September 30, 2024

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ROBERT D. SCHNEIDER,
Technical Sergeant (E-6), USAF
Appellant

Crim. App. No. 40403

USCA Dkt. No. 24-0228/AF

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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II.

WHETHER THE LOWER COURT ERRED BY AFFIRMING THAT TSGT SCHNEIDER'S CONVICTION FOR NON-VIOLENT OFFENSES TRIGGERED THE FIREARMS PRHOBITION UNDER 18 U.S.C. § 922 AS EXECUTED THROUGH THE ENTRY OF JUDGMENT.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals ("Air Force Court") had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On October 27, 2022, pursuant to his pleas, Appellant was convicted at a general court-martial convened at Hill Air Force Base

(AFB), of one charge and eight specifications of making a false official statement in violation of Article 107, UCMJ, 10 U.S.C § 907. (R. at 138.) A military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of twelve months, and to be discharged with a bad-conduct discharge. (R. at 368; Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ).) The convening authority took no action on the findings or sentence. (ROT, Vol. 1, Convening Authority Decision on Action.) The convening authority denied Appellant's deferment requests relating to his reduction in grade and automatic forfeitures. (*Id.*) The convening authority also denied Appellant's request to have his automatic forfeiture waived. (*Id.*)

STATEMENT OF FACTS

Background

TSgt Schneider served in the United States Air Force as a recruiter. (Def. Ex. Z at 3.) In that capacity he earned numerous accolades and was quite successful. (*Id.*; Def. Ex. Z.) However, TSgt Schneider's life entered a crisis of mental health struggles and alcohol abuse between 2019 and 2021. (R. at 56; 333.) This crisis was largely the result of his

deteriorating marriage. (R. at 301.) Alcohol became TSgt Schneider's coping mechanism, and his health rapidly declined. (R. at 334.)

TSgt Schneider's career as a recruiter began to suffer. (R. at 334.) During this time he would "fake [his] way through every interaction that [he] was having" in order to "focus on the next opportunity" to consume alcohol. (*Id.*) TSgt Schneider was later diagnosed with severe alcohol use disorder and adjustment disorder with mixed anxiety and depressed mood. (*Id.* at 37.)

In February 2021, TSgt Schneider's supervisors discovered that he had misled several officer applicants to believe that they had been accepted into Officer Training School, causing them to make detrimental life decisions in expectation of entering the Air Force. Around this time, TSgt Schneider was admitted into the Douglas County Detox Center before going to an extensive inpatient program at the Keystone Treatment Center in South Dakota. (R. at 335.)

After completing treatment, TSgt Schneider chose to cooperate with investigators. When interviewed, he was "forthright and forthcoming and confessed to misleading and lying to applicants." (Pros. Ex. 1 at 12.) TSgt Schneider chose to plead guilty to lying to several recruits about

their entry into the Air Force in order to "amend for the damage that [he] caused." (Def. Ex. Z at 5.)

I.B.'s Unsworn Statement

During sentencing, six of the named victims provided unsworn victim impact statements. (R. at 242-43.) One of those victims was I.B. (R. at 276.) In it, I.B. alleged:

> [W]ithin a week of us finding out about [TSgt] Schneider's scheme, we were notified that our identity was stolen, to this day we do not know if he was in on it. For months after we found out, my wife asked if we were safe. Honestly, I didn't have a truthful answer. I had no idea of his freedom to roam or the extent of his connections.

(R. at 250-51.)

Trial defense counsel objected to this, arguing that it was too speculative to qualify as a direct harm suffered by I.B. as a result of TSgt Schneider's offenses. (R. at 250.) Trial counsel replied that it was not speculative, because I.B. had earlier testified that he reasonably believed TSgt Schneider was responsible for the identity theft. (R. at 252.)

The military judge agreed with trial defense counsel that "there [had] been no evidence provided to [the military judge] that [TSgt] Schneider had anything to do with [I.B.]'s identity being stolen." (R. at 253.) Despite this, the military judge permitted the allegation to remain

in the unsworn statement. The military judge held that the allegation was relevant to I.B.'s feeling of betrayal "or feeling that [he had] been lied to." (*Id.*) The military judge found that I.B. was expressing a permissible speculation of what TSgt Schneider *could* have done. (R. at 253.) While the military judge did not make a formal Mil. R. Evid. 403 balancing test ruling, he held that he could make a distinction between focusing on I.B.'s sense of betrayal as opposed to actually holding TSgt Schneider responsible for the identity theft, thereby avoiding the danger of unfair prejudice. (*Id.*)

The Air Force Court considered this issue and affirmed the military judge's ruling. In particular, the service court found that the use of this speculative incident in I.B.'s life was created by the psychological impact of "fear or wondering or concern" that was "directly related to or result[ed] from the offense." (Appendix at 10.) The identity theft had also been referenced without objection in sworn testimony. (*Id.*) Moreover, the service court held that even if the military judge's consideration was error, it was without prejudice given the aggravating circumstances in this case. (*Id.*)

SUMMARY OF THE ARGUMENT AND REASONS TO GRANT REVIEW

Issue I

This case demonstrates the extent to which military judges continue to struggle with R.C.M. 1001's prohibition on the introduction of matters within a victim's unsworn statement that are unrelated to the convicted offenses. Although TSgt Schneider was never convicted of identity theft, the military judge permitted I.B. to delve into the topic over the defense objection. This runs afoul of this Court's previous holdings that prohibit a victim unsworn from detailing unrelated harms. The military judge permitted this by carving out a narrow distinction between the identity theft and its apparent propensity to merely remind I.B. of TSgt Schneider's actions. Such a distinction has never been recognized by this Court, thus spurring the need to clarify and resolve whether it is an acceptable practice.

Issue II

In the wake of this Court's ruling in *United States v. Williams*, __ M.J. __, 2024 CAAF LEXIS 501 (C.A.A.F. 2024), there remain unresolved questions concerning the authority of the service courts and this Court to provide relief for an erroneous firearms prohibition executed

through the entry of judgment. In *Williams*, this Court largely based its opinion on the fact that the error was incurred by the service court overturning the military judges declination to impose the prohibition, which lay beyond the service court's limited authority under Article 66, UCMJ. *Id.* at *14. However, the case at bar represents a more common occurrence in which the error is executed through the entry of judgment and persists through the post-trial process.

Review is therefore warranted for three reasons. First, the authority of the service court to correct an error of this kind which takes place through the post-trial process under Article 66(d)(2) remains unresolved by *Williams*. Second, this Court's authority to take corrective action on the service court's wrongful affirmance of the firearms prohibition under Article 67(c)(1)(B) requires clarification. Finally, TSgt Schneider continues to suffer undue prejudice based on the unconstitutional lifetime firearms ban that he faces.

ARGUMENT

I.

WHETHER THE MILITARY JUDGE ERRED BY ALLOWING I.B. TO INSINUATE THAT TSGT SCHNEIDER WAS RESPONSIBLE FOR AN UNCHARGED AND UNRELATED IDENTITY THEFT THAT TOOK PLACE AFTER THE CHARGED OFFENSE.

Standard of Review

The interpretation of R.C.M. 1001 is a question of law that is reviewed de novo. *United States v. Edwards*, 82 M.J. 239, 242 (C.A.A.F. 2022). The military judge serves as "gatekeeper" to ensure that the contents of the unsworn statement comply with R.C.M. 1001. *Id.* at 243. A military judge's decision to admit an unsworn statement is subject to the abuse of discretion standard. *Id.* An abuse of discretion occurs where the military judge's legal findings are erroneous or where she makes a clearly erroneous finding of fact. *United States v. Eugene*, 78 M.J. 132, 134 (C.A.A.F. 2018).

Law

R.C.M. 1001(c) articulates a crime victim's right to be reasonably heard during presentencing. The right to be reasonably heard is not

without limit. Rather, matters presented for victim impact must be "directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(B).

This Court has previously held that a victim impact statement "is not a mechanism whereby the government may slip in evidence in aggravation that would otherwise be prohibited by the Military Rules of Evidence, or information that does not relate to the impact from the offense of which the accused is convicted." *United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019). "[T]he military judge has an obligation to ensure the content of a victim's unsworn statement comports with the parameters of victim impact or mitigation," as defined in the Rules for Courts-Martial. *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021); (R.C.M. 1001, *Discussion* ("Upon objection by either party or sua sponte, a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3).")).

Analysis

This case highlights the continued issues that courts face with applying R.C.M. 1001(c)(2)(A)'s limitation on the content of a victim impact statement. Although this provision only permits consideration of

physical, emotional, or pecuniary harm directly suffered by the victim as a result of the convicted offense, both the military judge and the service court stretched the rule beyond its reasonable limits by allowing I.B. to offer information concerning an uncharged and speculative incident. These rulings invite this court to answer "a question of law which has not been, but should be, settled by this Court," per C.A.A.F. R. 21(b)(5)(A).

This Court has previously helped define the parameters of R.C.M. 1001(c)(2)(A) by explaining that a victim impact statement may not be used to allude to information that is unrelated to the accused's offenses. *Hamilton*, 78 M.J. at 342 . In *Hamilton*, this Court explicitly held that it was improper for a military judge to admit a victim unsworn statement which details offenses that the accused had not been convicted, and that "it was improper argument to detail the [the uncharged conduct victims had been affected by] and attribute the pain and suffering from the abuse to him." 78 M.J. at 343. Likewise, the military judge has an affirmative duty to ensure that "the content of a victim's unsworn statement comports with . . ." the parameters of R.C.M. 1001(c)(2)(A).

The military judge here tested these limitations by disavowing the face value of the unsworn statement, and instead taking it for a purpose

other than what I.B. explicitly offered it for. The military judge did so by disavowing TSgt Schneider's responsibility for the identity theft, but still holding that the psychological harm that I.B. suffered during this unrelated incident was attributable to him. In essence, the military judge and the service court created a rule whereby a victim's psychological response to an unrelated incident can be considered as a direct harm so long as it reminds the victim of the offenses that the accused was actually convicted of.

Such an interpretation of R.C.M. 1001(c)(2)(A) has never been articulated by this Court. Nonetheless, to the extent that *Hamilton* remains vague or unclear means that this case calls for this Court to clarify its prior holding to resolve the issue of law and give proper guidance to the lower courts. Accordingly, this Court should grant review in order to resolve this issue.

II.

WHETHER THE LOWER COURT ERRED BY AFFIRMING THAT TSGT SCHNEIDER'S CONVICTION FOR NON-VIOLENT OFFENSES TRIGGERED THE FIREARMS PRHOBITION UNDER 18 U.S.C. § 922 AS EXECUTED THROUGH THE ENTRY OF JUDGMENT.

Additional Facts

After his convictions, the Government determined that TSgt Schneider met the firearms prohibition in 18 U.S.C. § 922. (Statement of Trial Results (STR).) The Government did not specify which subdivision of section 922 TSgt Schneider met, nor did it articulate why he met trigger requirements. (*Id.*) The prohibition was executed by way of the military judge's signature on the entry of judgment. Although TSgt Schneider challenged the firearms prohibition before the Air Force Court, they declined to grant relief after "carefully considering [the issue]" and concluding that "it warrants neither discussion nor relief." (Appendix at 2.)

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019); *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

Law and Analysis

This Court most recently took up the issue of whether the service courts have authority to correct errors on the (STR) concerning firearms prohibition in *Williams*, __ M.J. __, 2024 CAAF LEXIS 501 (C.A.A.F.

2024). In that case, this Court disposed of the notion that the service court had authority under Article 66, UCMJ, to order an adverse modification of the STR to place the accused under the firearms prohibition. *Id.* at *13-14. This modification took place in spite of the military judge declining to do so before entry of judgment. *Id.* at *5-6. This Court reversed, holding that it was beyond the service court's limited authority to take action on the findings, sentence, or post-judgment error under Article 66. *Id.* at *14.

That case, however, leaves unresolved questions regarding the review authority of both the service court and this Court when applied to the specific facts of this case. Accordingly, this Court should grant review for three reasons.

First, this Court should grant review to resolve the question of whether service courts have authority to correct an erroneous entry on the STR as part of its statutory power under Article 66(d)(2) to "provide appropriate relief if the accused demonstrates error . . . after the judgment was entered into the record." Unlike *Williams*, this case involves an error in the firearms prohibition which was executed after

the entry of judgment, not before it. *Compare Williams*, __ M.J. __, 2024 CAAF LEXIS 501, at *5-6, *with* STR *and* EOJ.

Second, this Court should grant review to clarify its authority under Article 67(c)(1)(B), UCMJ, to take action with respect to "a decision, judgment, or order by the military judge, as affirmed or set aside as incorrect in law by the [service court]" in tandem with its previously exercised authority to correct errors in a promulgating order. *United States v. Lemire*, 82 M.J. 263, at n.* (C.A.A.F. 2022) Because the Air Force Court affirmed the firearms prohibition, this issue is ripe for this Court's consideration.

Third, TSgt Schneider faces undue prejudice: A lifetime firearms ban for non-violent crimes that were committed without any firearms. This disability goes against the text, history and tradition of firearm regulation in this country.

a. The Service Court Had Review Authority Under Article 66.

This Court should grant review in order to clarify the service courts' authority to take action on the firearms prohibition under Article 66(d)(2), UCMJ. The Air Force Court erred by refusing to take action on TSgt Schneider's unlawful firearms prohibition, ostensibly because it did

not think it had authority to do so. (Appendix at 2.) However, the service court did possess the authority to act on the prohibition through Article 66(d)(2), UCMJ. That provision states that "[i]n any case before the [service court] . . . the Court may provide appropriate relief if the accused demonstrated error . . . after the judgment was entered into the record." The error in question, the firearms prohibition, took place through the entry of judgment, and persisted in the processing of the court-martial after the judgment was entered on the record.

The entry of judgment is executed "[u]nder regulations prescribed by the Secretary concerned . . . ." R.C.M. 1111(a)(1). Per Air Force regulation, "*[a]fter* the EOJ is signed by the military judge and returned to the servicing legal office, the [Staff Judge Advocate] signs and attaches to the [EOJ] a first indorsement, indicating whether . . . firearm prohibitions are triggered." Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice* ¶ 20.41 (Apr. 14, 2022) (emphasis added). Thus, the firearm denotation on the First Indorsement that accompanies the EOJ into the record of trial explicitly happens *after* the entry of judgment is signed by the military judge. This forms the most recent notification to law enforcement entities about the

applicability of 18 U.S.C. § 922, thereby constituting a post-trial processing error. The service court gave this no consideration, instead just explaining that it "carefully considered the issue" and concluding that "it warrants neither discussion nor relief." (Appendix at 2.)

The facts of this case are distinct from those in *Williams*. This Court held that Article 66(d)(2) did not give the service court authority to act on the firearms prohibitions because "any error took place prior to the entry of judgment." *Williams*, 2024 CAAF LEXIS 501, at *14. Rather, the military judge ensured that the STR did not include the firearms prohibition before "promulgating the Judge of the Court . . . ." *Id.* Furthermore, this Court recognized that Article 66(d)(2), UCMJ, placed the burden on the accused to raise the issue before the service court. However, "after the military judge corrected the STR in the Judgment of the Court, [Williams] believed that there was no error to be corrected." *Id.* at *14. Hence, the issue was not raised before the service court, so as to "trigger the [service court's] correction authority under Article 66(d)(2)." *Id.*

The case at bar is distinguishable from *Williams*. Here, the erroneous firearms prohibition was executed through the entry of

judgment, and remained within the fabric of the post-trial process. The error has persisted beyond the entry of judgment, thus falling within the service court's Article 66(d)(2) power to provide relief "after judgement was entered on the record." Unlike *Williams*, TSgt Schneider raised the issue before the service court. Therefore, the service court possessed authority to act in this case.

Because *Williams* did not address these factual circumstances, this Court should grant review in order to clarify and resolve the question of the service courts authority under Article 66(d)(2). *Williams* was unique in that the service court entered a modification of the STR which was adverse to the appellant, thereby invoking an error which did not previously exist. However, this case represents a more typical situation in which firearms prohibition is erroneously entered upon judgment, and which remains through post-trial processing. By granting this issue, this Court can resolve Article 66(d)(2)'s application and provide vital guidance to the lower courts.

b. This Court Possesses Authority to Review the Service Court's Decision Under Article 67.

This Court should grant review in order to clarify the unresolved question of whether this Court has authority pursuant to Article

67(c)(1)(B) to take action on the lower court's affirmance of the military judge's erroneous entry of the firearms prohibition. That statute empowers this Court to take action on "a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." *Id.* The case at bar is ripe for consideration of this issue because the Air Force Court affirmed the unlawful firearms prohibition in TSgt Schneider's entry of judgment. This Court has employed its authority to order correction of a promulgating order wrongly directing for the accused to register as a sex offender. *Lemire*, 82 M.J. at n.*.

In *Williams*, this Court did not address the threshold issue of its own authority to take action on the military judge's decision under Article 67, UCMJ, because it found that the service court was without authority to order the modification in the first instance. However, this Court implied that it would have had the authority to address the merits of the firearms prohibition had the service court acted within its statutorily granted authority. 2024 CAAF LEXIS 501, at *8. In particular, this Court acknowledged that "the STR is part of the trial court's 'judgment.'" *Id.* Furthermore, "by modifying the STR the [service court] 'set aside as

incorrect in law' the judgment of the military judge." *Id.* at *11. Finally, this Court also explained that "it is well established that once our jurisdiction attaches, we may act 'on any issue concerning a matter of law which materially affects the rights of the parties." *Id.* at *9.

The Air Force Court's denial of TSgt Schneider's request for relief from the unlawful firearms prohibition renders this case subject to review before this Court under Article 67(c)(1)(B). This denial is tantamount to an affirmance of the STR, which this Court identified in *Williams* as a component of the trial court's judgment. As previously explained, this error was manifest in the post-trial process. This being so, this Court has authority to take action on the service court's affirmance.

While *Williams* implied that this Court possessed the authority to grant relief to appellants such as TSgt Schneider, that case did not explicitly reach that conclusion due to the underlying issue being mooted. This leaves an undecided question of law which should be settled by this Court. C.A.A.F. Rule 21(B)(5)(a). The lack of resolution creates the potential for confusion within the field that this Court would do well to clarify.

c. TSgt Schneider Has Been Prejudiced.

TSgt Schneider continues to suffer undue prejudice as a result of a lifetime firearms prohibition despite none of his convictions involving violent offenses. This disability goes against the text, history, and tradition of firearm regulation in this country. This Court has granted review on this issue in *United States v. Maymi*, 84 M.J. 308 (C.A.A.F. 2024) and *United States v. Lampkins*, 84 M.J. 172 (C.A.A.F. 2023). More recently, this Court granted review of the firearms prohibition in *United States v. Johnson*, No. 40257, Dkt. No. 24-004 (C.A.AF. September 24, 2024). TSgt Schneider respectfully asks that this Court granted review of this case a trailer to that one.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant his petition for grant of review.

Respectfully submitted,

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APPENDIX

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40403

UNITED STATES
Appellee

v.

Robert D. SCHNEIDER
Technical Sergeant (E-6), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 16 July 2024

Military Judge: Elijah F. Brown.

Sentence: Sentence adjudged 27 October 2022 by GCM convened at Hill Air Force Base, Utah. Sentence entered by military judge on 3 January 2023: Bad-conduct discharge, confinement for 12 months, reduction to E-1, and a reprimand.

For Appellant: Major Jenna M. Arroyo, USAF; Captain Michael J. Bruzik, USAF.

For Appellee: Colonel Steven R. Kaufman, USAF; Lieutenant Colonel J. Peter Ferrell, USAF; Major Olivia B. Hoff, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, GRUEN, and WARREN, *Appellate Military Judges*.

Chief Judge JOHNSON delivered the opinion of the court, in which Judge GRUEN and Judge WARREN joined.

JOHNSON, Chief Judge:

A general court-martial composed of a military judge alone found Appellant guilty, in accordance with his pleas pursuant to a plea agreement, of eight specifications of making false official statements in violation of Article 107, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 907.[1] The military judge sentenced Appellant to a bad-conduct discharge, confinement for 12 months, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings or sentence.

Appellant raises four issues on appeal, which we have partly rephrased: (1) whether the military judge erred by considering impermissible matters included in victim impact statements; (2) whether the sentence is inappropriately severe; (3) whether illegible portions of the record of trial require sentencing relief or remand for correction; and (4) whether the Government can prove the 18 U.S.C. § 922 firearms prohibition is constitutional as applied to Appellant and whether this court has jurisdiction to decide that issue. In addition, although not raised by the parties, we address certain errors in the post-trial processing of Appellant's court-martial.

We have carefully considered issue (4) and conclude it warrants neither discussion nor relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987); *United States v. Vanzant*, ___ M.J. ___, No. ACM 22004, 2024 CCA LEXIS 215, at *23–25 (A.F. Ct. Crim. App. 28 May 2024) (holding the 18 U.S.C. § 922 firearm prohibition notation included in the staff judge advocate's indorsement to the entry of judgment is beyond a Court of Criminal Appeals' statutory authority to review). As to the remaining assignments of error, we find no error that materially prejudiced Appellant's substantial rights. However, as explained below, we do find an error in the entry of judgment that warrants correction, and we take corrective action in our decretal paragraph.

I. BACKGROUND[2]

In July 2017, Appellant was assigned to a recruiting squadron focusing on recruiting health care professionals to the Air Force and was stationed in Nebraska. Beginning in January 2019, Appellant "was issued a series of [three] Letters of Reprimand [LORs] for willfully lying to applicants about the status of their applications, inputting false information into the Air Force Recruiting Information Support System [(AFRISS)] . . . , and failing to make reports

[1] Unless otherwise indicated, all references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] The information in this section is drawn primarily from the stipulation of fact, and quotations are from the stipulation.

altogether, in violation of standing and direct orders." In conjunction with the third of these LORs, in December 2019 Appellant's commander informed Appellant he was "to no longer perform recruiting duties;" in addition, Appellant's flight chief told Appellant he was "not to have any further contact with any applicants."

In spite of these directions, Appellant "continued to communicate with applicants" and "proceeded to tell several applicants that they had been admitted into the Air Force, when in fact they had not." Appellant was subsequently charged for false statements he made to eight applicants after December 2019.

EH initially came into contact with Appellant in April 2018 and provided Appellant numerous documents related to his application to join the Air Force. Beginning in October 2019, Appellant told EH he was scheduled for a series of interviews and appointments; in each case Appellant subsequently told EH the interviews or appointments were cancelled for one reason or another. In October 2020, Appellant sent EH a text message informing EH he had been admitted to the Air Force. In January 2021, Appellant met EH in person in order for EH to sign papers "pertaining to the health profession and loan repayment;" Appellant then "took [EH] on base to purchase uniforms." In reality, Appellant had input almost no information about EH into AFRISS and had not submitted an application on behalf of EH. Appellant's actions with EH came to light in February 2021 after EH contacted Officer Training School (OTS) in Montgomery, Alabama, in anticipation of attending training. Appellant was subsequently charged with making a false official statement to EH in October 2020 that EH was selected to attend OTS.

Appellant initially made contact with IB in December 2019 after IB used the Air Force recruiting website. Appellant told IB multiple times that IB would be commissioned into the Air Force, culminating in October 2020 when Appellant falsely told IB he had been selected for OTS and would be stationed at Scott Air Force Base (AFB), Illinois. Appellant told IB he could sell his current house and look for a house near Scott AFB, which IB proceeded to do. IB and his wife had sold their house, paid earnest money on a new house in Saint Louis, Missouri, and were on their way to OTS in Alabama when they learned IB had in fact not been selected to attend OTS.[3] Appellant was charged with making a false official statement to IB in October 2020 that IB was selected to attend OTS.

[3] When Appellant initially made contact with IB, IB was an enlisted member of the Air National Guard. By the time of Appellant's court-martial, IB had been commissioned as an Air Force officer.

Appellant contacted JD on a regular basis beginning in early 2020. In February 2021, Appellant falsely told JD that he had been selected to attend OTS later that month. Appellant directed JD to stop by Omaha, Nebraska, on his way to Alabama in order to receive a copy of his orders in person. After JD arrived in Omaha, he was contacted by Appellant's commander and flight chief who informed JD that he had not been selected for OTS, and in fact Appellant had never submitted JD's application or other paperwork.[4] Appellant was charged with making a false official statement to JD in February 2021 that JD was selected to attend OTS.

Appellant initially contacted JH in December 2019. JH worked with Appellant to apply to be an officer and health professional in the Air Force, including providing medical records and other documents related to obtaining a waiver for a medical issue. In December 2020, Appellant falsely told JH he had been selected to attend OTS. When Appellant subsequently stopped responding to JH, JH contacted the recruiting office and learned he had not been selected for OTS and Appellant had never submitted JH's application or waiver. Appellant was charged with making a false official statement to JH in December 2020 that JH had been selected to attend OTS.

Appellant initially contacted AC in late 2018 or early 2019. Through Appellant, AC attempted to apply for the Health Professions Scholarship Program. In January 2021, Appellant falsely told AC she was selected as an alternate to attend OTS.[5] In fact, Appellant never submitted AC's application and she was never selected as an alternate. Appellant was charged with making a false official statement to AC in January 2021 that AC had been selected as an alternate to attend OTS.

Appellant began communicating with SN in March 2018. In April or May 2020, Appellant falsely told SN she had been selected as an alternate for OTS. When SN received no further information from Appellant, she contacted him again in October 2020 when he told her "she was no longer needed." SN later learned Appellant had never submitted her application to the Air Force. Appellant was charged with making a false official statement to SN in April or May 2020 that SN had been selected as an alternate to attend OTS.

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[4] By the time of Appellant's court-martial, JD had been commissioned as an Air Force officer.

[5] At one point the stipulation of fact states Appellant told AC this in January 2020. Neither the parties nor military judge commented on this apparent discrepancy. However, in the context of the entire stipulation of fact and Appellant's statements during the military judge's guilty plea inquiry it is clear this is a typographical error, and this statement by Appellant in fact occurred in January 2021.

Appellant began communicating with MM between August and October 2019. In January or February 2021, Appellant falsely told MM she had been selected as an alternate to attend OTS and he had scheduled her for a Military Entrance Processing Station (MEPS) appointment, which he subsequently claimed was cancelled. In fact, Appellant never submitted MM's application and she had not been selected as an alternate to attend OTS. Appellant was charged with making a false official statement to MM in January or February 2021 that MM had been selected as an alternate to attend OTS.

Appellant initially made contact with MJ in early 2020. In February 2020, MJ began sending Appellant various transcripts and other documents. In January 2021, Appellant told MJ that he had a MEPS appointment for a physical at a facility that was an approximately four hour and forty-five minute drive from MJ's residence. Approximately one hour after MJ began the drive, Appellant sent him a message stating the appointment needed to be rescheduled. In reality, Appellant never submitted any documents to the Air Force on behalf of MJ and there never had been a MEPS appointment. Appellant was charged with making a false official statement to MJ in January 2021 that MJ had a MEPS appointment and the appointment was cancelled, or words to that effect.

When Appellant was interviewed by security forces in April 2021, he acknowledged lying to and misleading applicants and stated he felt "disgusted" by his actions. Appellant was subsequently diagnosed "with severe alcohol abuse disorder and adjustment disorder with mixed anxiety and depressed mood."

II. DISCUSSION

A. Victim Impact Statements

1. Additional Background

During presentencing proceedings, the Government called EH, IB, IB's spouse EB, JD, SN, and MJ to testify as witnesses. After the Government rested, seven of the named victims (EH, IB, JD, AC, SN, MM, and MJ) offered written unsworn statements pursuant to Rule for Courts-Martial (R.C.M.) 1001(c). Four of the named victims (EH, IB, JD, and SN) also provided oral unsworn statements, reading their written statements to the military judge. Appellant asserts the military judge erroneously allowed portions of four of the unsworn statements.

a. EH's Statement

The Defense objected to two portions of EH's statement. The first objection related to a paragraph describing the "significant financial impact" Appellant's conduct had on EH's life. EH described how, *inter alia*, he was required to

travel to Offutt AFB, Nebraska, multiple times at his own expense; purchased uniforms and other items relating to attending OTS; "sacrificed [his] position in a loan repayment program, giving up a $62,500 reimbursement" when he left his existing employment in anticipation of joining the Air Force; and went without employment for 15 weeks, losing "over $20,000" in wages. In addition, when EH resumed civilian employment he was "unable to maintain [his] previous salary" and had moved to a location with increased living expenses. The paragraph concluded, "While all calculations cannot be exactly monetized due to the length of time our communication has spanned, my financial loss due to [Appellant's] actions [is] in excess of 100 thousand dollars." The Defense, citing Mil. R. Evid. 403, objected specifically to this final sentence, describing it as a "conclusionary remark" not based on "detailed financial accounting" which was "not exceedingly probative" but "very prejudicial." The military judge overruled the objection, stating, "[b]ecause of the prefatory clause there that indicates that calculations can't be exactly monetized[,] I view this as an estimation by [EH] and will give it an appropriate weight as a result."

The Defense's second objection was to a sentence in a paragraph of EH's statement describing the "mental and psychological" and "emotional" impact of Appellant's conduct. Trial defense counsel objected specifically to the following sentence: "However, after enduring continual changes with information and schedules the relationship [with EH's romantic partner] ultimately ended due to her interpretation of [EH's] character throughout this process and the inability to marry into an erratic life." Trial defense counsel characterized this purported impact as "incredibly speculative," "incredibly attenuated," and not "directly related to or resulting from" Appellant's conduct. Trial defense counsel also cited Mil. R. Evid. 403, contending the statement was "prejudicial" and not "probative." The military judge overruled the objection, explaining:

> I think this is essentially [EH] expressing an opinion as to a factor that caused his relationship to come to an end. . . . I think I can give that the appropriate weight. It is what this witness believes contributed to the loss of that relationship, which is something that he believes was directly related to this particular offense.

b. IB's Statement

The Defense objected to two portions of IB's unsworn statement. First, trial defense counsel objected to the following:

> Within a week of [my wife and I] finding out about [Appellant's] scheme, we were notified that our identities were stolen. To this day, we do not know if he was in on it. For months after we found out, my wife asked if we were safe. Honestly, I didn't have a

> truthful answer. I had no idea of his freedom to roam or the extent of his connections.

Trial defense counsel argued this portion of the statement was speculative and did not reflect impact directly related to or resulting from Appellant's offense. The military judge overruled the objection, explaining:

> I understand your objection, [d]efense counsel, and I also understand there has been no evidence provided to this court that [Appellant] had anything to do with [IB's] identity being stolen. Whoever stole his identity though is different from, the sort of fear or wondering or concern that this victim has expressed.
>
> So, I don't read this as asserting, that [Appellant] was in anyway responsible. Instead, I view it as, this particular victim saying that, in light of the particular offense, and then this other thing happening to him--his identity being stolen--it just made him wonder if it could have been related.
>
> And so, it's really the impact, I think, of feeling betrayed or feeling that he's been lied to, so he wonders, well, if this person lied to me about this, what else could they have done. So, I see that there is a distinction there. I certainly am not going to read this as, asserting that [Appellant] actually did anything of the sort and considering the [Mil. R. Evid.] 403-balancing test, I find that I can make that distinction appropriately and so, the--any danger of unfair prejudice, doesn't substantially outweigh the probative value of the evidence.

Trial defense counsel also objected to the following passage about IB's reluctance to seek counseling to cope with the impact of Appellant's offense:

> There remains a stigma about seeking help for this sort of thing in the military. Even if I could without fear, I would not go to a uniformed counselor. Private counseling is something I would be open to receiving, but at this time, I do not want to dig an unwanted challenge or accumulate any more expenses over this trial.

Trial defense counsel objected on the basis that whether there is a stigma or the perception of a stigma in the military for receiving counsel was not "fairly attributable" to Appellant's actions. The military judge overruled the objection, explaining that he viewed this passage as IB explaining how he might "deal with the consequences of this offense," and not attributing the possible existence of a stigma to Appellant.

c. SN's Statement and MJ's Statement

SN's unsworn statement included the following: "Allowing [Appellant] to continue to serve in any capacity or receive any benefits provided from the Air Force is an insult to those who genuinely serve or have served our country." Trial defense counsel did not object to this portion of SN's statement. Trial defense counsel did object to another portion of SN's unsworn statement, and the military judge sustained that objection. After the military judge ruled on that objection, he asked the Defense whether there were "any additional objections" to the statement. Trial defense counsel responded, "No, Your Honor."

MJ's unsworn statement included the following: "It sickens me that this individual has also been getting paid at a [technical sergeant] pay level since he was found out, being allowed to collect his pay and allowances. Because of all this[,] a lesser punishment would not be appropriate." Trial defense counsel did not object to this portion of MJ's statement. Trial defense counsel did object to an earlier portion of the statement wherein MJ asserted Appellant "should get the maximum penalty allowed;" the military judge sustained that objection. The military judge then asked whether the Defense had "any additional objections" to MJ's unsworn statement. Trial defense counsel responded, "No, Your Honor."

2. Law

We review a military judge's decision to accept a victim impact statement offered pursuant to R.C.M. 1001(c) for an abuse of discretion. *See United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022). "A military judge abuses his discretion when his legal findings are erroneous, or when he makes a clearly erroneous finding of fact." *Id*. (citing *United States v. Eugene*, 78 M.J. 132, 134 (C.A.A.F. 2018); *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018)).

R.C.M. 1001(c) provides that during presentencing proceedings, the victim of a non-capital offense of which the accused has been found guilty has the right to make a sworn statement, an unsworn statement, or both. *See also* 10 U.S.C. § 806b(a)(4)(B) (stating the victim of an offense under the UCMJ has a right to be reasonably heard at a court-martial sentencing hearing). Such statements "may only include victim impact and matters in mitigation;" they "may not include a recommendation of a specific sentence." R.C.M. 1001(c)(3). For purposes of the rule, "victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001 (c)(2)(B).

We "consider[ ] four factors when deciding whether an error substantially influenced an appellant's 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.'" *Edwards*, 82 M.J. at 247 (quoting *Barker*, 77 M.J. at 384 (additional citations omitted)). "[A]n error is more likely to have prejudiced an appellant if the information conveyed as a result of the error was not already obvious from what was presented at trial." *Id.* (citing *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007)).

"Whether an accused has waived [or forfeited] an issue is a question of law we review de novo." *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citation omitted). "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). Appellate courts generally review forfeited issues for plain error, but "a valid waiver leaves no error to . . . correct on appeal." *Id.* (citation omitted). However, the applicable version of Article 66, UCMJ, 10 U.S.C. § 866, empowers a Court of Criminal Appeals to decline to apply forfeiture or waiver in order to address a legal error at trial, if warranted. *See United States v. Hardy*, 77 M.J. 438, 442–43 (C.A.A.F. 2018) (citations omitted).

3. Analysis

Appellant asserts the military judge erred by failing to exclude and by considering the portions of EH's, IB's, SN's, and MJ's unsworn statements quoted above. We address each statement in turn below.

However, as an initial matter we note that trial defense counsel and, at one point, the military judge purported to apply Mil. R. Evid. 403 to their analyses of the challenged unsworn statements. Mil. R. Evid. 403 expressly applies to "evidence." Unsworn victim impact statements offered pursuant to R.C.M. 1001(c) are not "evidence," and Mil. R. Evid. 403 is inapplicable when determining whether such statements may be properly received by the court-martial. *See United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021); *United States v. Hamilton*, 77 M.J. 579, 586 (A.F. Ct. Crim. App. 2017) (en banc). Accordingly, the references to Mil. R. Evid. 403 were inapposite. However, it is evident Mil. R. Evid. 403 was not determinative to any of the rulings Appellant challenges on appeal, and to the extent the military judge erred by applying Mil. R. Evid. 403 at one point, we find no material prejudice to Appellant's substantial rights from the error. *See* 10 U.S.C. § 859(a).

a. EH

We find the military judge did not abuse his discretion by overruling the defense objection to EH's statement that his financial loss resulting from Appellant's offense was "in excess of 100 thousand dollars." EH was describing his assessment of the financial impact resulting from the false official statement that EH had been selected for OTS and would be joining the Air Force,

of which Appellant had been convicted in accordance with his plea. This "financial . . . impact on the crime victim directly relating to or arising from the offense" of which Appellant had been convicted was squarely within the scope of R.C.M. 1001(c). That EH offered an estimated minimum amount rather than a precise calculation was not disqualifying. Moreover, EH's itemization of the types of costs he endured as a result of Appellant's deception add significant context and substantiation to the estimate.

We also find the military judge did not abuse his discretion by overruling the objection to EH's statement regarding the loss of a romantic relationship. EH described this event as one of the psychological impacts directly arising from and relating to Appellant's offense. What is more, he did not simply assert it was a consequence; he explained how the uncertainty caused by Appellant's conduct affected the relationship. The military judge explained he understood EH was describing his "opinion as to a factor that caused his relationship to come to an end." A psychological impact may be directly related to an offense without the offense being the sole cause of the impact. Whether the military judge found this information persuasive or significant as a sentencing consideration is a separate question; but the military judge's explanation of his ruling and comment that he could give the statement "the appropriate weight," coupled with the presumption that military judges know and apply the law absent evidence to contrary, convince us the military judge received and understood EH's unsworn statement in the appropriate light. *See United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citation omitted) ("Military judges are presumed to know the law and to follow it absent clear evidence to the contrary.").

b. IB

We find the military judge did not abuse his discretion by overruling the defense objection to IB's comments about his and his wife's identities being stolen. In explaining his ruling, the military judge carefully distinguished an implication that Appellant had stolen their identities—which IB did not allege and the military judge had no evidence of—from the exacerbation of the "fear or wondering or concern" IB felt after the theft due to Appellant's misconduct. This psychological impact was derived from Appellant's offense as well as the identity theft itself, and in that sense was "directly related to or resulting from" the offense.

Assuming *arguendo* the military judge erred by admitting this portion of the statement, after considering the four factors set forth in *Edwards*, 82 M.J. at 247, we find no material prejudice to Appellant's substantial rights. Several considerations lead us to this conclusion. First, IB also briefly referred to the identity theft during his testimony as a sentencing witness, which the Defense did not object to at trial or challenge on appeal. In addition, the military judge

indicated he would consider the statement in a specific and limited way. Also, the challenged sentences are a very small fraction of IB's relatively lengthy impact statement that spanned over three single-spaced pages of text. Moreover, the stipulation of fact, the testimony of IB and his wife, and IB's unsworn statement describe more direct and dramatic negative consequences of Appellant's offense, including *inter alia* inducing IB to sell his house, move to Saint Louis and attempt to buy a new house there, turn down employment opportunities, and drive to Alabama with his wife and infant son in anticipation of attending OTS. IB's feelings about the identity theft, as interpreted by the military judge, pale in comparison. Furthermore, we note the military judge adjudged a 12-month sentence to confinement for Specification 2, Appellant's offense against IB, which was concurrent with all other sentences to confinement. The military judge also adjudged concurrent 12-month sentences for Specifications 1 and 3, the offenses against EH and JD respectively. As described in the stipulation of fact, witness testimony, and unsworn statements, Specifications 1, 2, and 3, involving EH, IB, and JD, had the most severe victim impact of the eight offenses of which Appellant was convicted. Even if the military judge had excluded IB's reference to the identify theft from IB's unsworn statement, we are confident the military judge would still have sentenced Appellant to confinement for 12 months for Specification 2, in addition to the other elements of the sentence.

We also find the military judge did not abuse his discretion by overruling the defense objection to IB's statements regarding his reluctance to seek counseling after Appellant's offense. The military judge made clear he understood IB was not blaming Appellant for the existence of any "stigma" from counseling. Instead, the military judge understood IB was explaining what ameliorative measures he chose to pursue or forego to cope with the impact of Appellant's misconduct IB had already described. In that sense, this part of the statement directly related to Appellant's offense and its impact.

c. SN and MJ

We find Appellant waived his objections to the portions of SN's and MJ's unsworn statements that he challenges on appeal. In each case, trial defense counsel objected to other portions of the statements, and the military judge sustained those objections. But when the military judge asked whether there were any additional objections, trial defense counsel said "no." The United States Court of Appeals for the Armed Forces has held that "under the ordinary rules of waiver, [an a]ppellant's affirmative statements that he had no objection to [the] admission [of evidence] also operate to extinguish his right to complain about [its] admission on appeal." *Ahern*, 76 M.J. at 198 (citations omitted). Similarly, we conclude trial defense counsel's assertion that the Defense had no further objections to these statements amounted to waiver.

Cognizant of our authority to pierce waiver in order to correct a legal error, we find no cause to do so in this case. Military judges are presumed to know and apply the law, absent evidence to the contrary. *Erickson*, 65 M.J. at 225. To the extent either statement challenged on appeal might be interpreted as an improper recommendation for a specific sentence, we presume the military judge did not consider them so.

B. Sentence Severity

1. Law

We review issues of sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (footnote omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(d), UCMJ, 10 U.S.C. § 866(d). "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. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (alteration in original) (citation omitted). Although the Courts of Criminal Appeals are empowered to "do justice[ ] with reference to some legal standard," we are not authorized to grant mercy. *United States v. Guinn*, 81 M.J. 195, 203 (C.A.A.F. 2021) (quoting *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010)).

2. Analysis

Appellant contends his sentence is inappropriately severe. He asserts that at the time of the offenses he was experiencing a mental health crisis and severe alcohol abuse disorder which ultimately required in-patient treatment and lengthy rehabilitation. Appellant contends he "did not appear to be acting maliciously" when he committed these offenses, nor did he personally profit from them. He highlights his excellent service record prior to 2019, and that after he received treatment he cooperated with law enforcement, paid some financial compensation to a victim, pleaded guilty to the offenses, and showed great contrition for his actions. Appellant asks this court to set aside his bad-conduct discharge.

Based on his guilty pleas alone, Appellant might have been sentenced to a dishonorable discharge, confinement for 40 years, total forfeitures, and reduction to the grade of E-1. Appellant made a plea agreement with the convening authority that capped his term of confinement for each of the eight specifications of false official statement to 365 days, with each term to run concurrently. Appellant received concurrent sentences to confinement of between 3 and 12 months, in addition to a bad-conduct discharge, reduction to the grade of E-1, and a reprimand.

We do not find Appellant's sentence is inappropriately severe. After Appellant had already been repeatedly disciplined for lying to applicants and other misconduct, and was instructed not to have contact with applicants, he engaged in an extensive pattern of making false statements to health care professionals who wanted to apply to the Air Force. Most of the victims submitted unsworn statements and several testified to explain how Appellant's offenses had negatively affected their lives and their perception of the Air Force. Certain victims experienced significant financial loss, disruption to their lives and careers, and particularized feelings of anxiety and betrayal due to Appellant's crimes. The motivation for Appellant's actions may be difficult to understand, but he was certainly aware his victims were relying on, and impacted by, his false official statements. Having given individualized consideration to Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all other matters contained in the record of trial, we conclude Appellant's sentence is not inappropriately severe.

C. Legibility of the Record of Trial

1. Law

A complete record of the proceedings, including all exhibits, must be prepared for any general court-martial that results in a punitive discharge or more than 12 months of confinement. Article 54(c)(1), UCMJ, 10 U.S.C. § 854(c)(1); R.C.M. 1103(b)(2). Whether a record of trial is complete is a question of law we review de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014) (citation omitted).

"[A] substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the [G]overnment 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). 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). We 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). "In assessing either whether a record is complete . . . the threshold question is 'whether the omitted material was "substantial," either qualitatively or quantitatively.'" *Davenport*, 73 M.J. at 377 (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)) (additional citation omitted).

2. Analysis

Without objection, the military judge admitted Prosecution Exhibit 3, a 34-page document composed of Appellant's performance reports and their attachments. Appellant contends that pages five and six of the exhibit, representing

Appellant's referral performance report from 1 December 2018 through 30 November 2019, are "illegible." He further contends page eight, the indorsement to the referral memorandum, is "blurry and does not legibly show whether [Appellant] elected to respond" to negative information in the performance report.[6] Accordingly, Appellant reasons the record contains a substantial omission and requests this court either reassess the sentence to disapprove the bad-conduct discharge, or remand the record to correct the omission.

We are not persuaded any correction is required. The essential flaw in Appellant's reasoning is that we have no indication anything is missing from the original record of trial. It appears the Prosecution Exhibit 3 contained in the record is the same Prosecution Exhibit 3 the military judge received and reviewed during sentencing proceedings. Although we agree with Appellant that page 5 in particular is blurry and partially illegible, so far as the record discloses, this is simply the state of the evidence that was before the court-martial. Accordingly, we find no substantial omission and no relief warranted.

D. Post-Trial Errors

1. Deferment Requests

The convening authority's decision on action memorandum indicates Appellant requested deferment of his confinement, the reduction in grade, and the automatic forfeitures of pay and allowances. The convening authority expressly denied the deferments of the reduction in grade and automatic forfeitures, citing "the nature of the offenses of which [Appellant] was convicted and the effect of deferment on good order and discipline in the command." However, the convening authority did not grant or deny in writing Appellant's request to defer his confinement, nor state the reasons for doing so. The record discloses no indication the Defense objected or moved for correction of the convening authority's failure to address the request to defer confinement.

We review a convening authority's denial of a deferment request for an abuse of discretion. *United States v. Sloan*, 35 M.J. 4, 6 (C.M.A. 1992), *overruled on other grounds by United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018); R.C.M. 1103(d)(2). "When a convening authority acts on an [appellant]'s request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the [appellant]) and must include the reasons upon which the action is based." *Id.* at 7 (footnote omitted); *see also* R.C.M. 1103 (providing procedures for deferment). "A motion to correct an

[6] Although we agree with Appellant that page eight is not clearly marked, by our own observation there is some indication the indorsement reflects Appellant "did not" submit matters in response to the performance report. This conclusion is consistent with the absence of such a response from Prosecution Exhibit 3.

error in the action of the convening authority shall be filed within five days after the party receives the convening authority's action." R.C.M. 1104(b)(2)(B).

Because Appellant did not object or move to correct an error in the convening authority's decision on action, we review the convening authority's decision on action for plain error. *See Ahern*, 76 M.J. at 197 (citations omitted) (noting appellate courts review forfeited issues for plain error). Under the longstanding precedent of *Sloan*, the convening authority's failure to act on the confinement deferment request in writing and state the reasons was an error. *See* 35 M.J. at 7. For purposes of our analysis, we assume without holding the error was clear or obvious. However, under the circumstances of this case, we find no material prejudice to Appellant. Appellant bore "the burden of showing that the interests of [himself] and the community in deferral outweigh[ed] the community's interests in imposition of the punishment on its effective date." R.C.M. 1103(d)(2). However, Appellant's clemency request only impliedly requested deferment of his confinement and offered no specific justification for it. Moreover, Appellant not only forfeited the issue at the time, but he has not alleged on appeal prejudicial error by the convening authority. Furthermore, the convening authority denied Appellant's other deferment requests with a consistent rationale, and also denied Appellant's request to waive automatic forfeitures for the benefit of his dependents pursuant to Article 58b, UCMJ, 10 U.S.C. § 858b. In the absence of any indication the convening authority entertained an improper rationale for denying deferment of confinement, we find Appellant's material rights were not substantially prejudiced by the convening authority's failure to deny the deferment in writing and state the reasons for the denial.

2. Statement of Trial Results and Entry of Judgment

The Specification of Charge I alleged Appellant had on divers occasions willfully disobeyed a lawful command from his squadron commander in violation of Article 90, UCMJ, 10 U.S.C. § 890. The Statement of Trial Results (STR), prepared after the court-martial pursuant to R.C.M. 1101, correctly reflected Appellant had pleaded "not guilty" to this Specification, and that the Specification was "[w]ithdrawn and dismissed with prejudice in accordance with the plea agreement." The STR also correctly indicated Appellant had pleaded "not guilty" to Charge I, but it incorrectly stated he had been found "not guilty" of Charge I when in fact it also had been dismissed with prejudice. The entry of judgment prepared pursuant to R.C.M. 1111 repeats this error, stating Appellant was found "not guilty" of Charge I rather than it was dismissed with prejudice in accordance with the plea agreement. We find it appropriate to modify the entry of judgment to ensure it correctly reflects the

disposition of the charges and specifications in this case, and we take corrective action in our decretal paragraph. *See* R.C.M. 1111(c)(2).

III. CONCLUSION

The entry of judgment is modified as follows: for Charge I, the finding is modified by excepting "NG" and substituting therefor "Withdrawn and dismissed with prejudice in accordance with the plea agreement." The findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 3,722 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Century Schoolbook font, using 14-point type with one-inch margins.

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Certificate of Filing and Service

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on September 30, 2024.

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