UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40274 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF DOCKETING**
Ian M. WILSON	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

The above styled case was returned to this court on 26 September 2023 by the Military Appellate Records Branch (JAJM) for re-docketing with the court.

Accordingly, it is by the court on this 26th day of September, 2023,

ORDERED:

That the Record of Trial in the above styled matter is referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **IAN M. WILSON,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Special Panel No. ACM 40274 (f rev) 13 November 2023

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 60 days, which will end on **24 January 2024.** The record of trial was docketed with this Court on 26 September 2023. From the date of docketing to the present date, 48 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]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 13 November 2023.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
[redacted]

15 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) IAN M. WILSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40274 (f rev) 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]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 November 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **IAN M. WILSON,** United States Air Force *Appellant*	)))))))))	**MERITS BRIEF** Before Special Panel No. ACM 40274 (f rev) 19 January 2024

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

The undersigned appellate defense counsel attests he has, on behalf of Appellant, carefully examined the record of trial in this case. Appellant does not admit the findings or sentence are correct in law and fact, but submits the case to this Honorable Court on its merits with no additional specific assignment of error during this stage of appellate review.[1]

Respectfully submitted,

[redacted]
MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
[redacted]

[1] Appellant specifically preserves and maintains Assignment of Error III raised in his initial brief to this Court, dated 6 March 2023. On 16 August 2023, this Court remanded to the Chief Trial Judge to address several issues with the record of trial. *United States v. Wilson*, ACM 40274, 2023 CCA LEXIS 343 (A.F. Ct. Crim. App. 16 Aug. 2023). Appellant recognizes that Assignments of Error I and II are now moot by the action on remand.

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Airman First Class (E-3) **IAN M. WILSON,** United States Air Force *Appellant*	)	No. ACM 40274 6 March 2023

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

ASSIGNMENTS OF ERROR

I.

WHETHER THIS COURT SHOULD ORDER CORRECTION OF THE ENTRY OF JUDGMENT, WHICH INCORRECTLY STATES THAT THE CONVENING AUTHORITY DENIED A DEFERMENT REQUEST WHEN A1C WILSON ONLY MADE A SUSPENSION REQUEST.

II.

WHETHER A MISSING CONVENING ORDER NECESSITATES REMAND.

III.[1]

WHETHER A1C WILSON'S SENTENCE IS INAPPROPRIATELY SEVERE.

STATEMENT OF THE CASE

On 1 February 2022, at a general court-martial at Oakland County Circuit Court, Michigan, Airman First Class (A1C) Ian M. Wilson pleaded guilty before a

[1] Issue III is raised in the Appendix pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

military judge to one charge and specification of desertion in violation of Article 85, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 885 (2019).[2] (Record (R.) at 18, 21, 66; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 15 Mar. 2022.) The military judge sentenced A1C Wilson to a bad-conduct discharge, reduction to the grade of E-1, forfeiture of $1,190.00 pay per month for 2 months, and a reprimand. (R. at 89–90; EOJ, ROT Vol. 1, 15 Mar. 2022.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, ROT Vol. 1, 4 Mar. 2022.)

STATEMENT OF FACTS

The Charged Offense

A1C Wilson's family had a long tradition of military service; he knew from a young age he wanted to join the military. (Defense Exhibit (DE) O at 2.) His father, a Marine, persuaded him to join the Air Force rather than the Navy. (*Id.*) A1C Wilson's time in training featured numerous community service activities and service as a rope, or student leader. (*Id.*) He continued to go above and beyond during the second phase of his training as a medical technician, including volunteering as a security forces augmentee, running a marathon, and obtaining a medical training certificate not required for graduation. (*Id.* at 2–3.) He arrived at his first duty station, Nellis Air Force Base, Nevada, just as the global pandemic descended. (*Id.* at 3.) His services as a lab technician were crucial as the demand for COVID-19 testing sky-rocketed. (*Id.*)

[2] All references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*].

In January 2021, A1C Wilson discovered he was under civilian investigation based on a sexual assault allegation. (Prosecution Exhibit (PE) 1 at 1.) He retained a civilian counsel, who maintained contact with investigating detectives. (*Id.*) The Air Force Office of Special Investigations (AFOSI) ran a separate investigation and took his DNA sample and fingerprints on 2 February 2021. (*Id.* at 2.) On 9 February 2021, A1C Wilson's mother informed him of a warrant for his arrest. (*Id.* at 2.) He was ashamed to be charged, and he panicked. (PE 1 at 2; DE O at 3.) He purchased supplies like a fire starter and reservoir shower, withdrew money from his account, and began driving north. (PE 1 at 3; DE O at 3.)

When he arrived at Whatcom County, Washington, near the border with Canada, he purchased camping equipment. (R. at 40–41.) He parked approximately 100 yards from the border. (PE 1 at 3.) The United States Border Patrol, acting on a "Be On the Lookout" (BOLO) notification from A1C Wilson's unit issued after he failed to arrive at work on 10 February 2021, detained him and transferred him to local law enforcement. (*Id.*; R. at 43.) A1C Wilson admitted that, at the moment he bought the camping equipment, he intended to remain away from his unit permanently. (R. at 43.) However, shortly thereafter and near the border, he was no longer so resolved. (R. at 42.) His desertion lasted one day. (Charge Sheet, ROT Vol. 1.)

Presentencing

Twelve individuals wrote character letters to support A1C Wilson. These letters described an individual who excelled in academics and athletics, was "truly a leader amongst his peers," "helpful, smart, and resourceful," "kind and supportive,"

with "a compassion for those in need," and who gave significant time to community service. (DE B, C, E, F, G.) A1C Wilson "joined the Air Force to fight, literally fight, for those that could not fight for themselves." (DE I.) As for rehabilitation potential, they explained it was "outstanding," "excellent," and that he is one who "learns from his mistakes." (DE C, D, E, G, H, I, M.) Further, they described that his actions were "completely out of character." (*See, e.g.*, DE G.)

A1C Wilson began his unsworn statement with a profuse apology. (DE O at 1.) He explained that he "kick[s] himself everyday for letting [his] stress get to [him]," and he wished he just walked into work the next morning instead of running. (*Id.* at 3–4.) He asked only that the military judge not sentence him to a bad-conduct discharge. (*Id.* at 4.) The military judge sentenced A1C Wilson to a bad-conduct discharge, reduction to the grade of E-1, forfeiture of $1,190.00 pay per month for 2 months, and a reprimand. (R. at 89–90; EOJ, ROT Vol. 1, 15 Mar. 2022.)

A1C Wilson remained in civilian confinement from 11 February 2021 (the date of his apprehension) at least until his court-martial at a civilian courtroom in Michigan on 1 February 2022. (Charge Sheet, ROT Vol. 1; PE 1 at 3.) His defense counsel did not request confinement credit for the civilian confinement. (R. at 67.)

ARGUMENT

I.

THE ENTRY OF JUDGMENT INCORRECTLY STATES THAT THE CONVENING AUTHORITY DENIED A DEFERMENT REQUEST WHEN A1C WILSON ONLY MADE A SUSPENSION REQUEST.

Additional Facts

A1C Wilson's defense counsel submitted matters that asked the convening authority (CA) to "suspend[] his adjudged forfeitures and reduction to Airman Basic." (Clemency Request – *Airman First Class Ian M. Wilson*, ROT, Vol. 2, 17 Feb. 2022.) The CA denied both suspension requests, citing "detriment to the prejudice of good order and discipline in this command." (Convening Authority Decision on Action, ROT Vol. 1, 4 Mar. 2022.) However, the EOJ states that the CA denied both *deferment* requests. (EOJ, ROT Vol. 1, 15 Mar. 2022.)

Standard of Review

Appellate courts perform *de novo* review of post-trial processing. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). R.C.M. 1104(b)(2)(B) sets a five-day time limit for filing a motion to correct incomplete, irregular, or erroneous action. Failure to file this motion forfeits the issue, and appellate courts review for plain error. *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246, at *15 (A.F. Ct. Crim. App. 27 Jul. 2020) (unpub. op.). 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.* (citations and alterations omitted).

Law

R.C.M. 1103 governs deferment, which can occur with or without a request from an accused. R.C.M. 1103 (b), (c). R.C.M. 1103(d) sets forth specific criteria for the CA to consider when making a decision on deferment. Deferment ends upon entry of judgment. R.C.M. 1103(f)(1)(A).

R.C.M. 1107 governs suspension of the sentence. Suspension establishes a probationary period where part of the sentence is not executed. R.C.M. 1107(a). The period for suspension cannot be "unreasonably long." R.C.M. 1107(d)(3). Suspensions may have conditions that are established in writing and served on the accused. R.C.M. 1107(c).

Analysis

The language in the submission of matters is unequivocal: A1C Wilson asked for a suspension of reduction in grade and the forfeitures. The CA acted appropriately in responding to the *suspension* request—even if his conclusion that granting a minor suspension request would have *any* impact on good order and discipline is profoundly misguided. But the EOJ is flat wrong to state that the CA denied a deferment request. Whether forfeited under R.C.M. 1104 or not, this was error under any standard of review. A1C Wilson is entitled to an EOJ that accurately reflects the result of his court-martial. This Honorable Court should order correction of the EOJ.[3]

[3] If this Court agrees and orders correction, the corrected EOJ need not contain a certificate of review. In the current EOJ, a captain certifies that he performed Article 65(d), UCMJ, 10 U.S.C. § 865(d), review of the case. (EOJ, ROT Vol. 1, 15 Mar. 2022.) It is uncertain which subsection the counsel believed applied to the case. But in this posture, such review was not required.

WHEREFORE, A1C Wilson respectfully requests this Honorable Court order correction of the EOJ.

II.

THE RECORD OF TRIAL IS MISSING A CONVENING ORDER, WHICH NECESSITATES A REMAND.

Additional Facts

According to the transcript, A1C Wilson's court-martial was convened by "Special Order A-4 . . . as amended by Special Order A-6." (R. at 2.) Special Order A-6 is not included in the record of trial.

Standard of Review

This Court reviews whether a record of trial is incomplete *de novo*. *See United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law and Analysis

The record of trial is "the very heart of the criminal proceedings and the single essential element to meaningful appellate review." *United States v. Credit*, 4 M.J. 118, 119 (C.M.A. 1977). A complete record of proceedings is required for every court-martial in which the sentence adjudged includes "a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months." Article 54(c)(2), 10 U.S.C. § 854(c)(2). A complete record shall include a "copy of the convening order and any amending order." R.C.M. 1112(b)(3). "Omissions are quantitatively substantial unless 'the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.'" *United States v. Daley*, No. ACM 40012,

2022 CCA LEXIS 7, at *4 (A.F. Ct. Crim. App. 5 Jan. 2022) (unpub. op.) (quoting *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (alterations in original)). A substantial omission in a record of trial raises a presumption of prejudice to an appellant which the Government must rebut. *Henry*, 53 M.J. at 111 (citations omitted). "Moreover, since in military criminal law administration the Government bears responsibility for preparing the record of trial, it is fitting that every inference be drawn against the Government with respect to the existence of prejudice because of an omission." *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981) (citation omitted).

A valid convening order is a jurisdictional prerequisite. And it is plainly required for a complete record of trial. R.C.M. 1112(b)(3). Thus, its omission is "substantial." This Honorable Court should remand to resolve the issue of whether Special Order A-6 exists; if it does not, this court-martial lacked jurisdiction.

WHEREFORE, A1C Wilson respectfully requests this Honorable Court return the record of trial to the Chief Trial Judge, Air Force Trial Judiciary, to remedy the absence of the convening order.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
[redacted]

APPENDIX

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

III.

A1C WILSON'S SENTENCE IS INAPPROPRIATELY SEVERE.

Standard of Review

This Court reviews sentence appropriateness *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

This Court "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [it] 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). Considerations include "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) (citations omitted). "The breadth of the power granted to the [CCAs] to review a case for sentence appropriateness is one of the unique and longstanding features of the [UCMJ]." *United States v. Hutchison*, 57 M.J. 231, 233 (C.A.A.F. 2002) (citations omitted). This Court's role in reviewing sentences under Article 66(d) is to "do justice," as distinguished from the discretionary power of the convening authority to grant mercy. *See United States v. Boone*, 49 M.J. 187, 192

(C.A.A.F. 1998).

Analysis

A1C Wilson's bad-conduct discharge is inappropriately severe in light of: (1) the uncharacteristic and fleeting nature of his actions; (2) the time spent in confinement; and (3) his demonstrated rehabilitative potential.

First, A1C Wilson, faced with a serious civilian allegation, simply panicked. This was not a sophisticated and planned desertion. Instead, A1C Wilson and his civilian attorney were cooperating with investigating officers. But the news of an actual arrest warrant terrified A1C Wilson, who had never received anything beyond a traffic ticket before. While this does not excuse the behavior, it helps to explain the gravity of his actions. As his defense counsel explained in the clemency submission, A1C Wilson, only 20 at the time of the offense, made an impulsive decision that reflects brain immaturity among young adult males. (Clemency Request – *Airman First Class Ian M. Wilson*, ROT Vol. 2, 17 Feb. 2022.) The character letters describe his flight as something "completely out of character" for him. (*See, e.g.*, DE G.) Ultimately, his desertion lasted all of one day. And while at *some* point during his flight he intended to remain away permanently, he had regrets along the way and still had not resolved what to do when he stopped just short of the border.

Second, A1C Wilson spent significant time in confinement. While his defense counsel at trial conceded the restraint was not related to the desertion, his defense counsel at clemency pointed out that he gave up this claim to plead guilty, which benefitted the Government. (Clemency Request at 3.) Additionally, there was a strong case that he should have received confinement credit for this extended

detention, which occurred "*pursuant to the military's warrant*." (*Id.* (emphasis in original).) This Honorable Court should consider the extended confinement when determining whether the addition of a bad-conduct discharge is inappropriately severe.

Third, A1C Wilson's presentencing case demonstrates his strong character and rehabilitation potential. Unusual for a junior enlisted member, a dozen individuals lined up to support him. (DE B–M.) They spoke glowingly of his character, his community contributions, and his basic kindness. (DE B–M.) They lauded his service. And they described his rehabilitation potential as "outstanding" and "excellent." (DE C, D, E, G, H, I, M.) Such an Airman does not require the stigma of a bad-conduct discharge for a fleeting mistake.

In sum, taken into account the nature of the offense and the offender, a bad-conduct discharge is inappropriately severe. [4]

WHEREFORE, A1C Wilson respectfully requests this Honorable Court disapprove his bad-conduct discharge.

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[4] A1C Wilson does not challenge the remainder of the sentence. The language of the plea agreement could arguably suggest that the reprimand and reduction in grade were not authorized punishments. It states that the "court must enter a sentence as follows," and then discusses confinement, punitive discharge, and forfeitures, but not a reprimand or reduction in grade. (Appellate Exhibit VII at 2.) A1C Wilson does not contest the court-martial's authority to impose a reprimand or reduction in grade consistent with the plea agreement; this is akin to a drafting error and not a failure of a meeting of the minds.

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division (AF/JAJA)
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERRORS**
v.	)	Before Panel No. 1
Airman First Class (E-3) **IAN M. WILSON,** United States Air Force *Appellant.*	)	No. ACM 40274 5 April 2023

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

ISSUES PRESENTED

I.

WHETHER THIS COURT SHOULD ORDER CORRECTION OF THE ENTRY OF JUDGMENT, WHICH INCORRECTLY STATES THAT THE CONVENING AUTHORITY DENIED A DEFERMENT REQUEST WHEN A1C WILSON ONLY MADE A SUSPENSION REQUEST.

II.

WHETHER A MISSING CONVENING ORDER NECESSITATES REMAND.

III.[1]

WHETHER A1C WILSON'S SENTENCE IS INAPPROPRIATELY SEVERE.

STATEMENT OF THE CASE

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

[1] Appellant raised Assignment of Error III pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF FACTS

The facts relevant to each issue will be detailed in the argument section below.

ARGUMENT

I.

THIS COURT SHOULD MODIFY THE ENTRY OF JUDGMENT, WHICH INCORRECTLY STATES THAT THE CONVENING AUTHORITY DENIED A DEFERMENT REQUEST WHEN A1C WILSON ONLY MADE A SUSPENSION REQUEST.

Additional Facts

In Appellant's clemency request, dated 17 February 2022, he asked the convening authority to suspend his adjudged forfeitures and reduction to Airman Basic. (*Clemency Request – Airman First Class Ian M. Wilson,* ROT Vol. 2). The Convening Authority Decision on Action, dated 4 March 2022, stated that he denied Appellant's requests for (1) "suspension of adjudged forfeitures" and (2) "suspension of reduction of rank to E-1." (*Convening Authority Decision on Action*, ROT Vol.1).

The Entry of Judgement, dated 15 March 2022, states,

> Deferments: On 17 February 2022, the accused requested a deferment of adjudged forfeitures: On 4 March 2022, deferment was denied.
>
> On February 2022, the accused requested a deferment of reduction of rank E-1: On 4 March 2022, deferment was denied.

(*Entry of Judgement*, ROT Vol. 1).

Standard of Review

Proper completion of post-trial processing is a question of law subject to *de novo* review. United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004).

Law and Analysis

The United States agrees that the Entry of Judgment is incorrect. There is good cause not to remand this record for completion and correction, because this Court has the authority under R.C.M. 1111(c)(2) to modify the Entry of Judgment to correctly reflect the Convening Authority's Decision on Action. R.C.M. 1111(c)(2) states: "The Judge Advocate General, the Court of Criminal Appeals, and the Court of Appeals of the Armed Forces may modify a judgment in the performance of their duties and responsibilities." Modifying the Entry of Judgment in this case is a proper and efficient application of this Court's responsibilities.

The United States respectfully requests this Court modify the Entry of Judgment to reflect that Appellant asked for a suspension and the convening authority denied his suspension rather than a deferment.

II.

THE MISSING CONVENING ORDER DOES NOT NECESSITATE REMAND.[2]

Additional Facts

The transcript reflects that the convening order, Special Order A-4, dated 17 November 2021, that convened Appellant's court-martial was amended by Special Order A-6, dated 13 January 2022. (R. at 1). Special-Order A-6 is not contained within the record of trial.

At trial, all parties were furnished copies of Special Order A-6, dated 13 January 2021. (R. at 2). Trial defense counsel made no objections or motions regarding Special Order A-6.

[2] The United States is filing a motion to attach the missing convening order to the record of trial contemporaneously with this Answer brief.

Standard of Review

Whether an omission from a record of trial is "substantial" is a question of law reviewed *de novo*. United States v. Stoffer, 53 M.J. 26, 27 (C.A.A.F. 2000).

Law and Analysis

Under United States v. Henry, a substantial omission from the record renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. 53 M.J. 108, 111 (C.A.A.F. 2000). Under R.C.M. 1112(b)(3), a complete record of trial includes a copy of the convening order and any amending order. At least one court has seemingly found the omission of convening order from the record to be insubstantial. In United States v. Ferguson, the Army Court of Criminal Appeals found a missing convening order was not a "significant omission" from the record, because of the detailed discussion on the record about the convening order, and the fact it had no impact on the seating of members or the trial itself. No. ARMY 20140957, 2017 CCA LEXIS 490, at *2-3 (A. Ct. Crim. App. July 26, 2017). Here, like in Ferguson, Special Order A-6 was discussed on the record, and appears to have had no impact on the trial, since Appellant pled guilty and was sentenced by a military judge, rather than members. Thus, this Court could follow Ferguson and conclude the omission of the convening order was not substantial.

However, if this Court does find the omission substantial, Appellant suffered no prejudice from the omission. In United States v. Valle, the Navy-Marine Corps Court of Criminal Appeals found that the Government had rebutted the presumption of prejudice to the Appellant when the record of trial was missing the convening order, because (1) Valle was a bench trial with no members and (2) trial counsel stated on the record the commanding officer of the ship convened the court and trial defense counsel did not object. United States v. Valle, NMCM 93 01665, 1996 CCA LEXIS 418, at *5-6 (N-M Ct/ Crim. App. Jan. 31, 1996). Here the facts align with

Valle, because a military judge alone heard Appellant's case, trial counsel announced the convening orders on the record without objection from trial defense counsel, and all parties possessed a copy of Special Order A-6 at trial. Therefore, even if the presumption of prejudice were raised, Appellant suffered no prejudice from the absence of the amended convening order because it existed at the time of trial, Appellant was provided a copy of it, which was discussed on the record, and his court-martial was not affected by its absence in the record now. Furthermore, attachment of Special Order A-6 to the record of trial solidifies that the court-martial had proper jurisdiction over Appellant's case.

The United States has now moved to attached Special Order A-6 to the record trial. If the Court finds its omission to be substantial, an appropriate course of action would be for this Court to consider the attachment in deciding whether Appellant has suffered any prejudice from the missing convening order. *See* United States v. King, No. ACM 39583, 2021 CCA LEXIS 415, at *29-30 (A.F. Ct. Crim. App. 16 Aug. 2021).

The United States respectfully requests this Honorable Court deny this assignment of error and find the omission of the amended convening order did not prejudice Appellant.

III.[3]

A1C WILSON'S SENTENCE IS APPROPRIATE

Additional Facts

On 9 February 2021, Appellant left Nevada after 2300 hours. (Pros. Ex. 1 ¶11). He was stationed at the time at Nellis AFB, Nevada, as part of the 99th Medical Support Squadron (99MDSS). (Pros. Ex. 1 ¶1). After he left Nevada, Appellant developed the intent to

[3] Appellant raised Assignment of Error III pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

permanently depart from his service with the Air Force. (Pros. Ex. 1 ¶ 14). On 10 February 2021, after Appellant failed to show up for duty and his leadership was unable to contact him, his commander placed him on "Deserter status" and authorized his apprehension by state and federal law enforcement entities. (Pros. Ex. 1 ¶12). Evidence of Appellant's intent to stay away included that Appellant left his uniforms and work badge in his dormitory, he was only about 100-yards from the Canadian border and 1,355 miles from Nellis AFB when he was arrested, he had transferred money from savings to checking, and bought camping supplies to stay away, and he was facing criminal charges at the time he left. (Pros. Ex. 21).

Leading up to his departure on 9 February 2021, Appellant transferred $9,965 from his savings account to his checking account and withdrew some cash monies. (Pros. Ex. 1 ¶10 and ¶19). Appellant also researched search terms such as "Google Maps", "Canadian v. US words", and "Stanley Park, Vancouver, Canada". (Pros. Ex. 1 ¶9 and Attachment 12). While on the run, Appellant purchased camping gear in Washington State, including a tent, a backpack, a Leatherman multi-tool, and a foam sleeping pad. (Pros. Ex. 1 ¶ 15).

The impetus for Appellant's flight from Nevada was his panic over the arrest warrant issued by the State of Michigan for his arrest for sexual assault. (Pros. Ex. 1 ¶8 and ¶11). For approximately a month proceeding his desertion, Appellant had been under investigation in Michigan based on allegations from six victims for sexual assault. (Pros. Ex. 1 ¶¶ 2-4) The day he fled Nevada, Appellant's mother had told him the arrest warrant had been issued for his arrest. (Pros. Ex. 1 ¶8).

On 11 February 2021, after the Office of Special Investigations (OSI) disseminated a Be on the Lookout (BOLO) for Appellant to United States Customs and Border Patrol (CBP), CBP agents spotted Appellant and apprehended him. (Pros. Ex. 1 ¶¶14-16).

On 11 January 2022, Appellant entered into an Offer for Plea Agreement with the convening authority. (App. Ex. VII) The offer required Appellant to plead guilty to the Specification of the Charge at a general court-martial. (Id.) In exchange for his plea of guilty, the convening authority agreed Appellant would receive no confinement, could not receive more than a bad conduct discharge, and would not receive more than forfeiture of two-thirds pay per month. (Id.) The military judge sentenced Appellant to a bad conduct discharge, reduction in rank to E-1, and forfeiture of $1,190.00 pay per month for two months. (*Entry of Judgment*, ROT Vol. 1).

Standard of Review

This Court reviews sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006). 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 and Analysis

Appellant's sentence is not unduly severe. Rather, it fits his actions and the findings of guilt in his case. The appropriateness of a sentence is assessed "by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." United States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). Unlike the act of bestowing mercy through clemency, which was delegated to other hands by Congress, Courts of Criminal Appeals are entrusted with the task if 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).

Appellant's sentence to a bad conduct discharge and zero (0) days confinement is an appropriate punishment, because it fits the crime in question, the nature of the offense, and this particular Appellant. Moreover, without the plea agreement, Appellant faced a maximum of three (3) years confinement, a dishonorable discharge, and total forfeiture of all pay and allowances. *See* 2019 MCM, Appendix 12. Even though Appellant agreed to the sentencing terms in his plea agreement, Appellant argues his sentence was inappropriately severe. (Appendix to App. Br. at 1). "Absent evidence to the contrary, an accused's own sentence proposal is a reasonable indication of its probable fairness to him." United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979). Appellant gained the benefit of his agreement with the convening authority by not being subjected to any confinement and not facing the potential of a dishonorable discharge for deserting his unit to avoid his criminal arrest warrant for sexual assault. (Pros. Ex. 1). The fact that Appellant was in significant confinement due to a separate issue has no bearing on Appellant's sentence in this case. Furthermore, he received no confinement as part of his plea agreement.

Appellant argues that ultimately at the time he was apprehended he was only absent from his unit for one day. (Appendix to App. Br. at 2). However, at the time Appellant was apprehended by law enforcement, Appellant did not intend to return to his unit, had researched a route out of the United States to Canada, bought camping equipment, and removed and transferred funds in order to be able to stay away. (Pros. Ex. 1) Now Appellant seeks to gain the benefit not only of his agreement with the convening authority, but also the windfall of receiving effectively no punishment. Furthermore, Appellant argues that his sentencing case demonstrates he does not require the stigma of a bad-conduct discharge "for a fleeting mistake." (Appendix to App. Br. at 3). However, Appellant pled guilty to, and the military judge found him guilty of,

desertion in violation of Article 85, UCMJ, for intending to remain away from his unit *permanently*. (*Entry of Judgment*, ROT. Vol. 1) This was not fleeting mistake by Appellant, but a calculated flight from justice and the military for which Appellant received the appropriate sentence.

For these reasons, Appellant's punishment "fit[s] the offender" and his convictions. United States v. Mack, 9 M.J. 300, 317 (C.M.A. 1980) (citations omitted). The bad conduct discharge Appellant subjected himself to the potential of as part of his plea agreement was not inappropriately severe.

CONCLUSION

WHEREFORE, the United States respectfully requests this Court deny Appellant's claims and affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 April 2023.

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