IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Airman First Class (A1C) **ADJANI K. DAUGHMA** United States Air Force *Appellant*	)	No. ACM 40385 16 January 2023

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for the 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 **29 March 2023**. The record of trial was docketed with this Court on 29 November 2022. From the date of docketing to the present date, 48 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

ALEXANDRA K. FLESZAR, 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 Appellate Government Division on 16 January 2023.

Respectfully submitted,

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

18 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40385 Panel No. 1

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.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
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 18 January 2023.

OLIVIA B. HOFF, 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*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 1
Airman First Class (A1C) **ADJANI K. DAUGHMA** United States Air Force *Appellant*	)	No. ACM 40385 22 March 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 April 2023**. The record of trial was docketed with this Court on 29 November 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 4 April and 27 June – 1 July 2022, at Luke Air Force Base (AFB), Arizona, Appellant was tried and convicted by a General Court-Martial of panel members. Consistent with his pleas, of one charge and two specifications of wrongful use of various substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). Contrary to his pleas, Appellant was convicted of one charge and four specifications of sexual assault and abusive sexual contact, in violation of Article 120, UCMJ and one charge and specification of breach of restriction, in violation of Article 87b, UMCJ. Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Airman Adjani K. Daughma*, dated 4 Nov 22.

The military judge sentenced Appellant to confinement for five years,[1] forfeiture of all pay and allowances, reduction to the grade of E-1, and dishonorable discharge. *Id.* The convening authority took no action on the findings or sentence. R. at Vol. 1, Convening Authority Decision on Action – *United States v. A1C Adjani Daughma*, dated 23 Oct 22.

The record of trial consists of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the record is 841 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

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

[1] Appellant received 163 days of credit for pretrial confinement. *Id.*

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 22 March 2023.

Respectfully submitted,

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

23 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40385 Panel No. 1

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.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
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 23 March 2023.

OLIVIA B. HOFF, 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*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
Airman First Class (A1C) **ADJANI K. DAUGHMA** United States Air Force *Appellant*	)	No. ACM 40385 17 April 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **28 May 2023**. The record of trial was docketed with this Court on 29 November 2022. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

On 4 April and 27 June – 1 July 2022, at Luke Air Force Base (AFB), Arizona, Appellant was tried and convicted by a General Court-Martial of panel members. Consistent with his pleas, of one charge and two specifications of wrongful use of various substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). Contrary to his pleas, Appellant was convicted of one charge and four specifications of sexual assault and abusive sexual contact, in violation of Article 120, UCMJ and one charge and specification of breach of restriction, in violation of Article 87b, UMCJ. Record (R.) at Vol. 1, Entry of Judgment in the Case of *United States v. Airman Adjani K. Daughma*, dated 4 Nov 22.

The military judge sentenced Appellant to confinement for five years,[1] forfeiture of all pay and allowances, reduction to the grade of E-1, and dishonorable discharge. *Id.* The convening authority took no action on the findings or sentence. R. at Vol. 1, Convening Authority Decision on Action – *United States v. A1C Adjani Daughma*, dated 23 Oct 22.

The record of trial consists of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the record is 841 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

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

[1] Appellant received 163 days of credit for pretrial confinement. *Id.*

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 April 2023.

Respectfully submitted,

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

18 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40385 Panel No. 1

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.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
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 18 April 2023.

OLIVIA B. HOFF, 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	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FOURTH)**
	)	
v.	)	Before Panel No. 1
	)	
Airman First Class (A1C)	)	No. ACM 40385
ADJANI K. DAUGHMA	)	
United States Air Force	)	18 May 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 June 2023**. The record of trial was docketed with this Court on 29 November 2022. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 4 April and 27 June – 1 July 2022, at Luke Air Force Base (AFB), Arizona, Appellant was tried and convicted by a General Court-Martial composed of officer and enlisted members. Record (R.) at 28. Consistent with his pleas, Appellant was convicted of one charge and two specifications of wrongful use of controlled substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). R. at 162, 197. Contrary to his pleas, Appellant was convicted of one charge and two specifications of sexual assault and two specifications of abusive sexual contact, both in violation of Article 120, UCMJ, and one charge and one specification of breach of restriction, in violation of Article 87b, UCMJ. R. at 162, 800. The panel also acquitted Appellant of two specifications of abusive sexual contact, in violation of Article 120, UCMJ, and

one charge and one specification of obstruction of justice, in violation of Article 131b, UCMJ. R. at 800.

The military judge sentenced Appellant to confinement for five years,[1] forfeiture of all pay and allowances, reduction to the grade of E-1, and dishonorable discharge. The convening authority took no action on the findings or sentence. Record of Trial (ROT) Vol. 1, Convening Authority Decision on Action – *United States v. A1C Adjani Daughma*, dated 23 Oct 22.

The record of trial consists of 18 prosecution exhibits, five defense exhibits, 64 appellate exhibits, and one court exhibit; the record is 841 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Through no fault of Appellant's, Maj Fleszar has been working on other assigned matters and has not yet started review of Appellant's case. Maj Fleszar will be commencing terminal leave on and will be unable to complete review of the case prior to terminal leave. Maj Bosner has just been assigned as new counsel for Appellant, and has similarly not yet started review of Appellant's case.

Counsel is currently assigned 20 cases; 8 cases are pending initial AOEs before this Court. Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet started review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to review Appellant's case and advise Appellant regarding potential errors. Five cases have priority over the present case:

1. *United States v. Leipart*, ACM 39711/Misc. Dkt. No. 2021-03: The appellant's supplement to the petition for grant of review is due to the Court of Appeals for the Armed Forces on 22 May 2023.

[1] Appellant received 163 days of credit for pretrial confinement. *Id*.

2. *United States v. Gause-Radke*, ACM 40343: The record of trial consists of eight volumes. The transcript is 1,167 pages. There are 14 Prosecution Exhibits, two Defense Exhibits, 42 Appellate Exhibits, and four Court Exhibits. Maj Bosner is completing the Brief on Behalf of Appellant.
3. *United States v. McLeod*, ACM 40374: The record of trial consists of eight volumes. The transcript is 533 pages. There are 43 Prosecution Exhibits, two Defense Exhibits, and 38 Appellate Exhibits. Maj Bosner is reviewing the record.
4. *United States v. Daddario*, ACM 40351: The record of trial consists of three volumes. The transcript is 77 pages. There are four Prosecution Exhibits, no Defense Exhibits, and five Appellate Exhibits. Maj Bosner is reviewing the record.
5. *United States v. Smith*, ACM 40202: The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces on 29 June 2023.

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

Respectfully submitted,

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

DAVID L. BOSNER, 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 18 May 2023.

Respectfully submitted,

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

19 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40385 Panel No. 1

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.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
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 19 May 2023.

OLIVIA B. HOFF, 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,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
Airman First Class (A1C), **ADJANI K. DAUGHMA,** United States Air Force, *Appellant.*	)	No. ACM 40385
	)	20 June 2023

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **27 July 2023**. The record of trial was docketed with this Court on 29 November 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 4 April and 27 June – 1 July 2022, Appellant was tried and convicted by a general court-martial composed of officer and enlisted members at Luke Air Force Base (AFB), Arizona. Record (R.) at 28. Consistent with his pleas, Appellant was convicted of one charge and two specifications of wrongful use of controlled substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). R. at 162, 197. Contrary to his pleas, Appellant was convicted of one charge and two specifications of sexual assault and two specifications of abusive sexual contact, both in violation of Article 120, UCMJ, and one charge and one specification of breach of restriction, in violation of Article 87b, UCMJ. R. at 162, 800. The panel also acquitted Appellant of two specifications of abusive sexual contact, in violation of Article 120, UCMJ, and

one charge and one specification of obstruction of justice, in violation of Article 131b, UCMJ. R. at 800.

The military judge sentenced Appellant to confinement for five years,[1] forfeiture of all pay and allowances, reduction to the grade of E-1, and dishonorable discharge. The convening authority took no action on the findings or sentence. Record of Trial (ROT) Vol. 1, Convening Authority Decision on Action – *United States v. A1C Adjani Daughma*, dated 23 Oct 22.

The record of trial consists of 18 Prosecution Exhibits, five Defense Exhibits, 64 Appellate Exhibits, and one Court Exhibit. The transcript is 841 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Counsel is currently assigned 34 cases; 13 cases are pending initial AOEs before this Court. Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet completed review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to review Appellant's case and advise Appellant regarding potential errors. Five cases have priority over the present case:

1. *United States v. Smith*, ACM 40202: The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces on 29 June 2023.
2. *United States v. McLeod*, ACM 40374: The record of trial consists of eight volumes. The transcript is 533 pages. There are 43 Prosecution Exhibits, two Defense Exhibits, and 38 Appellate Exhibits. Counsel is reviewing the record.
3. *United States v. Gause-Radke*, ACM 40343: Counsel filed the Brief on Behalf of Appellant on 7 June 2023 and expect to reply in July 2023.

[1] Appellant received 163 days of credit for pretrial confinement. *Id*.

4. *United States v. Daddario*, ACM 40351: Counsel filed the Brief on Behalf of Appellant on 7 June 2023 and expect to reply in July 2023.

5. *United States v. Hernandez*, ACM 40287: The appellant's petition for grant of review is due to the Court of Appeals for the Armed Forces on 13 August 2023.

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

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 20 June 2023.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

21 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40385 Panel No. 1

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.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
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 2023.

OLIVIA B. HOFF, 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 40385**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adjani K. DAUGHMA	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 20 June 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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

Accordingly, it is by the court on this 22d day of June, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **27 July 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Airman First Class (A1C), **ADJANI K. DAUGHMA,** United States Air Force, *Appellant.*	)	No. ACM 40385
	)	19 July 2023

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **26 August 2023**. The record of trial was docketed with this Court on 29 November 2022. From the date of docketing to the present date, 232 days have elapsed. On the date requested, 270 days will have elapsed.

On 4 April and 27 June – 1 July 2022, Appellant was tried and convicted by a general court-martial composed of officer and enlisted members at Luke Air Force Base (AFB), Arizona. Record (R.) at 28. Consistent with his pleas, Appellant was convicted of one charge and two specifications of wrongful use of controlled substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). R. at 162, 197. Contrary to his pleas, Appellant was convicted of one charge and two specifications of sexual assault and two specifications of abusive sexual contact, both in violation of Article 120, UCMJ, and one charge and one specification of breach of restriction, in violation of Article 87b, UCMJ. R. at 162, 800. The panel also acquitted Appellant of two specifications of abusive sexual contact, in violation of Article 120, UCMJ, and

one charge and one specification of obstruction of justice, in violation of Article 131b, UCMJ. R. at 800.

The military judge sentenced Appellant to confinement for five years,[1] forfeiture of all pay and allowances, reduction to the grade of E-1, and dishonorable discharge. The convening authority took no action on the findings or sentence. Record of Trial (ROT) Vol. 1, Convening Authority Decision on Action – *United States v. A1C Adjani Daughma*, dated 23 Oct 22.

The record of trial consists of 18 Prosecution Exhibits, five Defense Exhibits, 64 Appellate Exhibits, and one Court Exhibit. The transcript is 841 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Counsel is currently assigned 38 cases; 18 cases are pending initial AOEs before this Court. Through no fault of Appellant's, undersigned counsel has been working on other assigned matters and has not yet completed review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to review Appellant's case and advise Appellant regarding potential errors. Four cases have priority over the present case:

1. *United States v. Martinez*, ACM 39973: After the CAAF's decision in *United States v. Anderson*, __ M.J. __, 2023 CAAF LEXIS 439 (C.A.A.F. 29 Jun. 2023), counsel is preparing a consolidated petition for a writ of certiorari to file at the Supreme Court of the United States.
2. *United States v. Thompson*, ACM 40019 (rem): The appellant's supplement to the petition for grant of review is due to the CAAF on 2 August 2023.
3. *United States v. Daddario*, ACM 40351: Counsel will draft a reply brief for this Court in August 2023.

[1] Appellant received 163 days of credit for pretrial confinement. *Id*.

4. *United States v. Nestor*, ACM 40250: The appellant's petition for grant of review is due to the CAAF on 29 August 2023.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 19 July 2023.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

20 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40385 Panel No. 1

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 July 2023.

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,*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 1
Airman First Class (A1C), **ADJANI K. DAUGHMA,** United States Air Force, *Appellant.*	)	No. ACM 40385
	)	17 August 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 September 2023**. The record of trial was docketed with this Court on 29 November 2022. From the date of docketing to the present date, 261 days have elapsed. On the date requested, 300 days will have elapsed.

On 4 April and 27 June – 1 July 2022, Appellant was tried and convicted by a general court-martial at Luke Air Force Base, Arizona. R. at 1, 197, 800. Consistent with his pleas, Appellant was convicted by a military judge of one charge and two specifications of wrongful use of controlled substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). R. at 162, 197. Contrary to his pleas, Appellant was convicted by officer and enlisted members of one charge and two specifications of sexual assault and two specifications of abusive sexual contact, both in violation of Article 120, UCMJ, and one charge and one specification of breach of restriction, in violation of Article 87b, UCMJ. R. at 162, 800. The panel also acquitted Appellant of two specifications of abusive sexual contact, in violation of Article 120, UCMJ, and

one charge and one specification of obstruction of justice, in violation of Article 131b, UCMJ. R. at 800.

The military judge sentenced Appellant to confinement for five years,[1] forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. R. at 839. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. A1C Adjani Daughma*, dated 23 October 2022.

The record of trial consists of 18 Prosecution Exhibits, five Defense Exhibits, 64 Appellate Exhibits, and one Court Exhibit. The transcript is 841 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Counsel is currently assigned 14 cases; 9 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. One case before this Court has priority over this case:

1) *United States v. Stelly*, ACM 40425 – The record of trial is four volumes consisting of three prosecution exhibits, five defense exhibits, and 10 appellate exhibits; the transcript is 109 pages. Undersigned counsel is presently reviewing the record of trial.

In addition, undersigned counsel, who was previously assigned as an Area Defense Counsel, is detailed to two general courts-martial. These trials are scheduled for the weeks of 2023 (*United States v. Maj A L*) and 2023 (*United States v. J Q*

[1] Appellant received 163 days of credit due to pretrial confinement. R. at 809

R). Both trials will take priority over the instant case. Finally, undersigned counsel was only recently assigned to the Appellate Defense Division, arriving on station on 26 July 2023.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 August 2023.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

21 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40385 Panel No. 1

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

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

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 August 2023.

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,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 1
Airman First Class (E-3), **ADJANI K. DAUGHMA,** United States Air Force, *Appellant.*	)	No. ACM 40385 22 August 2023

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Captain Trevor Ward has been detailed substitute counsel in undersigned counsel's stead and filed a pleading on Appellant's behalf on 17 August 2023. A thorough turnover of the record between counsel has been completed. The undersigned counsel will be departing from the Air Force Appellate Defense Division and beginning a new assignment on

Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

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

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 22 August 2023.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 1
Airman First Class (A1C), **ADJANI K. DAUGHMA,** United States Air Force, *Appellant.*	)	No. ACM 40385
	)	18 September 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **25 October 2023**. The record of trial was docketed with this Court on 29 November 2022. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 4 April and 27 June – 1 July 2022, Appellant was tried and convicted by a general court-martial at Luke Air Force Base, Arizona. R. at 1, 197, 800. Consistent with his pleas, Appellant was convicted by a military judge of one charge and two specifications of wrongful use of controlled substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). R. at 162, 197. Contrary to his pleas, Appellant was convicted by officer and enlisted members of one charge and two specifications of sexual assault and two specifications of abusive sexual contact, both in violation of Article 120, UCMJ, and one charge and one specification of breach of restriction, in violation of Article 87b, UCMJ. R. at 162, 800. The panel also acquitted Appellant of two specifications of abusive sexual contact, in violation of Article 120, UCMJ, and

one charge and one specification of obstruction of justice, in violation of Article 131b, UCMJ. R. at 800.

The military judge sentenced Appellant to confinement for five years,[1] forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. R. at 839. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. A1C Adjani Daughma*, dated 23 October 2022. Appellant is currently confined.

The record of trial consists of 18 Prosecution Exhibits, five Defense Exhibits, 64 Appellate Exhibits, and one Court Exhibit. The transcript is 841 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Counsel is currently assigned 15 cases; 12 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

One case before the Court of Appeals for the Armed Forces has priority over this case: *United States v. Smith*. On 6 September 2023, C.A.A.F. granted on one issue. In accordance with C.A.A.F.'s order, Appellant's initial brief is due on 6 October 2023. In addition, two cases before this Court have priority over the instant case:

1) *United States v. Knodel*, 40018 – The record of trial is seven volumes consisting of 18 prosecution exhibits, 62 defense exhibits, 24 appellate exhibits, and one court exhibit; the transcript is 727 pages. The *Dubay* record of trial is an additional seven volumes

[1] Appellant received 163 days of credit due to pretrial confinement. R. at 809

consisting of 48 appellate exhibits; the transcript is 1,475 pages. Undersigned counsel has completed his review of the *Dubay* transcript.

2) *United States v. Stelly*, ACM 40425 – The record of trial is four volumes consisting of three prosecution exhibits, five defense exhibits, and 10 appellate exhibits; the transcript is 109 pages. Undersigned counsel has completed his review of the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 18 September 2023.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

18 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40385 Panel No. 1

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 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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 18 September 2023.

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,*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 1
Airman First Class (A1C), **ADJANI K. DAUGHMA,** United States Air Force, *Appellant.*	)	No. ACM 40385
	)	18 October 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his ninth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 November 2023**. The record of trial was docketed with this Court on 29 November 2022. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed.

On 4 April and 27 June – 1 July 2022, Appellant was tried and convicted by a general court-martial at Luke Air Force Base, Arizona. R. at 1, 197, 800. Consistent with his pleas, Appellant was convicted by a military judge of one charge and two specifications of wrongful use of controlled substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). R. at 162, 197. Contrary to his pleas, Appellant was convicted by officer and enlisted members of one charge and two specifications of sexual assault and two specifications of abusive sexual contact, both in violation of Article 120, UCMJ, and one charge and one specification of breach of restriction, in violation of Article 87b, UCMJ. R. at 162, 800. The panel also acquitted Appellant of two specifications of abusive sexual contact, in violation of Article 120, UCMJ, and

one charge and one specification of obstruction of justice, in violation of Article 131b, UCMJ. R. at 800.

The military judge sentenced Appellant to confinement for five years,[1] forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. R. at 839. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. A1C Adjani Daughma*, dated 23 October 2022. Appellant is currently confined.

The record of trial consists of 18 Prosecution Exhibits, five Defense Exhibits, 64 Appellate Exhibits, and one Court Exhibit. The transcript is 841 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Counsel is currently assigned 18 cases; 13 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

Two cases before the Court of Appeals for the Armed Forces has priority over this case: (1) *United States v. Smith* and (2) *United States v. Robles*. On 5 October 2023, undersigned counsel submitted the initial brief to CAAF for *United States v. Smith*. On 13 October 2023, undersigned counsel submitted the petition for *United States v. Robles*. Undersigned counsel is presently working on the supplement to that petition. No case before this Court has priority over this case.

[1] Appellant received 163 days of credit due to pretrial confinement. R. at 809

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 18 October 2023.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

18 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40385 Panel No. 1

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 a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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 18 October 2023.

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* v. Airman First Class (A1C) **ADJANI K. DAUGHMA**, United States Air Force *Appellant*	**CONSENT MOTION TO EXAMINE SEALED MATERIALS** Before Panel No. 1 No. ACM 40385 18 October 2023

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

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

1) Transcript pages 134-55. These transcriptions are of closed sessions litigating issues related to Mil. R. Evid. 412, were attended by trial and defense counsel, and were ordered sealed by the military judge. R. at 133.
2) Prosecution exhibits 2-13 and 16. These exhibits are evidence admitted to the trier of fact for the Government's findings case. They were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 226, 228-31, 243, 510.
3) Defense exhibits B-C. These exhibits are evidence admitted to the trier of fact for the Defense's findings case. They were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 516, 518.
4) Appellate Exhibit XIX, attachments 1-3. These attachments were part of the Government's response to Appellate Exhibit XVIII (a Defense Motion for Appropriate

Relief—Unreasonable Multiplication of Charges). They were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 36.

5) Appellate Exhibits XX, XXI, XXII, and XXIII. These exhibits were motions, related evidence, and a ruling under Mil. R. Evid. 412. These matters were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 37.

6) Appellate Exhibit XXXVII and LX. These exhibits were the trail counsel's opening power point presentation and trial defense counsel's closing power point presentation, respectively. These matters were reviewed by trial and defense counsel and ordered sealed by the military judge. R. at 807.

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

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

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v.*

> *Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

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

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

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

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 18 October 2023.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40385**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adjani K. DAUGHMA	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 18 October 2023, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Prosecution Exhibits 2–13 and 16; Defense Exhibits B–C; Attachments 1–3 of Appellate Exhibit XIX and Appellate Exhibits XX, XXI, XXII, XXIII, XXXVII, and LX; and transcript pages 134–55. The exhibits were reviewed by both trial and defense counsel at Appellant's court-martial.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.).

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

Accordingly, it is by the court on this 30th day of October, 2023,

ORDERED:

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

Appellate defense counsel and appellate government counsel may examine **Prosecution Exhibits 2–13 and 16**; **Defense Exhibits B–C**; **Attachments 1–3 of Appellate Exhibit XIX** and **Appellate Exhibits XX, XXI, XXII, XXIII, XXXVII, and LX**; and **transcript pages 134–55**; subject to the following conditions:

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

No counsel granted access to the materials may photocopy, photograph, re-

produce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 1
Airman First Class (A1C), **ADJANI K. DAUGHMA,** United States Air Force, *Appellant.*	)	No. ACM 40385
	)	17 November 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his tenth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 December 2023**. The record of trial was docketed with this Court on 29 November 2022. From the date of docketing to the present date, 353 days have elapsed. On the date requested, 390 days will have elapsed.

On 4 April and 27 June – 1 July 2022, Appellant was tried and convicted by a general court-martial at Luke Air Force Base, Arizona. R. at 1, 197, 800. Consistent with his pleas, Appellant was convicted by a military judge of one charge and two specifications of wrongful use of controlled substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). R. at 162, 197. Contrary to his pleas, Appellant was convicted by officer and enlisted members of one charge and two specifications of sexual assault and two specifications of abusive sexual contact, both in violation of Article 120, UCMJ, and one charge and one specification of breach of restriction, in violation of Article 87b, UCMJ. R. at 162, 800. The panel also acquitted Appellant of two specifications of abusive sexual contact, in violation of Article 120, UCMJ, and

one charge and one specification of obstruction of justice, in violation of Article 131b, UCMJ. R. at 800.

The military judge sentenced Appellant to confinement for five years,[1] forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. R. at 839. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. A1C Adjani Daughma*, dated 23 October 2022. Appellant is currently confined.

The record of trial consists of 18 Prosecution Exhibits, five Defense Exhibits, 64 Appellate Exhibits, and one Court Exhibit. The transcript is 841 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Counsel is currently assigned 18 cases; 14 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

Since the filing of Appellant's last Motion for an Enlargement of Time (Ninth), two cases before the Court of Appeals for the Armed Forces (CAAF) have taken priority over this case: (1) *United States v. Smith* and (2) *United States v. Robles*. On 6 November 2023, undersigned counsel filed the Supplement to Petition for Grant of Review for *United States v. Robles* with CAAF. Yesterday, 16 November 2023, undersigned counsel filed the Reply Brief for *United States v. Smith* with CAAF. No case before this Court has priority over the instant case.

[1] Appellant received 163 days of credit due to pretrial confinement. R. at 809

In addition, undersigned counsel has made progress in this case. On 18 October 2023, undersigned counsel submitted a Consent Motion to Examine Sealed Materials, which was granted on 30 October 2023. Undersigned counsel has reviewed the unsealed transcript and exhibits and has begun legal research on several identified issues.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 November 2023.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

20 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40385 Panel No. 1

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 over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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 20 November 2023.

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 40385**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adjani K. DAUGHMA	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 17 November 2023 counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) 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 22d day of November, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **24 December 2023**.

Appellant's counsel is advised that given the number of enlargements granted thus far, the court will continue to closely examine any further requests for an enlargement of time regardless of changing counsel.

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,*	)	**MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	Before Panel No. 1
Airman First Class (A1C), **ADJANI K. DAUGHMA,** United States Air Force, *Appellant.*	)	No. ACM 40385
	)	15 December 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eleventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 January 2024**. The record of trial was docketed with this Court on 29 November 2022. From the date of docketing to the present date, 381 days have elapsed. On the date requested, 420 days will have elapsed.

On 4 April and 27 June – 1 July 2022, Appellant was tried and convicted by a general court-martial at Luke Air Force Base, Arizona. R. at 1, 197, 800. Consistent with his pleas, Appellant was convicted by a military judge of one charge and two specifications of wrongful use of controlled substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). R. at 162, 197. Contrary to his pleas, Appellant was convicted by officer and enlisted members of one charge and two specifications of sexual assault and two specifications of abusive sexual contact, both in violation of Article 120, UCMJ, and one charge and one specification of breach of restriction, in violation of Article 87b, UCMJ. R. at 162, 800. The panel also acquitted Appellant of two specifications of abusive sexual contact, in violation of Article 120, UCMJ, and

one charge and one specification of obstruction of justice, in violation of Article 131b, UCMJ. R. at 800.

The military judge sentenced Appellant to confinement for five years,[1] forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. R. at 839. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. A1C Adjani Daughma*, dated 23 October 2022.

The record of trial consists of 18 Prosecution Exhibits, five Defense Exhibits, 64 Appellate Exhibits, and one Court Exhibit. The transcript is 841 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Counsel is currently assigned 18 cases; 14 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

One case before the Court of Appeals for the Armed Forces (CAAF) takes priority over this case: *United States v. Smith*. Oral argument for that case is scheduled for 16 January 2024, and undersigned counsel is currently preparing for that argument. No case before this Court takes priority over the instant case. Undersigned counsel has made progress in this case. Undersigned counsel has completed a reviewed of the unsealed transcript and exhibits and has begun legal research on several identified issues. In addition, undersigned counsel reviewed the sealed

[1] Appellant received 163 days of credit due to pretrial confinement. R. at 809

materials on 13 December 2023. From that review, undersigned counsel has identified additional potential errors that will require research.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 December 2023.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

19 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40385 Panel No. 1

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 over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 420 days in length. Appellant's over a year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 4 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
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 19 December 2023.

JOCELYN Q. WRIGHT, 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,*	)	**MOTION FOR ENLARGEMENT OF TIME (TWELFTH)**
v.	)	Before Panel No. 1
Airman First Class (A1C), **ADJANI K. DAUGHMA,** United States Air Force, *Appellant.*	)	No. ACM 40385
	)	16 January 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his twelfth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 15 days, which will end on **7 February 2024**. The record of trial was docketed with this Court on 29 November 2022. From the date of docketing to the present date, 413 days have elapsed. On the date requested, 435 days will have elapsed.

On 4 April and 27 June – 1 July 2022, Appellant was tried and convicted by a general court-martial at Luke Air Force Base, Arizona. R. at 1, 197, 800. Consistent with his pleas, Appellant was convicted by a military judge of one charge and two specifications of wrongful use of controlled substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). R. at 162, 197. Contrary to his pleas, Appellant was convicted by officer and enlisted members of one charge and two specifications of sexual assault and two specifications of abusive sexual contact, both in violation of Article 120, UCMJ, and one charge and one specification of breach of restriction, in violation of Article 87b, UCMJ. R. at 162, 800. The panel also acquitted Appellant of two specifications of abusive sexual contact, in violation of Article 120, UCMJ, and

one charge and one specification of obstruction of justice, in violation of Article 131b, UCMJ. R. at 800.

The military judge sentenced Appellant to confinement for five years,[1] forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. R. at 839. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. A1C Adjani Daughma*, dated 23 October 2022. Appellant is currently confined.

The record of trial consists of 18 Prosecution Exhibits, five Defense Exhibits, 64 Appellate Exhibits, and one Court Exhibit. The transcript is 841 pages. Appellant is confined, understands his right to speedy appellate review, and consents to this request for enlargement of time.

Counsel is currently assigned 18 cases; 14 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

One case before the Court of Appeals for the Armed Forces (CAAF) takes priority over this case: *United States v. Smith*. Oral argument for this case was originally scheduled for today, 16 January 2024. Due to inclement weather, that argument was postponed until 24 January 2024; undersigned counsel will continue preparing for that argument. No case before this Court takes priority over the instant case. Moreover, undersigned counsel has made significant progress in this case. Undersigned counsel has completed a review of the unsealed and sealed transcript and exhibits. Additionally, undersigned counsel has identified several potential issues, conducted legal research, and has begun drafting assignment of errors.

[1] Appellant received 163 days of credit due to pretrial confinement. R. at 809.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 January 2024.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

18 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40385 Panel No. 1

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 over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 450 days in length. Appellant's year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed over two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 3 months combined for the United States and this Court to perform their separate statutory responsibilities.

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 18 January 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,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Airman First Class (E-3) **ADJANI K. DAUGHMA,** United States Air Force *Appellant*	)	No. ACM 40385 7 February 2024

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

ASSIGNMENTS OF ERROR

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING, OVER DEFENSE OBJECTION, EVIDENCE THAT WAS OBTAINED WITHOUT THE VOLUNTARY CONSENT OF A1C DAUGHMA?

II.

WHETHER NUMEROUS ERRORS IN THE RECORD OF TRIAL REQUIRES SENTENCING RELIEF OR REMAND FOR CORRECTION?

STATEMENT OF THE CASE

On 4 April and 27 June – 1 July 2022, Airman First Class (A1C) Adjani K. Daughma, Appellant, was tried and convicted by a general court-martial at Luke Air Force Base, Arizona. R. at 1, 197, 800. A military judge convicted A1C Daughma, consistent with his pleas, of two specifications of wrongful use of controlled substances, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a.[1] R. at 162, 197. Contrary to his pleas, a panel

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

of officer and enlisted members convicted A1C Daughma of two specifications of sexual assault and two specifications of abusive sexual contact, both in violation of Article 120, UCMJ, 10 U.S.C. §920, and one charge and one specification of breach of restriction, in violation of Article 87b, UCMJ, 10 U.S.C. § 887b. R. at 162, 800.

The military judge sentenced A1C Daughma to confinement for five years,[2] forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. R. at 839. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. A1C Adjani Daughma*, dated 23 October 2022.

STATEMENT OF FACTS

Initial Investigation and Search Authorization

On 4 March 2021, OS reported to the Air Force Office of Special Investigations (AFOSI), where he was interviewed. Appellate Exhibit XXXVII at 1. During that interview, OS alleged that he was sexually assaulted by A1C Daughma, and that he had exchanged electronic messages with A1C Daughma sometime after the assault. *Id*. Following this interview, AFOSI obtained a search authorization to seize and search A1C Daughma's phone for "text messages, Facebook Messenger messages, Snapchat messages, and any other communications (1) between [OS] and A1C [] Daughma . . . and (2) all communications related to the alleged Article 120 incident." *Id.* at 2.

OSI Interview and Consent Search

AFOSI agents interviewed A1C Daughma on 16 March 2021. *Id*. After being read his rights, A1C Daughma agreed to talk with the agents. *Id*. During the discussion, AFOSI agents requested that A1C Daughma open his phone and look at his electronic messages to determine

[2] A1C Daughma received 163 days of credit due to pretrial confinement. R. at 809

who he had messaged during the time of the alleged assault. *Id*. A1C Daughma agreed, unlocked the phone with facial recognition, and began going through it. *Id*. At this point, AFOSI agents intervened, and informed A1C Daughma they would go through the phone for him. A1C Daughma then withdrew consent because he did not want agents to have control of the phone. *Id*.

AFOSI agents responded:

> There's the prettiest way of doing this, which is by having you help us out and go through this and go through this together, okay? But we have an affidavit to seize your phone okay? So, what we're gonna do now is if you'd like to help us out with this, we'll proceed that way. If not, we do have an affidavit to seize this phone.

Id. After more time had passed, AFOSI agents again told A1C Daughma that: "We have authority to seize your phone, right? Um, like, we don't want anything to happen to it . . . I don't want all of it to suddenly delete your stuff right?" *Id.* at 3.

After making this representation, the agents continued to question A1C Daughma about electronic messages exchanged around the time of the alleged assault. *Id*. During this questioning, the agents—for the third time—told A1C Daughma that they had a "search authorization for [his] phone," and that the search would happen regardless of A1C Daughma's consent. *Id.* at 3-4. The agents reiterated that if A1C Daughma did not provide consent, information on his phone would be destroyed.[3] *Id.* at 3-4. After the agents continued to ask for consent to search A1C Daughma's phone, A1C Daughma eventually agreed that the agents could search messages from Facebook Messenger, but he declined to give consent to search "pictures and other stuff on [his] phone that [he] do not want [searched] . . . at all." *Id.* at 4. The agents were dissatisfied with this limited offer of consent, so they continued to ask A1C Daughma to expand the scope of that consent; A1C

[3] One of the agents later testified that this was a lie. R. at 74.

Daughma responded that "I don't [want] anything other than Facebook [M]essenger [searched], because that's what you guys want."[4] *Id*.

A1C Daughma continued explaining that "I just have a thing about privacy. So if you guys want a specific App, I'm more than willing to do that specific App . . . . But you keep saying you're going to do more and more." *Id.* at 4-5. The agents responded by telling A1C Daughma there was no way for them to limit their search only to messages. *Id.* at 5. When A1C Daughma suggested ways by which the agents could limit their search, at least one of the agents became aggravated, responding "[t]hat's not a thing that we're going to do . . . No . . . Hell no . . . [W]e stand on a high moral ground, right? So, we do respect your privacy, all we're asking for is literally just consent." *Id*.

During the course of the interview, AFOSI agents told A1C Daughma at least four times that they had the authority to search and seize his phone.[5] *Id.* 1-5. During the motion's hearing, SA Hall admitted that he told A1C Daughma about the authorization so that he would understand "that he was going to have to give us his phone . . . so that he was aware that regardless of whether he gave us consent, that we were going to be taking it." R. at 72. Despite referencing the search authorization throughout the four-and-half-hour-long interview,[6] AFOSI agents never informed A1C Daughma about the scope of that authorization. R. at 56. This was contrary to SA H understanding of AFOSI policy, which required SA H to inform A1C Daughma about the scope of the authorization. R. at 55-56.

[4] Interestingly, A1C Daughma was correct in this assertion. The agents' questions concerned only the electronic messages that were the subject of the search authorization. AE XXXVII at 1-5.

[5] When asked why he continued to reference the search authorization during the interview, Special Agent (SA) S H could not provide an answer. R. at 74-75

[6] The doors were locked for the entirety of the interview. R. at 80.

During the motion's hearing, SA H —the lead interviewer—was asked whether he was trained on specific tactics he was prohibited from using to gain consent to search. R. at 63. SA H responded that he could not think of anything specific, other than physically harming a subject or "egregious things." R. at 63.

Eventually, A1C Daughma consented to a search of his phone.

The Fruits of the Consent Search

After obtaining consent to search the entirety of his phone, AFOSI uncovered photos and videos of a sexually graphic nature that, the Government argued at trial, constituted evidence of Charge I, specifications 1-3. R. at 754; Appellate Exhibit XV at 6; Prosecution Exhibits 5-13, 16. Further, as a result of the search, RR was identified as an additional victim, which forms basis of Charge I, specification 4. AE XV at 6. Additionally, electronic messages sent and received concerning illicit drug use were uncovered; these messages initiated a drug investigation, which resulted in Charge II, Specification 1. *Id.* at 6. AE XV at 6.

Additional facts necessary to resolve specific issues are provided below.

ARGUMENT

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING, OVER DEFENSE OBJECTION, EVIDENCE THAT WAS OBTAINED WITHOUT THE VOLUNTARY CONSENT OF A1C DAUGHMA.

Standard of Review

This Court reviews a military judge's ruling on an evidentiary suppression motion for an abuse of discretion. *United States v. Black*, 82 M.J. 447, 451 (C.A.A.F. 2022); *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015); *United States v. Guihama*, 2022 CCA LEXIS 672, at *24 (A.F. Ct. Crim. App. Nov. 18, 2022). "An abuse of discretion occurs when the military judge

either applied the law erroneously or clearly erred in making findings of fact." *Black*, 82 M.J. at 451.

Law

1. Consent-Based Searches

The Fourth Amendment protects against unreasonable searches and seizures. U.S. CONST. amend. IV. Warrantless searches are "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). One of those exceptions is a search conducted with consent of the subject. *Olson*, 74 M.J. at 134 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). When the Government relies upon consent to justify a search, they have the burden of showing that the consent was freely and voluntarily given. *Schneckloth*, 412 U.S. at 222; *Olson*, 74 M.J. at 134; Mil. R. Evid. 314(e)(5) ("The [Government] must prove consent by clear and convincing evidence."). If the consent-based search was derived from express or implied coercion, then the search was not lawful under the Fourth Amendment. *Olson*, 74 M.J. at 134 (citing *Schneckloth*, 412 U.S. at 227).

While a military judge's decision to exclude evidence is reviewed for an abuse of discretion, "[t]he voluntariness of a confession is a question of law that [courts] review de novo."[7] *United States v. Lewis*, 78 M.J. 447, 453 (C.A.A.F. 2019); *United States v. Huchel*, 2003 CCA LEXIS 152, at *6 (A.F. Ct. Crim. App. June 16, 2003). "The test for voluntariness is whether the consent was Appellant's own 'essentially free and unconstrained choice,' or was [his] will overborn and [his] 'capacity and self-determination critically impaired.'" *Olson*, 74 M.J. at 134 (quoting *United States v. Watson*, 423 U.S. 411, 424 (1976)). Ultimately, the voluntariness of

[7] Although voluntariness is assessed *de novo*, the Court of Appeals for the Armed Forces (C.A.A.F.) reviews evidence of voluntariness in "the light most favorable to the prevailing party at trial." *United States v. Piren*, 74 M.J. 24, 28 (C.A.A.F. 2015).

consent "turns on whether an accused's 'will has been overborne.'" *Lewis*, 78 M.J. at 453 (quoting *Schneckloth*, 412 U.S. at 225).

Courts assess voluntariness against "the totality of the circumstances." *United States v. Wright*, 52 M.J. 136, 142 (C.A.A.F. 1999) (quoting *Schneckloth*, 412 U.S. at 227). "Although recognizing that voluntariness is determined from the totality of the circumstances, [the C.A.A.F.] has focused on six nonexclusive factors to assist in analyzing the voluntariness to search." *Olson*, 74 M.J. at 134. These non-exhaustive factors, sometimes referred to as *Wallace* factors, *id*. at 135 (citing *United States v. Wallace*, 66 M.J. 5 (C.A.A.F. 2008)), are:

> (1) the degree to which the suspect's liberty was restricted; (2) the presence of coercion or intimidation; (3) the suspect's awareness of his right to refuse [to consent] based on inferences of the suspect's age, intelligence, and other relevant factors; (4) the suspect's mental state at the time of consent; (5) the suspect's consultation, or lack thereof, with counsel; and (6) the coercive effects of any prior violations of the suspect's rights.

Id. at 134-35 (quoting *Wallace*, 66 M.J. at 9).

Notwithstanding the *Wallace* factors, the Supreme Court has held that consent obtained from a misrepresentation about a warrant to search a subject's property is "instinct with coercion." *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968). And, "[w]here there is coercion there cannot be consent." *Id*. at 550. Rather, "[i]n such a case, the purported consent is mere acquiescence to authority," and does not constitute a lawfully obtained consent to search. *United States v. Richter*, 51 M.J. 213, 221 (C.A.A.F. 1999). This Court, too, has recognized that consent cannot be voluntarily given after law enforcement officers misrepresent the scope of their lawful authority to search. *Huchel*, 2003 CCA LEXIS 152, at *6-7 (citing *Bumper*, 391 U.S. at 548-49) (reasoning that when law enforcement officials misrepresent their authority to search, it leads the subject to acquiesce to authority, and that such acquiescence is not voluntary consent). After all, "mere submission to the color of authority . . . is not consent." Mil. R. Evid. 314(e)(4).

Misrepresenting the scope of a lawful authority to search is distinct from informing a suspect of some future possibility that law enforcement may obtain such lawful authority. *Wright*, 52 M.J. at 142 ("The statement, 'seek a warrant,' is not coercion in and of itself."). The C.A.A.F. has said that there "is a significant difference" between misrepresenting an officer's lawful authority to search (as in *Bumper*), and merely stating that lawful authority may be obtained at some future time. *Id*.

Similarly, the Court of Military Appeals (C.M.A.) resolved several cases involving coercive consent. In *United States v. White*, a commander threatened his subordinate that if they did not consent to a urinalysis, he would simply order one. 27 M.J. 264, 266-67 (C.M.A. 1988). In that case, the C.M.A. concluded that the commander's representation was coercive because he falsely claimed he had authority to order the subject to a urinalysis; this eroded the subject's voluntary consent. *Id*. In another case, the C.M.A. reasoned that *Bumper* applies when law enforcement informs a subject that an alerting dog provided probable cause to search. *United States v. Middleton*, 10 M.J. 123, 134 (C.M.A. 1981).

In *United States v. Cady*, the appellant was given a choice: (1) consent to the search; or (2) be searched.[8] 22 U.S.C.M.A. 408, 409 n.3 (C.M.A. 1973) (citing *Bumper*, 391 U.S. at 548-49). The C.M.A. reasoned that this dichotomy was equivalent to the false choice offered in *Bumper*. *Id*. at 409. And, as such, "it is . . . doubtful whether the appellant's consent was freely and voluntarily given." *Id*. at 409 n.3.

2. Exclusionary Rule

[8] The searcher told appellant that he had probable cause to conduct a search regardless of their consent. *Cady*, 22 U.S.C.M.A. at 409.

"Evidence derivative of an unlawful search, seizure, or interrogation, is commonly referred to as the 'fruit of the poisonous tree' and is generally not admissible at trial." *United States v. Darnell*, 76 M.J. 326, 331 (C.A.A.F. 2017); *see also Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible."). The Supreme Court has clarified that only evidence tainted by the illegality falls within the fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Courts consider several factors when determining whether evidence is tainted by the illegality: (1) the temporal proximity between the illegal act and the obtained evidence; (2) any intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *Darnall*, 76 M.J. at 331 (citing *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)).

The Supreme Court has recognized that application of the exclusionary rule is not required in every case. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring v. United States*, 555 U.S. 135, 144 (2009).

> [T]hese competing principles can be distilled to two key factors . . . (a) "When [law enforcement officers] exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights [or] the case involve[s] recurring or systemic negligence" on the part of law enforcement, the deterrent value of exclusion is strong and tends to outweigh the resulting costs," but (b) "when [law enforcement officers] act with an objectively reasonable good faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force."

United States v. Lattin, 83 M.J. 192, 201 (C.A.A.F. 2023) (Ohlson, C.J., dissenting) (quoting *Davis v. United States*, 464 U.S. 229, 237 (2011)) (cleaned up). These competing principles of the exclusionary rule are codified in the military rules of evidence, which provides that evidence should be excluded when it "results in appreciable deterrence of future unlawful searches or

seizures and the benefits of such deterrence outweigh the costs to the justice system." *See Lattin*, 83 M.J. at 197 (quoting Mil. R. Evid. 311(a)(3)).

In *Lattin*, the C.A.A.F. assessed whether the exclusionary rule should apply when the search authorization obtained by law enforcement was overbroad. *Id*. at 196. A three-judge majority of the C.A.A.F. concluded that, while they may not agree with the trial judge's ruling *de novo*, they could not find that the judge's failure to exclude the evidence was "clearly unreasonable." *Id*. at 199. This is because there was only the possibility of "some future deterrence" to law enforcement and the cost to the justice system was high.[9] *Id*. Even though the cost of exclusion was high, two judges dissented, arguing that exclusion would deter not only the law enforcement officers in that particular case, but others involved in criminal investigations across the Air Force. *Id*. at 201 (Ohlson, C.J., dissenting). Notably, the dissenting judges articulated that, while there was some cost to the justice system, appellant was convicted of other specifications that would be unaffected by the suppression. *Id*. at 204.

Analysis

The military judge abused his discretion when he failed to suppress the evidence derived from a coercively obtained consent-based search. A1C Daughma did not voluntarily consent to a search of his phone because AFOSI agents used coercion to obtain that consent. The voluntariness of a consent-based search is reviewed *de novo*. Here, the totality of the circumstances, taken together with the *Wallace* factors, *Bumper*, and their progeny, demonstrate that there was no voluntary consent in this case. Accordingly, the military judge should have suppressed the evidence.

[9] The cost was high because excluding the evidence and its fruits meant that the named victim would be unable to testify, and the whole sum of evidence proving appellant's guilt would be inadmissible. *Lattin*, 83 M.J. at 199.

1. A1C Daughma did not voluntarily consent to a search of his phone.

The invalid "consent" obtained by the Government to search A1C Daughma's phone was the product of unlawful coercion by AFOSI. The voluntariness of a consent to search is a question of law reviewed *de novo*. *Lewis*, 78 M.J. at 453. The totality of the circumstances in this case demonstrates that AFOSI agents coerced A1C Daughma into providing consent for two main reasons. First, while the military judge correctly summarized the *Wallace* factors, he did not adequately assess the facts as they apply to those factors. Second, the military judge did not afford the correct weight to *Bumper* and its progeny, especially considering the tactics used by AFOSI agents in this case.

a. The *Wallace* factors demonstrate that A1C Daughma did not voluntarily consent to a search of his phone.

While voluntariness is determined from a totality of the circumstances, *Wright*, 52 M.J. at 142, C.A.A.F. has articulated six non-exhaustive factors to assist in analyzing the voluntariness of a consent-based search. *Olson*, 74 M.J. at 134. These non-exhaustive factors are called the *Wallace* factors. *Id*. at 135 (citing *Wallace*, 66 M.J. 5). Despite the military judge's assessment, nearly every *Wallace* factor weighs in favor of A1C Daughma. First, as the military judge noted, A1C Daughma's liberty was restricted because he was in a locked room with investigators for several hours. AE XXXVII at 11. Despite this, the military judge concluded that the restriction was "minimal" because A1C Daughma was aware of his Article 31, UCMJ, rights. *Id*. But, being read one's rights does not inform on the first *Wallace* factor; if anything, it informs on the sixth factor (coercive effects of any prior violations of rights). *Olson*, 74 M.J. at 135. To be sure, the military judge cited no caselaw to support his conclusion that a rights advisement means that the effect of a restriction on liberty is "minimal." On the contrary, C.A.A.F. has routinely limited its review of "restrictions on liberty" to the actual physical limitations imposed on a subject. *See, e.g.*, *Olson*,

74 M.J. at 134-35 (assessing factors such as being placed in a locked room, handcuffed, or otherwise physically restrained). As the military judge noted, A1C Daughma was physically restrained to the interview room for four-and-a-half hours and, as such, his liberty was restricted. This factor weighs against the voluntariness of the consent.

Second, there is ample evidence of coercion and intimidation during the interview. The interview lasted more than four hours before consent was obtained. AE XXXVII at 8. Crucially, during the interview, the AFOSI agents engaged in *per se* coercive conduct by misrepresenting the scope of their search authorization, which will be discussed further in Part 1.b., below. During that same time, AFOSI agents made repeated demands of A1C Daughma to provide consent, even though A1C Daughma consistently declined. *Id.* at 2-7 When confronted with A1C Daughma's declination to consent, the agents became agitated, cursing at A1C Daughma and informing him that they had the "high moral ground."[10] *Id.* at 6. At other times, the agents lied to A1C Daughma, telling him that if he didn't consent, information on his phone might be destroyed. *Id.* at 3; R. at 74. As such, and as discussed below in Part 1.b., the agents engaged in coercive tactics during their interview which defies the lawfulness of the consent.

Third, A1C Daughma's age, intelligence, and other factors weigh against the voluntariness of his consent. At the time of the interview, A1C Daughma was only 22 years old and was assigned to his first duty station. AE XXXVII at 8. These factors, combined with the *per se* coercive tactics discussed in Part 1.b. and his diminished mental state discussed below, inform against the voluntariness of consent.

[10] The military judge does not address this, instead making a blanket statement that the agents "maintained a calm demeanor." AE XXXVII at 13.

Fourth, as the military judge recognized, A1C Daughma was suffering from stresses typical for a law enforcement interrogation during the interview. AE XXXVII at 13. These stresses manifested in physically odd ways, to include A1C Daughma staring at a wall in the room opposite his interrogators, staring at the floor, and requesting that the agents turn around and face the wall while they question him. AE XV, attachments 3, 5, 6, 7, and 8; AE V at 2. The behavior exhibited by A1C Daughma during this interview were so odd, in fact, that it was the subject of a defense request for a sanity board. AE V. This strange behavior, combined with the stressors faced by a young Airman being interrogated for several hours, weigh against the voluntary nature of consent.

Fifth, A1C Daughma did not consult with a defense attorney prior to providing consent. AE XXXVII at 13. Therefore, this factor also weighs against the voluntariness of consent.

The sixth *Wallace* factor—the presence of any other rights violations—is not apparent. AE XXXVII at 13. Despite this, every other *Wallace* factor does weigh against the voluntariness of consent. As such, the military judge erred in his conclusion that A1C Daughma's consent to search his phone was voluntary.

b. AFOSI's misrepresentation of their lawful authority to search means that A1C Daughma could not voluntarily consent, regardless of the *Wallace* factors.

Notwithstanding the *Wallace* factors, AFOSI's misrepresentation of the scope of their search authority is fatal to any finding that the consent obtained was voluntary and lawful. The Supreme Court, C.A.A.F., C.M.A., and this Court have reasoned that misrepresenting the scope of a search authorization is an act so coercive that, on its own, it eviscerates the voluntariness of consent. *Bumper*, 391 U.S. at 548-50. (holding that when law enforcement informs a subject that they have a warrant, but they do not, that act amounts to coercion; and "[w]here there is coercion there cannot be consent."); *Richter*, 51 M.J. at 221 (reasoning that consent derived from a misrepresentation of a lawful authority to search is "mere acquiescence to authority."); *Wright*, 52

M.J. at 142 (distinguishing a misrepresentation of a lawful authority to search—which is coercion—and merely informing a subject that some future warrant may issue upon probable cause—which is not coercion); *Huchel*, 2003 CCA LEXIS 152, at *6-7 (reasoning that when law enforcement officials misrepresent their authority to search, it leads the subject to acquiesce to authority and that such acquiescence is not voluntary). This is because when law enforcement misleads a subject about the scope of a warrant, it leads the subject to "acquiesce to authority." *Richter*, 51 M.J. at 22. And, of course, "mere submission to the color of authority . . . is not consent." Mil. R. Evid. 314(e)(4). Consistent with *Bumper*, AFOSI's representation that they had lawful authority to search the entirety of A1C Daughma's phone stands against any notion that his eventual consent was voluntary.

The military judge recognized *Bumper*'s proposition in his summary of applicable law. AE XXXVII at 9. However, he failed to recognize its application by the C.A.A.F., C.M.A. and this Court.[11] Of relevant note, the C.A.A.F. has reasoned that it is *per se* coercive for law enforcement officers to misrepresent to a suspect that they have lawful authority to search property. *Richter*, 51 M.J. at 221 ("[A] search cannot be justified as based on consent where the 'consent' was given only after the official conducting the search has asserted that he has a warrant."). But that's exactly what happened to A1C Daughma. AFOSI agents informed A1C Daughma that they had authority to seize and search his phone. Throughout the interview, A1C Daughma articulated that he was willing to consent to agents searching his electronic messages; but, A1C Daughma also

[11] This was not the first time the military judge incorrectly summarized the law. During the motion's hearing for this suppression issue, the military judge informed counsel that if he excluded the evidence, and the defense presented any evidence from A1C Daughma's phone at trial, the Government would have a right to seize and search A1C Daughma's entire phone. R. at 127-28 ("If you [defense counsel] intended to introduce that on your own, the moment you do, potentially, you open the door . . . Now the government has its own independent basis to go get your client's phone and start looking through the remainder.").

communicated he did not want to give consent for the entirety of his phone, specifically photos and other such information. Despite this specific clarification, AFOSI agents continued to tell A1C Daughma that if he didn't provide consent for the *entire* phone, they were going to seize and search it anyway because they had authorization to do so. This is the kind of tactic that the Supreme Court and the C.A.A.F. have reasoned is *per se* coercive, and weighs decisively against the voluntariness of the consent.

In contrast, however, the military judge characterized AFOSI's tactics as merely being unclear, AE XXXVII at 12, concluding that their representations were not "completely inaccurate." *Id*. But this conclusion ignores the context of the conversation. A1C Daughma was willing to consent to a search of his electronic messages (i.e., those within the scope of the authorization). The agents were unhappy with this limited consent and continued to refer to a search authorization as a method to coerce a consent to search the entire phone. The agents could not have been referring to the already existing search authorization in this context, because A1C Daughma was already providing consent for the items covered in that authorization. At best, the agents were being deliberately obtuse to confuse A1C Daughma into thinking they had a more expansive authorization than they had. At worst they were referring to a fictional search authorization for A1C Daughma's entire phone. Either way, this behavior by the agents constituted *per se* coercion.

In *Cady*, the C.M.A. concluded that when a subject is given a choice between consenting or being searched, the consent derived from that "choice" is not voluntary. 22 U.S.C.M.A. at 409 n.3 (citing *Bumper*, 391 U.S. at 548-49). That is the same choice A1C Daughma was given here. AFOSI agents repeatedly asked for consent to search A1C Daughma's entire phone. When he declined, or insisted that any consent-based search be limited to electronic messages, he was met

with a false choice: consent or be searched. Just like *Bumper* and *Cady*, the agents never informed A1C Daughma about the scope of the search authorization (i.e., that it was limited just to electronic messages). In fact, the context of the interview demonstrates that they were deliberately implying the opposite: that they had authorization to seize and search the entire contents of A1C Daughma's phone. As such, "it is . . . doubtful whether [A1C Daughma's] consent was freely and voluntarily given." *Id*. at 409 n.3.

2. The Exclusionary Rule applies here.

Evidence will be excluded when it "results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system." *See Lattin*, 83 M.J. at 197 (quoting Mil. R. Evid. 311(a)(3)).

In this case, the military judge's decision not to exclude the evidence was clearly unreasonable for two reasons. First, because suppression would result in appreciable deterrence. And, second, because the costs to the justice system are outweighed by the benefits gained from exclusion.

In this case, law enforcement agents acted without due regard to the law by misrepresenting the scope of their lawful authority to search in order to coerce consent from a junior Airman. The agents chose not to inform A1C Daughma of the scope of their authorization—as is their policy to do—with the hope that the threat of a lawful blanket search would incentivize consent. These acts were contrary not only to their internal policies, but blackletter law. Even worse, the agents understood that A1C Daughma would have voluntarily consented to a search within the confines of the existing search authorization. Nevertheless, they pressured A1C Daughma in a locked room for over four hours to give consent anyway. In his assessment, the military judge once again claimed that the agents were not deliberately misleading A1C Daughma, just using inartful

language. AE XXXVII at 14. However, this characterization ignores the context of the conversation, the agents' deliberate decision to conceal the scope of the authorization, and A1C Daughma's repeated objection to any consent other than for electronic messages. Rather, the agents engaged in willful and unlawful deception to coerce A1C Daughma. This fits squarely within the type of misconduct that the exclusionary rule is intended to deter.

Further, the military judge characterized the agents' behavior as "isolated." *Id*. But, this characterization ignores the fact that multiple agencies, and individuals within those agencies, are involved in military sexual assault investigations. And, just as in *Lattin*, exclusion here would deter not only the law enforcement officers involved in the case, but other actors in the military justice system as well. *Lattin*, 83 M.J. at 201 (Ohlson, C.J., dissenting).

Second, the costs to the justice system do not outweigh the benefits of exclusion. "The principle cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free." *Lattin*, 83 M.J. at 204 (Ohlson, C.J., dissenting) (quoting *Herring*, 555 U.S. at 141). But A1C Daughma would not walk free. He has multiple convictions, only some of which are even partially tainted by the evidence subject to suppression. *Cf. id*. Further, unlike *Lattin*, there is untainted evidence in this case that the Government could have relied on to prosecute A1C Daughma, to include OS's testimony, the testimony of other eyewitnesses, and statements made by A1C Daughma.

In concluding his ruling, the military judge stated that "the videos and images at issue are strongly relevant to [] the alleged guilt . . . of [A1C Daughma]. Such direct evidence of charged offenses in sexual assault cases is extremely probative and rarely available." AE XXXVII at 14. He continued, admitting that suppression would put a strain on the Government's prosecution of A1C Daughma *Id*. While the military judge's concerns are laudable, it "is an outgrowth of the

Government's improper conduct and is a cost society must bear under these circumstances." *Lattin*, 83 M.J. at 204 (Ohlson, C.J., dissenting).

WHEREFORE, A1C Daughma respectfully requests this Honorable Court set aside the findings and sentence for Charge I, specifications 1-4, and Charge II, specification 1.

II.

THE NUMEROUS OMISSIONS IN THE RECORD OF TRIAL REQUIRES SENTENCING RELIEF OR REMAND FOR CORRECTION.

Additional Facts

The ROT has the following omissions:

- Prosecution Exhibit 8 – video not playable.
- Prosecution Exhibit 13 – video not playable.
- Prosecution Exhibit 16 – video not playable ("media unavailable").
- Defense Exhibit B – no video, just audio.
- Defense Exhibit C – no video, just audio.
- Appellate Exhibit XX, Attachment 2 – missing.

Standard of Review

Whether a record of trial is incomplete or not substantially verbatim is reviewed *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law and Analysis

The record of trial is "the very heart of the criminal proceedings and the single essential element to meaningful appellate review." *United States v. Credit*, 4 M.J. 118, 119 (C.M.A. 1977). A complete record is required for every court-martial in which the sentence adjudged includes "a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months." Article 54(c)(2), 10 U.S.C. § 854(c)(2). A complete record includes "[e]xhibits . . . and any appellate exhibits." R.C.M. 1112(b)(6).

The threshold question is whether the "omitted material was substantial, either qualitatively or quantitatively." *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014). "Omissions are quantitatively substantial unless the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness." *Id.* (internal punctuation and citations omitted).

A substantial omission in a record of trial raises a presumption of prejudice to an appellant, which the Government must rebut. *Id.* "Moreover, since in military criminal law administration the Government bears responsibility for preparing the record of trial, it is fitting that every inference be drawn against the Government with respect to the existence of prejudice because of an omission." *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981) (internal citation omitted).

By itself, the omission of an attachment to a defense motion, as well as non-playable prosecution and defense exhibits, are substantial omissions from the record. Even on their own, these omissions would be substantial; taken together, they most certainly are. This Court should use its broad remit under Article 66, UCMJ, to provide any sentence relief appropriate for the Government's failure to provide a record of trial within the meaning of R.C.M. 1112. The Government's chronic failure to docket complete records of trial shows no signs of abating.[12]

[12] *See United States v. Blackburn*, No. ACM 40303, 2023 CCA LEXIS 386 (A.F. Ct. Crim. App. Sep. 11, 2023) (remand order); *United States v. Portillos*, No. ACM 40305, 2023 CCA LEXIS 321 (A.F. Ct. Crim. App. Aug. 1, 2023) (remand order); *United States v. Manzano Tarin*, No. ACM S32734, 2023 CCA LEXIS 291 (A.F. Ct. Crim. App. June 27, 2023) (remand order); *United States v. Hubbard*, No. ACM 40339, 2023 CCA LEXIS 263 (A.F. Ct. Crim. App. June 15, 2023) (remand order); *United States v. Simmons*, No. ACM 40462, 2023 CCA LEXIS 236 (A.F. Ct. Crim. App. June 5, 2023) (remand order); *United States v. Gammage*, No. ACM S32731, 2023 CCA LEXIS 240 (A.F. Ct. Crim. App. June 5, 2023) (remand order); *United States v. Goodwater*, No. ACM 40304, 2023 CCA LEXIS 231 (A.F. Ct. Crim. App. May 31, 2023) (remand order); *United States*

Consequences for these repeated failures could correct this problem. However, if this Court disagrees that sentencing relief is warranted, a remand is required to determine whether the exhibits still exist. The absence of these records seriously impedes appellate review for A1C Daughma and this Court.

WHEREFORE, A1C Daughma respectfully requests this Court provide sentencing relief or remand to correct the record. A1C Daughma also demands speedy appellate review.

Respectfully submitted,

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v. Irvin, No. ACM 40311, 2023 CCA LEXIS 201 (A.F. Ct. Crim. App. May 12, 2023) (remand order); *United States v. Valentin-Andino*, 83 M.J. 537, 544 (A.F. Ct. Crim. App. 2023) (remanding because of audio issue); *United States v. Lake*, No. ACM 40168, 2022 CCA LEXIS 706 (A.F. Ct. Crim. App. Dec. 7, 2022) (remand order); *United States v. Fernandez*, No. ACM 40290, 2022 CCA LEXIS 668 (A.F. Ct. Crim. App. Nov. 17, 2022) (remand order); *United States v. Stafford*, No. ACM 40131, 2022 CCA LEXIS 654 (A.F. Ct. Crim. App. Nov. 8, 2022) (remand order); *United States v. Lampkins*, No. ACM 40135, 2020 CCA LEXIS 500 (A.F. Ct. Crim. App. Oct. 25, 2022) (remand order); *United States v. Romero-Alegria*, No. ACM 40199, 2022 CCA LEXIS 558 (A.F. Ct. Crim. App. Sep. 22, 2022) (remand order); *United States v. Payan*, No. ACM 40132, 2022 CCA LEXIS 242 (A.F. Ct. Crim. App. Apr. 28, 2022) (remand order); *United States v. Cooper*, No. ACM 40092, 2022 CCA LEXIS 243 (A.F. Ct. Crim. App. Apr. 28, 2022) (remand order); *United States v. Westcott*, No. ACM 39936, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. Mar. 17, 2022); *United States v. Goldman*, No. ACM 39939, 2022 CCA LEXIS 43 (A.F. Ct. Crim. App. Jan. 20, 2022) (requiring second remand for noncompliance with initial remand order); *United States v. Goldman*, No. ACM 39939 (f rev), 2022 CCA LEXIS 511 (A.F. Ct. Crim. App. Aug. 30, 2022) (remand order); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10 (A.F. Ct. Crim. App. Jan. 6, 2022); *United States v. Daley*, No. ACM 40012, 2022 CCA LEXIS 7 (A.F. Ct. Crim. App. Jan. 5, 2022).

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 Division on 7 February 2024.

Respectfully submitted,

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8 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	ANSWER TO ASSIGNMENTS OF ERROR Panel No. 1 ACM 40385

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING, OVER DEFENSE OBJECTION, EVIDENCE THAT WAS OBTAINED WITHOUT THE VOLUNTARY CONSENT OF A1C DAUGHMA?

II.

WHETHER NUMBEROUS ERRORS IN THE RECORD OF TRIAL REQUIRE SENTENCE RELIEF OR REMAND FOR CORRECTION?

STATEMENT OF THE CASE

As relevant to these assignments of error, Appellant was convicted, contrary to his pleas, of two specifications of sexually assaulting OS, one specification of committing abusive sexual contact against OS, and one specification of committing abusive sexual contact against RR, all under Article 120, UCMJ. Also relevant, consistent with Appellant's pleas, he was convicted of two specifications of wrongful use of a controlled substance (for cocaine and marijuana) under Article 112a. (*Entry of Judgment*, ROT, Vol. 1.) Appellant was sentenced to 5 years of

confinement, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the grade of E-1. (Id.) The convening authority took no action on the findings or sentence. (*Convening Authority Decision on Action*, ROT, Vol. 1.)

STATEMENT OF FACTS

The facts necessary for the disposition of these issues are set forth in the argument sections below.

ARGUMENT

I.

APPELLANT VOLUNTARILY CONSENTED TO THE SEARCH OF HIS PHONE.

Standard of Review

A military judge's "denial of a motion to suppress is reviewed for an abuse of discretion." United States v. Rader, 65 M.J. 30,32 (C.A.A.F. 2007) (citing United States v. Khamsouk, 57 M.J. 282, 286 (C.A.A.F. 2002)). "Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed de novo." Id. "In reviewing a ruling on a motion to suppress, [this Court] considers the evidence 'in the light most favorable to the prevailing party.'" United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996) (quoting United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995)). A military judge's ruling that consent was voluntary should not be disturbed unless it is unsupported by the evidence on the record or is clearly erroneous. United States v. Middleton, 10 M.J. 123, 133 (C.M.A. 1981.)

When reviewing a military judge's decision whether to apply the exclusionary rule under Mil. R. Evid. 311(a)(3), the court asks "whether the military judge's assessment of these matters was a 'clearly unreasonable' exercise of discretion." United States v. Lattin, 83 M.J. 192, 198 (C.A.A.F. 2023)

Statement of Facts

a. Facts related to Appellant's consent to search his phone.

On 4 March 2021, The Air Force Office of Special Investigations (OSI) interviewed OS who accused Appellant of sexually assaulting him. (App. Ex. XXXII at 1.) During the interview, OS told OSI that Appellant had contacted him via Facebook Messenger and SnapChat and tried to apologize about the incident leading to OS's allegations. (Id.) On 15 March 2021, OSI obtained a search authorization to search Appellant's cellular phone for "text messages, Facebook Messenger messages, Snapchat messages, and any other communications (1) between [OS] and [Appellant] between 19 Feb 20 and 16 March 21, and (2) all communications related to the alleged Article 120 incident sent between 19 Feb 20 and 16 March 2021." (Id. at 15.) The search authorization also directed the "disabling of security features" and that Appellant's "biometrics be used to access the phone." (Id.)

The day after obtaining the search authorization, 16 March 2021, OSI interviewed Appellant. (Id.) The OSI agents informed Appellant of his Article 31(b) rights, saying Appellant was suspected of committing sexual assault. (Id.) The rights advisement informed Appellant that he could request a lawyer at any time during the interview and that he could stop the questioning at any time. (App Ex. XV, Attach. 6, 22:34.) Appellant initially invoked his right to counsel. The agents told Appellant that they would take a quick break, that there were still some additional processes to follow before coming back in the room, and that they would come back and grab Appellant. (Id.) But at that point, Appellant reinitiated conversation with the agents because he wanted to hear the questions they were going to ask, but not necessarily answer them. (Id. at 23:50) The agents told Appellant they could not even ask him questions, because he had requested a lawyer. (Id. at 24:00) They told Appellant they would have to re-

read him his Article 31 rights, and Appellant then confirmed he still wanted to talk. (Id. at 24:08.) The agents again informed Appellant of his Article 31(b) rights, telling him that he could request a lawyer at any time during the interview and that he could stop the questioning at any time. (Id. at 24:30.) This time, Appellant agreed to speak with the agents. (Id.)

For ease of reference, the agents' mentions of the search authorization have been numbered in the recitation of facts below.

During the interview, the agents asked to look through Appellant's phone for messages between Appellant and the alleged victim. (App. Ex. XXXII at 2.) Appellant agreed and unlocked his phone using facial recognition. (Id.) When the agents told Appellant they would manipulate the phone for him, Appellant stated, "uh . . . no, we can close the phone then." (Id.)

SA SH then told Appellant:

> There's the [courteous][1] way of doing this which is by having you help us out and go through this and go through this together, okay? **[1] But we do have an affidavit to *seize* your phone, okay**? So what we're going to do now is if you'd like to help us out with this, we'll proceed that way**. [2] If not, we do have an affidavit to *seize* this phone,** which we're gonna end up doing regardless, okay?

(Id. at 2.) (emphasis added).

When Appellant asked why the agents would be seizing his phone regardless, SA SH answered, "Because like I said before, we do have information that there are messages sent between you and this individual, okay? We don't have access to those information, and we're under an impression that it's in your phone." (Id.)

The agents then navigated through the phone with some assistance from Appellant. (Id. at 3.) The agents mentioned that **[3] "we do have authority to seize your phone, right**," and

[1] The military judge's findings of fact capture this word as "prettiest." However, listening to the audio recording from Appellate Exhibit XV, Attach. 7, the word sounds like "courteous." SA SH testified that he believed he said "courteous," not "prettiest." (R. at 90.)

then stated they did not want to suddenly delete any of Appellant's data. (Id.) The agents asked Appellant to disable his passcode to prevent the potential erasure of data. (Id.)

Appellant did not want to leave his phone with the agents completely unlocked because he had personal banking information on the phone. (Id.) Eventually, Appellant created a new passcode to access his phone to share with the agents. (Id.)

A few minutes later, SA SH again brought up the search authorization: "So like we discussed before, um, **[4] we have a search authorization for your phone.** Okay?" (Id.) SA SH said the agents were "proceeding to doing that," but that what they were finding was not matching up with what Appellant had been telling them. (Id.) Appellant denied lying to the agents, and then SA SH said,

> **[5] So we already have search authorization for your phone**, but what we'd like to ask you is if we could just make a copy of the, of the information on the phone, okay, and just basically get your consent to make a copy in the event that some of the information is destroyed, um, unintentionally through the process of how we . . .

(Id. at 3-4.) At that point, the other agent, SA EB, chimed in and told Appellant, "what we're trying to do is we're trying to get the data from your phone just so that we can get you your phone back to you faster than . . ." (Id. at 4.)

Appellant asked if the agents wanted to copy the whole phone. (Id.) When the agents said yes, Appellant denied the request saying, "There's pictures. No." (Id.) Appellant then said "You guys, can have like, just Facebook Messenger. If you can do that, that's perfectly fine, I have no problems. But I have pictures and other stuff on my phone that I don't want copied at any . . . like at all." (Id.) SA SH asked if there was a particular application that Appellant did not want them to access. (Id.) Appellant replied, "I don't want you guys in anything other than Facebook Messenger, because that's what you guys want." (Id.)

SA SH then told Appellant the agents would be going through SnapChat as well. (Id.) Appellant asked why the agents needed SnapChat because he had just tried to show the agents SnapChat and they "didn't want it." SA SH responded, "just so you're aware that's one of the . . . applications we're going to be going through, okay." (Id.) SA SH then said, "Now, like I said, by giving us consent to do this, it's going to speed up the process for you to get your phone back faster, if not then, um it's just going to go through the normal chain of process . . ." (Id.) Appellant stated that he "understood completely" but that he had "a thing about privacy." (Id.) He continued, "So, if you guys want a specific App, I'm more than willing to do that specific App. I have no problems. But, you keep on saying you're going to do more and more . . ." (Id. at 4-5.)

The agents explained that they could not just pick and choose an app to review. (Id. at 5.) Appellant then asked, "Well, could you download it all and I watch you delete everything else other than what you need?" (Id.) SA SH replied that "it just doesn't work like that," and that their program could not "break it up by application." (Id.) The agents told Appellant that they respected his privacy and were not intending to embarrass him. (App. Ex. XV, Attach. 8 at 16:20.)[2] With regard to "embarrassing" Appellant, SA EB said, "Hell no. So you have to understand, we . . . we stand on a high moral ground, right? So we do respect your privacy." (Id.) The agents stated that they wanted to get consent to make a copy of everything contained on the device so they could go through the process faster and get Appellant his phone back faster. (App. Ex. XXXII at 5.) They said although Appellant would not get his phone back that

[2] The military judge's findings of fact do not include the word "embarrass," but SA EB can be heard uttering the word on the video in Attachment 8 to App. Ex. XV at the indicated time stamp. As the military judge said in his ruling, to the extent his written summary of the OSI interview is incomplete, it was unintentional, and "[t]he summary is not meant to indicate any finding of fact contradictory to the contents of the recorded interview." (App. Ex. XXXII at 3. n.2.)

day, it would speed up the process if they made a copy. (Id.) The agents did not agree that they would eventually delete the copy, but they said it would be used for law enforcement purposes only. (Id. at 5-6.)

SA EB then said, ". . .all we're really trying to do is we're trying to help you out to get your phone back faster and then, um, granting us consent. **[6] Because we do have authorization to *seize* your phone.** And you did provide us consent to look at your phone, and et cetera. It's just that, what we're trying, we're trying to help you out. We're trying to get it back to you faster . . ." (Id. at 6.) (emphasis added).

SA EB asked if Appellant was concerned with information on the phone being shared to a larger audience "in which judgment is introduced." (Id. at 6.) Appellant then said:

> I usually don't let my phone out of my hand, so this is just a big decision. I'm just trying to get all of the information . . . if it's just you two and you guys can promise me that like, nothing else is gonna happen from here. You guys are here for one thing and one thing only. You're going to find it or you're not going to find it and that will be it. I will give you consent.

(Id.)

The agents told Appellant they could not make any promises or guarantees, but that the people allowed to see Appellant's phone would be OSI as an organization and possibly the legal team. (Id. at 6-7.) The agents continued to say that nothing would go outside of "the people that need to know" and that "nobody can request to see this information if they don't have authorization to do that." (Id. at 7.) The agents said the information would remain "in-house" "until the investigation is complete," and then the information "gets archived and no one gives a shit anymore at that point." (Id.) At that point, Appellant stated, "I will give consent." (Id.)

The agents then filled out an AF Form 1364, *Consent for Search and Seizure* for Appellant. (Id.) SA EB explained the form to Appellant saying Appellant "was providing

consent to your phone, right, so basically all the information found or stored on iPhone 11 Pro Max." (Id.) The form stated that Appellant had been informed that he was suspected of sexual assault in violation of Article 120, UCMJ and that he had the legal right to consent to the search and seizure or to refuse consent. (Id.) It told Appellant that anything found during the search could be used against him in a criminal trial, and that if he refused consent, search, seizure, copying, and analysis could not be undertaken without a search warrant or authorization. (Id.) The form then stated that Appellant was allowing "All information found or stored" on his phone to be searched, seized, copied and analyzed. (Id.) It also stated, "Before deciding to give my consent, I carefully considered the matter. I am giving my consent voluntarily and of my own free will, without having been subject to coercion, unlawful influence, or unlawful inducement and without any promise of reward, benefit, or immunity having been made to me." (Id. at 8.) Finally, the form said, "I have read and understand this entire acknowledgement of my rights and grant of my consent for search and seizure." (Id.)

Appellant reviewed the form on his own for about 30-40 seconds, and then signed it. (Id. at 7.) At that point, Appellant had been interviewing with OSI for around four and a half hours. (Id. at 8.) Appellant was 22 years old at the time of the interview and had successfully completed Air Force basic training and technical school training. (Id.) His ASVAB scores were: Administrative: 55; Electrical: 64; General: 66; Mechanical: 65. (Id.)

b. The fruits of the initial consent search and the derivative evidence obtained

The initial consent search of Appellant's phone conducted on 16 March 2021 led to discovery of images and video of sexual acts between Appellant and the victim, OS, although the video could not be played. (App. XXVII at 2.) OSI also discovered text messages on the phone between Appellant and "Kelly" discussing the sale of drugs and Appellant's use of drugs. (Id. at

3.) Appellant eventually revoked consent to search his phone on 25 March 2021. (Id.) OSI used the evidence already found during the consent search to get a search authorization on 16 April 2021 to search the entire phone for images and videos related to the sexual assault and communications related to wrongful use and possession of controlled substances. (Id. at 1-5.) A report of the forensic examination of the phone, dated 16 June 2021, "identified 38 artifacts of sexual assault," one of which showed Appellant inserting his penis into OS's mouth. (App. Ex. XV, Attach. 2 at 13.) On Appellant's phone, OSI also discovered text messages about another sexual offense against RR. (Id., Attach. 2 at 3.)

Purportedly on 19 August 2021,[3] a military judge issued an Article 30a warrant for Appellant's Apple iCloud account. (Id. at Attach. 2 at 13; Attachs. 10-11.) On 28 October 2021, search of Appellant's iCloud account revealed five photos and eight videos of Appellant and OS on the night of the alleged sexual assault, several of which depicted them engaged in sexual acts. (Id. at Attach. 2 at 13-14.) Some of the sexual acts appeared to be consensual with OS's active participation, but others appeared to be occurring while OS was asleep or unconscious. (Id.)

c. Litigation of the consent search at trial and the military judge's ruling

At trial, Appellant moved to suppress the evidence uncovered during the consent search of his cell phone as well as the derivative evidence. (App. Ex. XV). During the motions hearing, trial defense counsel clarified that they were seeking to suppress: (1) photos and videos of Appellant and OS retrieved from both the phone and iCloud; (2) text communication between Appellant and RR, another victim identified during the search of the phone; (3) screenshots from the phone of a Cash App funding transfer related to the drug distributing specification; (4) interactions from the phone between Appellant and "Kelly"; (5) any portions of the Department

[3] The version of the order included the defense's motion to suppress is dated 19 August 2021, but appears to be unsigned. (App. Ex. XV, Attach. 11.)

of Defense Cyber Crime Center report related to the digital evidence; and (6) the testimony of RR related to his allegation of abuse sexual contact. (R. at 97 - 102.)

SA SH testified at the motion hearing, so the military judge had the chance to observe his testimony and demeanor. (R. at 41-91.) SA SH testified that he was not trying to trick Appellant into signing the consent form. (R. at 72.) He also testified he did not intend to mislead the accused about the scope of the consent being requested. (R. at 83.) Appellant did not testify on the motion.

The military judge denied Appellant's motion to suppress (App. Ex. XXXII.) The military judge found as fact that the "AFOSI agents did not intentionally attempt to trick the Accused into believing they possessed a broader search authorization than they actually possessed at the time of his interview in order to gain his consent to search." (Id. at 8) The military judge also found as fact that the agents "did not intentionally employ vague language in this case to trick the Accused." (Id. at 8)

In his conclusions of law, the military judge analyzed the factors from United States v. Wallace, 66 M.J. 5, 9 (C.A.A.F. 2008). (Id. at 11-13.) He found, based on the totality of the circumstances, that the government had proven the voluntariness of Appellant's consent by clear and convincing evidence. (Id. at 10.) The military judge concluded that OSI's statements about the search authorization "did not have a coercive impact on the Accused." (Id. at 12.) He reasoned: "The Accused was not coerced and did not acquiesce to any perceived claim of lawful authority to conduct the requested search after the statements were made." (Id.) The military judge pointed out that after OSI's references to the search authorization, "the Accused still understood he was being asked for consent" and "understood that he had the right to refuse consent." (Id.)

The military judge next analyzed the exclusionary rule under Mil. R. Evid. 311(a)(3) and determined that "exclusion of the evidence would not result in appreciable deterrence of future unlawful searches and seizures and the benefits of any potential deterrence do not outweigh the costs to the justice system." (Id. at 14.) He found that the agents did not engage in any "deliberate misconduct," and their actions were not a result of "any recurring or systematic failures in AFOSI as a whole." (Id.) To the extent the agents made any misrepresentations, they "at most were simple, isolated negligent acts by those agents involved." (Id.)

Additional relevant facts are included in the analysis below.

Law and Analysis

"Evidence of a search conducted without probable cause is admissible if conducted with lawful consent." Military Rule of Evidence (Mil. R. Evid.) 314(e)(1) (2019). "To be valid, consent must be given voluntarily." Mil. R. Evid. 314(e)(4). The test for voluntariness is whether the consent was the suspect's own "essentially free and unconstrained choice" or was his will overborne and his "capacity for self-determination critically impaired." United States v. Olson, 74 M.J. 132, 134 (C.A.A.F. 2015) (internal citations omitted).

Voluntariness of consent is a question of fact to be determined from all the circumstances. Mil. R. Evid. 314(e)(4); *see also* Olson, 74 M.J. at 134 (describing consent as a question of fact); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (applying a totality of the circumstances review).[4] The government must prove voluntary consent by clear and convincing evidence. Mil. R. Evid. 314(e)(5).

[4] Appellant claims that voluntariness of consent is a question of law reviewed de novo. (App. Br. at 11.) But he cites United States v. Lewis, 78 M.J. 447, 453 (C.A.A.F. 2019) which is a case about the voluntariness of confessions, not consent.

To determine whether consent is free and voluntary, this Court considers the following non-exhaustive factors:

(a) The degree to which the suspect's liberty was restricted;

(b) The presence of coercion or intimidation;

(c) The suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors.

(d) The suspect's mental state at the time;

(e) The suspect's consultation, or lack thereof, with counsel; and

(f) The coercive effect of any prior violations of the suspect's rights.

Wallace, 66 M.J. at 9 (citing United States v. Murphy, 36 M.J. 732, 734 (A.F.C.M.R. 1992)).

Consent is not voluntary when law enforcement agents falsely claim that they already have a search authorization. Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968). "Mere submission to the color of authority of personnel performing law enforcement duties . . . is not a voluntary consent. Mil. R. Evid. 314(e)(4). Nonetheless, "the majority of courts hold consent to be voluntary where the police tell the suspect that if he does not consent, they will 'obtain' or 'seek' a search warrant, provided probable cause for a warrant actually exists." United States v. Wright, 52 M.J. 136, 142 (C.A.A.F. 1999) (collecting cases).

Mil. R. Evid. 311(a)(3) provides that evidence obtained as a result of an unlawful search and seizure is inadmissible against an accused if "exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system." The government has the burden to prove by a preponderance of the evidence that such deterrence is not appreciable or does not outweigh the costs to the justice system. *See* Mil. R. Evid. 311(d)(5)(A).

Appellant argues that his consent to search his phone was invalid because OSI obtained it through unlawful coercion. (App. Br. at 11.) According to Appellant, the military judge (1) "did not adequately assess the facts as they apply to" the Wallace factors and (2) did not correctly consider Bumper and its progeny in assessing the tactics OSI used to gain Appellant's consent. Neither contention has merit.

a. The military judge appropriately applied and evaluated the Wallace factors to find Appellant's consent voluntary.

Despite Appellant's contention otherwise, an examination of each Wallace factor reveals that the military judge scrutinized the totality of the facts and circumstances and correctly found Appellant's consent to be voluntary.

(1) The degree to which the suspect's liberty was restricted

Appellant's liberty was restricted to some degree when he consented to the search of his phone, but the military judge correctly found that the restriction was minimal. The military judge considered that the agents never told Appellant he was under arrest and that Appellant did not ask to leave the interview room at any time. (App. Ex. XXXII at 11.) Before OSI asked Appellant for consent to search, they offered him the opportunity to leave the room to use the restroom, which Appellant declined. (App. Ex. XXVI at 1.) After Appellant invoked his Article 31 rights, the agents said they would leave the room and then "come grab" Appellant – an indication to Appellant that if he invoked his rights at any time during the interview (which he was told he could do), he would be able to leave. Appellant contends that a rights advisement does not mean that the restriction on liberty is "minimal." (App. Br. at 11). But here, OSI did more that just issue a rights advisement. They demonstrated through their words and conduct that Appellant could voluntarily terminate the interview at any time and that his decision would be honored. Since Appellant knew he could end the restrictive situation at any time, the military

judge appropriately characterized the degree of restriction as minimal. The totality of the circumstances established that although Appellant's liberty was somewhat restricted, the restriction was not so onerous that it would have overborne Appellant's will and capacity for self-determination.

(2) The presence of coercion or intimidation.

There was no coercion or intimidation used during Appellant's interview. This Court can review the video recording of the interview in Appellate Exhibit XV, Attachments 6-8 and will see that the agents did not yell or scream at Appellant or threaten him in any way. Nor did they employ intimidating body language or gestures. Although the agents did make repeated requests for consent after Appellant initially refused, our superior Court has found that such repeated requests do not necessarily render consent to search involuntary. United States v. Nelson, 82 M.J. 251, 257 (C.A.A.F. 2022).

Appellant alleges that "when confronted with [Appellant's] declination to consent, the agents became agitated, cursing at [Appellant] and informing him that they had the 'high moral ground.'" But this description mischaracterizes the exchange. When SA EB said, "Hell no," he was not cursing at Appellant. He was referring to not embarrassing Appellant when looking at images on Appellant's phone. The entire gist of the conversation was that the agents were not seeking to embarrass Appellant because the agents stand on a high moral ground and respect the right to privacy. (*See* App. Ex. XXXII at 5.) In keeping with this theme, shortly thereafter, the agents told Appellant the information on his phone would be used for law enforcement purposes only. This Court cannot reasonably construe this exchange as the agents expressing agitation at Appellant for not consenting to the search or trying to intimidate Appellant into consenting. Instead, the agents were merely trying to assuage some of the concerns Appellant demonstrated

about consenting. Other than this one interaction, Appellant cites no other evidence that contradicts the military judge's observation that "[b]oth agents maintained a calm demeanor throughout the exchanges with [Appellant], offered [Appellant] breaks,[and] did not threaten [Appellant] in any way." (Id. at 13.)

Appellant also claims that OSI lied by "telling him that if he didn't consent, information on his phone might be destroyed." (App. Br. at 12.) Again, this takes the discussion out of context. At that point, SA EB was asking Appellant to disable his passcode to avoid the potential deletion of data. (App. Ex. XV, Attach. 7, 38:40-39:10.) As SA SH explained in his in-court testimony, when OSI performs phone extractions, the agents get prompts about disabling security features in order for the extraction to be done properly. (R. at 76.) SA SH figured that – like removing a USB without ejecting it – trying to extract data without first disabling the passcode could cause "complications." (Id.) He testified that based on his experience as a communications troop, corruption of devices can happen easily and is a possibility. (R. at 77.) In light of that testimony, telling Appellant that disabling his passcode might avoid the potential erasure of data was not a lie and not coercive.

Even if OSI had lied to Appellant about the possibility that data might be deleted, law enforcement agents are permitted "to use trickery to obtain consent so long as it does not amount to coercion." United States v. Vassar, 52 M.J. 9, 12 (C.A.A.F. 1999). Here, OSI's statement presented the deletion of data as a possibility, not a certainty, which still gave Appellant a free and unconstrained choice of whether to disable his passcode. In sum, the evidence does not support that Appellant was coerced or intimidated into providing consent to search his phone.

(3) The suspect's awareness of his right to refuse based on inferences of the suspect's age, intelligence, and other factors.

For the third Wallace factor, Appellant relies only on the fact that he "was only 22 years old and was assigned to his first duty station." (App. Br. at 12.) But Appellant ignores the rest of the third Wallace prong: the suspects awareness of his right to refuse consent based on his age, intelligence, *and other factors.* Here, Appellant demonstrated that he was aware he could refuse consent, because he at first refused to allow OSI to access his pictures. Then, shortly before he decided to grant consent and after OSI's last mention of the search authorization, Appellant said, "this is just a big decision. I'm just trying to get all of the information." (App. Ex. XXXII at 6.) This statement showed that Appellant understood that granting consent was his own decision, and he could still refuse to do so. Even after that, OSI presented Appellant with the Consent to Search form that reminded Appellant that he had the legal right to refuse consent. Appellant spent 30-40 seconds reading the form before signing it. The evidence supports that Appellant understood throughout his interview that he could refuse consent to search the whole phone.

(4) The suspect's mental state at the time

The military judge properly found that Appellant "did not appear overwhelmed by his circumstances, nor under any acute amount of stress greater than the normal stress associated with a law enforcement interrogation." (App. Ex. XXXII at 13.) Appellant claims that he exhibited odd behavior during this interview, such as "staring at a wall in the room opposite his interrogators, staring at the floor, and requesting that the agents turn around and face the wall while they question him." (App. Br. at 13.) But he cites no time stamps from the videos to direct the reader to the portions of the interview he is referring to. This Court has access to the video of Appellant's interview and can review the interactions surrounding the consent to search.

While the agents and Appellant discussed searching the phone, they were mostly facing each other and directly interacting, and nothing seemed abnormal about their exchanges. This factor warrants finding Appellant's consent voluntary.

(5) The suspect's consultation, or lack thereof, with counsel

Appellant did not consult with counsel. But the OSI agents read Appellant his Article 31 rights twice, stating that Appellant had a right to consult with counsel and have counsel present at the interview. And when Appellant initially said he wanted a lawyer, the agents immediately terminated the interview and said they could not continue to ask Appellant questions unless they re-read him his rights, and he agreed to talk. Since OSI made Appellant aware of his right to request counsel at any time – and their intention to honor any such request – Appellant's lack of consultation with counsel does not lead to the conclusion that Appellant's will was overborne in deciding to grant consent.

(6) The coercive effect of any prior violations of the suspect's rights

The agents did not violate any of Appellant's rights before requesting consent to search his phone. On the contrary, they properly terminated the interview immediately upon Appellant's initial request for counsel. Further, the agents only resumed questioning Appellant after he reinitiated communication, the agents re-read him his Article 31 rights, and Appellant unambiguously waived those rights. This final factor favors finding Appellant's consent to search voluntary.

In sum, a balancing of the Wallace factors favors the government. The military judge correctly applied the Wallace factors, and his finding that consent was voluntary was supported by the record and not clearly erroneous. He did not abuse his discretion.

b. Appellant was not misled by the OSI agents' references to the search authorization, and thus OSI did not unlawfully coerce Appellant to consent to the search.

Apart from the Wallace factors, Appellant contends that his consent was involuntary because the OSI agents misrepresented the scope of their search authority by implying that they already had authority to search Appellant's entire phone. (App. Br. at 13). According to Appellant, the agents' conduct violated Bumper and its progeny, which hold that misrepresentations about a search authorization are per se coercive. (Id. at 13-14.) The United States does not contest the general principle of law that misrepresentations about a search authorization can vitiate consent, but it is irrelevant here. The evidence – especially when considered in the light most favorable to the government – shows that Appellant did not decide to consent to the search of his entire phone because he believed OSI would use their search authorization to search the whole phone anyway.

Although the government had the burden to prove the voluntariness of Appellant's consent, Appellant offered no evidence to establish that either (1) he actually believed OSI already had authority to search his entire phone or (2) that incorrect belief was why he consented to the search of his entire phone. Under Mil. R. Evid. 311(d)(6), Appellant could have chosen "to testify for the limited purpose of contesting the legality of the search or seizure" and could have explained his reasoning for consenting to the search. But Appellant did not do so. On appeal, Appellant has also not identified any statement he made during his discussions with OSI that would tend to show that he consented to the search because he believed OSI was already going to search his entire phone anyway. Indeed, it would have been illogical for Appellant to draw such a conclusion. If OSI already had authority to copy Appellant's entire phone, why would they need him to grant consent for the entire phone in the first place? Instead, OSI's

request for consent to search the entire phone would signal to a reasonable person that OSI *did not* already have such authority.

The evidence before the military judge didn't just fail to support the premise that Appellant consented to the search because he was misled to believe the agents had search authority for the entire phone. In fact, the evidence actually refuted that premise and supported that Appellant did not think the agents could already search his entire phone.

The OSI agents mentioned the search authorization six times during the interview at the follow time stamps:

OSI statement about the search authorization.	**Time Stamp**
[1] "But we do have an affidavit to ***seize*** your phone, okay?"	App. Ex. XV, Attach. 7, 33:45
[2] "If not, we do have an affidavit to ***seize*** this phone, which we're gonna end up doing regardless, okay?"	App. Ex. XV, Attach. 7, 33:53
[3] " . . .we do have authority to ***seize*** your phone, right . . ."	App. Ex. XV, Attach. 7, 38:42
[4] "So like we discussed before, um, we have a search authorization for your phone. Okay?"	App. Ex. XV, Attach. 8, 13:00
[5] "So we already have search authorization for your phone, but what we'd like to ask you is if we could just make a copy of the, of the information on the phone . . . "	App. Ex. XV, Attach. 8, 13:45
[6] "…all we're really trying to do is we're trying to help you out to get your phone back faster and then, um, granting us consent. Because we do have authorization to ***seize*** your phone."	App. Ex. XV, Attach. 8, 18:39

(1) The OSI agents made truthful statements about their ability to seize the phone.

To begin, this Court should have no concerns about the first, second, third, and sixth mentions of the search authorization (Attach. 7 at 33:45, 33:53, and 38:42; Attach. 8 at 18:39)

because in each of those instances, the agents referred only to their authority to seize the phone. That was an accurate description of the search authorization and therefore lawful. *Cf.* Wright, 52 M.J. at 142 (accurate statements about the ability to seek a warrant do not make consent involuntary). The truthful statement that the agents had authority to seize the phone would not have led Appellant to conclude that just because the agents could seize the phone, they could also search it in its entirety. And in any event, on the first two instances OSI mentioned the authority to seize, they did so in the context of asking to scroll through Appellant's phone to look for messages between Appellant and OS. (App. Ex. XXXII at 2.) Since OSI did have search authority for the messages sought during that exchange (*see* id. at 1-2), these first two statements about the search authority could not have misled Appellant.

Similarly, the third time OSI referred to the search authorization and ability to seize, they were asking Appellant to disable his passcode to prevent the erasure of data – not for consent to search the whole phone (Id. at 3.) The search authorization did, in fact, direct the disabling of security features (App. Ex. XV, Attach. 4), so the agents were not asking Appellant to do anything outside the scope of the authorization. This truthful statement about having authority to seize the phone would not have deceived Appellant into believing OSI had authority to search the entire phone.

Finally, the sixth time OSI mentioned having search authorization, they pointed out that since they already had authority to seize the phone, Appellant consenting to their copying of the phone might enable him to get the phone back faster.[5] Since the statement was solely about

[5] Appellant has not alleged that this statement by OSI was untruthful or unlawfully coerced Appellant to consent. The military judge aptly recognized that whether the agents' statements about an expedited return of the phone were true "does not impact the analysis, because as is noted in Vasar [sic], law enforcement may use some amount of deception with an Accused as long as it does not prevent the Accused from making a free choice." (App. Ex. XXXII at 12.) The military judge pointed out that Appellant was given the free choice either (1) to consent and

consent facilitating the expedited return of Appellant's phone, it would not have misled Appellant into believing OSI already could search his entire phone.

(2) The agents never told Appellant they had the ability to search the whole phone and instead focused on other reasons why Appellant should consent.

On the two occasions when the agents mentioned the authority to search the phone, they did not clarify that they only had authorization to search certain parts of the phone. But, at the same time, the agents also did not affirmatively tell Appellant that they had authorization to search the entire phone. These two mentions of the search authorization came in quick succession. (App. Ex. XXXII at 3.) OSI made them in conjunction with discussing first, the desire to preserve data in case of unintentional destruction, and second, the possibility that consenting to copying the phone would enable expedited return of the phone. (Id.) Indeed, the agents' statements focused on how consenting to the search could benefit Appellant; not on how refusing consent was futile, since OSI could search the whole phone anyway.

(3) The agents made truthful statements about why they were seizing the phone and what applications they intended to search.

The agents also made several accurate implications about the scope of the search authorization. When Appellant asked why the agents would seize the phone regardless of his consent, SA SH explained: "we do have information that there are messages sent between you and this individual, okay? We don't have access to those information, and we're under an impression that it's in your phone." (Id. at 2.) This matched the search authorization and affidavit (*cf.* App. Ex. XV, Attach. 4) and was a truthful explanation of why the agents were going to seize the phone.

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get the phone back more quickly and "ensure the extraction process did not inadvertently result in harm to the phone;" or (2) to "decline consent and be without his phone for a longer period of time." (Id. at 12-13.) Such a choice did not present such untenable options that it would have overborne Appellant's will or critically impaired his capacity for self-determination.

After the fifth mention of the search authorization, Appellant said he did not want the agents to see anything other than Facebook Messenger. (App. Ex. XXXII at 4.) In response, SA SH told Appellant SnapChat would be "one of" the apps they would be reviewing. (Id.) This statement was consistent with the search authorization which allowed the agents to search for SnapChat messages. (App. Ex. XV, Attach. 4) It also implied that the search pursuant to the search authorization was going to be focused on particular apps, rather than a carte blanche search of the whole phone.

The context of these references to the search authorization therefore supports the military judge's findings of fact that the agents "did not intentionally attempt to trick the Accused into believing they possessed a broader search authorization than they actually possessed at the time of his interview" and "did not intentionally employ vague language in this case to trick the Accused." (App. Ex. XXXII at 8).

(4) Appellant's statements during the interview showed he did not believe that the agents already had independent authority to search the whole phone.

Appellant's later statements reveal that Appellant was not misled to believe OSI had a broader search authorization than they actually did. After the fourth and fifth references to the search authorization, which mentioned the authority to *search*, Appellant initially denied OSI consent to copy his entire phone, because he did not want them to copy his pictures.[6] (App. Ex. XXXII at 4.) Appellant would have had no reason to deny the agents the ability to copy his

[6] Appellant claims that after Appellant denied OSI consent to access his pictures, the agents "continued to tell [Appellant] that if he didn't provide consent for the *entire* phone, they were going to seize and search it anyway because they had authorization to do so." (App. Br. at 15.) This simply did not occur as Appellant describes. After Appellant denied consent to copy his pictures, the agents only mentioned the search authorization one more time. (App. Ex. XXXII at 4-6.) This time, the agents merely mentioned having authority to *seize* the phone and did so in the context of telling Appellant that his consent would help them return the seized phone sooner. (Id.) They did not suggest they were going to use their search authorization to search the entire phone anyway.

pictures if he already thought the agents had search authority for the whole phone. Soon after, Appellant said the agents could have his Facebook Messenger "because that's what you guys want," but not any other apps. (Id. at 4.) Again, if Appellant thought that the agents already had lawful access to all his apps, he would have had no reason to deny the agents consent to search his other apps. Appellant then asked if the agents could download everything from the phone, and he could watch the agents delete everything other than what they needed. (Id. at 5.) This demonstrated that Appellant believed his consent – not an existing search authorization – controlled what the agents could copy.

The facts described above buttress the military judge's ultimate conclusion that OSI's statements about the search authorization did not mislead Appellant and "did not have a coercive impact" on Appellant. (Id. at 12.) Even after these statements, the military judge found that Appellant "still understood he was being asked for consent" and "understood that he had the right to refuse consent." (Id.) Since Appellant showed an understanding that he could still refuse consent to search his entire phone, his ultimate consent was a free and unconstrained choice. It was not a mere submission to the color of authority. The military judge correctly considered Bumper and its progeny and determined they did not apply, because Appellant was not misled by the statements about the search authority, and therefore was not coerced to give consent. In light of the available evidence, the military judge's conclusion that Appellant voluntarily consented to the search of his phone was not clearly erroneous and not an abuse of discretion.

c. The military judge appropriately exercised his discretion in finding that even if the consent search of Appellant's phone was unlawful, the derivative evidence should not be excluded under Mil. R. Evid. 311(a)(3).

Appellant urges that the exclusionary rule from Mil. R. Evid. 311(a)(3) must apply. (App. Br. at 16.) But he fails to explain why the military judge's application of the rule meets the high standard of being "clearly unreasonable." *See* Lattin, 83 M.J. at 198. On the contrary, the military judge's application of Mil. R. Evid. 311(a)(3) was not a clearly unreasonable exercise of his discretion. First, the military judge appropriately considered the culpability of the agents. He found as fact that OSI (1) "did not intentionally attempt to trick the Accused into believing they possessed a broader search authorization than they actually possessed at the time of his interview in order to gain his consent to search; and (2) "did not intentionally employ vague language in this case to trick the Accused." (App. Ex. XXXII at 8) As described earlier, these findings of fact were supported by the record and were not clearly erroneous, and this Court should accept them. The military judge had the opportunity to review the video of Appellant's interview and to observe the in-court testimony of SA SH. Based on his findings of fact, the military judge obviously found SA SH credible. A trial court's credibility determination "after a hearing on the merits of a motion to suppress is virtually unassailable on appeal." United States v. Milk, 66 F.4th 1121, 1131 (8th Cir 2023). As a result, Appellant's assertion of the agents' "deliberate decision to conceal the scope of the authorization" and "willful and unlawful deception" (App. Br. at 17) contradicts the military judge's factual findings and does not support applying the exclusionary rule.

Appellant challenges the military judge's characterization of the agents' conduct as "isolated" because other agencies and individuals are also involved in military sexual assault investigations. (App. Br. at 17.) But the military judge found no evidence of systemic issues.

He found as fact that the agents "were not instructed, either generally or specifically in this case, to use vague terminology when describing a search authorization."[7] (App. Ex. XXXII at 8.) To be sure, the rest of the agents' actions during their investigation highlighted their respect for Appellant's rights. When Appellant at first invoked his right to counsel, the agents immediately stopped their interview, and only resumed questioning after Appellant reinitiated conversation. After Appellant reengaged them, the agents properly readvised Appellant of his Article 31 rights and obtained a waiver of those rights before proceeding. When Appellant later revoked consent to search his phone, the agents did not recommence their search until they obtained a search authorization to search the entire phone. (App. Ex. XXVII at 2-5.) These facts support the military judge's conclusion that any misrepresentations about the scope of the search authorization "were at most, simple isolated negligent acts by those agents involved." (App. Ex. XXXII at 14.)

Since the military judge found as fact that any misrepresentations about the search authorization were unintentional, the agents' conduct was not the sort of "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights" that triggers suppression. Davis v. United States, 564 U.S. 229, 238 (2011). As the military judge appropriately concluded, the exclusionary rule would serve little deterrent purpose in this case. *See generally* Herring v. United States, 555 U.S. 135 (2009).

The military judge also correctly found that "any limited benefits of deterrence through exclusion are significantly outweighed by the costs to the justice system in this case." (App. Ex. XXXII at 14.) As the military judge recognized, the probative value of the videos and images found as a result of the consent search was high because "they directly depicted either charged

[7] The military judge's findings of fact on these issues were supported by the testimony of SA SH, who testified to as much in the motions hearing. (R. at 81-83.)

acts or uncharged relevant acts occurring close in time to charge conduct." (App. Ex. XXXII at 14.) Indeed, those videos and images showed the sexual conduct at issue between Appellant and the victim, OS, on the night of the charged offense. (App. Ex. XV at 13-14.) Such evidence in sexual assault cases is "rarely available" and would allow the trier of fact to hear the verbatim statements made by both participants at the time of the charged act and to directly evaluate each participant's level of "competence and intoxication." (App. Ex. XXXII at 14.)

The military judge noted that these videos and images had benefits for not only the government, but also Appellant: "At least a portion of the evidence sought to be excluded depicts OS, the alleged victim, engaging in actions with the Accused, and making statements to the Accused, which are indicative of his consent to the sexual activity and his potential motivation to fabricate a lack of consent."[8] (App. Ex. XXXII at 14.) The military judge also considered that exclusion of the evidence would make presentation of the parties' cases harder because they would have to "elicit [the victim's] testimony as if the evidence never existed, which strains reason." (Id.)

At bottom, exclusion of the highly probative evidence derived from the consent search would have undermined the truth-seeking function of the court-martial. The military judge was right that exclusion would have been "severely detrimental to the justice system in this case," and the benefits of reprimanding the agents for, at most, negligent conduct were "not worth imposing such a cost." (Id.)

As described in Lattin, appellate review of a military judge's application of Mil. R. Evid. 311(a)(3) is still highly deferential, since a military judge's ruling can be overturned only if it is a

[8] Some of the videos found in Appellant's iCloud account depicted the victim saying he did not want to cheat on his girlfriend and asking Appellant if "this was cheating?" (App. Ex. XV, Attach. 2 at 14.)

"clearly unreasonable" exercise of discretion. 83 M.J. at 198. The military judge's careful and thoughtful balancing of the deterrent value and social costs of exclusion was not "clearly unreasonable," and should remain undisturbed.

In sum, the military judge did not abuse his discretion either in finding Appellant's consent to search his phone to be voluntary, or in declining to apply the exclusionary rule to the fruits of the search under Mil. R. Evid. 311(a)(3). As a result, this Court should deny Appellant's assignment of error.

II.

APPELLANT'S CASE SHOULD BE REMANDED FOR CORRECTION OF APPELLATE EXHIBIT XX.

Standard of Review

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

Statement of Facts

Appellant alleges several omissions or errors in the record of trial:

- Prosecution Exhibit 8 – video not playable.
- Prosecution Exhibit 13 – video not playable.
- Prosecution Exhibit 16 – video not playable ("media unavailable").
- Defense Exhibit B – no video, just audio.
- Defense Exhibit C – no video, just audio.
- Appellate Exhibit XX, Attachment 2 – missing.

(App. Br. at 18.)

Upon the government's review of these materials (which were all sealed) in the original record of trial located at this Court, the government made the following observations:

- Prosecution Exhibit 8 – playable using VLC.
- Prosecution Exhibit 13 – playable using VLC.

- Prosecution Exhibit 16 – the video within the PowerPoint presentation will not play, but this may be related to outdated software on the Court's standalone computer.
- Defense Exhibit B – the video and audio both appear to work.
- Defense Exhibit C – the video and audio both appear to work.
- Appellate Exhibit XX, Attachment 2 – missing during the government's review as well.

Law and Analysis and Conclusion

Under R.C.M. 1112(d) this Court may remand an incomplete record of trial to a military judge for correction.

Remand is unnecessary for the majority of the items above, because Appellant's counsel should be able to play them using the VLC software on the Court's standalone computer. Before remanding the case with respect to Prosecution Exhibit 16, this Court should see if the playability problem can be rectified by updating the Court's software. Unless this is eliminated as the cause of the malfunction, a remand for correction may not solve the problem. If the Court's software is not the cause of the malfunction, the United States does not oppose remand for correction of this exhibit.

Appellate Exhibit XX, Attachment 2 is missing from the record. Since it is a sealed exhibit, its absence would not easily be rectified by a government motion to attached. Therefore, remand for correction of this exhibit under R.C.M. 1112(d) is appropriate.

CONCLUSION

After remand for correction, the United States respectfully requests that this Court affirm the findings and sentence in this case.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, and The Appellate Defense Division, via email, on 8 March 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
	)	Before Panel No. 1
v.	)	
	)	No. ACM 40385
Airman First Class (E-3) **ADJANI K. DAUGHMA,** United States Air Force	)	15 March 2024
Appellant	)	

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

Air Force Office of Special Investigations (AFOSI) agents used coercion to obtain consent to search A1C Daughma's phone. The military judge erred by declining to exclude the fruits of the subsequent search of that phone.

A. The *Wallace* factors weigh in favor of A1C Daughma.

(1) Restriction on Liberty

Much like the military judge, the Government cites no authority for their contention that the degree of A1C Daughma's restriction on liberty was so minimal that it does not satisfy this factor. *Compare* Ans. at 13 *with* AE XXXVII at 11. The Government's argument instead relies on the fact that AFOSI agents did not commit any violations of A1C Daughma's constitutional rights up to the point that they began to coerce his consent. Ans. at 13. Here, the Government adopts the military judge's mistake because that evidence goes to the sixth *Wallace* factor—prior rights violations—not this factor. *United States v. Olson*, 74 M.J. 132, 134-35 (C.A.A.F. 2015) (reasoning that where and how a suspect is held by law enforcement informs on the restriction of liberty factor, whereas a violation of constitutional rights—to include one's Article 31 rights—informs on the sixth factor); *United States v. Wallace*, 66 M.J. 5, 12 (C.A.A.F. 2008) (Baker, J., concurring) (explaining that a restriction on liberty involves the degree

to which the suspect is "under arrest or apprehension [or] held in the office of law enforcement agents."). A1C Daughma was held in a locked law enforcement interview room for four and a half hours. AE XXXVII at 11; R. at 80. Under the applicable precedent, this fact alone weighs significantly in A1C Daughma's favor.

Moreover, Government notes that the restriction was minimal because "[A1C Daughma] knew he could end the restrictive situation at any time." Ans. at 13. However, evidence for this assertion about A1C Daughma's mental state at the time of the interview exists nowhere in the record.[1] So, it is impossible that the military judge could have relied on this during his assessment of the first *Wallace* factor; and, if he did, such reliance was error.

(2) The Presence of Coercion

The Government mischaracterized the law when they argued that while "agents did make repeated requests for consent . . . [the C.A.A.F.] has found that such repeated requests do not necessarily render consent to search involuntary." Ans. at 14 (citing *United States v. Nelson*, 82 M.J. 251, 257 (C.A.A.F. 2022)) However, the *Nelson* case involved coercive tactics used to obtain a subject phone's passcode, not to gain consent to search the phone itself. *Nelson*, 82 M.J. at 254. As a result, the *Nelson* Court reasoned that "the analysis in *Wallace* [was] not applicable." *Id.* at 256 n.6. Unlike *Nelson*, the *Wallace* test is applicable in this case.[2] As such, this Court should reject the Government's attempt to conflate *Nelson* with the facts of this case. Instead, this Court should look to cases where the *Wallace* test was applied. In *Wallace* itself, for example, Judge Baker drew a distinction between mere "acceptance of the inevitable" and actual acquiescence. *Wallace*, 66 M.J. at 13 (Baker, J., concurring). In this case, nothing about the exchange between A1C Daughma and the AFOSI agents indicates a mere "acceptance

[1] The Government had the burden at trial to demonstrate the voluntariness of consent. Mil. R. Evid. 314(e)(5)
[2] The Government seems to agree with this. Ans. at 13.

of the inevitable." Rather, the AFOSI agents repeatedly told A1C Daughma that—regardless of his consent—they would be seizing and searching his phone; this resulted in A1C Daughma's acquiescence to authority.

The Government goes on to argue that AFOSI agents did not lie to A1C Daughma about information being deleted from his phone. Ans. at 14-15. This is incorrect. During the motion's hearing, SA SH was directly asked whether the above statement was true. R. at 74. SA SH responded, "No." R. at 74. When SA SH was later asked if he had ever seen data deleted from a phone during a search, SA SH again responded that he had not. R. at 76-77. And, while the C.A.A.F. has acknowledged that "trickery" can be used by law enforcement, trickery is substantially limited when law enforcement uses it to obtain consent. *United States v. Richter*, 51 M.J. 213, 225-26 (C.A.A.F. 1999) (explaining that trickery about a search authorization amounts to coercion). In fact, in *United States v. Salazar*, the C.A.A.F. specifically concluded that military investigators cannot lie to obtain a consent to search. 44 M.J. 464, 469 (C.A.A.F. 1996). Here, the agents lied to coerce consent, and that type of trickery is impermissible.

(3) Age and Intelligence

The *Wallace* Court concluded that a 26-year-old staff sergeant with over seven years of service was coerced into consenting. *Wallace* 66 M.J. at 9. Here, A1C Daughma was only 22 years-old at the time of the interview and assigned to his first duty station. This rendered A1C Daughma more vulnerable to the OSI's coercive tactics. Despite this, the Government cites to A1C Daughma's numerous denials as purported evidence that he understood he could refuse to consent. Ans. at 16. However, taken to its logical conclusion, this means that every time a subject exercises his right not to consent, the Government will use that as evidence that any later consent was not derived from coercion. In this case, the coercion was multi-faceted, occurring over four and a half hours. A1C Daughma's initial refusals engendered

aggravation from the AFOSI agents and led them to curse at A1C Daughma. Only after repeated refusals did A1C Daughma eventually give in. Importantly, A1C Daughma "consented" to a search, despite there being significant incriminating evidence on his phone. According to the Government, A1C Daughma understood he could refuse consent, but nevertheless gave consent to search a phone containing extremely aggravating evidence of a sexual assault. Contrary to the Government's assertions, this is far more indicative of A1C Daughma being misled than "freely and voluntarily" giving consent.

(4) A1C Daughma's Mental State

The Government argues that a review of the interview recording demonstrates that A1C Daughma was not overwhelmed. A1C Daughma concurs with the Government on that limited point. However, when reviewing the AFOSI interview, it will be evident that A1C Daughma's overall mental state was weakened, especially as the interview went on for four and a half hours. In addition to the coercive tactics used by AFOSI, the video of the interview demonstrates the relatively odd behavior exhibited by A1C Daughma. This, along with the information contained in AE V, shows that A1C Daughma's mental state was poor.

(5) A1C Daughma did not Consult with an Attorney

A1C Daughma did not consult with an attorney prior to giving consent. AE XXXVII at 13. Despite this, the Government argues that AFOSI's decision not to violate A1C Daughma's constitutional right to counsel should inform on this factor. Ans. at 17. But, as C.A.A.F. has recognized, that information goes to the sixth *Wallace* factor, not the fifth. Even the military judge recognized that this factor did not weigh in favor of the Government. AE XXXVII at 13.

(6) Prior Violations of Rights

While there were no apparent rights violations prior to AFOSI's coercion of A1C Daughma, not every *Wallace* Factor needs to be met to demonstrate coercion. *Wallace*, 66 M.J. at 10. Therefore,

because nearly every *Wallace* Factor weighs in favor of A1C Daughma, this Court should conclude that the military judge erred in deciding that A1C Daughma's consent was freely and voluntarily given.

B. AFOSI's misrepresentations about the search authorization are "instinct with coercion."[3]

Even if this Court concludes that the *Wallace* factors are not satisfied in A1C Daughma's favor, AFOSI's misrepresentations about the scope of the search authorization forced A1C Daughma to acquiesce to their authority. And, as such, his consent was not freely and voluntarily given.

(1) Government's Distinction between Search and Seize

The Government attempts to draw a distinction between the words "search" and "seize" as used by the AFOSI agents. Ans. at 19-21. In doing so, the Government argues that when AFOSI used the words "seize," they were merely referring to the existing search authorization which gave them authority to seize A1C Daughma's phone. Ans. at 20. This is clever lawyering, but this Court should be left unconvinced for several reasons.

First, SA SH routinely characterized "seize" as equivalent to "search" and "search authorization" during the motion's hearing. R. at 60-61 (referring to an authorization to seize and copy the phone as interchangeable); R. at 64 (responding to a question about "seiz[ing] the phone" by talking about the content that could be searched, as well as compulsory biometrics); R. at 71 (explaining that a search authorization is both an authorization to search *and* seize); R. at 75 (discussing authorizations, seizures, and searches as one set of actions). Second, the Air Force Form 1176, which AFOSI uses, is entitled "Authority to Search *and* Seize" not "Search *or* Seize." AE XXIX; R. at 58. Third, the context of the conversation between the agents and A1C Daughma demonstrates that the agents were using the terms "seize," "search," and "search authorization"

[3] *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).

synonymously. For example, agents told A1C Daughma at the outset that he should consent to a search of his phone; if he didn't, the agents informed A1C Daughma that they "have an affidavit to seize this phone" and they would proceed that way if he didn't give consent. AE XXXVII at 2-3. As SA SH testified at the motion's hearing, he told A1C Daughma about the authorization to search and seize the phone "so that he was aware that regardless of whether he gave us consent, that we were going to be taking it." R. at 72.

Importantly, there is no evidence to suggest that A1C Daughma understood the difference between a seizure of his phone and a search of it. In fact, the evidence available to the military judge suggests the opposite. A1C Daughma repeatedly responded to AFOSI statements about seizure with concerns about the content *within* the phone. If A1C Daughma understood the difference between search and seizure, as the Government argues, he would not have been concerned about the content *within* the phone when the agents discussed mere seizure. See *e.g.*, AE XXXVII at 4-5. To be sure, at no time did either agent inform A1C Daughma about the scope of the existing search authorization, despite referring to it six different times. R. at 56.

(2) The Agents Impliedly Stated they had Authority to Search A1C Daughma's Entire Phone

The Government concedes that the agents never "clarif[ied] that they only had authorization to search certain parts of the phone." Ans. at 21. Nevertheless, the Government argues that the agents did not "affirmatively tell [A1C Daughma] that they had authorization to search the entire phone." Ans. at 21. There is nothing in the caselaw indicating that statements from law enforcement must be "affirmative" or otherwise all-encompassing to be coercive. Put differently, the Government's unlawful coercion is not saved by the agents' vague representations about the scope of their imaginary search authority. Even if there was such a requirement, the context of the AFOSI agents' statements demonstrates that they were discussing an authorization

to search the entire phone. For example, A1C Daughma agreed to consent to a search of his electronic messages (i.e., those things within the scope of the original search authorization). Nonetheless, the agents continued to coerce A1C Daughma, stating "we already have search authorization for your phone . . . we [want] a copy." AE XV, Attch. 8, at 13:45. This reference to a search authorization could have been two things: (1) a reference to the already existing authorization, as the Government contends; or (2) a reference to a broader, albeit nonexistent, authorization. Because this statement was articulated only after A1C Daughma already agreed to consent to a search of those things within the original authorization, the agents must have been referring to the latter.[4]

(3) A1C Daughma believed AFOSI had Authority to Search his Phone

The Government argued that A1C Daughma "offered no evidence" that he believed AFOSI had authority to search his phone and that he could have testified to demonstrate this fact.[5] Ans. at 18. There are several problems with this argument. First, it is an attempt to shift the Government's burden to the defense. Second, there is no support in *Bumper* or its progeny that there must be

[4] The Government asks: "If OSI already had authority to copy [A1C Daughma's] entire phone, why would they need him to grant consent for the entire phone in the first place?" Ans. at 18. The answer to the Government's question is simple: because the Government routinely seeks consent for those things within the scope of an authorization to create a fail-safe should some later court determine that the authorization was unlawful. *See, e.g., United States v. Osorio*, 66 M.J. 632, 634 (A.F. Ct. Crim. App. 2008) (explaining that AFOSI agents obtained a consent to search appellant's hard drive despite already having an authorization to do so); *cf. United States v. Sanders*, 66 M.J. 529, 532 (A.F. Ct. Crim. App. 2008) (concluding that "even without the government's questionable method of obtaining . . . consent, the evidence leading to the appellant's conviction would have been legally seized pursuant to the . . . search authorization"). Regardless, should there be any glaring ambiguity in this matter, it was the Government's burden to demonstrate the voluntariness of consent. Mil. R. Evid. 314(e)(5).

[5] The Government, not the Defense, has the burden to prove voluntariness by clear and convincing evidence. Mil. R. Evid. 314(e)(5). Moreover, an accused has the "absolute right" not to testify at a criminal proceeding against him. *See, e.g.*, *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005).

direct, testimonial evidence of an "actual coerced belief" on the part of the coerced person. And third, it is simply untrue that there was "no evidence." While there may not have been direct testimonial evidence from A1C Daughma, there was ample evidence demonstrating A1C Daughma was coerced by AFOSI. As discussed above, A1C Daughma had already provided consent to search messages within the scope of the first authorization. Nonetheless, agents continued to tell him that they had an authorization to search and seize his phone. This implies that the search authorization was more expansive than it was. Moreover, after being informed about this nonexistent authorization, A1C Daughma provided "consent" for a search of his whole phone even though that phone contained substantial incriminating evidence. This is clear circumstantial evidence that A1C Daughma was faced with an unconstitutional choice: consent or be searched. *United States v. Cady*, 47 C.M.R. 345, 346 n.3 (C.M.A. 1973) (citing *Bumper*, 391 U.S. at 548-49).

C. The Exclusionary Rule should apply in this case.

The exclusionary rule should apply in this case as it would result in appreciable deterrence. *Bumper* and its progeny make it clear that law enforcement cannot misrepresent the scope of a search authorization to garner consent. Despite this, AFOSI agents did exactly that in this case. SA SH testified that he repeatedly told A1C Daughma about the search authorization so that he understood, regardless of his consent, that his phone would be searched. This type of misconduct—which occurred at least six times—violates clear precedent from the Supreme Court, the C.A.A.F., C.M.A., and this Court. Making matters worse, SA SH testified that he had never been trained—or could not recall being trained—on what types of coercion were acceptable, and which were not, for the purposes of obtaining consent. R. at 63. This is institutional negligence. Moreover, the

AFOSI agents also lied to coerce consent, which is impermissible under the C.A.A.F.'s precedent. *Salazar*, 44 M.J. at 469.

At the very least, SA SH would be deterred from future misconduct if the evidence were suppressed. *See, e.g.*, *United States v. Lattin*, 83 M.J. 192, 201 (C.A.A.F. 2023) (Ohlson, C.J., dissenting) ("It is presumably true that [the SA who committed the misconduct] would be deterred if the exclusionary rule were applied."). And, while the Government argues that the "military judge found no evidence of systemic issues," Ans. at 24, some evidence indicates otherwise. As SA SH explained, he never received training on the type of coercion that is acceptable when obtaining consent other than not to physically force a subject to do something. R. at 63. Moreover, even in the absence of such evidence, deterrence would nevertheless logically extend to "all those involved in criminal investigations." *Lattin*, 83 M.J. at 201-02 (Ohlson, C.J., dissenting).

There can be little doubt that the evidence obtained from the coercion in this case was extremely helpful to the Government. As the Government notes, the military judge determined that excluding the evidence would make the presentation of their case difficult. Ans. at 26. What the Government fails to mention is that it would be difficult because OS did not have an independent memory of being sexually assaulted. R. at 528 (recalling the consensual sexual acts but not the allegedly non-consensual ones that followed). In fact, it was the fruits of the unlawful search that make up the sum total of the evidence against A1C Daughma for the guilty specifications concerning OS. Certainly, excluding this evidence would make a conviction for the allegations against OS nearly impossible. But, such a concern is merely "an outgrowth of the Government's improper conduct and is a cost society must bear." *Lattin*, 83 M.J. at 204 (Ohlson, C.J., dissenting).

WHEREFORE, A1C Daughma respectfully requests this Honorable Court set aside the findings and sentence for Charge I, specifications 1-4, and Charge II, specification 1.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

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 Division on 15 March 2024.

Respectfully submitted,

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Appellate Defense Counsel
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1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ORAL ARGUMENT**
v.	)	Before Panel No. 1
Airman First Class (A1C), **ADJANI K. DAUGHMA,** United States Air Force, *Appellant.*	)	No. ACM 40385
	)	15 March 2024

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

Pursuant to Rules 23 and 25 of this Honorable Court's Rules of Practice and Procedure, A1C Adjani K. Daughma hereby moves for oral argument on the following issue:

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING, OVER DEFENSE OBJECTION, EVIDENCE THAT WAS OBTAINED WITHOUT THE VOLUNTARY CONSENT OF A1C DAUGHMA?

WHEREFORE, A1C Daughma respectfully requests that this Honorable Court grant the motion for oral argument.

Respectfully submitted,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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,

TREVOR N. WARD, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**OPPOSITION TO MOTION**
Appellee,	)	**FOR ORAL ARGUMENT**
	)	
	)	
v.	)	No. ACM 40385
	)	
Airman First Class (E-3)	)	Before Panel No. 1
ADJANI K. DAUGHMA, USAF,	)	
Appellant.	)	22 March 2024

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

Pursuant to Rules 23(c) and 25 of this Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for oral argument, filed 15 March 2024. Appellant has offered no justification for why oral argument is necessary and would assist the Court. The parties have already extensively briefed this case, and the issue presented – the voluntariness of consent – is straightforward and turns on the facts of this case. The oral argument would not contribute anything additional to this Court's understanding of the issues. Further, this case was docketed with the Court on 29 November 2022, meaning 479 days have already elapsed since docketing. Granting oral argument will make it harder for this Court to meet the 18-month standard from docketing to opinion. United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)

If this Court decides to grant oral argument, undersigned counsel would not be prepared to present oral argument until 22 April 2024 at the earliest. Undersigned counsel will be on Reserve Duty/leave from 2024, and time will be needed to prepare for oral argument and to schedule moots.

For these reasons, the United States respectfully requests this Court deny Appellant's request for oral argument.

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 Appellate Defense Division on 22 March 2024.

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 40385**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adjani K. DAUGHMA	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 15 March 2024, Appellant moved this court to hear oral argument in the above-captioned case. The Government opposed the motion.

The court orders oral argument on the following issue:

> **WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING, OVER DEFENSE OBJECTION, EVIDENCE THAT WAS OBTAINED WITHOUT THE VOLUNTARY CONSENT OF APPELLANT.**

Accordingly, it is by the court on this 3d day of April, 2024,

ORDERED:

Appellant's Motion for Oral Argument is **GRANTED** as specified above.

Oral argument in the above-captioned case will be heard at **1000 hours on Thursday, the 25th day of April 2024**, in the Air Force Court of Criminal Appeals courtroom, 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland 20762.

Each of the parties will be allotted **20 minutes** to present oral argument. *See* A.F. Ct. Crim. App. R. 25.2(b).

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40385**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adjani K. DAUGHMA	)	
Airman (E-2)*		
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 3 April 2024, the court ordered oral argument in the above-captioned case on the following issue:

> **WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING, OVER DEFENSE OBJECTION, EVIDENCE THAT WAS OBTAINED WITHOUT THE VOLUNTARY CONSENT OF APPELLANT.**

In this same order, the court ordered the oral argument be heard at 1000 hours on Thursday, 25 April 2024. Due to nonavailability of counsel, the court is modifying its order, and the oral argument will now be heard on Wednesday, 24 April 2024. Accordingly, it is by the court on this 9th day of April, 2024,

ORDERED:

Oral argument in the above-captioned case will be heard at **1000 hours on Wednesday, the 24th day of April 2024**, in the Air Force Court of Criminal Appeals courtroom, 1500 West Perimeter Road, Suite 1900, Joint Base Andrews – Naval Air Facility Washington, Maryland 20762.

Each of the parties will be allotted **20 minutes** to present oral argument. *See* A.F. Ct. Crim. App. R. 25.2(b).

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

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*The court notes earlier filings show the Appellant as an Airman First Class (E-3) when the charge sheet, entry of judgment, Statement of Trial Results, and personal data sheet reflect Appellant's rank as an Airman (E-2).

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40385**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Adjani K. DAUGHMA	)	**CHANGE**
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 12th day of April, 2024,

ORDERED:

That the record of trial in the above-styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge

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*	)	**NOTICE OF APPEARANCE OF GOVERNMENT COUNSEL**
v.	)	Before Panel No. 1
Airman First Class (E-3) **ADJANI K. DAUGHMA,** United States Air Force *Appellant*	)	No. ACM 40385 19 April 2024

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

The undersigned hereby enters appearance as counsel for the United States in the above-captioned case pursuant to Rule 12, Air Force Court of Criminal Appeals Rules of Practice and Procedure. The undersigned counsel will appear as co-counsel on behalf of the United States sitting second chair.

MATTHEW D. TALCOTT, Colonel, USAF
Chief
Government Trial & Appellate Operations Division
Military Justice & 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 19 April 2024.

MATTHEW D. TALCOTT, Colonel, USAF
Chief
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force

1 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) ADJANI K. DAUGHMA, USAF, *Appellant.*	)))))))))	MOTION TO SUBMIT SUPPLEMENTAL CITATION OF AUTHORITY ACM 40385 Panel No. 1

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

Pursuant to Rules 23.3(d) and 25.2(e) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to submit a supplemental citation of authority that was presented in oral argument. Rule 25.2(e) specifically allows that "[c]ounsel may also submit a supplemental citation of authority within 7 days following oral argument to cite any legal authority presented in oral argument that was not previously cited."

During oral argument on 24 May 2024, in response to a question from the Court, undersigned counsel cited Groh v. Ramirez, 540 U.S. 551 (2004) and stated she would provide a supplemental citation to this Court. This motion is responsive to that promise. In Groh v. Ramirez, the Supreme Court recognized that the Fourth Amendment does not require an officer exercising a search warrant to show the warrant to the owner of the property being searched before the officer commences the search. Id. at 562 n.5.

In accordance with Rule 25.5(e), the United States respectfully requests that this Court grant its motion to submit this supplemental citation of authority.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 May 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762