IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4), **JESSA M. BARTOLOME,** United States Air Force, *Appellant.*	))))))))))	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ** No. ACM SXXXXX 28 August 2023

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

On 14-16 March 2022, a special court-martial composed of officer members convened at Joint Base Pearl Harbor-Hickam, Hawaii, convicted Senior Airman (SrA) Jessa M. Bartolome, contrary to her plea, of one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2019).[1] The military judge sentenced SrA Bartolome to a reprimand, reduction to the grade of E-2, and two months of hard labor without confinement, and two months of restriction to the limits of Joint Base Pearl Harbor-Hickam. Record of Trial (ROT) Vol. 1, Entry of Judgment, dated 13 April 2022.

On 31 May 2023, the Government purportedly sent SrA Bartolome the required notice by mail of her right to appeal within 90 days. Pursuant Article 66(b)(1)(A), UCMJ, SrA Bartolome files her notice of direct appeal with this Court.

[1] SrA Bartolome was acquitted of one specification of abusive sexual contact in violation of Article 120, UCMJ, and one specification of wrongful use of cocaine in violation of Article 112a, UCMJ.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 August 2023.

Respectfully submitted,

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22045**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Bartolome, Jessa M.	)	**DOCKETING**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

A notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), was submitted by Appellant and received by this court in the above-styled case on 28 August 2023. On 7 September 2023, the record of trial was delivered to this court by the Military Appellate Records Branch.

Accordingly, it is by the court on this 11th day of September, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 2. Briefs will be filed in accordance with Rule 18 of the Joint Rules of Appellate Procedure and Rule 23.3(m) of this court's Rules of Practice and Procedure. *See* JT. CT. CRIM. APP. R. 18, A.F. Ct. Crim. App. R. 23.3(m).

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION TO ATTACH AND SUSPEND RULE 18**
v.	)	
	)	Before Panel 2
Senior Airman (E-4) **JESSA M. BARTOLOME,** United States Air Force *Appellant*	)	No. ACM 22045 12 September 2023

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

Pursuant to Rule 23.3(b) and 23.3(r) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Jessa M. Bartolome hereby moves (1) to attach the document contained in the Appendix to the Record of Trial and (2) for this Honorable Court to suspend its rules regarding the time for filing a Brief on Behalf of Appellant, JT. CT. CRIM. APP. R. 18, until the verbatim transcript is produced.

The email included in the Appendix is relevant to the Appellant's request that this Honorable Court suspend its rules regarding the time for filing a Brief on Behalf of Appellant. The authenticity of the email is readily apparent. Appellant does not have a verbatim transcript of his trial. The email contains a request from the Government to the Trial Judiciary (JAT) to produce a verbatim transcript in the case. Since the Government has already requested JAT prepare a verbatim transcript, it is unnecessary for Appellant to move this court to order its production. However, Appellant respectfully requests this Honorable Court suspend Rule 18 until such a time as a verbatim transcript has been produced by the Government.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this Motion to Attach and to Suspend Rule 18.

Respectfully submitted,

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

Appendix

1. Government's Email to JAT Central Docketing Workflow, dated 31 August 2023.

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 Government Trial and Appellate Operations Division on 12 September 2023.

Respectfully submitted,

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

15 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JESSA M. BARTOLOME, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO ATTACH AND SUSPEND RULE 18 ACM 22045 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose Appellant's Motion to Attach and Suspend Rule 18. A verbatim transcript is being prepared for Appellant's case. The United States respectfully requests that this Court not set a particular due date for production of the verbatim transcript, unless it later becomes necessary to intervene. Should Appellant believe production of the verbatim transcript has taken too long, she can file for relief in his assignments of error brief.

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jessa M. BARTOLOME	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 16 March 2022, Appellant was convicted at a special court-martial of one specification of violating Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928.[1] A military judge sentenced Appellant to 2 months hard labor without confinement, restriction to the limits of Joint Base Pearl Harbor for 2 months, reduction to the grade of E-2, and a reprimand. On 28 August 2023, Appellant filed a timely notice of direct appeal pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A),[2] which was docketed with this court on 11 September 2023.

On 12 September 2023, Appellant moved to attach an email to present to this court that the Government requested the Air Force Trial Judiciary produce a verbatim transcript in his case. Appellant further requested that this court suspend Rule 18 until such time a verbatim transcript has been produced by the Government. *See* JT. CT. CRIM. APP. R. 18.

On 15 September 2023, the Government responded indicating that they do not oppose Appellant's motion but requested no deadline be set at this time.

In consideration of the foregoing, and the Government's position, the court grants Appellant's Motion to Attach, suspends Rule 18 for 60 days, and establishes a timeline for the completion of this transcript.

Accordingly, it is by the court on this 20th day of September 2023,

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[1] References to the punitive articles of the UCMJ in this order are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] *See* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022).

ORDERED:

Appellant's Motion to Attach and Suspend Rule 18 is **GRANTED.**

It is further ordered:

The Government will provide the verbatim transcript, either in printed or digital format, to the court, appellate defense counsel, and appellate government counsel not later than **21 November 2023**. If the transcript cannot be provided to the court and the parties by that date, the Government will inform the court in writing not later than **14 November 2023** of the status of the Government's compliance with this order.

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

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

16 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Senior Airman (E-4) **JESSA M. BARTOLOME** USAF, *Appellant.*	)))))))))	**UNITED STATES' MOTION FOR LEAVE TO FILE FOR COURT TO AMEND ORDER – OUT OF TIME** Panel 2 No. ACM 22045

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

Pursuant to Rule 23.3(d) of this Court's Rules of Practice and Procedure, the United States respectfully requests that this Court amend its 20 September 2023 order to produce a verbatim transcript in this case. The current date ordered for production is 21 November 2023. Now, the United States requests that the Court amend its order and extend the deadline to produce the verbatim transcript until 21 December 2023. This motion is being filed out of time.

An additional 30 days is needed to comply with this Court's order. The extra 30-day extension will allow ample time to transcribe the remainder 10 hours of audio and send the transcript to trial counsel and trial defense counsel for review. The original court reporter is no longer working as a court reporter with the Air Force. Instead, the military judge will have to review and certify the transcript. The court reporter field is critically understaffed and prioritizing transcribing direct appeal cases. Currently, JAT has over 300 hours of audio listed for transcription assistance. JAT is prioritizing transcribing the audio in the case of United States v. SrA Jessa M. Bartolome. For these reasons, this Court should grant a 30-day extension to produce the verbatim transcript.

This motion is being filed out of time because of the recent information brought to the Government's attention on 15 November 2023. This Court ordered the Government to inform the Court in writing no later than 14 November 2023 of the status of the Government's compliance with its order. (*Order*, dated 20 September 2023). On 14 November 2023, JAJG reached out to JAT to get a status update on the verbatim transcript. JAJG did not hear back until 15 November 2023. JAT thought that the status update was sent on 14 November 2023 via email. But because of email failures, JAJG did not get a response until 15 November 2023. In its response, JAT informed JAJG that the verbatim transcript would not be finalized and certified before the 21 November 2023 deadline and therefore asking an additional 30 days to comply with this Court's order.

WHEREFORE, the United States requests that the Court amend its order to produce a verbatim transcript to reflect a new due date of 21 December 2023.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 16 November 2023.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jessa M. BARTOLOME	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 20 September 2023, the court granted Appellant's Motion to Attach and Suspend Rule 18 and ordered the Government to provide a verbatim transcript to the court, appellate defense counsel, and appellate government counsel not later than 21 November 2023. The court further ordered that "[i]f the transcript cannot be provided to the court and parties by that date, the Government will inform the court in writing not later than **14 November 2023** of the status of the Government's compliance with this order." The Government failed to respond by the 14 November 2023 deadline.

On 16 November 2023, the Government moved, out of time, the court to amend its 20 September 2023 order to reflect a new suspense date of 21 December 2023 for the production of the verbatim transcript. The Government asserts that "[t]he original court reporter is no longer working as a court reporter with the Air Force," and therefore, "the military judge will have to review and certify the transcript." The Government assures the court that the Trial Judiciary (JAT) has prioritized transcription of the audio in Appellant's case. Appellant did not submit any opposition.

Having considered the Government's motion, the procedural posture of the case, and the likelihood that this will be the singular request for a delay in providing the ordered transcription, the Government's request for a new deadline date is not unreasonable and the court agrees to amend its order by extending the deadline to the date provided in its decretal paragraph below.

Accordingly, it is by the court on this 28th day of November, 2023,

ORDERED:

Appellee's Motion for Leave to File for Court to Amend Order – Out of Time in the above captioned case is **GRANTED**.

The Government will provide the verbatim transcript, either in printed or digital format, to the court, appellate defense counsel, and appellate government counsel not later than **21 December 2023**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

14 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Senior Airman (E-4) **JESSA M. BARTOLOME** USAF, *Appellant.*	)))))))))	**UNITED STATES' MOTION FOR LEAVE TO FILE FOR COURT TO AMEND ORDER (SECOND)** Panel 2 No. ACM 22045

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

Pursuant to Rule 23.3(d) of this Court's Rules of Practice and Procedure, the United States respectfully requests that this Court amend its 28 November 2023 order to produce a verbatim transcript in this case. The current date ordered for production is 21 December 2023. Now, the United States requests that the Court amend its order and extend the deadline to produce the verbatim transcript until 20 January 2024.

Government received the following update from the Deputy Court Reporter Manager on 13 December 2023. Due to the court reporters' current workload, the verbatim transcript will not be completed before 21 December 2023. Thus, an additional 30 days is needed to comply with this Court's order.

WHEREFORE, the United States requests that the Court amend its order to produce a verbatim transcript to reflect a new due date of 20 January 2024.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 14 December 2023.

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

22 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, ***Appellee,***	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST) OUT OF TIME**
v.	)	
Senior Airman (E-4) **JESSA M. BARTOLOME, USAF,** *Appellant.*	)	ACM 22045 Panel No. 2

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

Pursuant to Rule 23.3(m)(5) of this Court's Rules of Practice and Procedure, the United States respectfully requests that it be granted an enlargement of time, out of time, of 30 days, until 21 January 2024, to produce the verbatim transcript in this case.

This case was docketed with the Court on 11 September 2023. As of the date of this request, 103 days have elapsed since docketing. On the date requested, 133 days will have elapsed. The justification for this enlargement of time is to allow the Air Force Trial Judiciary (AF/JAT) to complete the verbatim transcription and obtain the military judge's review and certification of the same. This is the United States' first motion for enlargement of time; previously, the United States moved twice for this Court to amend its order to extend the deadline.

On 20 September 2023, this Court ordered the United States to produce a verbatim transcript by 21 November 2023. On 16 November 2023, the United States moved for this Court to amend its order and extend the deadline to 21 December 2023 after learning that the court reporter originally assigned to the case was no longer working for the Air Force and the transcription workload had to be redistributed amongst the already short-staffed court reporter labor force. On 28 November 2023, this Court granted the United States' motion and amended the deadline.

This motion is being filed out of time, because while the United States was originally optimistic about meeting the 21 December 2023 deadline, circumstances dictated otherwise. On 13 December 2023, the Government was informed by the Deputy Court Reporter Manager that the transcript would not be complete by 21 December 2023. Although the Trial Judiciary is prioritizing transcription of direct appeal cases—including United States v. Jessa M. Bartolome—the court reporter field remains critically understaffed, and output is affected as a result. On 14 December 2023, the United States moved a second time for this Court to amend its order and extend the deadline for production of the verbatim transcript to 20 January 2024. This Court denied the order on 21 December 2023, and the United States is now moving for an enlargement of time out of time.

Unfortunately, JAJG does not have authority or management capabilities over the Air Force's court reporters and therefore has had difficulty effectively managing the production of verbatim transcripts. JAJG can only communicate Court deadlines to AF/JAT and then report to the Court what AF/JAT tells us about the progress being made on any one transcript. New procedures have been implemented to handle the production of verbatim transcripts in future direct appeal cases, and JAJG hopes that will alleviate the confusion and delay seen in this case.

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

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 December 2023.

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Senior Airman (E-4) **JESSA M. BARTOLOME** USAF, *Appellant.*	)))))))))	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (SECOND) OUT OF TIME** Panel 2 No. ACM 22045 22 January 2024

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

Pursuant to Rule 23.3(m)(5) of this Court's Rules of Practice and Procedure, the United States respectfully requests that it be granted an enlargement of time, out of time, 15 days, until, 5 February 2024, to produce the verbatim transcript in this case.

As background, on 22 December 2023, we submitted the requested titled "United States' Motion for Enlargement of Time (First) Out of Time." In that motion, we requested until 21 January 2024 because a new court reporter needed to create the verbatim transcription and then the military judge needed to review and certify it. The motion calculated that, as of 21 January, 133 days would have elapsed since docketing and, although it was the first such motion; recounted the United States had twice moved the Court to amend its order to extend the deadline; and noted that the Government Trial and Appellate Operations Division (JAJG) lacks authority or management capabilities over the Air Force's court reporters. JAJG informed JAT that this Court had granted the enlargement of time until 21 January but asked JAT to make every attempt possible to finish the verbatim transcript by 21 January, because the Court might not be inclined to grant another enlargement.

This Motion is being filed out of time because, when JAJG contacted JAT on 17 January 2024, JAT responded that they were still trying to get trial counsel to complete review of the

transcript but did not inform JAJG that they would not be able to meet the deadline. It was only on 22 January that JAT informed JAJG that they would not be able to meet the deadline.

Regarding this Motion, the Air Force Trial Judiciary (JAT) provided JAJG with updates on their efforts to complete the verbatim transcript and to obtain trial counsel and military judge certifications. By a separate Motion to Attach Document to be filed today, we will submit a Declaration from JAT providing a chronology and explanation why we are submitting this Motion for Enlargement of Time until 5 February 2024 to submit those matters to this Court. Foremost, the military judge has represented he will provide his certification on Friday, 2 February 2024.

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

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 22 January 2024 via electronic filing.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENT**
v.	)	Panel 2
Senior Airman (E-4) **JESSA M. BARTOLOME** USAF, *Appellant.*	)	No. ACM 22045 22 January 2024

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

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

A. Appendix – Declaration of MSgt C C. A , Acting Court Reporter Manager, AF/JAT, dated 22 2023 (3 pages)

On 28 August 2023, Appellant, through Appellate Defense Counsel, filed her notice of direct appeal pursuant to Article 66(b)(1)(A) with this Court. (*Notice of Direct Appeal Pursuant to Article 66(b)(1)(A)*, dated 28 August 2023.)

The Declaration in the above-listed Appendix explains the steps the Air Force Trial Judiciary has taken to generate the verbatim transcript and to obtain trial counsel and military judge certification of the same, the latter of which is expected on 2 February 2024.

The United States is filing this Motion to Attach the above listed Appendix in support of the Motion for Enlargement of Time also filed today.

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

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 22 January 2024 via electronic filing.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

26 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Senior Airman (E-4) **JESSA M. BARTOLOME** USAF, *Appellant.*	)))))))))	**UNITED STATES' MOTION TO ATTACH DOCUMENT OUT OF TIME** Panel 2 No. ACM 22045

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

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

Appendix – Certified Verbatim Transcript in the case of *United States v. Senior Airman Jessa M. Bartolome*, dated 14 March 2022 (470 pages)

This Court ordered the Government to provide a verbatim transcript. (*Order*, dated 20 September 2023). On 29 December 2023, this Court granted the United States' "Motion for Enlargement of Time (First) Out of Time" to produce the verbatim transcript until 21 January 2024.[1] On 22 January 2024, the United States filed another "Motion for Enlargement of Time (Second) Out of Time" to produce the verbatim transcript because the Acting Deputy Court Reporter Manger told JAJG that the transcript would not be certified before the 22 January 2024 deadline. This motion is still pending with the Court, but should become moot after this filing. This filing is out of time because the Trial Judiciary informed JAJG that it could not meet the 22 January 2024 deadline due to issues completing certification, and although the government filed a motion for enlargement of time, out of time, the Court has not yet acted upon it.

[1] The deadline of 21 January 2024 fell on a Sunday extending the deadline to 22 January 2024 in accordance with Rule 15 of this Court's Rules of Practice and Procedure.

On 26 January 2024, the Acting Deputy Court Reporter Manager informed JAJG that the verbatim transcript and all required certificates have been uploaded to WebDocs. The appendix is responsive to this Court's previous order.

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 26 January 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENT**
v.	)	Panel 2
Senior Airman (E-4) **JESSA M. BARTOLOME** USAF, *Appellant.*	)	No. ACM 22045 31 January 2024

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

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

Declaration of Mary Ellen Payne, Associate Chief, Air Force Appellate Operations Division, dated 31 January 2024, with a 19-page attachment (21 pages total)

On 24 January 2024, Appellant filed a motion asking this Court to impose sanctions on the government for failure to obey court orders to produce a verbatim transcript in Appellant's case.

This declaration and its attachment (containing email correspondence related to this case) will provide this Court with additional information about the processing of Appellant's verbatim transcript and will assist this Court in ruling on Appellant's motion.

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

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

(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 31 January 2024 via electronic filing.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jessa M. BARTOLOME	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 20 September 2023, the court granted Appellant's Motion to Attach and Suspend Rule 18 and ordered the Government to provide a verbatim transcript to the court, appellate defense counsel, and appellate government counsel not later than 21 November 2023. The court further ordered that "[i]f the transcript cannot be provided to the court and parties by that date, the Government will inform the court in writing not later than **14 November 2023** of the status of the Government's compliance with this order." The Government failed to respond by the 14 November 2023 deadline.

On 16 November 2023, the Government moved, out of time, the court to amend its 20 September 2023 order to reflect a new suspense date of 21 December 2023 for the production of the verbatim transcript. That motion was granted via court order on 28 November 2023.

On 14 December 2023, the Government moved the court to amend its order again, this time to reflect a new suspense date of 20 January 2024 for the production of the verbatim transcript. That motion was denied on 21 December 2023. The next day, 22 December 2023, the Government moved for an enlargement of time, out of time, to complete the transcript. On 29 December 2023, that motion was granted, giving the Government an extension until 21 January 2024.

On 22 January 2024, the Government filed two motions. One requested a second enlargement of time, out of time, specifically an extension until 5 February 2024. Additionally, and as explanation for their latest request for an extension, the Government filed a motion to attach a document—a declaration from the Acting Court Reporter Manager at the Air Force Trial Judiciary (JAT). The Government requested an extension of time to produce a verbatim transcript in this case until 5 February 2024 because, according to the attached declaration, "the military judge stated he would need until 2 February 2024 to complete his review" of the verbatim transcript.

On 24 January 2024, Appellant filed a motion for leave to file a motion for sanctions and a motion for sanctions. In that filing, Appellant asserts he does not oppose the Government's motion to attach the JAT declaration, however he requested this court dismiss the government motion for an enlargement of time.

On 26 January 2024, the Government filed a motion to attach a document—a verbatim transcript in Appellant's case and "all required certificates." Appellant did not submit any opposition.

On 31 January 2024, the Government filed a motion for leave to file a motion to dismiss and a motion to dismiss, asserting this court lacks jurisdiction over Appellant's case. On this same day, the Government filed a motion to attach a document—a declaration from the Associate Chief and Director of Appellate Operations, Air Force Trial and Appellate Operations Division (JAJG), detailing the process of obtaining the verbatim transcript in this and similarly situated cases.

Also on 31 January 2024, the Government filed its opposition to Appellant's sanctions motion stating that the court "should deny Appellant's request to impose sanctions on the [G]overnment for failure to produce a verbatim transcript."

On 7 February 2024, Appellant filed his response to the Government's motion for leave to file a motion to dismiss and a motion to dismiss for lack of jurisdiction; Appellant opposed the latter of these two motions.

We have considered the aforementioned filings and the procedural posture of the case.

Accordingly, it is by the court on this 12th day of February, 2024,

ORDERED:

The Government's 22 January 2024, 26 January 2024, and 31 January 2024 motions to attach documents are **GRANTED.**

The Government's Motion for Enlargement of Time (Second) Out of Time, dated 22 January 2024, is **MOOT**.

Appellant's 24 January 2024 motion for leave to file a motion for sanctions is **GRANTED**. Action on Appellant's 24 January 2024 motion for sanctions is **DEFERRED**.

Government's 31 January 2024 motion for leave to file a motion to dismiss is **GRANTED**. Action on Government's 31 January 2024 motion to dismiss is **DEFERRED**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **JESSA M. BARTOLOME,** United States Air Force *Appellant*	)	No. ACM 22045 15 March 2024

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

Pursuant to Rule 23.3(m)(1), (2), and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **25 May 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, dated 20 September 2023. Counsel received a copy of the certified verbatim transcript on 26 January 2024. United States' Motion to Attach Document Out of Time, dated 26 January 2024. From the date of docketing to the present date, 190 days have elapsed. On the date requested, 261 days will have elapsed.

On 14–16 March 2022, a special court-martial comprised of officer members at Joint Base Pearl Harbor-Hickam, Hawaii, found Appellant guilty, contrary to his[1] pleas, of one charge and one specification of assault consummated by battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 8, 432; Record of Trial (ROT) Vol. 1, Entry

1

of Judgment (EOJ), dated 13 April 2022. The court also acquitted Appellant of one charge with one specification of abusive sexual contact and one charge with one specification of wrongful use of cocaine. R. at 432; EOJ. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to be restricted to the limits of Joint Base Pearl Harbor-Hickam for a period of two months, and to perform hard labor without confinement for two months. R. at 466; EOJ. The convening authority took no action on the findings or the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Senior Airman Jessa M. Bartolome*, dated 4 April 2022.

The record of trial is two volumes consisting of four prosecution exhibits, ten defense exhibits, and 22 appellate exhibits; the transcript is 467 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 30 clients; 18 clients are pending initial AOEs before this Court. Fourteen matters currently have priority over this case:

1) *United States v. Taylor*, ACM 40371 – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is preparing to present oral argument as lead counsel in this case on 21 March 2024.
2) *United States v. Patterson*, ACM 40426 – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has reviewed the record of trial, including sealed materials, in this case and begun drafting the AOE.
3) *United States v. Zhong*, ACM 40441 – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court

exhibit; the transcript is 482 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

4) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Hughey*, ACM 40517 – The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Petty*, ACM S32759 – The record of trial is three volumes consisting of four prosecution exhibits, seven defense exhibits, and five appellate exhibits; the transcript is 136 pages. Undersigned counsel has not yet begun reviewing the record of trial, but additional counsel has been detailed to assist with this case.

9) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the

transcript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

10) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

11) *United States v. Everhart*, ACM S32764 – The record of trial is two volumes consisting of 14 prosecution exhibits, four defense exhibits, and six appellate exhibits; the transcript is 128 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

12) *United States v. Russell*, ACM S32766 – The record of trial is three volumes consisting of three prosecution exhibits, 16 defense exhibits, two court exhibits, and six appellate exhibits; the transcript is 115 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

13) *United States v. Villanueva Gonzalez*, ACM S32763 – The record of trial is a one volume electronic record of trial consisting of nine prosecution exhibits, two defense exhibits, and 11 appellate exhibits; the transcript is 139 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

14) *United States v. McDuffie*, ACM 40564 – The record of trial is four volumes consisting of 17 prosecution exhibits and 13 appellate exhibits; the transcript is 343 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 15 March 2024.

Respectfully submitted,

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

19 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JESSA M. BAROLOME, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME No. ACM 22045 Panel No. 2

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 19 March 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **JESSA M. BARTOLOME,** United States Air Force, *Appellant.*	)	No. ACM 22045
	)	15 May 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 June 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, dated 20 September 2023. Counsel received a copy of the certified verbatim transcript on 26 January 2024. United States' Motion to Attach Document Out of Time, dated 26 January 2024. From the date of docketing to the present date, 251 days have elapsed. On the date requested, 291 days will have elapsed.

On 14–16 March 2022, a special court-martial comprised of officer members at Joint Base Pearl Harbor-Hickam, Hawaii, found Appellant guilty, contrary to his[1] pleas, of one charge and one specification of assault consummated by battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 8, 432; Record of Trial (ROT) Vol. 1, Entry

1

of Judgment (EOJ), dated 13 April 2022. The court also acquitted Appellant of one charge with one specification of abusive sexual contact and one charge with one specification of wrongful use of cocaine. R. at 432; EOJ. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to be restricted to the limits of Joint Base Pearl Harbor-Hickam for a period of two months, and to perform hard labor without confinement for two months. R. at 466; EOJ. The convening authority took no action on the findings or the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Senior Airman Jessa M. Bartolome*, dated 4 April 2022.

The record of trial is two volumes consisting of four prosecution exhibits, ten defense exhibits, and 22 appellate exhibits; the transcript is 467 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 28 clients; 18 clients are pending initial AOEs before this Court.[2] Nine matters currently have priority over this case:

1) *United States v. Ollison*, ACM S32745 – The record of trial is two volumes consisting of three prosecution exhibits, one defense exhibit, and nine appellate exhibits; the

[2] Since the filing of Appellant's last request for an enlargement of time, counsel prepared for and presented oral argument to this Court as lead counsel and prepared and filed a brief on a specified issue in *U.S. v. Taylor*, ACM 40371; completed his review of the eight-volume record of trial and prepared and filed a 30-page AOE in *U.S. v. Patterson*, ACM 40426; completed his review of the four-volume record of trial and prepared and filed a 25-page AOE in *U.S. v. Zhong*, ACM 40441; prepared and filed a motion to dismiss in *In re R.R.*, Misc. Dkt. No. 2024-02; prepared and filed a petition for grant of review with the Court of Appeals for the Armed Forces (CAAF) and began drafting the supplement to the petition in *U.S. v. Ollison*, ACM S32745, USCA Dkt. No. 24-0150/AF; began reviewing the eight-volume record of trial in *U.S. v. Kershaw*, ACM 40455; and participated in practice oral argument sessions for two additional cases. Additionally, counsel was out of town on temporary duty (TDY) on and , attended the CAAF continuing legal education program on , and was on leave on .

transcript is 142 pages. Undersigned counsel has petitioned the CAAF for a grant of review in this case and is drafting the supplement to the petition.

2) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has reviewed approximately thirty percent of the record of trial in this case.

3) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

4) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 17 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2062 pages. Undersigned counsel will need to conduct additional review of the record of trial to prepare a brief on remand in this case.

5) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Hughey*, ACM 40517 – The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

7) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the

transcript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

9) *United States v. McDuffie*, ACM 40564 – The record of trial is four volumes consisting of 17 prosecution exhibits and 13 appellate exhibits; the transcript is 343 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 15 May 2024.

Respectfully submitted,

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

17 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JESSA M. BAROLOME, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME No. ACM 22045 Panel No. 2

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

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

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

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

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 17 May 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22045**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jessa M. BARTOLOME	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 15 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Second) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 20th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Second) is **GRANTED**. Appellant shall file any assignments of error not later than **24 June 2024.**

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

Appellant's counsel is advised that any subsequent motions for enlargement of time each shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 390 days after docketing, will not be granted absent exceptional circumstances.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **JESSA M. BARTOLOME,** United States Air Force, *Appellant.*	)	No. ACM 22045
	)	17 June 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 July 2024**. The record of trial was docketed with this Court on 7 September 2023, but this Court suspended Rule 18 until appellate defense counsel received a copy of the certified verbatim transcript. Order, Motion to Attach and Suspend Rule, dated 20 September 2023. Counsel received a copy of the certified verbatim transcript on 26 January 2024. United States' Motion to Attach Document Out of Time, dated 26 January 2024. From the date of docketing to the present date, 284 days have elapsed. On the date requested, 321 days will have elapsed.

On 14–16 March 2022, a special court-martial comprised of officer members at Joint Base Pearl Harbor-Hickam, Hawaii, found Appellant guilty, contrary to his[1] pleas, of one charge and one specification of assault consummated by battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 8, 432; Record of Trial (ROT) Vol. 1, Entry

1

of Judgment (EOJ), dated 13 April 2022. The court also acquitted Appellant of one charge with one specification of abusive sexual contact and one charge with one specification of wrongful use of cocaine. R. at 432; EOJ. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-2, to be restricted to the limits of Joint Base Pearl Harbor-Hickam for a period of two months, and to perform hard labor without confinement for two months. R. at 466; EOJ. The convening authority took no action on the findings or the sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. Senior Airman Jessa M. Bartolome*, dated 4 April 2022.

The record of trial is two volumes consisting of four prosecution exhibits, ten defense exhibits, and 22 appellate exhibits; the transcript is 467 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Counsel is currently representing 27 clients; 16 clients are pending initial AOEs before this Court.[2] Eight matters currently have priority over this case:

1) *United States v. Doroteo*, ACM 40363 – The record of trial is 14 volumes consisting of 19 prosecution exhibits, three defense exhibits, 151 appellate exhibits, and two court exhibits; the transcript is 2,149 pages. Undersigned counsel was recently detailed to this case and is preparing to support oral argument before this Court on 18 June 2024

[2] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 13-page reply to the Government's answer in *U.S. v. Patterson*, ACM 40426; prepared and filed the supplement to the petition for grant of review with the Court of Appeals for the Armed Forces (CAAF) in *U.S. v. Ollison*, ACM S32745, USCA Dkt. No. 24-0150/AF; reviewed approximately sixty five percent of the eight-volume record of trial, including sealed materials, and began drafting the AOE in *U.S. v. Kershaw*, ACM 40455; was detailed to and prepared for both oral argument and a supplemental filing based on new post-trial disclosures in *U.S. v. Doroteo*, ACM 40363; reviewed 382 pages of a verbatim transcript requiring certification; and participated in practice oral argument sessions for one additional case. Additionally, counsel attended the CAAF continuing legal education program on , was off for , and was on leave on .

as well as assisting with drafting a supplemental filing based on new post-trial disclosures.

2) *United States v. Kershaw*, ACM 40455 – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel has reviewed approximately ninety five percent of the record of trial and begun drafting the AOE in this case.

3) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the transcript is 329 pages. Undersigned counsel has begun reviewing the record of trial in this case.

4) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 17 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2062 pages. Undersigned counsel will need to conduct additional review of the record of trial to prepare a brief on remand in this case.

5) *United States v. Casillas*, ACM 40499 – The record of trial is 14 volumes consisting of 37 prosecution exhibits, three defense exhibits, one court exhibit, and 170 appellate exhibits; the transcript is 1,957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Hughey*, ACM 40517 – The record of trial is three volumes consisting of five prosecution exhibits and 14 appellate exhibits; the transcript is 101 pages. Undersigned counsel has begun reviewing the record of trial in this case.

7) *United States v. Rodgers*, ACM 40528 – The record of trial is eight volumes consisting of three prosecution exhibits, one defense exhibit, and 39 appellate exhibits; the

transcript is 199 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

8) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to timely appeal, was provided an update on the status of counsel's progress on Appellant's case, was advised of the request for an enlargement of time, and has not indicated whether he agrees with the request for an enlargement of time.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 17 June 2024.

Respectfully submitted,

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

21 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JESSA M. BAROLOME, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME No. ACM 22045 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 321 days in length. Appellant's nearly a year-long delay practically ensures this Court will not be able to issue a decision that complies with out superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 21 June 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) **JESSA M. BARTOLOME,** United States Air Force, *Appellant.*	**MOTION FOR LEAVE TO FILE MOTION FOR SANCTIONS AND MOTION FOR SANCTIONS** Before Panel No. 2 No. ACM 22045 24 January 2024

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

Pursuant to Rules 23 and 23.3 of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Jessa M. Bartolome hereby requests that this Court grant leave to file a motion for sanctions and sanction the United States for failing to comply with this Court's orders by dismissing Charge II and its Specification with prejudice. The motion for leave to file and the motion for sanctions are combined in a single motion in accordance with Rule 23(d).

Facts

A special court-martial convicted SrA Bartolome, contrary to his[1] pleas, of one count and one specification of assault consummated by a battery for touching another person on the "torso," in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. Record of Trial (ROT) Vol. 1, Entry of Judgment, 1. SrA Bartolome timely filed a notice of direct appeal with this Court on 28 August 2023, and the Court docketed the case on 11 September 2023 after receiving the ROT from the Military Appellate Records Branch on 7 September 2023. Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ, 1; Notice of Docketing, 1. The day after

1

SrA Bartolome filed his notice, a paralegal from the Government Trial and Appellate Operations Division (JAJG) requested preparation of a verbatim transcript of the proceedings in this case. Motion to Attach and Suspend Rule 18, Appendix. Once this Court docketed the case, SrA Bartolome moved the Court to suspend Rule 18 until the Government produced the verbatim transcript. *Id.* at 1. The Court granted that motion and ordered the Government to provide the verbatim transcript to the Court and counsel for both parties not later than 21 November 2023. Order, Motion to Attach and Suspend Rule 18, 2. The Court further ordered that, if the Government could not provide the transcript by that date, it must inform the Court in writing of its compliance with the order not later than 14 November 2023. *Id.*

On 16 November 2023, the Government moved this Court, out of time, to amend its order and extend the deadline for producing a verbatim transcript to 21 December 2023. United States' Motion for Leave to File for Court to Amend Order – Out of Time, 1. The Government asserted the additional 30 days would "allow ample time to transcribe the remainder 10 hours of audio" and assured the Court that the Air Force Trial Judiciary (JAT), which supervises the Air Force court reporters, was prioritizing the transcription of this case. *Id.* The Court granted this motion on 28 November 2023, noting that it had considered "the likelihood that this will be the singular request for a delay in providing the ordered transcription." Order, United States' Motion for Leave to File for Court to Amend Order – Out of Time, 1. Accordingly, the Court ordered the Government to provide the verbatim transcript on 21 December 2023.

The Government again moved this Court to amend its order on 14 December 2023, now requesting a deadline of 20 January 2024 to produce the verbatim transcript. United States' Motion for Leave to File for Court to Amend Order (Second), 1. In support of this motion, the Government simply stated, "Due to the court reporters' current workload, the verbatim transcript will not be

completed before 21 December 2023." *Id.* The Court denied this motion without a written order on 21 December 2023. The day after this denial, the Government renewed its request for an additional 30 days in the form of a motion for enlargement of time out of time. United States' Motion for Enlargement of Time (First) Out of Time, 1. The Government provided additional details, indicating the verbatim transcript was not complete, despite JAT prioritizing this case, because "the court reporter field remains critically understaffed, and output is affected as a result." *Id.* at 2. The Government also noted that JAJG "does not have authority or management capabilities over the Air Force's court reporters and therefore has had difficulty effectively managing the production of verbatim transcripts." *Id.* The Court granted this motion, giving the government until 21 January 2024 to provide the verbatim transcript.

After having its motion granted, the Government did not file anything in this case before 21 January 2024. On 22 January 2024, the Government filed another motion for an enlargement of time out of time, now requesting an additional 15 days until 5 February 2024 to produce the verbatim transcript. United States' Motion for Enlargement of Time (Second) Out of Time, 1. As justification, the motion itself states, "It was only on 22 January that JAT informed JAJG that they would not be able to meet the deadline." *Id.* at 2. However, the motion was accompanied by a motion to attach a declaration from JAT's Acting Court Reporter Manager. United States' Motion to Attach Document, 1. This declaration provides further details about the timeline for the production of the verbatim transcript. The chronology indicates the primary court reporter assigned to this matter and additional court reporters worked on the transcription intermittently from 22 September 2023 to 2 January 2024. Declaration of C A , 1–2.[2] All transcription was reportedly completed on 2 January 2024, but the transcript was not provided

[2] SrA Bartolome recognizes that the motion to attach this document is pending before this Court and does not oppose the United States' Motion to Attach Document.

because it required review by others. *Id.* at 2. The court reporter purportedly followed up with the trial counsel regarding review of the transcript nine days later, but it was seemingly not until 17 January 2024 that anyone responsible for managing the transcription process engaged on this issue. *Id.* One of the trial counsel from this case separated from the Air Force, while the other is now a reservist who apparently could not be reached by either JAT personnel or his assigned office, although personnel from his office acknowledged that they did not actually attempt to contact him. *Id.* Based on "previous guidance," the deputy court reporter manager instructed the court reporter to prepare a memorandum in lieu of trial counsel's review and finalize the transcript. *Id.* at 3. However, the court reporter responded that the military judge still needed to certify the transcript, and the military judge indicated on 22 January 2024 that he needed until 2 February 2024 to complete his review. *Id.*

Law and Analysis

Courts of Criminal Appeals "may set and enforce deadlines" and have power to act to address delays in appellate proceedings. *United States v. Roach*, 66 M.J. 410, 419 (C.A.A.F. 2008). The Court exercised this authority repeatedly in this case, issuing orders and granting motions which, together, set three different deadlines for the Government to provide a verbatim transcript in this case. *See* Order, Motion to Attach and Suspend Rule 18, 2; Order, United States' Motion for Leave to File for Court to Amend Order – Out of Time, 1; United States' Motion for Enlargement of Time (First) Out of Time, 1. "[C]ounsel appearing before this court have a duty to obey all orders of this court, except in the extraordinary situation where the court issues an order plainly calling for counsel to engage in unlawful or unethical conduct." *United States v. Sauk*, 74 M.J. 594, 600 (A.F. Ct. Crim. App. 2015). Unfortunately, the Government has repeatedly failed to obey this Court's orders to provide a verbatim transcript. Contrary to the Government's

position, these failures were avoidable, and the United States should be held accountable for its repeated failures to comply with the orders of this Court.

The Government's actions in this case demonstrate an institutional apathy towards this Court's orders. Between JAJG's first request for a verbatim transcript and this Court's most recent deadline, 145 days elapsed. *See* Motion to Attach and Suspend Rule 18, Appendix; United States' Motion for Enlargement of Time (First) Out of Time, 1. For much of that time, the court reporters, employees of the United States assigned to complete the task ordered by this Court, only worked on the transcription intermittently, seemingly doing so only when it did not conflict with other tasks. Despite the Government's repeated assertions that this transcript was prioritized, *e.g.,* Motion for Leave to File for Court to Amend Order – Out of Time, 1, its personnel regularly prioritized other matters over it. Declaration of C A , 1–2. Even once the transcription was complete, the Government failed to move with any sense of urgency to have the transcript reviewed and complete the process by the Court's deadline. The completion of transcription by 2 January 2024 left 19 days to provide the transcript by the Court's deadline on 21 January 2024, but the Government squandered what should have been more than enough time. *See id.* at 2. Although the court reporter apparently sent the transcript to the trial counsel for review, he did not follow up for nine days, and still the court reporter took no further action when he received no response. *Id.* It then took an additional six days for leadership within JAT to become involved. *Id.* For unknown reasons, no one has been able to contact the trial counsel who remains an Air Force reservist, although the reservist's legal office seemed to mirror the apathy of the rest of the Government actors by not even attempting to contact him despite JAT's request. *Id.* at 2–3. Two days before this Court's deadline, the Government finally decided to utilize an alternative to trial counsel review which it could have used much earlier, especially since it was

apparently known from "previous guidance." *Id.* at 3. Even then, the military judge required to certify the transcript asserted, without further explanation and on the day after this Court's deadline, that he would need until 2 February 2024 to complete the task. *Id.* It is unclear whether anyone sent the transcript to the military judge earlier. All of these actions show repeated instances of Government actors choosing not to prioritize this Court's orders and failing to take the actions which would have allowed the Government to meet the deadlines.

In addition to failing to meet this Court's deadlines, the Government has regularly been untimely with its requests for amended orders and enlargements of time. Three of the four Government motions on this issue have been filed out of time.[3] United States' Motion for Leave to File for Court to Amend Order – Out of Time; United States' Motion for Enlargement of Time (First) Out of Time; United States' Motion for Enlargement of Time (Second) Out of Time. Further, the Government filed both motions for enlargements of time after the deadlines they sought to extend had passed, despite this Court's rules requiring that motions for enlargements of time be filed at least seven calendar days before the filing is due. A.F. Ct. Crim. App. R. Prac. and Proc. 23.3(m)(1). To explain this, the Government claims it did not know it would fail to meet the deadline earlier. *E.g.,* United States' Motion for Enlargement of Time (Second) Out of Time, 1 ("It was only on 22 January that JAT informed JAJG that they would not be able to meet the [21 January 2024] deadline."). These woefully untimely filings further demonstrate a lack of reasonable diligence in complying with this Court's orders. The lack of diligence or sense of priority with which actors throughout the Government have treated this situation reveal a simple truth: the United States is not taking this Court's orders in this case, which is entitled to speedy

[3] Ironically, the only motion on this subject which the Government timely filed is the one the Court denied on 21 December 2023. *See* United States' Motion for Leave to File for Court to Amend Order (Second).

appellate review, with the attentiveness the Court deserves and the law requires. These failures by the Government warrant sanctions from this Court to reinforce the importance of dutifully complying with the Court's orders.

This Court has previously recognized two remedies at its disposal for addressing failures to comply with its orders: dismissing the charges and specifications in the case and holding counsel in contempt of court. *Sauk*, 74 M.J. at 600. While both are available here, SrA Bartolome does not believe holding counsel in contempt of court is an appropriate remedy for this situation. Counsel for the Government have made it clear they have little control over the actions of other Government actors which are required to fulfill the Court's orders. United States' Motion for Enlargement of Time (First) Out of Time, 2 (stating that JAJG "does not have authority or management capabilities over the Air Force's court reporters and therefore has had difficulty effectively managing the production of verbatim transcripts"). The Government's own chronology also makes it clear that Government counsel have sought regular status updates on this matter, while others throughout the Government have repeatedly failed to prioritize and diligently execute the task ordered by this Court. *See* Declaration of C A . Sanctioning the counsel will not address the totality of the Government's utter failure to comply with this Court's orders. An appropriate sanction must reach an interest of the party as a whole.

Dismissing the Charge and Specification of which SrA Bartolome was convicted appropriately sanctions the Government's conduct by reaching one of its interests. At one point, the United States decided it was in its best interest to prosecute SrA Bartolome, ultimately leading to his conviction and the subsequent appeal. However, now that the case is on appeal, the United States apparently cannot muster the resources to produce a verbatim transcript in accordance with the deadlines this Court has repeatedly extended in its orders. The Government as an institution

seems unconcerned that its interests will be negatively affected by not complying with this Court's orders, and sanctions from the Court should show otherwise. Dismissing the Charge and Specification will negatively affect the United States' interest in bringing this case against SrA Bartolome, sending a clear message to all involved that the United States, as a party to this case, must comply with this Court's orders. It is also the only meaningful relief available to SrA Bartolome, as his sentence has been served in its entirety and included neither confinement nor a punitive discharge. *See* EOJ. Finally, the Government's own filings point out that there are other direct appeals cases like this one which are awaiting transcription. *E.g.,* United States' Motion for Enlargement of Time (First) Out of Time, 2. Allowing the Government to effectively ignore this Court's orders in this case without notable consequences will likely lead to similar institutional behavior in other direct appeals cases because the Government will have little incentive to change its priorities. This Court should send a clear message to the Government as a whole that it must take necessary steps to comply with the Court's orders, and it can do so by dismissing the Charge and Specification for the Government's failure to do so here.

WHEREFORE, SrA Bartolome respectfully requests this Honorable Court grant this motion for sanctions, set aside the findings of guilty and the sentence, and dismiss Charge II and its Specification with prejudice. This relief will moot the Government's second motion for an enlargement of time, so SrA Bartolome also respectfully requests the Court dismiss that motion.[4]

[4] In light of this motion's bearing on the Government's pending motion for an enlargement of time, out of time, this motion is being filed within two business days after receipt of the Government's motion, consistent with Rule 23.2 of this Honorable Court's Rules of Practice and Procedure.

Respectfully submitted,

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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 Government Trial and Appellate Operations Division on 24 January 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**UNITED STATES' RESPONSE TO MOTION FOR SANCTIONS**
v.	)	Panel 2
Senior Airman (E-4) **JESSA M. BARTOLOME** USAF, *Appellant.*	)	No. ACM 22045 31 January 2024

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 responds to Appellant's Motion for Sanctions, dated 24 January 2024. This Court should deny Appellant's request to impose sanctions on the government for failure to produce a verbatim transcript.

Background

On 23 December 2022, Congress amended Article 66, UCMJ to provide appellate review by a Court of Criminal Appeals (CCA) to servicemembers convicted at general and special courts-martial, regardless of the adjudged sentence. *See* James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year 2023, Public Law No. 117-263, 136 Stat. 2395, Section 544. These amendments enlarge the number of servicemembers who are eligible for CCA review.[1] Before 23 December 2022, the Air Force did not prepare verbatim transcripts for servicemembers like Appellant whose sentences did not meet the threshold for CCA review under Article 66. Since the change in the law, the Air Force Government Trial and Appellate Operations Division (JAJG) has been supportive of providing verbatim transcripts to all servicemembers who file for direct appeal

[1] The United States contends that these amendments do not apply to Appellant's court-martial and will be filing a motion to dismiss this case for lack of jurisdiction.

with this Court. JAJG and the Air Force Appellate Defense Division (JAJA) agree that military appellate defense counsel cannot adequately perform their duties toward their new clients without verbatim transcripts of the court-martial proceedings.

JAJG has worked with the Air Force Military Justice Law and Policy Division (JAJM) and the Trial Judiciary (JAT) to ensure that, going forward, a verbatim transcript will automatically be prepared in every special and general court-martial with a conviction before docketing with this Court. (Govt. Motion to Attach, dated 31 January 2024, Declaration of Ms. Payne dated 31 January 2024.) However, Appellant filed his[2] direct appeal with this Court before the Air Force's new policies for production of verbatim transcripts went into effect.

There have been growing pains as the Air Force adjusts to the new Article 66. The Services were given little advanced warning about the expansive amendments to Article 66, so after 23 December 2022, the Air Force suddenly faced needing to transcribe a greater number of cases with the same number of court reporters. Moreover, there were no procedures in place for production of verbatim transcripts in all cases, so those procedures needed to be developed.

The following timeline details some of the relevant events related to preparation of the verbatim transcript in Appellant's case:

29 June 2023 – In relation to another direct appeal case, United States v. Folts, JAJG asks if in the future JAT will let them know no less than 8 days before a deadline if the deadline cannot be met. (Govt. Motion to Attach, dated 31 January 2024, Email Attachments at 1.)

9 August 2023 – In relation to another direct appeal case, United States v. Clark, JAJG asks for JAT's assistance in keeping JAJG informed of JAT's ability to meet verbatim transcript deadlines. JAJG explains that "the government cannot just miss a deadline" and must file a motion with AFCCA asking for an enlargement of time. JAJG asks JAT to let them know as soon as possible when it becomes clear a court reporter cannot meet a deadline. (Id. at 4.)

28 August 2023, 1944 – Appellant files his notice of direct appeal.

2

31 August 2023 – JAJG requests JAT prepare a verbatim transcript for Appellant's case. (App. Motion to Attach and Suspend Rule 18, dated 12 September 2022, Attachment).

11 September 2023 – AFCCA issues notice of docketing for Appellant's case.

20 September 2023 – AFCCA issues its order for a verbatim transcript in Appellant's case, setting a deadline of 21 November 2023, with a requirement that the government notify the Court by 14 November if the deadline cannot be met.

JAJG forwards the order to JAT and asks JAT to let them know by 13 November if there will be any trouble meeting the deadline. (Govt. Motion to Attach, dated 31 January 2024, Email Attachments at 6.)

14 November 2023, 0854 – JAJG emails JAT to ask for an update on Appellant's verbatim transcript. (Id. at 9.)

14 November 2023, 2131 – Upon not receiving a response from JAT, JAJG emails the Deputy Chief Trial Judge to try to get an update on Appellant's verbatim transcript. (Id. at 12.)

15 November 2023 – [AFCCA outreach argument in Chicago]. JAT explains that it did not respond to JAJG's email from the day before due to technological issues. JAT informs JAJG that it will need a 30-day extension due to the court reporter field being critically staffed, but that Appellant's case "is at the top of our list." (Id. at 8-9.)

JAT tells JAJG they will send a status email 1 week prior to the new deadline. (Id. at 8.)

16 November 2023 – JAJG moved this Court to amend its order out of time, requesting an extension until 21 December 2023.

28 November 2023 – AFCCA grants the motion to amend, extending the deadline for Appellant's verbatim transcript until 21 December 2023.

13 December 2023 – JAJG, including the Chief, Associate Chief, and Director of Operations and JAT, including the Chief Trial Judge, Clerk of the Court, Court Reporter Manager, and Deputy Court Reporter Manager, have an in-person meeting (also attended by a representative of JAJA) to discuss implementing better procedures for remanded cases that require correction under R.C.M. 1112(d). During the meeting, the issue of verbatim transcripts is also discussed. JAJG again asks JAT to let JAJG know a week in advance if a court reporter could not meet an AFCCA deadline for a verbatim transcript. (Govt. Motion to Attach, dated 31 January 2024, Declaration of Ms. Payne dated 31 January 2024.)

After the meeting, the Deputy Court Reporter Manager emails JAJG to say additional time would be needed to complete Appellant's verbatim transcript and asks for an additional 30 days. (Govt. Motion to Attach, dated 31 January 2024, Email Attachments at 15.)

14 December 2023 – JAJG says it will put in an enlargement request for Appellant's verbatim transcript but cautions JAT that this will likely be the last extension AFCCA grants and asks JAT to make every effort to finish the verbatim transcript within the next 30 days. (Id.)

JAJG files a Motion for Leave to File Request to Amend Court Order, asking for an extension until 21 January 2024.

21 December 2023 – This court denies JAJG's Motion to Amend.

22 December 2023 – JAJG files a Motion for Enlargement of Time, Out of Time for production of the verbatim transcript.

27 December 2023 – JAJG informs JAT that AFCCA denied the original request for more time to complete Appellant's transcript. JAJG tells JAT that it is restyling the motion as a motion for enlargement of time, but that the Court is unhappy that the transcription was taking so long. (Govt. Motion to Attach, dated 31 January 2024, Email Attachments at 17.)

29 December 2023 – JAJG informs JAT that the request for enlargement of time has been granted until 21 January 2023 (22 January, since 21 January is a Sunday). (Id. at 16.)

17 January 2024 – JAJG emails JAT to ask about the status of Appellant's transcript. (Id.)

18 January 2024 – JAT tells JAJG that the transcript has been completed, but the "court reporter is diligently working to get the TC to complete their review of the transcript." JAT does not suggest that it will be unable to meet the deadline. (Id.)

22 January 2024 – JAT informs JAJG that it will not be able to submit the verbatim transcript on 22 January, and that the military judge will need until 2 February 2024 to review and certify the transcript. (Govt. Motion to Attach, dated 22 January 2024, Declaration of MSgt CCA, dated 22 January 2024)

JAJG files a Motion for Enlargement of Time, Out of Time for production of the verbatim transcript.

24 January 2024 – Appellant files a motion asking for this Court to impose sanctions on the government.

26 January 2024 – The government files a motion to attach with this Court attaching Appellant's completed verbatim transcript.

Analysis

Although the government acknowledges that the progress on preparation of Appellant's verbatim transcript has been less than ideal, sanctions are not warranted. The government has never refused to comply with this Court's order. On the contrary, the government has been taking steps to produce a verbatim transcript for Appellant since before this Court even issued its order. JAJG promptly asked JAT to provide a verbatim transcript after Appellant filed his notice of direct appeal and, later, promptly notified JAT of this Court's order to produce a verbatim

transcript. All the evidence before this Court shows that JAT had been making progress in transcribing Appellant's court-martial, even if the progress was slower than desirable. And Appellant's verbatim transcript has now been delivered to JAJA and this Court. (Govt. Motion to Attach, dated 26 January 2024).

The government, writ large, has had difficulties meeting the verbatim transcript deadlines imposed by the Court's orders, some of which can be attributed to the pre-existing design of the JAG Corps. Although JAJG represents the government in filings with this Court and responds to Court orders, an order for the government to produce a verbatim transcript presents unique challenges. JAJG's responsibilities do not normally include production of Records of Trial (ROT), so it had no preexisting procedures in place for ROT or transcript production. *See* Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, dated 14 April 2022, para. 1.6.2.5 ("JAJM is responsible for ROTs for all DAF courts-martial.") JAT is responsible for producing verbatim transcripts. (Id. at para. 1.7). But JAJG and JAT are not in the same JAG Corps domain, and JAJG has no management authority over JAT and the court reporters – especially since the Trial Judiciary is supposed to be an independent entity within the Air Force. *See generally* DAFI 51-110, *Professional Responsibility Program*, dated 11 December 2018, Attachment 8.) As a result, when this Court orders production of a verbatim transcript, the most JAJG can do is relay the orders/deadlines to JAT and ask for updates on the progress being made, emphasize the need for timely processing, and then report the responses back to this Court.

In addition to making several general requests to JAT to inform them of transcript statuses one week before a deadline, JAJG proactively requested status updates from JAT before each of the deadlines imposed in this case:

Deadline	**Date JAJG requested status from JAT**
21 November 2023	14/15 November 2023
21 December 2023	13 December 2023
21 January 2023 (22 January due to weekend)	17 January 2023

Although the government made several out of time filings asking for additional time in this case, there were explanations that demonstrate something other than a lack of diligence or disregard for this Court's orders. The first out of time filing (16 November 2023) was due to an undelivered email from JAT's email system and was compounded by the entire JAJG leadership team being TDY. The second out of time filing (22 December 2023) was due to this Court changing course and deciding not to accept Motions to Amend the Court's Order in lieu of Motions for Enlargement of Time. (JAJG originally timely filed its Motion to Amend but had to refile out of time as a Motion for Enlargement of Time after this Court rejected the Motion to Amend). The third out of time filing (22 January 2023) is admittedly less defensible, because despite being asked to provide advance notice of such situations, JAT did not notify JAJG until the date of the deadline that it would not be able to meet the deadline. JAJG notes, however, that the prior Court Reporter Manager appears to have retired, and a new Acting Court Reporter Manager has now taken over, which may have contributed to the disconnect. (Declaration of MSgt CCA, dated 22 January 2024).

JAJG cannot speak to JAT's prioritization decisions for transcribing all Air Force courts-martial worldwide, but it seems apparent that JAT is struggling with manning and the increased workload after the unexpected amendments to Article 66. Also, JAT court reporters are not

centralized, but rather are scattered all over the world, which undoubtedly makes communication and meeting strict deadlines for transcript production more difficult.

JAJG believes that most of the issues in this case can be attributed to the fact that JAT and its court reporters are not used to working under strict AFCCA-imposed deadlines to produce transcripts. Normally, when a verbatim transcript needs to be produced, court reporters do not work under a strict deadline and do not have to communicate their progress to JAJG. Having to suddenly comply with multiple orders from this Court to produce verbatim transcripts by certain deadlines and coordinate with an outside entity (JAJG) has been a significant adjustment.

The circumstances of this case do not represent a flagrant flouting of this Court's orders to produce a verbatim transcript. Instead, they reflect the difficulties that can ensue when the law imposes new requirements on the government without much advanced warning, and the Air Force has to play catch-up. As mentioned above, new procedures have been put in place so that a verbatim transcript will already be part of every ROT docketed with this Court.

Sanctions, especially the drastic one of dismissal of the charge and specification with prejudice, are not appropriate. The government has not acted in bad faith, nor has Appellant demonstrated any prejudice from the delay in producing a verbatim transcript. Assuming this Court has jurisdiction over this case, in the normal course of appellate review, Appellant can ask for relief for post-judgment delay under Article 66(d)(2).

WHEREFORE, the United States requests that the Court deny Appellant's Motion for Sanctions.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 31 January 2024 via electronic filing.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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31 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JESSA M. BARTOLOME, USAF, *Appellant.*	)))))))))	**MOTION FOR LEAVE TO FILE MOTION TO DISMISS AND MOTION TO DISMISS** No. ACM 22045 Panel No. 2

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

Pursuant to Rules 23 and 23.3 of this Court's Rules of Practice and Procedure, the United States moves for leave to file a motion to dismiss and moves to dismiss Appellant's direct appeal for lack of jurisdiction. Under the previous version of Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2021), which applies to Appellant's court-martial, Appellant has no right to direct appellate review before this Court.[1]

INTRODUCTION

The jurisdictional controversy in this case stems from the Fiscal Year 2023 National Defense Authorization Act[2] (FY 2023 NDAA), passed on 23 December 2022, which amended Article 66, UCMJ. While the prior version of Article 66 allowed only servicemembers who received a court-martial sentence above a certain threshold to apply to a Court of Criminal Appeals (CCA) for appellate review, the new statute gives *all* servicemembers with a general or special court-martial conviction the right to appeal to a CCA. Before passage of the FY 2023 NDAA

[1] The United States acknowledges that this Court has denied similar motions in other cases. But those denials did not consider the new changes to the Rules For Courts-Martial through Executive Order 14103, dated 28 July 2023. These changes support the United States' position that there is no jurisdiction in this case and justify this Court taking a closer look at this issue.

[2] James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year 2023, Public Law No. 117-263, 136 Stat. 2395

amendments, based on his[3] sentence, Appellant had no right to appeal to a CCA under Article 66, and appellate review of his court-martial and his conviction had become "final" under Articles 57(c) and Article 76, UCMJ. 10 U.S.C. § 857(c) (2021); 10 U.S.C. § 876 (2021). The pertinent question is whether the jurisdiction broadening amendments to Article 66 apply to convictions like Appellant's that were already final before the amendments were passed.

This Court should conclude the amendments do not apply to Appellant's case. Nothing in the FY 2023 NDAA states that the Article 66 amendments apply retroactively, much less to cases that had already reached finality before the enactment of the NDAA. And interpreting the FY 2023 NDAA to resurrect already final courts-martial raises serious constitutional, separation of powers concerns. The Supreme Court has held that Congress may not pass legislation to reopen final judgments without violating the separation of powers doctrine. Plaut v. Spendthrift Farm, 514 U.S. 211 (1995). To avoid this constitutional conundrum, this Court must decline to read language into the FY 2023 NDAA that reopens courts-martial that have already reached finality under Article 57 and Article 76.

In addition to raising constitutional concerns, interpreting the FY 2023 NDAA amendments to Article 66 to apply retroactively conflicts with the plain language of the rest of the UCMJ. Even after the FY 2023 NDAA amendments, Article 65(d)(2) UCMJ, 10 U.S.C. § 865(d) (2023), and R.C.M. 1201 (2019, 2023, 2024 eds.) contemplate that there will still exist a category of cases that are "ineligible for direct review" under Article 66 and that will still receive only Article 65 review. If, after 23 December 2022, all non-waived courts-martial are now entitled to Article 66 review, this would render Article 65(d)(2) superfluous. The only way to explain Article 65(d)(2)'s continued existence is to conclude that Congress intended the FY 2023 NDAA

3

amendments to Article 66 to only apply to cases with entries of judgment (EOJs) dated on or after 23 December 2022. Congress's decision to keep Article 65 intact after the FY 2023 NDAA amendments to Article 66 thus evinces clear congressional intent that some special and general courts-martial – including Appellant's with an EOJ dated before 23 December 2022– remain ineligible for Article 66 review.

At bottom, this Court cannot read the FY 2023 NDAA Article 66 amendments to apply retroactively to final convictions like Appellant's without implicating constitutional concerns; and in any event, Congress already signaled its intent that the amendments only apply to EOJs dated on or after 23 December 2022 by maintaining Article 65(d)(2). Since, either way, Appellant is ineligible for Article 66 review, this Court should dismiss this case for lack of jurisdiction.

STATEMENT OF CASE

Appellant was charged with one charge and one specification of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920; one charge and one specification of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one charge and one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ; 10 U.S.C. § 912a. (Entry of Judgment (EOJ), dated 13 April 2022, ROT, Vol 1.) Contrary to his plea, Appellant was convicted at a special court-martial of the specification of assault consummated by a battery, by exceptions and substitutions. (Id.) He was acquitted of the other charges. On 16 March 2022, a military judge sentenced Appellant to reduction to the grade of E-2, hard labor without confinement for 2 months, and a reprimand. (Id. at 1-2.)

The convening authority took no action on the findings and approved the adjudged sentence in its entirety. (Convening Authority Decision on Action, dated 4 April 2022, ROT, Vol. 1.) Judgment was entered on **13 April 2022**. (EOJ, ROT, Vol 1.) On **6 June 2022**, an attorney

"designated under regulations prescribed by" the Secretary of the Air Force completed the Judge Advocate General's (TJAG) Article 65(d), UCMJ. (EOJ, ROT, Vol 1.) That attorney concluded that (1) Appellant's court-martial had jurisdiction over Appellant and the offenses, (2) the charge and specifications stated offenses, (3) the sentence was legal, and (4) the findings and sentence were correct in law and fact. (*See* id.; *see also* Article 65(d)(2)(B), UCMJ (listing reviewing criteria for cases not eligible for direct appeal to the Air Force Court of Criminal Appeals).)

On 31 May 2023, a paralegal from 11 AF/JA notified Appellant of the right to file a direct appeal. (Attachment to ROT, Vol. 1.)

On 28 August 2023, Appellant filed with this Court a Notice of Direct Appeal Pursuant to Article 66(b)(1)(A). (Notice of Appeal, dated 28 August 2023.) On 11 September 2023, this Court issued a Notice of Docketing and ordered that Appellant's case be "referred to Panel 2" for appellate review. (Notice of Docketing, dated 11 September 2023.)

LAW AND ARGUMENT

Standard of Review

This Court and its sister courts of criminal appeals are Article I "courts of limited jurisdiction, defined entirely by statute." United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015). Thus, without an express statutory grant of jurisdiction, the Court "cannot proceed at all," because jurisdiction is the prerequisite to its "power to declare the law…." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (quoting Ex Parte McCardle, 74 U.S. 506 (1869)). If this Court determines that it lacks jurisdiction, its "only function remaining … is that of announcing the fact and dismissing the cause." Steel Co., 523 U.S. at 94.

This Court reviews questions related to its own jurisdiction *de novo*. *See* United States v. Brubaker-Escobar, 81 M.J. 471, 474 (C.A.A.F. 2021).

Law

The UCMJ Before and After the 2023 NDAA Amendments

Article 66(b) – Review by the Court of Criminal Appeals

Effective 23 December 2022, Congress amended subsections (b) of Article 66, UCMJ. *See* Section 544(b) of the FY 2023 NDAA. **Article 66 (b)(1)** was modified as follows:

Before FY 2023 NDAA	**After FY 2023 NDAA**
(b) REVIEW. (1) APPEALS BY ACCUSED.—A Court of Criminal Appeals shall have jurisdiction over a timely appeal from the judgment of a court-martial, entered into the record under section 860c of this title (article 60c) [10 U.S.C. § 860c], as follows: (A) On appeal by the accused in a case in which the sentence extends to confinement for more than six months and the case is not subject to automatic review under paragraph (3). (B) On appeal by the accused in a case in which the Government previously filed an appeal under section 862 of this title (article 62) [10 U.S.C. § 862]. (C) On appeal by the accused in a case that the Judge Advocate General has sent to the Court of Criminal Appeals for review of the sentence under section 856(d) of this title (article 56(d)) [10 U.S.C. § 856(d)]. (D) In a case in which the accused filed an application for review with the Court under section 869(d)(1)(B) of this title (article 69(d)(1)(B)) [10 U.S.C. § 869(d)(1)(B)] and the application has been granted by the Court.	(b) REVIEW. (1) APPEALS BY ACCUSED—A Court of Criminal Appeals shall have jurisdiction over— (A) a timely appeal **from the judgment of a court-martial, entered into the record under section 860c(a)** of this title (article 60c(a)) [10 U.S.C. § 860c(a)], **that includes a finding of guilty**; and (B) a summary court-martial case in which the accused filed an application for review with the Court under section 869(d)(1) of this title (article 69(d)) [10 U.S.C. § 869(d)(1)] and for which the application has been granted by the Court. ….

After the amendments, **Article 66(b)(3)** continues to provide for automatic CCA review of cases with a sentence of death, dismissal, dishonorable or bad conduct discharge, or more than 2 years of confinement.

Article 65 – Transmittal and Review of Records

Congress did not amend Article 65, UCMJ, "Transmittal and review of records." Both before and after the FY 2023 NDAA, **Article 65(b)(1)** states that for cases entitled to automatic review, where the judgment includes a sentence of death, a punitive discharge or confinement for more than 2 years, the Judge Advocate General shall forward the record of trial to the CCA. Under **Article 65(b)(2)**, for cases eligible for direct review under Article 66(b)(1), the Judge Advocate General shall forward a copy of the record to appellate defense counsel. Before the 2023 NDAA, this referred to any case not eligible for automatic review, but with a sentence to more than six months of confinement.

Article 65(c)(1) continues to require that the Judge Advocate General provide notice to the accused of the right to file an appeal under Article 66(b)(1).

Article 65(d)(1) addresses "Review by a Judge Advocate General," which may be conducted by "another attorney designated under regulations prescribed by the Secretary concerned." **Article 65(d)(2)** continues to provide procedures for "Review of cases *not eligible for direct appeal.*" (emphasis added). **Article 65(d)(2)(A)** clarifies that a review under the rule "shall be completed in each general or special court-martial that *is not eligible for direct appeal* under paragraph (1) or (3)" of Article 66(b)." (emphasis added.) **Article 65(d)(2)(B)** provides the criteria to be used for review of the cases not eligible for direct appeal under Article 66. If the attorney conducting the review under Article 65(d) believes corrective action may be required, the

record shall be forwarded to the Judge Advocate General, in accordance with **Article 65(e)(1)**, who may set aside the findings or sentence, in whole or part.

Article 69 – Review by the Judge Advocate General

In contrast to Article 65, Congress did significantly alter Article 69 in the FY 2023 NDAA. *See* Section 544(c). Prior to the 2023 NDAA, under **Article 69(a)**, an accused with a sub-jurisdictional sentence from a general or special court-martial could apply to the Judge Advocate General for review under certain circumstances. **Article 69(c)(1)(A)** and **(2)** described the scope of the actions the Judge Advocate General could take for special and general courts-martial.[4] Based on **Article 69(b)**, the accused was required to submit his application for Article 69 review within a year of the date of completion of his Article 65 review. Under this prior version of Article 69, a case reviewed by TJAG under the statute could then make it to a Court of Criminal Appeals (CCA) in two ways: under **Article 69(d)(1)(A)**, if TJAG sent it there, or, under **Article 69(d)(1)(B)**, if the accused submitted an application for review, that was granted by the Court. When such a case arrived at the CCA, based on **Article 69(e)**, the Court could only act with respect to matters of law.

Under the **new Article 69(a)**, if an accused with a general or special court-martial conviction applies for review under the statute, TJAG's only option for action is to "order such court-martial be reviewed under" Article 66. Under the **new Article 69(b)(1)(B)**, an accused with a general or special court-martial conviction must apply for TJAG Article 69 review not later than "one year after the end of the 90-day period beginning on the date the accused is provided notice

[4] The scope of TJAG's authority to review certain cases under the pre-FY 2023 NDAA version of Article 69, UCMJ is currently under review at the Court of Appeals for the Armed Forces (CAAF) in United States v. Parino-Ramcharan, ___ M.J. ___, 2023 CAAF LEXIS 773(C.A.A.F. 2023). CAAF's ultimate decision could mean that Appellant had no right to relief from TJAG under the old version of Article 69. *See* United States v. Parino-Ramcharan, 2023 CCA LEXIS 314 (A.F. Ct. Crim. App. 2023).

of appellate rights under" Article 65(c) – or if the accused waived or withdrew from appellate review before notification of appellate rights, not later than one year after the entry of judgment. The new **Article 69(c)(2)** explains that "in a case reviewed under" Article 65(b), which means cases that were eligible for direct review, but appeal was waived or was withdrawn, TJAG may only review "the issue of whether the waiver or withdrawal of an appeal was invalid under the law." If it was invalid, TJAG must send the case to the CCA. Id.

On 28 July 2023, the President signed Executive Order 14103, effective that day, updating the Rules for Courts-Martial. **R.C.M. 1201(a)(1) (2023, 2024 ed.)** did not change and continues to provide that an attorney designated by TJAG will review "[e]ach general and special court-martial case that is *not eligible for appellate review* by a Court of Criminal Appeals under Article 66(b)(1) or (3)." (emphasis added). The title to **R.C.M. 1201(h) (2023, 2024 ed.)**, "Application for relief to the Judge Advocate General *after final review*," did not change, but the substance of the subsection did. (emphasis added). **R.C.M. 1201(h)(1)(B) (2019 ed.)** previously allowed TJAG to "modify or set aside the findings or sentence, in whole or in part" of a general or special court martial previously reviewed under paragraph (a)(1) – i.e. cases not eligible for appellate review by a CCA. Under the revised **R.C.M. 1201(h)(1)(B) (2023, 2024 ed.)**, for general or special courts-martial previously reviewed under paragraph (a)(1) – again cases that were *not eligible* for review by a CCA and received only Article 65 review– TJAG now only has the authority to order the court-martial be reviewed by a CCA, rather than being able to act on the findings or sentence.

Articles 57 and 76 – Finality of Judgments

Article 57(c) remained unchanged after the FY 2023 NDAA. Article **57(c)(1)(A)** reads, "Completion of appellate review. Appellate review is completed under this section when a review

under section 865 of this title (article 65) [10 USCS § 865] is completed." Article **57(c)(2)** then provides: "Completion as a final judgment of legality of proceedings. The completion of appellate review shall constitute a final judgment as to the legality of the proceedings." In turn, **Article 76** states that the "appellate review" of records of trial provided for by the UCMJ and the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by the UCMJ "are final and conclusive."

R.C.M. 1209 (2019, 2023, 2024 eds.) is entitled "Finality of courts-martial," and reiterates that for a general or special court-martial, a conviction is final when review is completed under "R.C.M. 1201(a) (Article 65)." *See* **R.C.M. 1209(a)(1)(A) (2019, 2023, 2024 eds.)**. R.C.M. **1209(b) (2019, 2023, 2024 eds.)**, "Effect of finality," states:

> The judgment of a court-martial and orders publishing the proceedings of a court-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies and officers of the United States, subject only to action upon petition for a new trial under Article 73, to action under Article 69, to action by the Secretary concerned as provided in Article 74, and the authority of the President.

(emphasis added).

The Manual for Courts Martial has consistently maintained that TJAG's Article 69 review "is not part of appellate review within the meaning of Article 76 or R.C.M. 1209." R.C.M. 1201 (b)(3)(A) Discussion (1984 ed.); R.C.M. 1201(b)(3)(A) Discussion (2016 ed.); R.C.M. 1201(h)(4)(B) Discussion (2019 ed.); 1201(h)(4)(B) Discussion (2024 ed.).

Inapplicability of the FY 2023 NDAA amendments to certain circumstances

With regard to the application of the amendments to Articles 61, 66, and 69, Section 544(d) of the FY 2023 NDAA states that the "amendments made by this section shall not apply to—(1) any matter that was submitted before the date of the enactment of [the NDAA] to a Court of

Criminal Appeals established under section 866 of title 10 . . . or (2) any matter that was submitted before the date of the enactment of this Act to a Judge Advocate General under section 869 of such title." *See* 136 Stat. 2395.

Law on Retroactivity of Statutory Amendments

"[T]he general rule [is] that when a statute has no effective date, absent a clear direction by Congress to the contrary, it takes effect on the date of its enactment." Johnson v. United States, 529 U.S. 694, 702 (2000); *see also* United States v. Pritt, 54 M.J. 47 (C.A.A.F. 2000) (discussing an amendment to Article 95, UCMJ, which took effect the day the President signed the legislation).

The Supreme Court recognizes a general presumption *against* statutory retroactivity. Landgraf v. USI Film Prods., 511 U.S. 244, 265-66 (1994). If a new statute would "impose new duties with respect to transactions already completed," it does not apply retroactively "absent clear congressional intent favoring such a result." Id. at 280. But courts need not even resort to this presumption if the statute otherwise makes clear it does not apply retroactively, because "[w]here congressional intent is clear, it governs." Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 838 (1990) (declining to apply statutory amendments retroactively where the plain language of the statute "evidenced clear congressional intent" that the amendments did not apply to judgments entered before its effective date).

Analysis

To begin, since the NDAA contains no express effective date or language indicating retroactive application, the modifications to Article 66, UCMJ, impacting this Court's jurisdiction over courts-martial took effect on the date of the NDAA's enactment, which was 23 December 2022. *See* Johnson, 529 U.S. at 702. The dispositive question for this Court is whether these

amendments to Article 66 apply to convictions like Appellant's that were already "final" on 23 December 2022. The answer is no.

a. Per Article 57(c)(2), Appellant's conviction was final after he received Article 65 review; the potential availability of Article 69 review does not affect finality.

Having finished Article 65 review on 6 June 2022, appellate review of Appellant's court-martial conviction was already final under Article 57(c) when the 2023 NDAA amendments went into effect later that year. Article 57(c)(1)(A) establishes that "appellate review" is complete when Article 65 review has been completed. And, under Article 57(c)(2), the completion of appellate review constitutes "a final judgment as to the legality of the proceedings."

The fact that Appellant still could have applied for Article 69 review[5] as of 23 December 2022 does not affect the finality of his conviction. "Finality of a legal judgment is determined by statute," Plaut, 514 U.S. at 227, and, here, the statute (Article 57) does nothing to tie finality to Article 69 review. Since appellate review was over after completion of Article 65 review, under the UCMJ, there was a final judgment as to the legality of Appellant's conviction at that point–regardless of whether Article 69 review might still have been an option.

Reading Articles 57 and 76 together as a whole leads to this same conclusion. *See* United States v. Quick, 74 M.J. 517, 520 (N-M. Ct. Crim. App. 2014) (quoting Norman J. Singer, Statutes and Statutory Construction § 46:05, at 154 (6th ed. 2000)) ("sections of a statute should be construed in connection with one another as 'a harmonious whole' manifesting 'one general purpose and intent'"). Article 76 states that "appellate review . . . provided by" the UCMJ is "final and conclusive." "Appellate review" is defined elsewhere within the UCMJ, specifically in Article 57, *not* to include Article 69 review. Construing Articles 57 and 76 together as "a harmonious

[5] CAAF could find in Parino-Ramcharan that servicemembers in Appellant's position could *not* have received Article 69 review under pre-FY 2023 NDAA version of the rule.

whole" illustrates that Article 69 review is not in any way a prerequisite to finality under Article 76. In short, per the plain language of the UCMJ, after completion of Article 65 review, appellate review of Appellant's case was final for purposes of Article 76.[6]

The Manual states outright what is implicit in Articles 57 and 76: Article 69 review "is not part of appellate review within the meaning of Article 76 or R.C.M. 1209." R.C.M. 1201(h)(4)(B) Discussion (2019). *See also* 53 Am Jur 2d Military and Civil Defense § 30.8 ("The procedure by which a case may be considered by the Judge Advocate General [under Article 69] is not part of the appellate review considered final within the meaning of Article 76 of the Uniform Code of Military Justice."); Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, 24 January 2024, para. 24.18 ("For cases that do not require corrective action, [special courts-martial] and [general courts-martial] reviewed under Article 65, UCMJ, are final under Article 76, UCMJ, upon completion of the judge advocate's review."); DAFI 51-201, 14 April 2022, para. 24.17 (same).

Some federal circuits have thus aptly characterized Article 69 review by the Judge Advocate General as "a collateral proceeding akin to coram nobis" that is "an ancillary review procedure" and "not part of a direct appellate procedure." Curci v. United States, 577 F.2d 815 (2d Cir. 1978); McKinney v. White, 291 F.3d 851, 855 (D.C. Cir. 2002) (same). As the Court of Federal Claims has explained, the statutory framework that provides for finality in the court-martial process "is not affected by the subsequent filing of a writ of error coram nobis." MacLean v. United States, 67 Fed. Cl. 14, 21 (2005). Likewise, the availability of a collateral attack through Article 69 review does not affect the finality of courts-martial convictions.

[6] In any event, to say that finality *really* occurs only after a servicemember's Article 69 options have been exhausted would render Article 57(c)(2)(A) completely meaningless and purposeless. If Congress intended Article 69 review to be the benchmark for finality, why wouldn't it have just said so in Article 57(c)?

Further reinforcing that Article 69 cannot be viewed as part of direct appellate review is the type of review that would have been available to appellants whose cases arrived at the CCA via Article 69. Such cases would not have received a full Article 66 review with factual sufficiency and sentence appropriateness review. Instead, the CCA could only act on such cases with respect to matters of law. *Compare* Article 66(d)(1)(2021) *with* Article 69(e)(2021). As a result, a CCA's collateral Article 69(d)-(e) review was in no way the equivalent to direct Article 66 review.[7] In retroactivity analyses, the concept of finality is typically tied to completion of *direct* appellate review. *Cf.* Beard v. Banks, 542 U.S. 406, 412 (2004). Since Article 69(d)-(e) review by a CCA is simply not part of, nor equivalent to, direct appellate review, it does not affect finality under Article 76.[8]

In sum, the plain language of the UCMJ, the Manual for Courts-Martial, DAFI 51-201, and federal case law all support that Article 69 review is not part of direct appellate review. Appellant's conviction was therefore final under Article 76 after Article 65 review was completed on 6 June 2022 – well before the FY 2023 NDAA amendments to Article 66 expanding direct appellate review went into effect.

[7] As our superior Court explained in Denedo v. United States, although final judgments may be reviewed in certain circumstances, such as in coram nobis petitions, they are reviewed under "highly constrained standards." 66 M.J. 114, 121 (C.A.A.F 2008). The more stringent standards applied during CCA review under Article 69 after final review are consistent with that principle.

[8] The differences between a CCA's direct appellate review under Article 66 and a CCA's collateral review via Article 69 (2021) underscore another significant point. If applied retroactively, the FY 2023 NDAA Article 66 amendments would expand, rather than simply maintain, the CCA access and review available to servicemembers with previously subjurisdictional sentences. Such an amendment "speaks to the substantive rights" of servicemembers and is "as much subject to [the Supreme Court's] presumption against retroactivity as any other [statute]." *See* Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 951 (1997).

b. To avoid constitutional concerns, this Court should not read the FY 2023 NDAA amendments to reopen Appellant's already-final court-martial conviction.

That direct appellate review of Appellant's conviction had reached finality raises constitutional concerns about whether Congress, through the FY 2023 NDAA amendments to Article 66, could retroactively reopen the case and subject it to new direct appellate review.[9] In Plaut, the Supreme Court held that Congress could not, through new legislation, retroactively command the federal courts to reopen final judgments without violating the constitutional doctrine of separation of powers. 514 U.S. at 219. The Court observed that the Founders recognized "a sharp necessity to separate legislative and judicial power." Id. at 221. As the Court characterized it, "[w]hen retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case.'" Id. at 225 (citing The Federalist No. 81, p. 545 (J. Cooke ed. 1961)). For Congress to "annul a final judgment" would be a "an assumption of Judicial power," which is forbidden. Id. at 224 (internal citations omitted). *See also* Hayburn's case, 2 U.S. 409, 2 Dall. 409, 411 (1792) (opinion of Iredell, J., and Sitgreaves, D. J.) ("No decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested").

True, Plaut dealt with the final judgments of Article III courts, and the military justice system is located within the Executive Branch of the federal government. *See* United States v. Brown, ___ M.J. ____, 2024 CAAF LEXIS 18, at *26 (C.A.A.F. Jan. 10, 2024) (Hardy, J. concurring in part and dissenting in part) ("all the actors in the military justice system are members

[9] This Court should not forget that the FY 2023 NDAA itself says nothing about applying retroactively to already-final court-martial convictions. So interpreting the NDAA to resurrect "final" cases, such as Appellant's, already requires this Court to read retroactivity language into the law that is not there.

of the executive branch"). But separation of powers concerns remain. The Supreme Court recently reiterated that the "military justice system's essential character" is "judicial," and that "courts-martial have long been understood to exercise judicial power of the same kind wielded by civilian courts." United States v. Ortiz, 138 S.Ct. 2165, 2174-75 (2018) (internal citations omitted). As Justice Thomas explained in his Ortiz concurrence, because the Constitution gives the political branches expansive power over the military, the Constitution allows the military to have an entity within the Executive Branch that exercises judicial power. Id. at 2186; 2188-89 (Thomas, J. concurring). Congress's annulment of the final judicial decision of an Executive Branch entity (in this case, the completion of an Article 65 review) would also be an unconstitutional assumption of judicial power condemned in Plaut. And even putting aside the Executive Branch's authority to exercise judicial power through the military justice system, Congress reopening final judgments declared by the Executive Branch still represents one branch of government interfering with the functioning of another. *See* Benjamin v. Jacobson, 172 F.3d 144, 159 (2d Cir. 1999) ("The Constitutional principle of separation of powers protects each of the three Branches of the federal government from encroachment by either of the other Branches.")[10]

In sum, following the logic of Plaut, once the Executive Branch has issued a final judgment as to the legality of a court-martial proceeding through completion of Article 65 review, the Legislative Branch (Congress) cannot reopen that judgment without violating the separation of powers doctrine. Interpreting the FY 2023 NDAA to reopen final judgments of courts-martial – especially where nothing in the plain language of the NDAA purports to do so – raises serious

[10] The fact that Congress, through the UCMJ, created the military justice system that exercises judicial power does not change the analysis. In Plaut, the Supreme Court recognized that Congress had constitutional authority to create inferior Article III courts. 514 U.S. at 221. Nonetheless, Plaut's holding appears to prohibit Congress from overturning the final judgment of *any* Article III court. Id. at 225-26.

constitutional concerns under Plaut. Following the canon of constitutional avoidance, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." Jones v. United States, 526 U.S. 227, 239 (1999) (citing United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)). In this case, this Court can avoid the constitutional quandary altogether by simply refusing to read retroactivity language into the FY 2023 NDAA that is not there. *Cf.* QUALCOMM Inc. v. FCC, 181 F.3d 1370, 1380, n.8 (D.C. Cir. 1999) (in light of historical practice and constitutional concerns, "the court will not read a statute retroactively to alter a final judgment absent an express statement of intent").

c. Constitutional implications aside, historical legal practice, inside and outside the military, does not support applying new statutory legislation to already-final judgments, especially without congressional direction.

Even if the constitutional considerations of Plaut do not apply to final judgments of Executive Branch entities, Plaut at least establishes that there is no legal norm for applying new statutory amendments to cases that are already final on appeal. Indeed, while Landgraf discusses the ins and outs of when statutes can be applied retroactively, it focuses on the retroactive application of statutes to pending – not final – cases. 511 U.S. at 249-50. And reopening final judgments would certainly be an instance of "impos[ing] new duties with respect to transactions already completed," that, under Landgraf retroactivity principles, should not be undertaken without a statement of clear congressional intent. *Cf.* Hernandez-Rodriguez v. Pasquarell, 118 F.3d 1034; 1042 (5th Cir. 1997) (citing Landgraf, 511 U.S. at 280).

Other federal and state courts have consistently refused to apply statutory or regulatory changes to cases that have already reached finality. *See e.g.* Hernandez-Rodriguez, 118 F.3d at 1043-44 (refusing to apply newly instituted regulations to an already final decision of the Board

of Immigration Appeals, an Executive Branch entity,[11]especially since the regulations did not purport to apply retroactively); Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 810 (11th Cir. 1988) (declining to apply a new statute retroactively to judgments that had become final and unappealable before the statute's effective date); People v. Padilla, 50 Cal. App. 5th 244, 251, 263 Cal. Rptr. 3d 784, 789 (2020) ("A retroactive ameliorative statute applies in a given case if it becomes effective *prior to* the date the judgment of conviction becomes final … .") (emphasis added) (internal citations omitted). As a result, this Court has scant precedent – if any at all – to support applying the FY 2023 NDAA amendments retroactively to already-final cases, particularly where the amendments did not even purport to apply retroactively.

Finally, declining to apply the FY 2023 NDAA to cases that were already final under Articles 57(c) and 76 would be consistent not only with other federal and state holdings, but also with prior military court decisions. After CAAF's predecessor, the Court of Military Appeals (CMA), was created under the Uniform Code of Military Justice, CMA repeatedly "held that whenever court-martial proceedings are completed prior to the effective date of the Uniform Code . . . this Court has no jurisdiction to review them." United States v. Homcy, 40 C.M.R. 227 (C.M.A. 1969) (citing United States v. Sonnenschein, 1 U.S.C.M.A. 64 (C.M.A. 1951) and United States v. Musick, 3 U.S.C.M.A 440 (C.M.A. 1953)). Likewise, here, Appellant's court-martial and appellate review were completed prior to the effective date of the FY 2023 NDAA. In keeping with prior military decisions, this Court should determine it has no jurisdiction to review cases like Appellant's that already reached finality prior to the changes to Article 66, UCMJ.

[11] https://www.justice.gov/eoir/board-of-immigration-appeals.

d. The plain language of the post-23 December 2022 UCMJ does not support application of the FY 2023 NDAA Article 66 amendments to cases like Appellant's.

This Court need not rely only on constitutional avoidance principals to resolve the jurisdictional question in this case. Congress has already telegraphed through Article 65 that it did not intend the FY 2023 NDAA amendments to resurrect Appellant's already-final court-martial – or to apply to any other case with an entry of judgment dated before 23 December 2022.

Congress elected to make no changes to Article 65 in the FY 2023 NDAA. Article 65(d)(2)(A) still states that a review by a judge advocate general "shall be completed in each general and special court-martial that is not eligible for direct appeal under paragraph (1) or (3) of [Article 66(b)]." Thus, Congress obviously contemplated that there would still be some category of cases existing after 23 December 2022 that would not be "eligible for direct appeal" and would receive only an Article 65 review by a judge advocate. If this were not Congress's intent, there would be no reason for Congress to maintain Article 65(d)(2)(A) in its preexisting form. To disregard Article 65(d)(2)(A) "violates the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." United States v. Nordic Vill. Inc., 503 U.S. 30, 36 (1992). The unchanged Article 65(d)(2)(A) thus refutes any notion that Congress intended the changes to Article 66 to apply retroactively. If the new Article 66 applied retroactively to all general and special courts-martial, irrespective of when they occurred, then there would no longer be any such cases "not eligible for direct appeal." Instead, Article 65(d)(2)(A) reveals that Congress must have intended the FY 2023 NDAA amendments only to apply to entries of judgment dated after the NDAA's effective

date.[12] In such a scenario, after 23 December 2022, there would still be some cases "ineligible for review" that needed Article 65(d) review.

Examining Article 65(d)(2) and (3) together proves instructive, and an excerpt of Article 65(d) from the Manual for Courts-Martial is included on the next page to assist the Court.

[12] Congress's tying of application of the Article 66 amendments to the date of entry of judgment, which according to R.C.M. 1111(a)(2) "initiates the appellate process," makes sense on every level. Not only does it comport with the plain language of Articles 65 and 66, but it reflects the general rule in other jurisdictions that a "statute creating a right of appeal where one did not exist before does not apply to judgments entered before its enactment." 4 C.J.S. Appeal and Error § 3 (2023); see also, e.g., State v. Boldon, 954 N.W.2d 62, 68 (Iowa 2021) (the statutory right to direct appeal is determined by those laws "in effect at the time the judgment or order appealed from was rendered"); Murphy v. Murphy, 295 Ga. 376, 378, 761 S.E.2d 53 (Ga. 2014) (right to appeal did not arise until judgment was entered—the law regarding appellate procedure in effect at the time of the judgment was the governing law); In re Farmers & Traders Bank of Wrightstown, 244 Wis. 576, 12 N.W.2d 925 (1944) (same).

(d) REVIEW BY JUDGE ADVOCATE GENERAL.—

(1) BY WHOM.—A review conducted under this subsection may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated under regulations prescribed by the Secretary concerned.

(2) REVIEW OF CASES NOT ELIGIBLE FOR DIRECT APPEAL.—

(A) IN GENERAL.—A review under subparagraph (B) shall be completed in each general and special court-martial that is not eligible for direct appeal under paragraph (1) or (3) of section 866(b) of this title (article 66(b)).

(B) SCOPE OF REVIEW.—A review referred to in subparagraph (A) shall include a written decision providing each of the following:

(i) A conclusion as to whether the court had jurisdiction over the accused and the offense.

(ii) A conclusion as to whether the charge and specification stated an offense.

(iii) A conclusion as to whether the sentence was within the limits prescribed as a matter of law.

(iv) A response to each allegation of error made in writing by the accused.

(3) REVIEW WHEN DIRECT APPEAL IS WAIVED, WITHDRAWN, OR NOT FILED.—

(A) IN GENERAL.—A review under subparagraph (B) shall be completed in each general and special court-martial if—

(i) the accused waives the right to appeal or withdraws appeal under section 861 of this title (article 61); or

(ii) the accused does not file a timely appeal in a case eligible for direct appeal under subparagraph (A), (B), or (C) of section 866(b)(1) of this title (article 66(b)(1)).

Article 65(d)(2)(A)'s language "each general and special court-martial that is not eligible for direct appeal under paragraph (1) or (3) of [Article 66(b)]" cannot be understood to refer to any other category of cases other than those with EOJs dated *before* 23 December 2022.

- It does not apply to servicemembers who already submitted matters under Article 66, UCMJ before 23 December 2022, because those appellants were, by definition, eligible for direct appeal under Article 66(b)(1) or (3).

- It does not apply to servicemembers who waived, withdrew, or failed to timely file a direct appeal because those appellants are already addressed in Article 65(d)(3), and such an interpretation would render Article 65(d)(2) superfluous.

- While it might apply to cases where a servicemember already applied for review under Article 69 before 23 December 2022 or whose one-year timeframe for seeking Article 69 review had already expired, it cannot apply *only* to those cases, for the reasons described in the next paragraph.

Article 65(d)(2)(A)-(B) require that cases "not eligible for direct review" under Article 66 receive an Article 65 review. By definition, as of 23 December 2022, a general or special court-martial then being reviewed under Article 69 (or whose time for seeking review under Article 69 had expired) had already received Article 65 review. *See e.g.* Article 69(b) (2021) (to be eligible for Article 69 review, a servicemember must submit his application within a year of Article 65 review). If Article 65(d)(2)(A) only applies to such cases already submitted for Article 69 review, and every other non-waived case is now "eligible for direct review," then there would be no reason for Article 65(d)(2)(A) to direct new Article 65 reviews. Yet Article 65(d)(2) still directs that Article 65 review will occur in some non-waived cases.

Simply put, in its interpretation of the UCMJ after the FY 2023 NDAA amendments, this Court must account for the continuing existence of Article 65(d)(2)(A) and (B) and must interpret them in a way that does not render them surplusage. To do so, this Court must again conclude that Congress contemplated that after 23 December 2022, there would still be a category of cases ineligible for Article 66 direct review that needed future Article 65 review. Cases with entries of judgment rendered before 23 December 2022 fit that bill,[13] and therefore this Court must conclude that Congress intended the FY 2023 NDAA amendments to Article 66 to apply only to cases with entries of judgment after 23 December 2022. Appellant, who has an entry of judgment dated 13 April 2022 is therefore ineligible for Article 66 review.

The President's implementation of Article 65 in R.C.M. 1201(a) in the new 2023 and 2024 Manuals For Courts-Martial reinforces this conclusion. R.C.M. 1201(a)(1) (2023, 2024

[13] For example, a general court-martial with an entry of judgment dated 21 December 2022 would not be eligible for Article 66 review and would have still needed to receive Article 65 review at the time the FY 2023 NDAA went into effect on 23 December 2022. Congress's maintenance of Article 65(d)(A)-(B) in its current form accounts for such a scenario.

eds.) still directs Article 65 review for general and special courts-martial "not eligible for appellate review by a Court of Criminal Appeals under Article 66(b)(1) or (3)." Again, there would have been no need for the President to maintain this language in the 2023 and 2024 Manuals if there were not some cases remaining after the FY 2023 NDAA amendments that were still ineligible for CCA review and needed Article 65 review.

Since the plain language of the UCMJ reveals that the Article 66 amendments do not apply retroactively to provide Article 66 review to all special and general court-martial convictions, this Court need not even apply the general presumption against retroactivity described in Landgraf, 511 U.S. at 280. In determining retroactivity, "[w]here congressional intent is clear, it governs." Kaiser Aluminum & Chem. Corp., 494 U.S. at 838. *See also* Mathews v. Kidder, Peabody & Co., 161 F.3d 156, 161 (3d Cir. 1998) ("we must use normal statutory construction rules to determine if Congress manifested an intent to only apply a statute to future cases. . .if we find an intent to not apply a statute retrospectively, our inquiry is done"). Congressional election to maintain Article 65(d)(2)(A) in existing form evidences "clear congressional intent" that some general and special courts-martial – those like Appellant's with entries of judgments before 23 December 2022 – remain ineligible for direct appeal. Congressional intent governs, and this Court has no jurisdiction to review Appellant's case.

e. According to the new R.C.M. 1201, Appellant was entitled to Article 69 review under the new version of the rule after the FY 2023 NDAA.

The FY 2023 NDAA raises questions about to what extent and under what rules a servicemember with an entry of judgment before 23 December 2022 (who has not previously applied) is entitled to Article 69 review. Although R.C.M. 1201(a)(1) (2023, 2024 ed.) confirms that such servicemembers are still not entitled to Article 66 review and receive Article 65 review

instead, Article R.C.M. 1201(h)(1)(B) contemplates prospective TJAG Article 69 review of these cases under the post-FY 2023 NDAA Article 69 rules. R.C.M. 1201(h)(1)(B) and (h)(4)(A) allow TJAG to send these cases to the CCA for review "on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence." These provisions cannot apply to servicemembers who already applied for Article 69 review before 23 December 2022 and are grandfathered in under the prior version of Article 69, *see* FY 2023 NDAA, Section 544(d)(1) and (2), because under the old rule, TJAG could have "set aside the findings or sentence in whole or in part." Nor can the provisions apply to servicemembers who waived Article 66 review, because those individuals are covered by R.C.M. 1201(h)(4)(B). These provisions can only apply to servicemembers who remained ineligible for Article 66 review after 23 December 2022 and chose to exercise their Article 69 rights after that date.

If R.C.M. 1201(h) accurately captures Congress's intent, the unchanged Article 65 and old 66 rules apply to cases with EOJs before 23 December 2022, but now the new Article 69 rules apply to such cases. Such a delineation makes sense and is in keeping with the Supreme Court's retroactivity principles. Since the EOJ "initiates the appellate process," *see* R.C.M. 1111(a)(2), cases with EOJs before 23 December 2022 had already begun the appellate process when the FY 2023 NDAA went into effect. Congress likely wanted those cases to continue appellate review under the same rules until they reached finality, which Congress reflected by keeping Article 65 in its preexisting form.

In contrast, as already explained, Article 69 is a collateral, ancillary review outside of direct appellate review. If servicemembers with pre-23 December 2022 EOJs who finished direct appellate review were still prospectively eligible for collateral Article 69 review, Congress likely

thought the new version of Article 69 should apply. *See* Landgraf, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of *prospective* relief, application of the new provision is not retroactive") (emphasis added). In other words, the FY 2023 NDAA amendments to Article 66 do not apply retroactively to cases with EOJs before 23 December 2022 because Congress indicated otherwise through Article 65, and retroactivity principles say congressional intent governs.[14] Kaiser Aluminum & Chem. Corp., 494 U.S. at 838. But the amendments to Article 69 *do* apply to such cases because Congress was silent as to their applicability, and changing a servicemember's ability to seek prospective relief is not a retroactive application of a new law. Landgraf supports this interpretation, since, in that case, the Supreme Court refused to assume that Congress intended for all provisions of an amendatory Act to be treated alike with respect to prospective or retrospective application. 511 U.S. at 260-61 n. 12. Likewise, here, there is no reason for this Court to conclude that Congress intended for the amendments to Articles 66 and 69 to apply in exactly the same manner to cases with EOJs before 23 December 2022.

f. The two exceptions to application of the FY 2023 NDAA amendments in Section 544(d) of the Act do not imply that Congress intended the amendments to apply to all situations not expressly excluded.

Sections 544(d)(1) and (2) of the FY 2023 NDAA contain two caveats about how the amendments to Articles 61, 66, and 69 will be applied: those amendments do not apply (1) to matters already submitted to a CCA before the enactment of the NDAA or (2) to matters already submitted to the Judge Advocate General under Article 69, UCMJ before the enactment of the NDAA. One might question what purpose the 544(d)(1) caveat serves if, as the United States argues, the FY 2023 NDAA amendments to Article 66 already do not apply to cases with EOJs

[14] Not to mention that Congress could not have retroactively reopened cases that had completed final review under Article 65 before 23 December 2022 because that would have raised constitutional concerns. *See* Section b. above.

before 23 December 2022. After all, any case that falls into that category would have an EOJ dated before 23 December 2022. But these caveats are not mere surplusage. Since courts have, in the past, applied statutory changes to "pending" cases, *see* Landgraf, 511 U.S. at 264, Congress may have found it necessary to specify that the FY 2023 NDAA amendments do not apply to cases already pending at the CCA.[15] Because no similar general rule applies to cases like Appellant's where an appeal is already "final" and not "pending," Congress likewise may have found it unnecessary or redundant to state that the amendments did not apply to those cases. In other words, Congress may have thought it already obvious that the amendments would not apply to cases that had already reached "finality."

Further, as recognized by the President in R.C.M. 1201(h), the new Article 69 rules apply to servicemembers who were eligible, but had not yet applied for Article 69 review before 23 December 2022. Congress therefore needed to memorialize its intention for the old Article 69 rules to apply to cases pending Article 69 review at the time of the FY 2023 NDAA's enactment.

Since there are other plausible reasons for Congress to have highlighted those caveats in the NDAA, this Court should not jump to the unsupported conclusion that the caveats were intended to reflect the amendments' retroactive application to *all* cases not expressly excluded. Such reasoning fails to account for Congress's indication, through maintaining Article 65, that the amendments also do not apply to some other category of non-waived general and special courts-

[15] The Section 544(d)(1) caveat confirms that for cases already sent to a CCA for review under Article 69(d), the CCA may still only act with respect to matters of law, and those servicemembers continue not to be entitled to military appellate defense counsel. Article 69(d)-(e)(2021). Under the new amendments, all servicemember with an EOJ with a finding of guilty who apply for direct review would be entitled to both factual and legal sufficiency review and military appellate defense counsel. Article 66(b)(2)(A)(i)(2023); Article 66(b)(1),(d)(1)(2023). Per Section 544(d)(2), servicemembers whose cases reached the CCA through Article 69(d) before 23 December 2022 are not entitled to these new rules.

martial. (*See* Section d. above). And such a conclusion would require this Court to read retroactivity language into the NDAA that simply is not there.

The Supreme Court and other federal courts have similarly declined to use this type of negative inference to find clear congressional intent to apply a statute retroactively. *See* Landgraf, 511 U.S. at. 257-61; Mathews, 161 F.3d at 167; Scott v. Boos, 215 F.3d 940, 948 (9th Cir. 2000). In Landgraf, the Supreme Court refused to apply the canon of "*expressio unius est exclusio alterius*"[16] to an amendatory Act with similarities in structure to the FY 2023 NDAA. 511 U.S. at 259. The Civil Rights Act at issue in Landgraf stated that, except as otherwise specifically provided, the Act's amendments would take effect upon enactment. Id. at 257. Two other sections of the Act specified that the Act's amendments would not apply to certain categories of cases: (1) cases where a disparate impact complaint had already been filed and an initial decision had been rendered before certain dates; and (2) cases where the conduct of American citizens working abroad occurred before the date of enactment of the Act. Id. at 258. The Supreme Court declined to conclude that "because Congress provided specifically for prospectivity in two places," the Court should infer that Congress intended the rest of the statute to apply retroactively. Id. at 259. It found that Congress could have had other reasons for highlighting the two scenarios where the Act would apply prospectively. Id. at 260-61. The Court also expressed doubt that Congress would choose "a surprisingly indirect route to convey an important and easily expressed message concerning the Act's effect on pending cases."[17] Id. at 262. In the end, the Supreme Court did not

[16] "The inclusion of one thing is the exclusion of others." *See* United States v. Mooney, 77 M.J. 252, 257 (C.A.A.F. 2018).

[17] As the Third and Ninth Circuits similarly observed in Mathews and Scott, respectively, given the strong presumption against retroactivity, "it would be strange indeed if Congress had used a silent negative inference to indicate that the [] amendments should be applied retrospectively." Mathews, 161 F.3d at 168-69; Scott, 215 F.3d at 948.

read either caveat "as doing anything more than definitively rejecting retroactivity with respect to the specific matters covered by its plain language." Id. at 261 n.12.

The same logic should apply here. Just because Congress denoted certain circumstances where the FY 2023 NDAA amendments do not apply retroactively to pending cases does not support the negative inference that Congress therefore intended the amendments to apply retroactively to all circumstances not specified. As described above, Congress could have had other reasons for highlighting the Section 544(d) caveats. And if Congress had wanted to apply the Article 66 amendments retroactively to cases already having received EOJs but pending Article 65 review, it could have easily said so. Accordingly, this Court should follow the Supreme Court's lead and view the Section 544(d) caveats as doing nothing more than "definitively rejecting retroactivity with respect to the matters covered by its plain language." Landgraf, 511 U.S. at 261 n.12. The caveats do not overcome the plain language of Article 65(d) or the presumption against retroactivity and do not support that the FY 2023 NDAA Article 66 amendments apply retrospectively to Appellant's case.

In the end, constitutional separation of powers concerns militate against this Court reading the FY 2023 NDAA Article 66 amendments to retroactively reopen Appellant's already final court-martial conviction for a new direct appellate review. But this Court need not reach that constitutional question, because the plain language of the post-23 December 2022 UCMJ – Article 65(d)(2) in particular – already reveals that Congress intended the amendments to apply only to cases with entries of judgment dated on or after 23 December 2022. Under either reasoning, the FY 2023 NDAA amendments to Article 66, UCMJ do not govern Appellant's court-martial. Under the prior version of Article 66, this Court has no jurisdiction to review Appellant's direct appeal.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Court dismiss Appellant's direct appeal.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 January 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) **JESSA M. BARTOLOME,** United States Air Force, *Appellant.*	**RESPONSE TO GOVERNMENT'S MOTION FOR LEAVE TO FILE MOTION TO DISMISS AND MOTION TO DISMISS** Before Panel No. 2 No. ACM 22045 7 February 2024

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

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, Appellant, Senior Airman (SrA) Jessa M. Bartolome, responds to the Government's Motion for Leave to File Motion to Dismiss and Motion to Dismiss, filed on 31 January 2024. SrA Bartolome does not oppose the Motion for Leave to File Motion to Dismiss on procedural grounds but requests this Honorable Court deny the Motion to Dismiss on the merits.

STATEMENT OF THE CASE

For the purpose of this response, SrA Bartolome accepts the Government's statement of the case in part. Motion for Leave to File Motion to Dismiss and Motion to Dismiss, 31 January 2024 (MTD), 3–4. However, several pertinent dates are missing, and are provided here.

On 29 August 2023, a paralegal from the Government Trial and Appellate Operations Division requested the Trial Judiciary prepare a verbatim transcript for this case, and the government did not assert any jurisdictional defects at that time. *See* Motion to Attach and Suspend Rule 18, 12 September 2023, Appendix. On 15 September 2023, the Government indicated it did not oppose SrA Bartolome's Motion to Attach and Suspend Rule 18 and asserted no jurisdictional defects. United States' Response to Appellant's Motion to Attach and Suspend Rule 18, 15 September 2023. The Court granted SrA Bartolome's motion and ordered the

Government to produce a verbatim transcript not later than 21 November 2023. Order, Motion to Attach and Suspend Rule 18, 20 September 2023, 2. In the ensuing months, the Government filed four requests for extensions of this deadline, some framed as motions to amend the Court's order while others were presented as motions for enlargements of time. United States' Motion for Leave to File for Court to Amend Order – Out of Time, 16 November 2023; United States' Motion for Leave to File for Court to Amend Order (Second), 14 December 2023; United States' Motion for Enlargement of Time (First) Out of Time, 22 December 2023; United States' Motion for Enlargement of Time (Second) Out of Time, 22 January 2024. None of these filings raised any jurisdictional issues. *Id.* The Government ultimately provided the verbatim transcript on 26 January 2024, two days after SrA Bartolome asked this Court to sanction the government for failing to comply with the Court's orders. United States' Motion to Attach Document Out of Time, 26 January 2024; Motion for Leave to File Motion for Sanctions and Motion for Sanctions, 24 January 2024. The first assertion of any jurisdictional defect came on 31 January 2024 when the Government filed the motion now before the Court. MTD.

This Court analyzed similar arguments presented by the Government and issued an order denying the Government's motion to dismiss for lack of jurisdiction in other, similar cases, including one on 7 September 2023. Order, *United States v. Boren*, No. ACM 40296, dated 7 September 2023 (*Boren* Order). The Government acknowledges this in its motion but claims Executive Order 14103, dated 28 July 2023, provides cause to revisit this jurisdictional issue. MTD at n.1. It claims that the changes to the Rules for Courts-martial (R.C.M.) in this executive order support its position that this Court lacks jurisdiction in this case. *Id.* Annex 1, where the changes to the R.C.M. are incorporated into the *Manual for Courts Martial*, was effective on 28 July 2023, although already legislated with the National Defense Authorization Act (NDAA) in December of 2022. Exec. Order 14103, 88 Fed. Reg. 50,535 (28 July 2023). Additionally,

Executive Order 14103 specifically provides that nothing in Annex 1 "shall be construed to invalidate any…trial in which arraignment occurred, or other action begun prior to the date of this order…and…other action may proceed in the same manner and with the same effect as if the Annex 1 amendments had not been prescribed." *Id*.

LAW AND ANALYSIS

1. The 2023 NDAA does not bar this Court from hearing SrA Bartolome's appeal despite the completion of an Article 65(d) review of his[1] case.

To summarize the Government's argument, the 2023 NDAA's jurisdictional changes apply only to cases that are not administratively final, and the Government's decision to review SrA Bartolome's case under Article 65(d) cuts off the broad jurisdiction granted under the 2023 NDAA. MTD at 11-12. Since the Government sought to review SrA Bartolome's case under Article 65 in June 2022, it argues the obvious broadening of those cases eligible for direct appeal under the 2023 NDAA could not apply to his case because of that prior action by the Government. However, as this Court outlined in the Order for *United States v. Boren*, the trigger for jurisdiction *is not* based on action or inaction by the Government, but is set forth within the NDAA itself. *Boren* Order at 8. Section 544 of the NDAA, states that the jurisdictional amendments shall not apply to:

> (1) any matter that was submitted before the date of the enactment of [the NDAA] to a Court of Criminal Appeals . . . ; or
>
> (2) any matter that was submitted before the date of the enactment of this Act to a Judge Advocate General [(TJAG)] under [Article 69, UCMJ].

136 Stat. 2583-84. Neither of these provisions apply to SrA Bartolome. As of the date of the enactment of the NDAA, he had neither submitted an appeal to a Court of Criminal

1

Appeals (CCA), nor had he submitted any matter to TJAG under Article 69, UCMJ. The Government does not contest those facts.

As to the finality of SrA Bartolome's case given the prior Article 65(d) review, this Court has already reviewed that issue in *United States v. Boren*, No. ACM 40296, and rejected the finality argument as it relates to the Article 65(d) review. *Boren* Order at 8–9. This Court found that the two scenarios Congress excluded from the broadened jurisdiction of this Court do not hinge on prior appellate review under Article 65(d). *Id.* at 6, 9. Rather, the provisions to exclude cases from review from this expanded jurisdiction are explicitly stated in the statute and do not apply in this case. Because SrA Bartolome could have still sought further post-trial review and relief from TJAG or this Court under Article 69, his case "was not final in the sense of having exhausted his access to the CCA, which is what Congress has expanded in the FY23 NDAA." *Boren* Order, 8.

2. Executive Order 14103 does not change the UCMJ Articles at issue or make the Government's arguments more persuasive.

The Government's expressed basis for reasserting these arguments is the Presidential implementation of these legislative changes by Executive Order 14103 in July of 2023. MTD, n.1. Notably, changes to the Executive Order in Annex 1 were effective only as of 28 July 2023 and did not alter the version of Article 65 in effect after the enactment of the 2023 NDAA. This timeline also means the Amendment to the R.C.M. in this executive order had been effective for over a month when this Court issued its order in *Boren* on 7 September 2023. *See Boren* Order. Further, nothing in those changes invalidate any proceedings which were then already begun. Exec. Order 14103, 88 Fed. Reg. 50,535 (28 July 2023). Since the changes, or lack thereof, to the R.C.M. by executive order merely implement the changes to the UCMJ and do not change the statutes, this Court should not allow the Government's observations about this executive order

to sway it from its previous holdings on these arguments. *See Boren* Order.

The Government is wrong when it argues the lack of any changes to Article 65 must mean that, in cases where such review is complete, review is precluded by this Court. MTD at 2–3. It is also wrong that SrA Bartolome's case and others like his, who had either an EOJ prior to the 2023 NDAA date or prior Article 65(d) review are those cases contemplated by Article 65 as "cases which are not eligible for direct appeal." MTD at 18–19. Applying the Government's logic—to exclude cases that already had Article 65 review and/or an EOJ prior to the enactment of the 2023 NDAA because Congress intended these cases to be those to which are ineligible for direct appeal, *id.*—ignores the plain text of the statute discussed above and would make Article 65(d)(2) surplusage just with the passage of time. If those were the only cases that were still contemplated, soon no cases would qualify for review under Article 65(d)(2) review, and the surplusage of this subsection would be inevitable.

3. The "retroactive" effect in this case does not raise traditional concerns about retroactivity.

There is a "general rule that when a statute has no effective date, absent a clear direction by Congress to the contrary, it takes effect on the date of its enactment." MTD at 10 (alterations removed) (quoting *Johnson v. United States,* 529 U.S. 694, 702 (2000)). This is a true statement of the rule, but the law at issue in the case at bar is different. Here, Congress has provided two narrow classes of cases to which the statute does not apply, 136 Stat. 2583–84, taking the statute outside the reach of the default rule and accommodating a wide breadth for review by this Court of the many cases that have otherwise not been appealed to this Court or already been reviewed pursuant Article 69.

Moreover, the retroactive application of statutes is nuanced. "While statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple

or mechanical task." *Landgraf v. USI Film Products,* 511 U.S. 244, 268 (1994). As this Court previously observed, *Landgraf* concerned the retroactive creation of new obligations for private parties, not new legislatively mandated requirements for the government. *Id.* at 270; *Boren* Order, 9.

"Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." *Landgraf*, 511 U.S. at 273. As an example, *Landgraf* points out that the Supreme Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. This cuts both ways. Where a statute removes jurisdiction, this strips jurisdiction even for a cause of action that was once properly filed. *Id.* (citing *Bruner v. United States,* 343 U.S. 112, 116–17 (1952)). Conversely, where a statute removes an obstacle to appeal, that action inures to the benefit of pending appeals. *Id.* (citing *Andres v. Charlestone Stone Prods. Co,* 436 U.S. 604, 607–08, n.6 (1978) (case pending appeal received the benefit of a statutory change that removed the amount-in-controversy requirement that otherwise would have barred jurisdiction)). In sum, for statutes altering jurisdiction, the general rule is that they apply to pending cases, and this rule "does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." *Republic Nat'l Bank of Miami v. United States,* 506 U.S. 80, 100–01 (1992) (Thomas, J., concurring) (citing *Bruner,* 343 U.S. at 116–17).

Here, through the enacted statutory text, Congress sought to expand the jurisdiction of the service courts of criminal appeals, thus removing obstacles to a class of individuals who could previously not seek review by an appellate court—those whose cases did not meet the requirements of Article 66(b)(1)(A)-(D). 10 U.S.C. § 866(b) (2021). This expansion should apply to the benefit of those whose cases are still pending. As outlined above in section (1), and articulated by this

Court in the *Boren* Order, there is not "finality" in the sense that Article 65(d) review did not exhaust SrA Bartolome's appellate rights. Given his case was still pending at the implementation of the 2023 NDAA, there is no final exhaustion of these expanded rights by SrA Bartolome, and the precedence to allow for the 'retroactive' application of jurisdictional changes to those cases still pending, the Court has jurisdiction to hear SrA Bartolome's appeal.

4. SrA Bartolome's notice of appeal was timely.

SrA Bartolome received notice of his right to appeal on or after 31 May 2023 and filed his Notice of Direct Appeal timely, within the 90-day period set forth in Article 66(c)(1)(A), on 28 August 2023. Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), 28 August 2023. This Court received the record of trial on 7 September 2023 and issued a notice of docketing on 11 September 2023. Notice of Docketing, 11 September 2023, 1. Article 66(c)(l), UCMJ, 10 U.S.C. § 866(c)(l) (2022), provides that an appeal is timely filed if:

> [F]iled before the later of-
>
> (A) the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under [Article 65(c), UCMJ, 10 U.S.C. § 865(c)]; or
>
> (B) the date set by the Court of Criminal Appeals by rule or order[.]

SrA Bartolome can satisfy either provision. First, he received a notice of his appellate rights after the change in jurisdiction on or after 31 May 2023. Second, the date can be set by rule or order of this Court. While this Court has not updated its Rules in light of the recent statutory change, it has decided to docket this case by means of a docketing order, thus satisfying the second provision for timeliness.

The sudden expansion of jurisdiction has unsettled expectations for appellate proceedings and may result in fewer cases not eligible for direct appeal that are reviewed under Article 65(d). However, the expansion of Article 66 for direct appeals by an accused does not otherwise render

Article 65(d) surplusage.

To resolve this jurisdictional issue, there are three potential courses of action, two proposed by the Government and one undertaken by this Court already. First, as the Government now advocates, the Government would be able to curtail this Court's jurisdiction by completion of the appellate review process under Article 65(d) without any corresponding section in the NDAA to support such a limit to the Congressional expansion of the service courts of criminal appeals' jurisdiction. As this Court noted in the *Boren* Order, the service's court of criminal appeals jurisdiction is not controlled by the Government's action or inaction on a case (neither by providing the notice of right to direct appeal, nor by completing Article 65(d) review).

The second course of action is to draw a firm line based on the EOJ date and bar all pending cases with EOJs dated before that date from appellate review, presumably with the option of reaching this Court through TJAG review. This approach is inconsistent with the language Congress used in the 2023 NDAA to exclude certain cases and violates the general rule on retroactive application of statutes that alter jurisdiction.

This Court should (and already has by docketing this case) adopt the third option and allow cases still in the potential appellate pipeline on 23 December 2022 to take advantage of the statutory expansion of jurisdiction. Such a course of action harmonizes with case law, the language of the 2023 NDAA, and the reason why Congress made the change in the first place: to expand the reach of this Court's appellate jurisdiction.

WHEREFORE, SrA Bartolome respectfully requests this Honorable Court deny the Government's motion to dismiss.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 February 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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Air Force Appellate Defense Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO WITHDRAW FROM APPELLATE REVIEW AND MOTION TO ATTACH**
v.	)	Before Panel No. 2
Senior Airman (E-4) **JESSA M. BARTOLOME,** United States Air Force, *Appellant.*	)	No. ACM 22045
	)	16 July 2024

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

Pursuant to Rule 16 of this Honorable Court's Rules of Practice and Procedure, and Rule for Courts-Martial (R.C.M.) 1115, Appellant, Senior Airman Jessa M. Bartolome, hereby moves to withdraw his case from appellate review. Appellant has fully consulted with Major Frederick Johnson, his appellate defense counsel, regarding this motion to withdraw. No person has compelled, coerced, or induced Appellant by force, promises of clemency, or otherwise to withdraw his case from appellate review.

Further, pursuant to Rules 23(b) and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant asks this Court to attach the six-page document appended to this pleading to Appellant's Record of Trial. The document is Appellant's completed Department of Defense Form 2330, *Waiver/Withdrawal of Appellate Rights in General and Special Courts-Martial Subject to Review by a Court of Criminal Appeals*, to include the entry of judgment referenced in the top line of the form, and is therefore necessary to comply with R.C.M. 1115(d) and Rule l6.1 of this Honorable Court's Rules of Practice and Procedure.

WHEREFORE, this Honorable Court should grant this motion to withdraw from appellate review and attach the requested document to the record.

Respectfully submitted,

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

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 16 July 2024.

Respectfully submitted,

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