. Aug. 4, 2020) (unpub. op.). In that case, the appellant stated he "cooperated with [law enforcement] the best that [he] could." Id. at *11. The military judge permitted trial counsel to introduce evidence that the appellant had "resisted assisting in the investigation of

another airman because he was initially unwilling to do so, not because he was incapable." Id. This Court found the statement to be "analogous to the appellant's statement in Manns." Id. Contrasting with Cleveland, this Court also found that the evidence offered in rebuttal in Wiseman was "more contrary" than the rebuttal evidence admitted in Cleveland. Id. In finding that the appellant's statement that he cooperated was a statement of fact, this Court opined that "[i]f [a]appellant had stated 'I feel' or 'I believe I cooperated' that might have been indicative of an opinion, not a fact—but he did not." Id.

Based on Appellant's unsworn statement, Appellant's phone call with his sister was proper rebuttal evidence to explain, counteract, or disprove Appellant's alleged accountability and regret.

Firstly, it was not error to take Appellant's words in his unsworn statement as statements of fact rather than opinions. Analogous to Wiseman, Oliver, and Manns, Appellant did not include "I feel" or "I believe" as a predicate to his statement. (Pros. Ex. 4). Instead, he said "I *have* to take accountability for [my actions]" and "I *have* made mistakes that I *will* regret for the rest of my life." (Def. Ex. A) (emphasis added). Neither of these statements is conditional. They are unreserved statements of fact, and it was not error for the military judge to treat them as such.

Secondly, following the holding in Manns, the rebuttal evidence offered against Appellant in this case is "more contrary" than the evidence presented in Cleveland. Wiseman, 2020 CCA LEXIS 260 at *11. Appellant expressed that he was taking accountability for his "misconduct" and that he would "always regret" his actions twice each in his unsworn statement. (Def. Ex. A). Yet in his phone call, Appellant said his domestic violence charge against DJ was "stupid," refused to write or read any "apologetic letter," and called DJ "little crazy ass." (Pros. Ex. 4). While Appellant argues that his words in the phone call do not "genuinely contradict" his

unsworn statement (App. Re. Br. at 4), that is too narrow a view of what constitutes proper rebuttal evidence. Trial counsel was not limited to only rebutting "specific evidence [trial defense counsel] offer[ed] in mitigation." United States v. Strong, 17 M.J. 263, 266 (C.M.A. 1984). Trial counsel could also offer rebuttal against "reasonable inferences which must be drawn from" the defense's evidence in mitigation. Id. at 266-267. "Remorse" is a synonym of "regret."[1] A reasonable inference from Appellant's acknowledgment of his misconduct and regret for his actions was that he is sorry for his actions. Appellant's statement that he would not apologize to DJ, that DJ was "crazy," and that the domestic violence charge against him was "stupid" was "the best evidence of his true feelings, which the military judge was justified in considering" when crafting his sentence. United States v. Leach, 2022 CCA LEXIS 76, at *19 (A.F. Ct. Crim. App. Feb. 3, 2022) (unpub. op.).

When taken together, Appellant's phone call and his unsworn statements are like the contrary statements at issue in Manns; they show that Appellant did not truly regret his actions or take accountability for them. Alternatively, the military judge could consider that if Appellant was regretful and taking responsibility, he had only done so in the last twelve days. Either interpretation would provide the military judge with context to "explain" or "contradict" Appellant's statements of fact in his unsworn statement. Strong, 17 M.J. at 266. Without this evidence, the military judge, as the sentencing authority, would have been misled and provided with only a one-sided picture as to Appellant's regret and accountability. Therefore, the military judge did not abuse his discretion in admitting this evidence to rebut Appellant's unsworn statement.

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[1] *See Merriam-Webster's Online Thesaurus*, https://www.merriam-webster.com/thesaurus/regret (last visited 10 March 2025).

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

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I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 12 March 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**SUPPLEMENTAL BRIEF ON**
	)	**BEHALF OF APPELLANT**
Appellee,	)	
v.	)	Before a Special Panel
	)	
Technical Sergeant (E-6),	)	No. ACM S32765
RENARD D. JENKINS,	)	
United States Air Force,	)	12 March 2025
Appellant.	)	

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

Appellant, Technical Sergeant (TSgt) Renard D. Jenkins, pursuant to this Court's order on 5 March 2025, files this supplemental brief. In addition to the arguments in his opening and reply briefs, TSgt Jenkins offers the following.

II.

The military judge abused his discretion by admitting the nearly sixteen-minute-long phone recording without a proper foundation for rebuttal by making erroneous findings of fact and applying the wrong standard for lack of remorse.

A. Additional Facts

During the plea inquiry, TSgt Jenkins admitted details leading up to the offenses involving D.L.J. (R at 16.) Concerning the domestic violence offense, TSgt Jenkins explained the circumstances of his marriage with D.L.J. This included their frequent arguing and D.L.J.'s intent to leave him. (R. at 19.) TSgt Jenkins elaborated on this during the discussion of the threatening communications which took place after they separated and D.L.J. took their daughter. (R. at 25.) He explained that they "got in several fights over the phone" and the "fights [would] revolve around small and big issues in [their] relationship, as well as tension from being physically

separated." (*Id.*) TSgt Jenkins also described his frustration over D.L.J.'s refusal to let him see their daughter during Thanksgiving. (R. at 30.)

Following the inquiry and the findings of guilty, the Government first attempted to admit the prison phone recording as a prosecution exhibit during its presentencing case. (R. at 79.) The Government's theory of admission was based on TSgt Jenkins's purported "views on the seriousness of his offenses, whether or not he [had] any remorse for his conduct, and . . . his rehabilitative potential." (R. at 80.) The military judge declined to admit the recording, ruling that it was improper evidence in aggravation. (R. at 83.) Further, the military judge also concluded that the recording did not qualify as rebuttal to anything that was in evidence at that stage of the proceeding. (R. at 83) ("It may very well end up being relevant as rebuttal evidence, but just not at this time.").

TSgt Jenkins later gave an unsworn statement which reiterated his description of his marital breakdown with D.L.J. (Def. Ex. A.) This included details of their separation and TSgt Jenkins's loss of visitation with his daughter. (*Id.*) TSgt Jenkins did not elaborate his frustration with D.L.J. beyond what he admitted in his plea inquiry, except to clarify that he held himself responsible for his actions. (*Id.*)

After the Defense rested, the Government asked the military judge to reconsider the admission of the phone recording as rebuttal to TSgt Jenkins's unsworn statement and to show lack of remorse. (R. at 114, 117.) The military judge admitted the recording as rebuttal, explaining:

> [TSgt Jenkin]'s unsworn statement states that his conduct alone led to this court-martial, that he regrets the decisions that he made, and that he'll regret the mistakes he made for the rest of his life. I think what has been proffered is relevant to rebut that. So I will allow it for that purposes. What is his expression of – about the crimes and the victim.

(R. at 120.) The military judge did not listen to the recording before making his ruling, and asked trial counsel for headphones and a disc reader after admitting it. (R. at 121.) Before listening to it, the military judge heard the Government's argument on sentencing. (R. at 122.) Trial counsel quoted the recording at length and argued that it showed a lack of remorse. (R. at 123.) This included the following quotes:

> The motherfuckers probably going to want me to write a letter, An apologetic letter. I ain't writing a goddamn letter and I ain't reading nothing I didn't write either. [Trial defense counsel] calls, try to write something, talk about some – apologizing to [D.L.J.], all this other shit. I ain't reading shit.
>
> . . .
>
> Fuck it, I ain't have to read nothing. At sentencing, you've got to have a letter apologizing to your victim. I ain't doing that shit. This ain't no murder charge. Not like they do on TV, apologizing to the family and all that shit. Shit, I don't give a fuck no more. I've already signed the paper. [D.L.J.] crazy little ass.

(R. at 122.) On the recording, TSgt Jenkins made these statements in regular speaking tone. (Pros. Ex. 4. at 09:30.) Twice, trial counsel suggested that the recordings were the most probative evidence of TSgt Jenkins's attitude towards the crimes. (R. at 123, 126.) Trial counsel summed up her argument by suggesting that a lenient sentencing was only acceptable for individuals who are "actually sorry" and take responsibility for their actions. (R. at 126.)

B. The military judge made clearly erroneous findings of fact.

The military judge made clearly erroneous factual findings during the admission of the recording. "A military judge's factual findings are clearly erroneous when there is no evidence in the record to support the findings or when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Harris*, 78 M.J. 434, 437 (C.A.A.F. 2019).

The military judge erred by finding that TSgt Jenkins's unsworn statement contained expressions towards the crimes and victims which were sufficient to open the door to introducing the phone recording as rebuttal. Importantly, TSgt Jenkins's discussion of the crimes and D.L.J. in the unsworn was limited to his description of the events leading up to the offenses. TSgt Jenkins made no overt comment on the nature of the crimes themselves and offered no opinion of D.L.J. The information in the unsworn was substantially the same as what TSgt Jenkins already described during the plea inquiry. In both, TSgt Jenkins merely explained his marital difficulties with D.L.J. and the pain he felt after losing access to his daughter.

The military judge's factual determination following the unsworn statement contradicted his holding upon the Government's first attempt to admit the recording in its presentencing case. This is because the military judge was confronted with nearly identical facts during the Government's case following the plea inquiry. TSgt Jenkins's admissions during the providence inquiry included the separation and divorce with D.L.J., their frequent arguments, and difficulties with child visitation. In that instance, the military judge determined that the recording was not proper rebuttal. Yet, the military judge made contrary findings after TSgt Jenkins's unsworn statement provided substantially the same information. If anything, the unsworn statement was even less descriptive of "the crimes and the victim" because TSgt Jenkins did not attribute any of his frustration to D.L.J., whereas he did during the plea inquiry. This contradictory finding by the military judge is paradoxical and indicative of clear error. Moreover, it leads to a definitive and firm conviction that a mistake has been committed. *Harris*, 78 M.J. at 437.

Additionally, the military judge was incapable of determining whether the recording fit in the scope of rebuttal because he did not listen to the recording before admission. The scope of rebuttal is a fact-specific inquiry that is defined by the evidence introduced by the other party.

United States v. Saferite, 59 M.J. 270, 274 (C.A.A.F. 2004). The evidence presented in rebuttal is limited to that which can explain, repel, counteract, or disprove the evidence introduced by the other party. *United States v. Banks*, 36 M.J. 150, 166 (C.M.A. 1992). By failing to listen to the recording, the military judge was incapable of making findings of fact necessary to determine if it fit the limited purpose of rebuttal. This is especially troubling because earlier in the proceedings the military judge determined that the recording raised improper aggravation. Without listening to the recording, the military judge could not determine whether it was proper evidence in rebuttal, or just means for the government to bootstrap impermissible matters into the record. *United States v. Cleveland*, 29 M.J. 361, 364 (C.M.A. 1990). When properly evaluated, the admission of the recording in its entirety was clearly erroneous.

C. The military judge did not apply the correct standard.

The military judge did not analyze admission of the recording under the appropriate standard for lack of remorse. Evidence of lack of remorse is a narrow subset of rebuttal that can be admitted only where an accused offers a statement and "has either expressed no remorse or his expression of remorse can be arguably construed as being shallow, artificial, or contrived." *United States v. Edwards*, 35 M.J. 351, 355 (C.M.A. 1992). This limitation exists to shield the accused against impermissible comment on the constitutional right to remain silent. *Id.* This determination is fact-specific and depends on the context of each individual case. *Id.* at 354. The military judge did not apply this standard or mention it.

Even assuming arguendo that TSgt Jenkins's assertion of regret was an expression of remorse, admission of the recording was permissible only if the military judge first determined that TSgt Jenkins's regret was "shallow, artificial, or contrived." *Id.* The military judge made no finding under this standard. This deficiency was especially apparent given that the military judge

did not review the recording before ruling on its admissibility. Without doing so, the military judge was in no position to decide whether it cast TSgt Jenkins's regret as inauthentic. Had the military judge done so, he likely would have concluded that the unsworn statement and the recording involved two completely different topics. In the unsworn statement, TSgt Jenkins expressed shame for his actions, whereas in the recording he described his difficulties with D.L.J. during their tumultuous marriage along with his refusal to apologize to her.

United States v. Chaves, 28 M.J. 691, 692 (A.F.C.M.R. 1989) is instructive. The A.F.C.M.R. held that an instruction on lack of remorse was erroneous. The Government asked for the instruction after the appellant made an unsworn statement which did not contain an expression of remorse. *Id.* Rather, the unsworn statement was limited to discussion of the appellant's childhood, his family life, his time in the military, and the events leading up to the offenses of which he was convicted. *Id.* The A.F.C.M.R. held that this limited reference in the unsworn statement was insufficient to warrant an instruction on lack of remorse. *Id.* Moreover, there was no evidence presented to show "any overt display by the appellant of a lack of remorse." *Id.* This may have included a statement from the appellant bragging about the offenses or expressing satisfaction with committing them. *Id.* The instruction therefore amounted to an inappropriate comment on the appellant's right to remain silent. *Id*. *See also United States v. Apgar*, No. ACM 40210, 2023 CCA LEXIS 159, at *7 (A.F. Ct. Crim. App. Apr. 10, 2023) (assuming error where trial counsel argued lack of remorse based on absence of apology to victim in appellant's plea inquiry).

In this case, TSgt Jenkins offered an unsworn statement, but did not elaborate on the nature of his regret or offer a specific apology to D.L.J. As in *Chaves*, it was erroneous for the military judge to allow evidence of lack of remorse based on the narrow content of the unsworn statement.

Without the predicate foundation to introduce lack of remorse, admission of the recording and the trial counsel's reliance on it during argument was an improper intrusion on TSgt Jenkins's rights. The Court of Appeals for the Armed Forces (when it was still named the Court of Military Appeals) has recognized that the right of an accused to make an unsworn statement is longstanding and valuable, and that it should not be undercut or eroded. *United States v. Partyka*, 30 M.J. 242, 246 (C.M.A. 1990). "If the Government may rebut an unsworn statement under circumstances not permitted [by the Rules for Courts-Martial], the right to make an unsworn statement becomes a trap for the accused and counsel." *Id.* This Court should resist a holding that allows the rule prohibiting lack of remorse evidence to be swallowed up by the exception that permits its admission under limited circumstances.

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 & Appellate Operations Division on 12 March 2025.

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